No. 14-646

IN THE
Supreme Court of the United States

SAI,
Petitioner,
v.

UNITED STATES POSTAL SERVICE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Sai and the government are in apparent agreement on the larger issues that render this case appropriate for *certiorari*. With respect to the importance of this issue, the government does not respond to the risks of identity theft and extortive embarrassing publication resulting from public access to detailed affidavits of assets and liabilities. Nor does the government disagree that publication forces indigent parties into an unfair choice between protecting themselves from these harms and access to courts and counsel.

The government also expressly acknowledges that the D.C. Circuit, Third Circuit, and Ninth Circuit have ruled that the presumption of public access applies to indigent affidavits, while the First Circuit has ruled that it does not. It challenges the published versus unpublished nature of these decisions, without recognizing that orders sealing indigent affidavits rarely will result in a published opinion, and it suggests a distinction that makes no difference by noting that the First Circuit mentioned guidance by the Administrative Office of Courts. None of this changes the express rulings of the circuits that, as the government acknowledges, conflict on the question presented.

The government raises the question of whether this case is an appropriate vehicle, based on its jurisdictional posture, but it does not argue that jurisdiction over the question is lacking, nor could it. And it does not assert that the purported jurisdictional infirmity forecloses Sai's litigation—it does not. Thus, the D.C. Circuit's decision is a binding resolution of Sai's rights going forward in

this case, requiring him to raise this question here, or not at all. This matter is neither moot nor will it be mooted by other issues. Indeed, the government's entire analysis of whether this case is an appropriate vehicle amounts to a quibble with Sai's imprecise requests for relief as a *pro se* plaintiff, which likely will be present in any case that is representative of the thousands of indigents seeking redress in the courts every year. None of the government's concerns foreclose review or otherwise render this case an inappropriate vehicle to answer the question presented.

Ultimately, this petition comes down to the government's contention that Sai could have, possibly, built a record establishing specific, individualized harm that would result from publishing his detailed affidavit of assets and liabilities. That misses the point. The issue presented is *whether he should have to do so*, when there is a recognized privacy interest in the information contained in the detailed affidavit. The correct answer is "no." The circuits are divided on this concededly important question, and this Court's intervention is needed to resolve the conflict.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DIVIDED ON WHETHER THERE IS A PRESUMPTION OF PUBLIC ACCESS TO IFP AND CJA AFFIDAVITS.

Throughout its opposition, the government both expressly and implicitly agrees with Sai that the circuits are divided on whether there is a presumption of public access to IFP and CJA affidavits. As is further discussed below, the

government expressly states that the D.C. Circuit, Third Circuit, and Ninth Circuit have found a presumption of public access for detailed affidavits, while "the First Circuit held that no First Amendment or common-law presumption of access applied to CJA affidavits." Opp. 13.

The difference among the circuits is based on whether the court finds the affidavits to be "judicial documents" that carry a presumption of public access, or ministerial ones that do not. If the documents are ministerial, the test relied on by the government for weighing the presumption of public access against the interests of the party seeking to seal a judicial record, as stated in *Johnson* v. *Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991), is irrelevant. The government does not suggest otherwise. Nor does the government dispute that the First Circuit determined that these documents are ministerial in *In re Boston Herald, Inc.*, 321 F.3d 174, 181 (1st Cir. 2003), but that the D.C. Circuit, Third Circuit, and Ninth Circuit have determined them to be judicial documents. Opp. 12-14.

Thus, the government's contention that the "order does not squarely conflict with any decision of this Court or any other court of appeals," Opp. 4, is flat wrong. If the D.C. Circuit had recognized the document as a ministerial filing, as the First Circuit did, the D.C. Circuit would have had to rule that there is no public right of access to the document, and Sai would be allowed to file his affidavit under seal. *See United States* v. *El-Sayeigh*, 131 F.3d 158, 159 (D.C. Cir. 1997) (there is no public right of access to document determined not to be a "judicial record").

The government challenges whether IFP and CJA affidavits are judicial or ministerial documents on the merits of the question. Opp. 9-10. Sai does not disagree with the government's underlying point that the documents are important to the administration of courts, insofar as they "enable the court to determine whether the litigant is 'unable to pay' court fees," Opp. 9, but the government stretches the term "judicial document" beyond any reasonable definition based on that. It asserts that the affidavits would be ministerial if they had "no larger significance beyond an individual litigant's entitlement to in forma pauperis status in a particular case." Opp. 10. But they are "judicial" because "[p]ublic access to the affidavits may help shed light on a number of important issues pertaining to" implementation of the IFP statute. *Id*.

By that ethereal standard, just about any administrative document of the courts and any filing would be a judicial document because they shed light on the courts' use of funds or how the court resolves administrative issues of individual litigants. Indeed, that would render a plea agreement a judicial document when it is provided solely for the purpose of allowing the court to rule on the government's motion to seal the agreement. Yet, the D.C. Circuit has ruled that a plea agreement is *not* a judicial document in that context, and that there is no public right of access to these documents. *El-Sayeigh*, 131 F.3d at 159. That is so, even though public access to such a plea agreement "may help the public ascertain the court's interpretation" of the standard for sealing a plea agreement, and reviewing the agreements "may also provide valuable guidance to" defendants considering a plea agreement. *See* Opp.

10. The First Circuit articulated a more appropriate standard in *Boston Herald* based on relation of the document to "the core of the judicial function," 321 F.3d at 181, and this Court should grant the writ so that it can adopt the proper test.

Nor is it relevant that the D.C. Circuit may be more likely to find that a financial affidavit—as opposed to other documents—overcomes the presumption of a public right of access when a litigant provides personalized threat of harm from disclosure. Opp. 11. The issue in this case is whether such a presumption exists at all for an IFP or CJA affidavit.[1] The government repeatedly concedes that the D.C. Circuit ruled that it does. *E.g.,* Opp. 11. And the government recognizes that the Third and Ninth Circuits have ruled that way as well. Opp. 12 ("the Third Circuit, like the D.C. Circuit, has applied a presumption that in forma pauperis affidavits should be publicly accessible") (citing *Hart* v. *Tannery*, No. 11-2008, 2011 WL 10967635, at *1 (3d Cir. June 28, 2011)); Opp. 12-13 (the Ninth Circuit "'assumed' that a criminal defendant's financial affidavits . . . were subject to a

[1] Accordingly, the government misunderstands Sai's citation to the *Press-Enterprises* test in the IFP and CJA contexts. The issue concerning the *Press-Enterprises* test is not, as the government asserts, that "that the [D.C.] court of appeals held that the public has a First Amendment right of access to in forma pauperis affidavits." Opp. 8 n.1. Rather, as the government implicitly acknowledges, the D.C. Circuit's failure to apply the *Press-Enterprises* test in this case is indicative of its treatment of the presumed right of access to in forma pauperis affidavits. The point is that the *Press-Enterprises* test is the vehicle through which this Court *could resolve* the conflict among the circuits, not the basis for establishing the conflict. Pet. 16-17.

qualified First Amendment presumption of public access . . . [and] held that the presumption had not been overcome by 'speculative' concerns that the affidavits might contain incriminating information") (citing *Seattle Times Co.* v. *United States Dist. Ct. for the W. Dist. of Wash.*, 845 F.2d 1513, 1561 n.1, 1519 (9th Cir. 1988)).

It is odd, then, for the government to claim there is no intra-circuit conflict here. It is indisputable that the First Circuit expressly disagrees. *Boston Herald*, 321 F.3d at 180-81. Indeed, the government admits that "[t]he First Circuit held that no First Amendment or common-law presumption of access applied to CJA affidavits."[2] Opp. 13. And it is of no moment that the First Circuit reviewed the issue in

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[2] The government, inconsistent with its accurate recognition that the First Circuit ruled that there is no "presumption of access applied to CJA affidavits" generally, states that "CJA affidavits would be 'fully open to public scrutiny' in the ordinary case" under the First Circuit's opinion by operation of guidance from the Administrative Office of the United States Courts. Opp. 13-14. That is flat untrue. The First Circuit raised the AO's guidance that *other documents* would be made public. *Boston Herald*, 321 F.3d at 180. It further noted that "CJA *eligibility decisions* will be fully open to public scrutiny" because "[t]he fact that an application was filed and an attorney appointed are public matters which are entered on the docket of a case" and "[t]he amounts of money paid to Connolly's attorney will presumably be made public in due course." *Id.* at 187 (emphasis added). The court then stated that "[t]he only significant aspects of Connolly's CJA application that were not made public are the details of his family's assets, liabilities, and financial obligations." *Id.* Thus, under the ruling, CJA affidavits in the "ordinary case" are *not* subject to a presumption of a public right of access, even though the eligibility decisions themselves are "fully open to public scrutiny." *Id.*

the context of a criminal case. The government does not challenge the fact that the privacy interest is the same, in light of the documents disclosing the same information, and it expressly concedes that other considerations are similar. Opp. 14. It only claims that the public interest in disclosure is different in the criminal context. *Id.* But given the fact that the public interest in access is particularly strong in the criminal context, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 564-574 (1980) (discussing the historical importance of public access to criminal proceedings), the First Circuit presumably would be at least as likely to seal an IFP affidavit than a CJA affidavit.

II. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE.

1. The government does not dispute the importance of the issue presented here. Thousands of litigants file indigent affidavits every year. Pet. 10. And they are forced "to forego their privacy interests to secure access to the court system." Pet. 9. Untold numbers of other litigants are deterred from bringing cases because of the risks imposed. *See* Br. for W. Ctr. on Law and Poverty and Legal Aid Ass'n of Cal. as Amici Curiae Supporting Pet. at 13-17, No. 14-1005 (2014) (explaining how the public filing of such affidavits exposes IFP applicants' sensitive financial information, familial problems, and disabilities to the public).

It is no wonder that public disclosure of detailed financial affidavits is a deterrent to access to the courts. The affidavits require disclosures of monthly income and expenditures not only for the applicant, but for the applicant's spouse, and if the applicant is

a minor, his or her parent or guardian. Pet. App. 22a, 27a. That information can be used for numerous ills, including identity theft, and extortive publication of embarrassing information contained in the affidavits or easily accessed with information from the affidavits, such as loan defaults and net worth. Pet. 13-14. Because of these risks, courts have consistently protected the sensitive, private information contained in IFP and CJA affidavits in other contexts. Pet. 11-12.

The government does not express disagreement with any of this. It spends much of its opposition addressing the importance of financial affidavits to the judicial process. *E.g.,* Opp. 5-6. Sai agrees. The affidavits are critical, and the information in them is important. But, of course, the general importance of the document is irrelevant to whether it should be presumptively sealed. It is an administrative court document, and one that undisputedly carries the power to crush the filer if placed in the wrong hands. Thus, Sai only asks that these documents be presumptively sealed. And the court watchdogs the government seeks to protect can then obtain the records on a showing of good faith interest, and with the protection of redactions of specific information, like account numbers and social security numbers.

2. This case is an appropriate vehicle to resolve the question presented. The government mainly relies on issues endemic to any IFP/CJA case to claim that this is an inappropriate vehicle, including imprecise phrasing of reliefs requested by Sai, who was *pro se* in the D.C. Circuit. Opp. 3-4.

The government also relies on the fact that this case involves an unpublished order, but this is the

type of issue that generally creates numerous unpublished orders and precedents that go unchallenged by the litigants. It is a preliminary matter—the ability to file as an indigent, which does not go to the merits of the case. Thus, it is not an issue that regularly lends itself to a published opinion. Additionally, the litigants, by definition, normally cannot afford representation that will take such an issue up to a court of appeals and this Court. Nor do they have the legal education and experience to dot every "i" and cross every "t" in the panoply of filings required before they reach this level. That is no reason to deny relief on an issue that affects thousands of litigants each year in a way that puts their livelihoods, their assets, and their reputations at risk.

Moreover, even as a *pro se* litigant, Sai has placed this case in the proper procedural posture for this Court to review the D.C. Circuit's decision.

The government asserts that because "district courts, not courts of appeals, [have] jurisdiction to review agency FOIA decisions" that the D.C. Circuit lacked jurisdiction over Sai's underlying petition for review. Opp. 14-15. But the challenged ruling did not concern Sai's underlying FOIA request—it addressed Sai's independent motion for leave to file his financial affidavit in federal court under seal. Thus, this Court has jurisdiction to review the question presented, 28 U.S.C. § 1254(1), and the government does not explain why a jurisdictional question on the merits would render this question of relief on a pre-merits collateral issue of sealing an indigency affidavit unnecessary to answer.

In any event, the purported jurisdictional infirmity is not fatal to the case after this Court rules—it would just involve re-filing the appeal of the administrative decision in the district court, where the same privacy and access issue will come up again. This time, though, Sai would be foreclosed from arguing against a presumption of public access because the D.C. Circuit decided that issue. Pet. App. 2a. Thus, Sai and thousands of other similarly situated indigent parties need this Court's review now, and the purported jurisdictional infirmity in the D.C. Circuit is not one that affects this Court's jurisdiction or would otherwise moot the issue presented going forward in this litigation.

This case represents the interests of the thousands of individuals who are not involved in a well-known case, and yet, the courts place their detailed affidavits on the internet or otherwise in the public sphere despite no one asking for it. Those are the most vulnerable parties, and every day of delay in resolving this issue is another day in which numerous indigent parties have their private lives placed on the internet for anyone with PACER access to see and for opportunists to take advantage.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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