Case No. 16-2431

United States Court of Appeals
for the
Third Circuit

NORTH JERSEY MEDIA GROUP INC., BLOOMBERG L.P., NBCUNIVERSAL MEDIA, LLC, THE NEW YORK TIMES COMPANY, NEW JERSEY ADVANCED MEDIA LLC, DOW JONES & COMPANY, INC., ASSOCIATED PRESS, PUBLIC MEDIA NJ, INC., NEW YORK PUBLIC RADIO, AMERICAN BROADCASTING COMPANIES, INC., PHILADELPHIA MEDIA NETWORK, PBC, and POLITICO LLC,

Plaintiffs/Appellees,

v.

UNITED STATES OF AMERICA, WILLIAM E. BARONI, JR., and BRIDGET ANNE KELLY,

Defendants/Appellees,

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant/Appellee,

JOHN DOE,

Intervenor/Appellant.

ON APPEAL FROM OPINIONS AND ORDERS ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, NEWARK AT NO. 2:16-CV-00267, THE HONORABLE SUSAN D. WIGENTON, U.S.D.J.

ANSWERING BRIEF ON BEHALF OF MEDIA APPELLEES

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Rules

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Appellate Rule 26.1.1, the undersigned, counsel of record for Media Appellees, hereby certifies that:

Appellee American Broadcasting Companies, Inc., a nongovernmental corporate party, is a wholly-owned subsidiary of The Walt Disney Company, which is publicly held.

Appellee Associated Press, a not-for-profit corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Appellee Bloomberg L.P. Is a non-governmental limited partnership whose partnership interests are held by Bloomberg Inc. and BLP Acquisition L.P., which are privately held.

Advance Publications, Inc. is the only corporate parent of appellee New Jersey Advance Media LLC, a nongovernmental corporate party, and is privately held.

Appellee North Jersey Media Group Inc., a nongovernmental corporate party, is wholly-owned by Macromedia Incorporated, a privately-held company.

Appellee The New York Times Company, a publicly traded company, has no parent company. One publicly held corporation, Grupo Financiero Inbursa, S.A.B. de C.V., owns more than 10 percent of its stock.

WNET, a nonprofit corporation, is the sole member of appellee Public Media NJ, Inc., a nonprofit corporation. Neither corporation has shares or stock.

Appellee NBCUniversal Media, LLC, a nongovernmental corporate party, is indirectly owned by Comcast Corporation. Comcast Corporation is a publicly held corporation. No other publicly held corporation owns 10% or more of the equity of NBCUniversal Media.

Appellee Dow Jones & Company, Inc., a nongovernmental corporate party, is a Delaware corporation with its principal place of business in New York. News Corporation, a publicly held company, is the indirect parent corporation of Dow Jones & Company. Ruby Newco, LLC, a subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones & Company. No publicly held company directly owns 10% or more of the stock of Dow Jones & Company.

Appellee Philadelphia Media Network, PBC, a public benefit corporation, is owned by The Institute for Journalism in New Media, LLC (the "Institute") and by Philadelphia Media Network PBC Charitable Trust (the "Charitable Trust"). No publicly held corporation owns 10% or more of Philadelphia Media Network's stock. The Institute, a subsidiary of the Philadelphia Foundation, a well-known nonprofit, owns 9,999 non-voting shares of Philadelphia Media Network representing 99.99% of the outstanding shares. The remaining 1 voting share of Philadelphia Media Network is owned by the Charitable Trust.

Appellee POLITICO LLC, a nongovernmental corporate party, is a wholly-owned subsidiary of Perpetual Capital, LLC, which is privately held.

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Date: May 27, 2016

COUNTER-STATEMENT OF RELATED CASES AND PROCEEDINGS PURSUANT TO LOCAL APPELLATE RULE 28.1(a)(2)

The proceedings from which this appeal arises are the criminal action of United States v. Baroni et al., Case No. 15-cr-193, and the related civil proceeding of North Jersey Media Group, et al. v. United States, et al., Case No. 16-cv-267, before the Hon. Susan D. Wigenton, U.S.D.J. in the United States District Court for the District of New Jersey. This matter has not previously been before this Court and Media Appellees are not aware of any other related cases or proceedings.

COUNTER-STATEMENT OF THE CASE

The Indictment against Defendants William Baroni ("Baroni") and Bridget Ann Kelly ("Kelly"), which names co-conspirator David Wildstein and "others" (A60-94), alleges not only criminal activity, but also significant abuse of power and violation of the public trust by Port Authority of New York and New Jersey, Christie Administration officials, and possibly other political operatives close to the Governor's election campaigns. This case presents an extraordinarily important issue of public concern and a need for maximum transparency regarding First Amendment and common law access to judicial records.

Appellant, John Doe ("Doe"), has improperly infused his Statement of the Case with pervasive argument and conclusory statements. The facts set forth below are an accurate recitation of what has transpired in this matter.

A. Defendants Sought a Bill of Particulars Listing Unindicted Co-Conspirators and the Government Responded to That Request, Filing a Copy with the Court.

Baroni and Kelly filed omnibus motions seeking discovery of various types of information and specifically demanding a bill of particulars as to, among other things, the unindicted co-conspirators referred to in the Indictment as "others." A98-129. The Government opposed Defendants' motion for this bill of particulars. A136-140. Yet in the same opposition brief, under Point "B" ("Responses to Defendants' Requests for Particulars") the Government agreed to provide the exact information ***specifically sought*** by the demand for a bill of particulars, saying that

while the Defendants' requests "go beyond what is required to be disclosed in a bill of particulars" (A140), "[n]evertheless, the Government will, in a document to be filed under seal, identify any other individual about whom the Government has sufficient evidence to designate as having joined the conspiracy." A141. Following through with its promise, the Government transmitted such a filing to the Defendants and the Court on January 11, 2016, which the District Court later identifies as the "Conspirator Letter." A25. While the Conspirator Letter was not filed on the docket, the Government requested in the Conspirator Letter that the District Court maintain it under seal, but the Government never made a formal motion to do so. Id.

The day after Baroni received the Conspirator Letter, he wrote to the Court to object that (1) there was no authority to seal "the contents of [the Government's] response to Mr. Baroni's Bill of Particulars Motion"; (2) the Conspirator Letter was improperly sent to Chambers rather than being publicly docketed; and (3) the Government had sought the Court's imprimatur for sealing rather than applying the Protective Order in effect. A148-49. In response, on January 15, the Government cited the U.S. Attorney's Manual ("the USAM")[1] at Section 9-27.760: "with respect to bills of particulars that identify unindicted co-conspirators, prosecutors generally

[1] Media Appellees cite the USAM only to show that the Government's reliance on it reveals the Government's view that it was correctly filing a bill of particulars with the Court. Section 1-1.00 of the USAM instructs that it "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable by any party, civil or criminal."

should seek leave to file such documents under seal." A150. The Government additionally cited United States v. Smith, 776 F.2d 1104 (3d Cir. 1985) ("Smith")[2], and recognized the application of the Smith balancing test to be applied prior to the public disclosure of the Conspirator Letter. A150-51.

As is standard federal practice, the District Court expected the parties to voluntarily work out disputes – including Defendants' request for a bill of particulars – and failing that, the District Court would hear any remaining disputes. Because the bill of particulars had been provided on January 11, there was no need to hold a hearing on that particular issue, although a hearing to review all outstanding motion issues was held on February 5, 2016.

During that hearing, the District Court explained that the materials requested by the omnibus motions "had been produced and have been exchanged," and told the parties, "I don't necessarily need to rule on them unless you have an issue going forward." A165. Immediately following argument, the District Court issued an order stating that "the remainder of Defendants' Discovery Motions were DISMISSED AS MOOT as per counsels' representations and the discussion on the record." A184.

[2] Although there are other cases captioned "United States v. Smith," all references to "Smith" refer to this case.

B. Media Appellees' Motion

On January 13, 2016, two days after the Conspirator Letter was filed, a consortium of news organizations (the "Media Appellees") filed a motion to intervene and for relief based on First Amendment and common law rights of access, seeking the Conspirator Letter.[3] Media Appellees' motion relied to a large extent on Smith, which found a right of access to bills of particulars (including lists of unindicted co-conspirators) under the First Amendment and common law, and which described bills of particulars, for the purposes of access, as "more akin to the functions of an indictment than to discovery," where access to filed documents is limited. 776 F.2d at 1111.

Smith requires a court to undertake a balancing of the presumption of First Amendment access against any compelling government interest imposing restrictions on access, which must be narrowly tailored. Id. at 1116-17. Media Appellees maintained that the reputational/privacy interests of the unindicted co-conspirators – who were, based on a fair reading of the Indictment, very likely public political figures or public officials or employees – were insufficient to overcome the presumption of access under the First Amendment. As to the common law access rules, Media Appellees argued that the Conspirator Letter, having been filed by litigants with the District Court, was a judicial record within the scope of a common

[3] This motion to intervene and for relief in the criminal action was, for administrative reasons, assigned a separate civil action and docket number. See A54 (Doc. No. 63 and 1/15/16 Clerk's Note).

law right of access and any interests in closure were likewise insufficient to overcome that right to access.

Despite extensive media coverage of Media Appellees' motion, neither Doe nor Defendants filed an opposition. The Government's opposition did not dispute that the Conspirator Letter was a bill of particulars or a filed judicial record. Rather, the Government focused on its contention that "the co-conspirator designation had no adjudicatory value at this juncture of the criminal matter" (A188), and was "not a part of any request for judicial decision making" (A195). The Government also argued that "unless and until the information becomes relevant to a decision by the Court, the public interest does not outweigh third-party privacy interests." A189. The Government further acknowledged that the names in the Letter might well come out at trial, after the District Court rules by a preponderance of the evidence that the individuals were co-conspirators for the purposes of Fed. R. Evid. 801(d)(2)(E). A195.

C. The District Court's Opinions

The District Court had long possessed the Conspirator Letter when it issued its decision on May 10, 2016. It relied upon the holding in Smith that First Amendment and common law rights of access "extend to bills of particulars." A26. Because the First Amendment is implicated, the District Court applied the Smith test requiring a compelling governmental interest in closure, narrowly tailored, to overcome the public's First Amendment right of access. The District Court

differentiated the facts here from those in Smith, where the bill of particulars was "broadly conceptualized," including not only persons who the Government believed to be unindicted co-conspirators, but also those who "*could conceivably be considered* as unindicted co-conspirators," and was produced in the early stages of a then-incomplete investigation. A27 (citing Smith, 776 F.2d at 1113-14). The District Court rejected the Government's arguments that the result in Smith should be the focal point of the District Court's consideration given the very different circumstances surrounding the creation of the Conspirator Letter here and the facts of this case as a whole. Id.

As the District Court observed in weighing the unindicted co-conspirators' reputational and privacy rights under Smith:

> The underlying events that gave rise to the Indictment have been extensively covered by the media, such that even persons tangentially involved have already been identified and exposed in the press. There is very little that is private about the lane closures or the lives of the people allegedly connected to them. Further, individuals thus far identified as being involved in the lane closings have been public employees and/or elected and appointed officials, and anyone named in the Conspirator Letter is likely to have held a similar position. As the *Smith* court noted, "the public has a substantial interest in the integrity or lack of integrity of those who serve them in public office." *Id*. at 1114; *see also id.* at 1116 (Mansmann, J., concurring) (stating that public employees and elected officials "cannot claim a right of privacy with respect to the manner in which the perform their duties. Where a criminal trial allegedly involves violations of the public trust by government officials, the public's need to monitor closely the judicial proceedings is perforce increased."); *United States v. Kushner*, 349 F. Supp. 2d 892, 906-07 (D.N.J. 2005) (noting that the "public has a strong interest in the use officials make of their positions of public trust").

A27-28.

Media Appellees immediately requested a deadline for turnover of the Letter from the Court and the following day the Court Ordered a May 13 deadline.(A43 #32 and #35). At some unknown time prior to that deadline, Doe applied to the District Court, *ex parte*, for permission to "augment the legal arguments before the court". Brief of Appellant Doe ("Br.") at 16; A34. It appears the District Court instructed Doe to file his papers publicly, which he did, seeking to intervene and stay the May 10 based upon an amorphous due process right, not previously recognized by this Court, that had never been raised by any party and was neither implicated by the circumstances of this matter nor consistent with this Court's instructions in Smith. Doe's application to the District Court did not even address the Smith standard, either to argue that it did not apply or to challenge the District Court's application of it.

In its May 13th decision denying Doe's application, the District Court reviewed and reiterated its findings, rejecting Doe's primary contentions that (1) the Conspirator Letter is not a bill of particulars or a judicial record to which the public has a right of access, but rather is a "courtesy copy" of a discovery document sent to the Court, and (2) "identifying him as an unindicated co-conspirator without providing him a forum to challenge that designation would undeniably deprive him of due process." A34.

Instead, the Court found that the Conspirator Letter was a bill of particulars and a judicial record subject to the public's First Amendment and common law right

of access and the Smith analysis dictated its release under common law access because:

- "The Conspirator Letter was submitted to [the District] Court and Defendants in response to Defendants' motions for bills of particulars." Id.
- "The Government requested that the document be maintained under seal, pursuant to internal policies of the U.S. Attorney's office 'regarding bills of particulars that identify unindicted co-conspirators.'" Id.
- "The document was never labeled a courtesy copy, nor has the Government included [the District] Court in other exchanges of mere discovery material." Id.

The District Court noted that Doe failed to address the May 10th Opinion's analysis under Smith or provide a counter-analysis under the Smith standard. Id. The District Court also stated that Doe failed to cite to any binding authority that stands for the proposition that his due process rights would be violated by being identified as an unindicted co-conspirator and failed to acknowledge that his reputational/privacy rights were considered in both the District Court's May 10th Opinion and "in *in camera* proceedings before [the District] Court during which time Doe was given the opportunity to be heard orally and in writing." Id. The District Court concluded:

> This Court does not take the identification of unindicted co-conspirators lightly, recognizing the possible reputational consequences of such a revelation. However, here, this Court has given Doe notice and an opportunity to be heard and has thoroughly considered his privacy interests in determining that the Conspirator Letter should be made public. Pursuant to the dictates of Due Process, Doe has been heard by this Court.

Id.

The District Court denied Doe's motion to stay the release of the Conspirator Letter. Doe then sought an emergent stay pending this appeal.

COUNTER-STATEMENT OF THE STANDARD OF REVIEW

Pursuant to Fed. R. App. P. 28(i), Media Appellees accept and incorporate by reference Doe's statement of the standard of review with the following exceptions:

With respect to the public's right of access under the common law, this Court "review[s] the district court's order for abuse of discretion." In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts, 913 F.2d 89, 92 (3d Cir. 1990); United States v. Wecht, 484 F.3d 194, 208 (3d Cir. 2007) ("We review decisions relating to the common law right of access generally for abuse of discretion."). In this case, there is no reason for application of the "modified abuse-of-discretion standard" proposed by Doe. Br. at 20. The application of that standard, articulated in United States v. Smith, 787 F.2d 111 (3d Cir. 1986) ("Smith II"), is premised upon the proposition that "a district court's decision to give access to judicial records pursuant to the common law right to inspect and copy judicial records is less dependent on the trial court's familiarity with the proceedings, and hence deserves less deferential review, although it is still denominated a discretionary decision." Id. at 113. The determinations by the District Court in this matter, in contrast to the scenario identified in Smith II, do not concern the general application of the common law right to access and are in fact "dependent on the trial court's familiarity with the proceedings." These fact-sensitive determinations are referenced in a substantial portion of Doe's Brief devoted to arguing that the

Conspirator Letter is not a bill of particulars by reference to the specific facts of the proceedings before the District Court.

With respect to the District Court's determinations concerning First Amendment issues, this Court "exercise[s] substantially broader review." Capital Cities, 913 F.2d at 92. However, "[t]his independent review 'is not equivalent to a "de novo" review of the ultimate judgment itself' but is necessary to ensure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'" Free Speech Coal., Inc. v. Attorney Gen. U.S., 787 F.3d 142, 151 (3d Cir. 2015), reh'g granted, (Sept. 1, 2015) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508-514 (1984)).

This Court "review[s] a district court's denial of a stay for abuse of discretion." Jackson v. Danberg, 656 F.3d 157, 162 (3d Cir. 2011); CTF Hotel Holdings, Inc. v. Marriott Int'l, Inc., 381 F.3d 131, 139 n.12 (3d Cir. 2004). To the extent that a district court's determination as to a movant's likelihood of success "involves a purely legal determination," it is reviewed de novo. In re Revel AC, Inc., 802 F.3d 558, 567 (3d Cir. 2015). However, this Court "review[s] the district court's underlying factual determinations under a clearly erroneous standard." Acierno v. New Castle Cty., 40 F.3d 645, 652-53 (3d Cir. 1994) (in related context of review of denial of applications for preliminary injunctions) (citing In re Assets of Myles Martin, 1 F.3d 1351, 1357 (3d Cir. 1993)).

SUMMARY OF ARGUMENT

Doe's appeal rings hollow. While reputation is undoubtedly important, including to unindicted co-conspirators, 31 years ago this Court in Smith set forth a test to measure First Amendment and common law rights of access against those reputational/privacy interests. Here, the District Court correctly applied that analysis and gave Doe every opportunity to be heard.

Because Doe cannot undo Smith, he seeks to circumvent it by claiming the Conspirator Letter is not a bill of particulars that the public is presumptively entitled to access, but rather is ordinary criminal discovery, and that its filing with the Court did not create a judicial record within the common law right of access. No matter how Doe attempts to parse these issues, there can be no serious dispute that the Conspirator Letter was at all times properly treated by the Government, Defendants, and the District Court as a bill of particulars. A response to a request for a bill of particulars requires neither specific form, nor judicial order. Further, Doe's arguments would allow any prosecutor to completely nullify the public's First Amendment and common law rights under Smith by simply renaming a bill of particulars or deciding not to file it with the clerk.

Not happy with having had all the consideration Smith allows, Doe misstates the law (or attempts to invent new law) and twists the facts in attempting to eviscerate Smith's holdings, instead essentially demanding the right to challenge a U.S. Attorney's discretion to designate unindicted co-conspirators by claiming non-

existent substantive "due process" rights. To do this, Doe relies upon a litany of cases from other circuits involving concerns not present here or in Smith and not involving the public's rights of access. Doe's attempts to compare the facts of this matter to those of Smith also fail because the facts relied upon by Doe either cannot preclude disclosure under the Smith analysis or weigh in favor of disclosure rather than against it.

Nevertheless, public disclosure of the Conspirator Letter would not violate Doe's due process rights because Doe's only due process rights are to adequate procedures, which were fully provided by the District Court. Doe had every chance to raise his arguments after Media Appellees filed their Motion on January 13, 2016, but instead sat on his hands; his claims that he relied on the Government to represent his interests are unavailing, as his arguments cut against the Government's prosecutorial discretion. Additionally, the opposition submitted by the Government did not include Doe's "due process" arguments or the cases relied upon by Doe. Doe clearly had something different to say than the Government but chose not to say it. This alone should defeat Doe's due process claim.

Therefore, the District Court's Orders in this matter should be upheld.[4]

[4] Even if this Court were to accept any part of Doe's argument, as Media Appellees argued in their Emergency Motion that this Court has held in abeyance, even if Doe were to establish standing for him, he cannot possibly have standing to object to the disclosure of the names of others identified in the Conspirator Letter.

ARGUMENT

I. THE FIRST AMENDMENT AND COMMON LAW RIGHTS OF ACCESS APPLY TO MEDIA APPELLEES' REQUESTS.

A. The Law on the Public's First Amendment and Common Law Rights of Access Is Beyond Dispute.

There can be no dispute that the public has both a First Amendment and common law right of access to judicial proceedings and records. See Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596 (1982); In re Cendant Corp., 260 F.3d at 192 (3d Cir. 2001). This Court has held that these open-court proceedings are "mandated by at least six societal interests": (1) promotion of "informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system"; (2) "assurance that the proceedings [are] conducted fairly to all concerned"; (3) "significant community therapeutic value"; (4) "a check on corrupt practices by exposing the judicial process to public scrutiny, thus discouraging decisions based on secret bias or partiality"; (5) enhancement of "the performance of all involved"; and (6) "discourage[ment] of perjury." United States v. Criden, 675 F.2d 550, 556 (3d Cir. 1982) ("Criden II"). Closure of criminal records to which there is a presumptive right of access is permitted only under rare circumstances when there is "cause shown that outweighs the value of the openness." Press-Enterprise Co. v. Superior Court of California, Riverside Cty., 464 U.S. 501 (1984).

B. Smith Specifically Extends the Public's Presumptive Rights of Access to the Conspirator Letter as a Matter of Law.

This Court determined in Smith that the First Amendment right of access applies to a list of unindicted co-conspirators filed in response to a defendant's motion for bills of particulars. Smith, 776 F.2d at 1111. As here, Smith involved media intervenors' motion to intervene in a criminal proceeding to gain access to a list of names of unindicted co-conspirators filed by the Government. Id. at 1106. The district court had found that the list could remain sealed so long as the government showed "good cause," and concluded that unsealing would cause "serious injury to the persons named on the list" because it would invade their privacy rights and provide them no meaningful opportunity to respond. Id. at 1107.

On appeal, this Court analyzed the issue through the "historical and structural analysis mandated by Richmond Newspapers, Globe Newspaper, and Press-Enterprise," noting that "[a]lthough those cases concerned access to judicial proceedings, no reason occurs to us why their analysis does not apply as well to judicial documents," such as the list of unindicted co-conspirators. Id. at 1111-12. Repeating the "logic and experience" language of Globe Newspaper, the Smith Court recognized the "institutional value of public indictment[s]" and concluded that "[b]ecause of our historic experience and the societal interest served by public access to indictments and informations, . . . such access is protected by the First Amendment and the common law right of access to the judicial process." 776 F.2d at 1112.

The Smith Court reasoned that "[s]ince a First Amendment right of access is involved, ***the trial court ensealment of the list of names can be sustained only if it 'is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.***'" Id. (quoting Press Enterprise, 464 U.S. at 510) (emphasis added). Accordingly, the Smith Court disavowed the district court's "good cause" standard and set forth a stringent and exacting burden that must be met to prohibit access to lists of unindicted co-conspirators.

C. The Public's Presumptive First Amendment Right to Access the Conspirator Letter Cannot be Overcome in This Matter.

There are few governmental interests sufficiently compelling to outweigh the public's First Amendment right of access, including such limited circumstances as grand jury secrecy (see In re Newark Morning Ledger Co., 260 F.3d 217, 221 (3d Cir. 2001)), individual privacy interests (see Smith, 776 F.2d at 1114), the government's need to conduct criminal investigation unfettered by early public disclosure of its sources of evidence and identities of witnesses (see United States v. Sealed Search Warrants, No. 99-1096, 1999 WL 1455215, at *7 (D.N.J. Sep. 2, 1999)), and threats to national security (N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 217-18 and n.13 (3d Cir. 2002)). None of these governmental interests apply can outweigh the public's right of access here.

In the context of the broad public interest attendant here, any argument that the individual reputational/privacy interests of these unindicted co-conspirators outweigh public access to their names is unavailing. Based on the language of the

Indictment, it is inevitable that the unindicted co-conspirators are various elected or appointed officials or political operatives who allegedly "deliberately caus[ed] significant traffic problems in Fort Lee through a reduction in the number of the Local Access Lanes – all under the false pretense of a traffic study." A64. Public employees and elected and appointed officials "***cannot claim a right of privacy with respect to the manner in which they perform their duties***." Smith at 1116 (Mansmann, J., concurring) (emphasis added). Political operatives who operate closely with those public officials should likewise be prohibited from relying on such privacy rights. Thus, the individual reputational/privacy interests of the unindicted co-conspirators here are, almost by definition, insufficiently compelling to outweigh the public's First Amendment rights of access.

Many cases decided since Smith have concluded that public officials have "no privacy interest in freedom from accusations, baseless though they may be, that touch on [their] conduct in public office or in [their] campaign for public office." See In re McClatchy Newspapers, Inc., 288 F.3d 369, 373 (9th Cir. 2002) (holding that newspaper was entitled to writ of mandamus compelling disclosure of unredacted letters). In Smith II, this Court declined to seal a sidebar conversation involving a high official in Pennsylvania's Republican Party, explaining, "[a]s a high official in the state's Republican Party, he is [like potential political operatives here] a public person and subject to public scrutiny." Smith II, 787 F.2d at 116. "Political figures are well-equipped and have ample opportunity to respond to any accusations

of wrongdoing. . . . Privacy interests should be trumped when evoked to protect public officials from criticism." United States v. Huntley, 943 F. Supp. 2d 383, 387 (E.D.N.Y. 2013) (granting petition by members of the press to unseal sentencing memorandum containing list of names). See also United States v. Kushner, 349 F. Supp. 2d 892, 906-07 (D.N.J. 2005) (explaining that current and former public officials have diminished expectations of privacy); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 788 (3d Cir. 1994) (finding that if access to a filed document "involves issues or parties of a public nature, and involves matters of legitimate public concern, that should be a factor weighing against entering or maintaining an order of confidentiality."); United States v. Gonzalez, 927 F. Supp. 768, 784 (D. Del. 1996) ("concerns of institutional or individual embarrassment are far outweighed by the absolute necessity of allowing the light of public scrutiny to shine brightly upon government agencies, the courts, and the judicial process, so that the citizenry may be fully informed.").

Indeed, as the Supreme Court has held, there is a "paramount public interest in a free flow of information to the people concerning public officials, their servants." Garrison v. Louisiana, 379 U.S. 64, 77 (1964). Moreover, as this Court noted more than three decades ago, "the public has a lively interest in considering the relationships formed by elected officials." Medico v. Time, Inc., 643 F.2d 134, 142 (3d Cir.), cert. denied, 454 U.S. 836 (1981). It is these very relationships that seem to form the basis of the Government's allegations of conspiracy here. Doe

cannot assert a narrowly tailored compelling interest in restricting access to the Conspirator Letter that outweighs the public's First Amendment rights to access.

D. The Smith Court's Decision to Affirm Sealing Was Premised upon Facts Not Present Here.

Although the Smith Court ultimately determined that the list should remain sealed to protect the named persons' reputational/privacy rights, it did so ***based on specific circumstances not present here***, including that: (1) "the bill . . . set forth a list of names including not only those 'persons who, in the opinion of the United States [Attorney], are unindicted co-conspirators in this case,' but also those persons who, in his opinion, '*could conceivably be considered* as unindicted co-conspirators due to their alleged involvement in events included in the conspiracy,'" and (2) "the United States Attorney's opinion was formed on the basis of an investigation that had not yet reached the point where he was willing to make a decision on whether to prosecute." Id. at 1113.[5]

In light of the inclusion of the names of persons who only "conceivably may" be considered co-conspirators, the Smith Court concluded that "it is virtually certain that serious injury will be inflicted upon innocent individuals as well. In these circumstances, we have no hesitancy in holding that the trial court had a compelling governmental interest in making sure its own process was not utilized to

[5] Here, the investigation had been completed and the Government specifically stated that the Conspirator Letter contained a list of those individuals for whom there is sufficient evidence of involvement in the conspiracy. A151.

unnecessarily jeopardize the privacy and reputational interests of the named individuals." Id.

Judge Mansmann's concurrence sheds further light on the Smith decision, sharply criticizing that particular United States Attorney for using a "broad brush" in filing its bills of particulars and producing an "overbroad bill of particulars which provides the government with great latitude in the description of the crime charged." Id. at 1116-17 (Mansmann, J., concurring). She explained that defendants' interest in a narrowly drawn indictment and bill of particulars and the public's interest in a speedy and public trial "require that the government be prepared to name as unindicted co-conspirators in a bill of particulars only those individuals for whom it has the requisite evidence. . . . The government may not speculate as to those who could conceivably be co-conspirators." Id. at 1117.

This Court, aware of the balance between the First Amendment and common law rights and reputational/privacy interests, noted that "the list contains the names of some individuals who are public officials and some who are public employees" and concluded that "the public has a substantial interest in the integrity or lack of integrity of those who serve them in public office." Id. at 1114. Judge Mansmann's concurrence agreed:

> The list of unindicted co-conspirators at issue includes the names of public employees and elected officials, who cannot claim a right of privacy with respect to the manner in which they perform their duties. . . . Where a criminal trial allegedly involves violations of the public trust by government officials, the public's need to monitor closely the judicial proceedings is perforce increased.

Id. at 1116 (Mansmann, J., concurring). Thus, absent the unique circumstances of Smith or other rare circumstances, public officials and public employees included on a list of unindicted co-conspirators have no reputational or privacy interests sufficiently compelling to avoid disclosure.

Indeed, just a year later, this Court further explained that the Smith Court's decision occurred in a particular factual context, namely that the U.S. Attorney's expressed opinion in the bill of particulars was based on an investigation that had not yet reached the point where he was willing to make a decision on whether to prosecute. See Smith II, 787 F.2d at 116. In 2000, the Seventh Circuit likewise recognized that these unique circumstances were the reason the list remained sealed in Smith, explaining that "the Government had provided no factual context for its inclusion of particular names on the list." United States v. Ladd, 218 F.3d 701, 704 (7th Cir. 2000). Upon this distinction, the Seventh Circuit in Ladd ***granted access*** to a list of unindicted co-conspirators, finding that "where there is a more reliable basis for finding that the individuals were indeed coconspirators, that concern [of injury to reputation] must yield to the public's right to know the sources of evidence." Id. at 705.

Here, a lengthy and thorough investigation was completed by the Government, ensuring that those named in the Conspirator Letter are not simply individuals who may be "conceivably considered as" co-conspirators, but rather

individuals against whom the Government in fact has sufficient evidence to establish participation in a conspiracy.

Doe acknowledges that, as here, "Smith was a public-corruption case." Br. at 56. Therefore, Doe's contention that "widespread media coverage [of Bridgegate]" weighs against disclosure (id. at 55) also fails. As Judge Mansmann explained in her concurrence in Smith, where the nature of the underlying criminal matter involves corruption and misconduct by public figures and officials, that only ***strengthens*** the public's interests in access.

E. The District Court Properly Analyzed and Applied Smith.

Weighing the public's First Amendment right to access the Conspirator Letter against the interests of Doe and the other unindicted co-conspirators, the District Court noted the significant differences between the facts at work here and those in Smith, ultimately reaching a different result on the unique circumstances of this case. Doe's argument that the District Court "misapplied the balancing test this Court established in Smith" (Br. at 49) because the facts of this case either are identical to those in Smith or somehow weigh even more heavily against disclosure are patently without merit. Apart from Doe's impermissible assertion of these arguments for the first time on appeal,[6] Doe's analysis under Smith is fatally flawed and contrary to

[6] As a threshold matter, Doe is barred from arguing that the District Court erred in its application of the Smith standard because he never presented and thus deliberately waived this argument below. Tri-M Grp., LLC v. Sharp, 638 F.3d 406, 416 (3d Cir. 2011) (quoting United States v. Petersen, 622 F.3d 196, 202 n.4 (3d Cir.

the facts of this matter. In reality, comparison of the facts of this matter to those of Smith only reinforces the decisions below.

First, Doe stresses that disclosure of the Conspirator Letter will cause damage to his reputation. Br. at 51. Doe further contends that "the [D]istrict [C]ourt failed to recognize [the] critical fact" that "the harm that would befall those named in the Conspirator Letter [upon disclosure] is 'clearly predictable' and severe." Id. at 55. However, the potential of "predictable and severe" damage to the reputation of an unindicted co-conspirator is, by the very nature of the Smith scenario, always at issue. Doe's case is not special in this regard and his attempt to impose an absolute ban on disclosure under Smith whenever such disclosure may result in injury to an individual's reputation would render the balancing test articulated in Smith meaningless.

Doe also contends that the purported overbreadth of the Conspirator Letter requires that it not be disclosed. However, Doe provides no support for his contentions that "the Government has acknowledged that the Conspirator Letter is overbroad and ***lists innocent individuals*** against whom the Government has 'no evidence' or insufficient evidence to indict,"[7] (Br. at 50-51 (emphasis added)), that

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2010)). Doe is similarly barred from now arguing that the Smith standard does not control this matter in the first place. See Sec. II A, infra.

[7] The Government made no such statement regarding the specific content of the Conspirator Letter. The actual statement in the Government's brief, misleadingly quoted by Doe, was a general explanation that "Unindicted coconspirators

"the Government's potential 801(d)(2)(E) designations are typically overbroad" (Br. at 52), or that "the Conspirator Letter ***included innocent individuals***"[8] (id.). The Conspirator Letter, like any list of unindicted co-conspirators, is by definition broader in scope than an indictment. However, there is no evidence that the Conspirator Letter is any broader than appropriate. Far from an acknowledgement of "typical" overbreadth, the Government has contended that it "makes such designations only upon careful consideration of the facts." A195.[9]

Doe argues that the Conspirator Letter is necessarily overbroad because the standard of proof for establishing that an individual was a co-conspirator for purposes of Rule 801(d)(2)(E) requires less than "sufficient evidence to charge those individuals with a crime." Br. at 52. Again, Doe's objection is a generalized grievance against the nature of bills of particulars that list unindicted co-conspirators. It has no relevance to the Smith analysis because any list of unindicted co-conspirators to which Smith may be applied will invariably encompass individuals against whom the Government claims to have sufficient evidence for

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designated at this phase of prosecution have a status before the law that is no different than other individuals who were subjects of an investigation that yielded either no evidence of their wrongdoing or some such evidence, but not enough to warrant their being charged." A200.

[8] The cited page of the Government's opposition actually explains only that "a criminal prosecution is a fluid endeavor" and that it may become unnecessary for an unindicted co-conspirator to be named during trial proceedings. A196-97.

[9] Certainly, the breadth of the Conspirator Letter is distinguishable from the list at issue in Smith, which named anybody who "could conceivably be considered as unindicted co-conspirators." Smith, 776 F.2d at 1113.

purposes of Rule 801(d)(2)(E) but not necessarily sufficient evidence to indict. Again, Doe's case is not special in this regard and a rule precluding disclosure where the Government does not conclusively establish that it has sufficient evidence to indict the named individuals would similarly render the Smith balancing test meaningless.

Doe argues that the facts of this matter weigh more heavily against disclosure than the facts of Smith because the Conspirator Letter was generated only after an investigation and "a considered decision *not* to prosecute the individuals named." Br. at 53. However, this argument directly contradicts Smith and, as noted above, the completion of the Government's investigation here, where it was not complete in Smith, weighs in favor of, not against, disclosure.

Doe contends that the District Court erred by "reason[ing] that the Media's extensive coverage of Bridgegate meant that any of the thousands of persons 'tangentially involved' with the affair had a diminished or non-existent right of 'privacy.'" Br. at 54. This hyperobolic contention misconstrues the District Court's Opinion, which commented on the public nature of the controversy only in explaining the relative weight of the individual and public interests to be balanced under Smith since "the public has a substantial interest in the integrity or lack of integrity of those who serve them in public office." A28 (quoting Smith, 776 F.2d at 1114). The District Court did not decide that the reputational/privacy rights of the unindicted co-conspirators were rendered non-existent; it even emphasized that

"[t]his Court does not take the identification of unindicted co-conspirators lightly, recognizing the possible reputational consequences of such a revelation." A18. As noted above, the public nature of the underlying criminal matter only strengthens the public's interest in access.

Doe's contention that the "widespread media coverage [of Bridgegate]" weighs against disclosure (id. at 55) is also not unique to Doe's claim. The effect of disclosure on the reputation of the unindicted co-conspirators is a concern inherent to the Smith analysis. Doe also offers no explanation as to how damage to an individual's reputation caused by his being named as an unindicted co-conspirator can be enhanced either quantitatively or qualitatively by media coverage of, and commentary upon, facts already disclosed to the public, to the extent that potential reputational harm can be exacerbated by media coverage, this risk is already part of the Smith analysis undertaken by the District Court.

Lastly, Doe again misconstrues Smith in arguing that "the public's interest in the integrity of its public officers" is entirely irrelevant to the Smith analysis. Br. at 56 (citing Smith, 776 F.2d at 1114). While the Smith Court referred to its statement in United States v. Martin, 746 F.2d 964, 969 (3d Cir. 1984) – a case which expressly did not address the First Amendment right of access (id. at 967 n.3) – that "extraordinary public interest" should not "be an important factor in the balancing process" under the common law right of access. However, in its analysis of ***whether the First Amendment right of access attached***, the Smith Court actually declined to

consider the public's interest in the requested materials for the "more fundamental reason" that it was not relevant to that issue. Smith, 776 F.2d at 1114-15 (explaining that, instead, "the underpinnings of the First Amendment and common law rights of access are historical experience and societal utility."). Whether the unindicted co-conspirators are public figures or employees and the public's interest in the integrity of its government are relevant ***to the other prong*** of the Smith analysis: whether the individuals' reputational/privacy rights outweigh the public's First Amendment right of access. See, e.g., Smith II, 787 F.2d at 116; Gonzalez, 927 F. Supp. at 784. Here, the likelihood that the individuals involved in the Bridgegate affair are public figures or officials favors disclosure.

All of Doe's contentions that the facts of this matter weigh against disclosure under the Smith standard fail. On the issues raised by Doe, the facts of this matter are materially different from those of Smith and require disclosure.

F. Common Law Access Also Applies to the Conspirator Letter.

In addition to the First Amendment right of access, the public also enjoys a common law right of access to judicial records and proceedings. See United States v. Smith, 123 F.3d 140, 155-56 (3d Cir. 1997) ("Smith III"). This right antedates the Constitution, and provides the public presumptive access to a wide variety of judicial records and documents. See Littlejohn v. Bic Corp., 851 F.2d 673, 678 (3d Cir. 1988); Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157, 161 (3d Cir. 1993); see also Martin, 746 F.2d at 968 ("The common law right of

access is not limited to evidence, but rather encompasses all judicial records and documents. It includes transcripts, evidence, pleadings, and other materials submitted by litigants.") (internal quotations and citations omitted). Moreover, where, as here, "the common law right of access is buttressed by the significant interest of the public in observation, participation, and comment on the trial events, . . . the existence of a presumption of release is undeniable." United States v. Criden, 648 F.2d 814, 823 (3d Cir. 1981) ("Criden I").

G. The Conspirator Letter is a Bill of Particulars.

The District Court correctly found the Conspirator Letter to be a bill of particulars subject to the public's right of access under Smith. Doe's disingenuous attempts to distinguish the Conspirator Letter from the document at issue in Smith are without merit.

It is well settled that a bill of particulars is a proper procedure for disclosing names of unindicted co-conspirators. See, e.g., Will v. United States, 389 U.S. 90, 99(1967) ("It is not uncommon for the government to be required to disclose the names of some potential witnesses in a bill of particulars, where the information is necessary or useful in the defendant's preparation for trial."); United States v. Barrentine, 591 F.2d 1069, 1077 (5th Cir.), cert. denied, 444 U.S. 990 (1979) ("A bill of particulars is a proper procedure for discovering the names of unindicted coconspirators"); United States v. Capozzi, 883 F.2d 608, 611 (8th Cir. 1989) (government filed bill of particulars naming five unindicted co-conspirators); United

States v. Hughes, 817 F.2d 268, 272 (5th Cir.), cert. denied, 484 U.S. 858 (1987); United States v. Dempsey, 733 F.2d 392, 394 (6th Cir. 1984) (affirming district court's direction to government to inform the defendants of the names of all unindicted co-conspirators in response to a motion for a bill of particulars); United States v. Trie, 21 F. Supp. 2d 7, 22 (D.D.C. 1998) (defendant entitled to bill of particulars as to the identities of unnamed co-conspirators); United States v. Fine, 413 F. Supp. 740, 746 (W.D. Wis. 1976) ("The identities of defendants as to particular objectives of the conspiracy and of unidentified co-conspirators . . . are proper matters for inclusion in a bill of particulars.").

According to Doe, a "genuine" bill of particulars within the First Amendment and common-law rights of access must be (1) a formal pleading; (2) ordered by the Court; (3) which the ***Government*** considers to be a "bill of particulars"; and (4) which is filed with the Court. See Br. at 30-35. Doe concludes that the District Court therefore erred in finding the Conspirator Letter –produced voluntarily in response to a demand for a bill of particulars – was "genuine." Id. at 25-26, 30.

As noted above, the District Court's determination was based upon a number of factors, including the Government's own characterization of the document as subject to the holding in Smith and Justice Department internal policies governing bills of particulars. A150. Nothing in the Federal Rules, Smith, or case law requires a bill of particulars to conform to Doe's arbitrary criteria. First, nothing in the Rules suggests that a bill of particulars must conform to any particular form nor do the

Rules require the bill of particulars be ordered or filed.[10] See Fed. R. Crim. P. R. 7(f). Rule 7(f), concerning bills of particulars, simply states that "[t]he court ***may*** direct the government to file a bill of particulars." Id. (emphasis added). Doe's suggestion that a bill of particulars must conform to suggested forms included in the appendix to the Federal Rules of Criminal Procedure in the 1950s (see Br. at 32 n.10), is equally without merit.[11]

In Smith, as here, defendants "filed motions for bills of particulars requesting, *inter alia*, that the government identify the unindicted co-conspirators referred to in the indictment." Smith, 776 F.2d at 1105. "[W]hile reserving decision on all other aspects of the Rule 7(f) motions [concerning bills of particulars], the court below

[10] In fact, bills of particulars are frequently provided by the government without being "ordered," as Doe erroneously contends is required (See Br. at 33). United States v. Continental Group, Inc., 456 F.Supp. 704 n.1 (E.D.Pa. 1978) (Government identified 10 corporations and 41 individuals as unindicted coconspirators in voluntary bill of particulars); United States v. Glenn Berry Mfrs., Inc., No. 89-9104, 1990 WL 11655, at *1 (E.D.Pa. Feb. 8, 1990) (Government complied with defendant's request for the identities of various co-conspirators by submitting a list of co-conspirators in its voluntary bill of particulars); United States v. Suntar Roofing, Inc., 709 F. Supp. 1526, 1529 (D. Kan. 1989) (government identified three unindicted co-conspirators in its voluntary bill of particulars); United States v. Allied Asphalt Paving Co., 451 F. Supp. 804, 809-810 (N.D. Ill. 1978) (indictment supplemented by voluntary bill of particulars providing names of certain unindicted co-conspirators).

[11] Rule 7(f) was amended in 1996 to relax the rules concerning bills of particulars by eliminating the requirement that cause be shown before a bill of particulars may be ordered. The drafters did so specifically "to encourage a more liberal attitude by the courts towards bills of particulars without taking away the discretion which courts must have in dealing with such motions in individual cases." Notes of Advisory Committee on Rules, Fed. R. Crim. P. 7(f).

simultaneously ordered identification of the unindicted co-conspirators and granted a government request for a protective order regarding their names." Id. at 1105-06. Similar to the Conspirator Letter, the Government then filed a document listing the names of the unindicted co-conspirators (id. at 1106), which was determined by this Court to be a bill of particulars and therefore within the public's First Amendment right of access. Id. at 1110-1113.

In attempting to characterize the Conspirator Letter as something other than a bill of particulars, Doe places much emphasis on the Eleventh Circuit panel decision in United States v. Anderson, 799 F.2d 1438 (11th Cir. 1986), cert. denied, 480 U.S. 981 (1987) ("Anderson I"). Doe's reliance on Anderson I is misplaced. Its holding – that a bill of particulars was more akin to a discovery tool than an indictment and thus not entitled to First Amendment access – directly contradicts and specifically rejects this Court's holding a year earlier in Smith, which was noted again by this Court only a few months later in Smith II, and four years after Anderson I in Capital Cities, 913 F. 2d at 94. Anderson I, 779 F.2d at 1442 n.4. The holding in Anderson I therefore cannot possibly be the law in this Circuit.

H. The Conspirator Letter Was Filed with the Court and is a Judicial Record.

Doe attempts to argue that the Conspirator Letter was not technically "filed" and thus, in addition to not being a "genuine" bill of particulars, it is not a "judicial record" for purposes of the public's First Amendment and common law rights of access. See Br. at 30, 34. Doe conflates common law access, which requires a

judicial record for the right of access to apply (see, e.g., Martin, 746 F.2d at 968), and First Amendment access, which is not limited to judicial records.[12]

Doe argues that the Conspirator Letter is not a "judicial record" because it was not properly filed. See Br. at 28-30, 33. Specifically, Doe argues that the Conspirator Letter was never technically "filed with the Clerk" because it was merely delivered to the court. Id. at p. 34-35. This argument elevates form over substance to an absurd degree and would allow the Government or any other party to nullify the public's rights of access merely by failing to comply with filing requirements. However, the common law right of access is not limited to "filings"; "judicial records" also include documents that have been "otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings" (United States v. Chang, Nos. 02-2839/02-2907, 47 F. App'x 119, 122 (3d Cir. Sep. 20, 2002) (quoting Cendant, 260 F.3d at 192 (3d Cir. 2001)), as well as "transcripts, evidence, pleadings, and other materials submitted by litigants" (Smith, 776 F.2d at 1110 (citation omitted)).

Doe's argument also ignores the very law he cites and the Government's intent in sending the Conspirator Letter to the District Court. Doe correctly states that

[12] Instead, the First Amendment analysis considers "whether the place and process have historically been open to the press and the general public" and "whether 'public access plays a significant positive role in the functioning of the particular process in question.'" Smith III, 123 F.3d at 146. This analysis has already been applied by this Court when it found in Smith that "the First Amendment right of access . . . extend[s] to bills of particulars." 776 F.2d at 1111.

filings in a criminal action are governed by Fed. R. Civ. P. 5. Doe cites Rule 5 and yet ignores its directive to district courts that they accept papers delivered to them for filing. Doe also wrongly states that the Government did not intend for the Conspirator Letter to be filed. See Br. at 35. Prior to sending the Conspirator Letter to the court, the Government represented to the District Court that the document would "be ***filed*** under seal . . ." A141 (emphasis added). Furthermore, the Government would not have needed to request the document be sealed if it did not intend for it to be filed with the Court.

I. Doe's Adoption of the Government's Argument That the Conspirator Letter Lacks "Adjudicatory Significance" Is Unavailing.

The Government's apparent intent in providing the Conspirator Letter to the District Court was to demonstrate to the court that Defendants' request for a bill of particulars was satisfied. Having received the Conspirator Letter, the District Court agreed with the parties that Defendants' motion was rendered moot (A184), and correctly determined that the Conspirator Letter was therefore a judicial record subject to the common law right of access.

Nevertheless, Doe creates another argument out of whole cloth, claiming that the Conspirator Letter is not within the public's right of access under Smith because the document lacks "adjudicatory significance." Br. at 34. The District Court rejected an argument by the Government below that until the court made some sort of determination as to the evidentiary weight of the Conspirator Letter, its lack of

adjudicatory significance weighed against any right of access. A197. Nowhere in Smith was there even any hint that a document's "adjudicatory significance" might weigh against the public's right of access. Even if "adjudicatory significance" were a relevant consideration, it is inherent in the Conspirator Letter. Despite the Government's desire in the context of its brief below to minimize the significance of the Conspirator Letter, it was produced to Defendants and the District Court "to enable the accused to prepare for trial and to prevent surprise, and to this end the government is strictly limited to proving what it has set forth in it." United States v. Murry, 297 F.2d 812, 819 (2d Cir. 1962) (cited by Smith, 776 F.2d at 1111). Also, as noted below, the Conspirator Letter was also significant to the District Court's determination that Defendants' outstanding motions were rendered moot. See A184.

Additionally, the Government treated the Conspirator Letter as a bill of particulars subject to the public's right of access under Smith by submitting it to the District Court and requesting that it remain under seal pursuant to Smith as well as Justice Department polices "regarding bills of particulars that identify unindicted co-conspirators." A26-28; A150. As the District Court pointed out in its May 13th Order, there was nothing identifying the Conspirator Letter as "mere discovery" produced as an alternative to a bill of particulars nor "has the Government included [the District] Court in other exchanges of mere discovery material." A18.

Despite Doe's protestations, there can be no dispute that the Government produced the Conspirator Letter in response to a demand for a bill of particulars and

defended its filing of the Letter by reference to the USAM's guidelines for protecting bills of particulars. Doe's reference to the Government's desire "not to be constrained by a bill of particulars" as somehow indicative of its intent that the Conspirator Letter not be treated as a bill of particulars subject to the public's right of access under Smith" (Br. at 34) is belied by the Government's own characterization of the document. A150.

II. RELEASE OF THE CONSPIRATOR LETTER WOULD NOT VIOLATE DOE'S DUE PROCESS RIGHTS.

A. Doe's Only Due Process Rights Are to Adequate Procedural Safeguards.

Doe never fully articulates the nature of the due process rights he asserts. Instead, Doe relies upon vague and conclusory contentions that his "right to due process is triggered" (Br. at 37) by any potential release of the Conspirator Letter (regardless of the circumstances) and that his "due process right to prevent that false and misleading communication outweighs the Media's right of access" (Br. at 22). Doe appears to assert a substantive due process right that does not exist, relying upon a twisting of various authorities from other circuits. Even assuming that Doe has an interest protected by the Due Process Clause, Doe is entitled only to procedural due process.

The difference between procedural and substantive due process, although not addressed by Doe, is critical to determining Doe's claims. "Procedural due process imposes constraints on governmental decisions which deprive individuals of

'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Mathews v. Eldridge, 424 U.S. 319, 332 (1976). It is concerned with the issue of what procedures are adequate before such liberty or property interests may be affected. In contrast, "[t]he substantive component of the Due Process Clause limits what government may do regardless of the fairness of procedures that it employs." Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 399 (3d Cir. 2000).

A substantive due process right to be absolutely free of any harm to one's reputation does not exist. "[N]ot all property interests worthy of procedural due process protection are protected by the concept of substantive due process." Nicholas v. Pennsylvania State Univ., 227 F.3d 133, 140 (3d Cir. 2000) (quoting DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 598 (3d Cir. 1995)). "Rather, to state a substantive due process claim, 'a plaintiff must have been deprived of a particular quality of property interest.'" Nicholas, at 140 (quoting DeBlasio at 598). In Boyanowski, this Court rejected the viability of a substantive due process claim premised upon alleged defamation and damage to an individual's reputation. Boyanowski, 215 F.3d at 400. In so holding, the Court observed that "[t]he Supreme Court has made clear that federal courts are not to view defamatory acts as constitutional violations." Id. at 401-02 (citing Paul v. Davis, 424 U.S. 693 (1976); Siegert v. Gilley, 500 U.S. 226, 233-34 (1991) (explaining that the plaintiff's factual

allegations of damage to his reputation "cannot . . . be held to state a claim for denial of a constitutional right.")).

Any claimed deprivation of Doe's due process rights can therefore relate only to procedural due process.

B. Doe Was Afforded Procedural Due Process.

Doe suffered no deprivation of his procedural due process rights because he was afforded due process by the District Court. Doe never specifies what procedures he claims would have been adequate. Regardless, it is clear that Doe suffered no deprivation because he received fully adequate notice and an opportunity to be heard below.

"A procedural due process claim is subject to a 'two-stage' inquiry: (1) whether the plaintiff has 'a property interest protected by procedural due process,' and (2) 'what procedures constitute due process of law.'" Schmidt v. Creedon, 639 F.3d 587, 595 (3d Cir. 2011) (quoting Gikas v. Wash. Sch. Dist., 328 F.3d 731, 737 (3d Cir. 2003)); see also Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000). Assuming that Doe possesses a protected property interest, "the question then becomes what process is due to protect it." Montanez v. Sec'y Pennsylvania Dep't of Corr., 773 F.3d 472, 482 (3d Cir. 2014) (quoting Newman v. Beard, 617 F.3d 775, 783 (3d Cir. 2010)). In determining what process is required,

> a court is to weigh three factors: (1) "the private interest that will be affected by the official action", (2) "the risk of an erroneous deprivation of such interest through the procedures used" and the value of "additional or substitute procedural safeguards", and (3) the governmental interest, "including the

> function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

Id. at 483 (3d Cir. 2014) (quoting Mathews, 424 U.S. at 335).

Doe never addresses these factors and fails to present any argument as to what procedures constitute due process of law. Nevertheless, the "fundamental requirement of due process" is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" City of Los Angeles v. David, 538 U.S. 715, 717 (2003) (quoting Mathews, 424 U.S. at 333); see also Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("The fundamental requisite of due process of law is the opportunity to be heard."); United States v. Raffoul, 826 F.2d 218, 222 (3d Cir. 1987) ("The minimum requirements of due process are notice and an opportunity for a hearing appropriate to the nature of the case.").

Here, Doe was afforded due process by the District Court, which specifically found that "the docketing of the motion" and the "extensive media coverage [were] more than sufficient to put [Doe] on notice that his interests were at stake."[13] A17.

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[13] See, e.g., Tim Darragh, Who else knew about the Bridgegate scandal?, NJ.com (Jan. 13, 2016), http://www.nj.com/news/index.ssf/2016/01/nj_advance_media_others_ask_court_to_reveall_bridg.html; Paul Berger, Media companies ask court to release names of unindicted co-conspirators in GWB trial, NorthJersey.com (Jan. 13, 2016), http://www.northjersey.com/news/media-companies-ask-court-to-release-names-of-unindicted-co-conspirators-in-gwb-trial-1.1490586; Andrew Seidman, Media seek list of Bridgegate coconspirators, Philly.com (Jan. 15, 2016), http://articles.philly.com/2016-01-15/news/69768835_1_governor-chris-christie-news-organizations-bridget-anne-kelly; David Voreacos, Who Are the Mystery Conspirators in Bridgegate? Shhhhhhh, Bloomberg (Jan. 13, 2016), http://www.bloomberg.com/news/articles/2016-01-13/bridge-prosecutors-secretly-file-accomplice-list-with-judge.

Further, Doe's interests were "considered in [the District] Court's May 10th Opinion in its application of the Smith balancing test and in *in camera* proceedings before [the District] Court during which time Doe was given the opportunity to be heard orally and in writing." A18.

Doe does not contend that he was unaware of the application for months or denied an opportunity to be heard in opposition. Instead, Doe claims only that he "relied on the Government and its obligation under the USAM to vindicate his constitutional and reputational rights." Br. at 15. However, as noted above, this statement is not credible as Doe's due process arguments were not addressed in the Government's opposition (which was publicly filed and available to Doe for months prior to the District Court's ruling) and in fact are contrary to the Government's interests. Doe cannot possibly dispute that he received notice and an opportunity to be heard at a meaningful time and in a meaningful manner; he simply chose not to make any use of this opportunity.

To the extent that Doe claims a due process right not only to oppose disclosure but also to "contest [the Government's] designation" of him as an unindicted co-conspirator in the first place (id. at 49), such an argument fails for the reasons set forth below in section II(E). Taken to its logical conclusion, this argument would impose absurd burdens on the justice system, severely limit the Government's ability to prosecute criminal activity, and undermine longstanding and fundamental principles.

C. The District Court Fully and Properly Considered Doe's Interests in Its Analysis Under Smith.

Even though Doe chose not to participate in the proceedings below until the District Court had already ruled, the District Court fully considered and addressed the reputational/privacy concerns raised by Doe (expressly including his interest in avoiding implication without later opportunity for vindication at trial) in its May 10th Opinion. The District Court specifically identified the relevant concerns as "the privacy interests of uncharged third parties, who have no opportunity to vindicate themselves at trial" (A8), acknowledged Smith as the guiding authority on this exact concern (id.), and undertook the Smith analysis in order to address the interests of Doe and other uncharged individuals (A8-9). Ultimately, the District Court found these specific reputational/privacy concerns insufficient to overcome the public's right to access the Conspirator Letter: "Although privacy for third-parties is indeed important, this Court is satisfied that the privacy interests of uncharged third parties are insufficiently compelling to outweigh the public's right of access." A9.

Doe's proposed alternate standard – "weigh[ing] the harm to an individual against the ***government's*** interest in publicly naming unindicted co-conspirators" (Br. at 48) – encompasses the same consideration of his interests and the interests of other uncharged individuals as the Smith analysis undertaken by the District Court. The only difference is what Doe's interests are to be measured against. Doe argues that his interests should be weighed against governmental interests not asserted or implicated in this case and that the First Amendment and common law rights of the

public should not enter into the court's decision. This position is unsupportable, unreasonable, and ignores the undisputed fact that this Court in Smith specifically outlined the balancing to be performed by a district court when the public applies for access to a bill of particulars.

Thus, the Smith analysis, prescribed for this precise scenario by this Court and duly undertaken by the District Court, entails full consideration of Doe's interests.

D. Doe's Refusal to Avail Himself of the Opportunity to Be Heard Before the District Court is Fatal to His Due Process Claims.

As set forth above, Doe has fully received Due Process. To the extent Doe alleges his specific arguments about substantive due process were not fully considered, Doe's failure to utilize the notice and opportunity that he was afforded is by itself fatal to his claims. "Before bringing a claim for failure to provide due process, 'a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate.'" Wilson v. MVM, Inc., 475 F.3d 166, 176 (3d Cir. 2007) (quoting Alvin, 227 F.3d at 116); see also Zinermon v. Burch, 494 U.S. 113, 126 (1990) (explaining that a due process violation "is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process.").

Thus, "[u]nder the jurisprudence, a procedural due process violation cannot have occurred when the governmental actor provides apparently adequate procedural remedies and the plaintiff has not availed himself of those remedies." Alvin, 227 F.3d at 116. "If there is a process on the books that appears to provide

due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants." Id. (citing McDaniels v. Flick, 59 F.3d 446, 460 (3d Cir. 1995)).

However, this is precisely what Doe has done here: he skipped the "process on the books" by choosing not to participate in the proceedings below – despite the fact that the Government never raised the "due process" argument he now raises (and would likely take issue with aspects of it) – and now seeks to avoid the consequence of that calculated decision by having this Court afford him additional process retroactively. This is impermissible and Doe's late application is barred.

E. Doe's True Objectives Cannot Be Achieved in this Court Because Doe's Challenge Is Not to the Public's Right of Access but Rather to the Government's Internal Practices and Opinions.

Doe's use of "due process" terminology obscures a more fundamental flaw in his application. Doe's Brief makes clear that his true objective is not to challenge the public's right of access to bills of particulars under the First Amendment or the common law. He cannot credibly make such a challenge in light of the clear holdings of this Court on those issue. Rather, Doe challenges the Government's practice of designating individuals as unindicted co-conspirators, whether for evidentiary purposes or otherwise.

However, the Government's practice – essentially consisting of the Government forming an opinion as to the sufficiency of its evidence – is inherently and necessarily a unilateral one. Doe's challenge amounts to a request that he be

permitted to oversee or challenge the Government's opinions as to whether uncharged individuals were joint venturers with criminal defendants and whether the evidence supports such a conclusion.

Specifically, Doe contends that the Government's assertion that it has "sufficient evidence to designate [the unindicted co-conspirators] as having joined the conspiracy" is "flatly erroneous." Br. at 53. Doe further objects to the District Court's acceptance of the Government's position that it had in fact formed such a belief as to the sufficiency of its evidence without Doe being afforded an opportunity to "challenge" that belief. Id. at 54. Strikingly, Doe never provides or describes any support for his proclamations that the Government does not actually have the evidence it claims and that Doe is in fact innocent.[14] There is no legal basis for Doe's demand to review the evidentiary evaluations made by the Government in connection with its prosecutorial decision-making. On the contrary, one case relied upon by Doe has specifically "denie[d] the [unindicted co-conspirator] movants' requests to make factual findings related to their innocence." United States v. Anderson, 55 F. Supp. 2d 1163, 1170 (D. Kan. 1999) ("Anderson II").

As Doe acknowledges, there is a likelihood that his name will be revealed at trial during the Government's presentation of its case. Even the cases cited by Doe

[14] Doe could have at least argued this point had he not deliberately refused to participate in the proceedings below prior to judgment. However, having made that decision, Doe's unsupported challenges to the Government's evidence – even if they were legally cognizable – cannot be heard now.

acknowledge that Doe has no right to challenge the disclosure of his name at trial. See United States v. Briggs, 514 F.2d 794, 805 (5th Cir. 1975) ("An unindicted conspirator anonymously designated as an 'other person' or as 'John Doe' may be unmasked in a bill of particulars or at trial."); Anderson II, 55 F. Supp. 2d at 1169. Nor does Doe have any due process right entitling him to oversee the Government's prosecutorial decision-making process. It is therefore unclear what basis there could possibly be for Doe's demand to challenge not only the public's interest in disclosure but also the Government's designation of Doe as an unindicted co-conspirator in the first place. Indeed, the proposition that unindicted individuals are entitled to appeal the subjective opinions of the Government as to the sufficiency of its evidence is absurd and unworkable.

What Doe hopes to achieve – a prohibition against the practice of naming unindicted co-conspirators in any form whatsoever (or against the Government forming an opinion as to whether an individual was a joint venturer with a criminal defendant) – cannot be achieved through this appeal. Such a reversal of fundamental and longstanding prosecutorial practices (accepted by this Court and others without ever being prohibited) would require legislative action.[15]

[15] The necessity for a legislative response to Doe's concerns – or at the very minimum a revision of the Rules of procedure and evidence – is recognized in the articles cited by Doe. See Ira P. Robbins, Guilty Without Charge: Assessing the Due Process Rights of Unindicted Co-Conspirators, 2004 Fed. Cts. L. Rev. 1, I.3 (2004) (arguing that "Congress should bar the use of unindicted co-conspirators' real names in grand jury indictments"); Raeed N. Tayeh, Implicated But Not Charged: Improving Due

Doe's red herring arguments are simply an effort to achieve through an adjudication what must be done through legislation or revision of the rules of procedure and evidence. These goals cannot be achieved in this appeal. Accordingly, Doe's appeal should be denied.

III. THE DISTRICT COURT PROPERLY APPLIED SMITH AND PROVIDED ADEQUATE DUE PROCESS.

A. Doe Is Barred from Arguing for the First Time on Appeal That the Smith Standard Is Not Applicable to This Matter.

As noted above in footnote 5, Doe is barred from arguing for the first time on appeal that this matter is not governed by this Court's decision in Smith. Doe's application to the District Court entirely failed to address the analysis prescribed by this Court in Smith (as acknowledged by the District Court at A18). However, Doe never argued below that Smith did not provide the proper analytical framework for determining whether the public's rights of access required release of the Conspirator Letter (nor did any other party). Doe is therefore barred from raising this augment for the first time on appeal. "It is axiomatic that 'arguments asserted for the first time on appeal are deemed to be waived and consequently are not susceptible to

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Process for Unindicted Co-Conspirators, 47 Akron L. Rev. 551, 582-585 (proposing: (1) revision to Fed. R. Evid. 801(d)(2)(E), (2) revision of Justice Department internal guidelines, and (3) imposition of a rule requiring all filings naming unindicted co-conspirators be made under seal). Not surprisingly, these law review articles do not concern the issue of the public's rights of access under the First Amendment and common law and accordingly do not even address Smith.

review in this Court absent exceptional circumstances.'" Tri-M, 638 F.3d at 416 (quoting Petersen, 622 F.3d at 202 n.4).

B. Smith, Not Authority Cited by Doe, Controls the Disposition of Doe's Application.

Even if the Court considers Doe's new arguments concerning the applicability of the Smith standard, these arguments are unavailing. Doe desperately attempts to avoid application of the Smith analysis by mischaracterizing the competing interests to be balanced. Doe contends that the proper balancing "weighs the harm to an individual against the ***government's*** interest in publicly naming unindicted co-conspirators." Br. at 48. Although "the harm to an individual" is already contemplated as part of the Smith analysis, the Government's "interest in publicly naming unindicted co-conspirators" simply is not at issue here. In fact, the Government has argued ***against*** public disclosure prior to trial. There is therefore no reason to use this false dichotomy as the basis of any alternative balancing inquiry rather than employing the Smith analysis.

Smith addresses this exact scenario – a claim for access to a bill of particulars containing a list of unindicted co-conspirators – and explains that the appropriate balancing analysis weighs the reputational interests (asserted by Doe) of uncharged individuals against the public's interest in access. Smith, 776 F.2d at 1110-13. There is no reason to employ any other standard, much less one imported from another Circuit. Doe's contention that Smith is "not a due process case" (Br. at 48) is irrelevant. There was no occasion for discussion of deprivation of due process

rights in Smith because the Court was providing the required process. Thus, the framework for weighing Doe's interests is that set forth in Smith, not an unarticulated standard to be gleaned from decisions from other circuits.

C. The Cases Cited by Doe Are Factually Distinct from This Matter and Involve Different Considerations.

Doe attempts to place this appeal within the wrong analytical framework with a deluge of citations to inapposite cases from other circuits involving materially different facts and considerations. None of these cases involve applications by the public for access under the First Amendment or the common law. Instead, each and every one of the cases concerns evaluation of interests not at issue here. None of the cases cited by Doe are remotely analogous to this matter.

Doe cites Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) for its general statement that "where the state attaches a 'badge of infamy' to the citizen, due process comes into play." Br. at 37. However, Constantineau involved a procedural due process challenge to a state statute which allowed a police chief to post a public notice, without notice or hearing, banning sales of alcohol to a particular individual on account of the individual's excessive drinking. Id. at 434-35. Here there was no such lack of notice and hearing; as described above, Doe sustained no deprivation of any procedural due process rights.

Other cases cited generally by Doe also concern procedural due process. See Paul, 424 U.S. at 711 (examining case law illustrating that "the Fourteenth Amendment's guarantee of due process of law required certain procedural

safeguards"); Hill v. Borough of Kutztown, 455 F.3d 225, 233-39 (3d Cir. 2006) (examining plaintiff's "procedural due process claims" and addressing substantive claims only in footnote to say that they "fail[] for the same reasons"); URI Student Senate v. Town Of Narragansett, 631 F.3d 1, 9-15 (1st Cir. 2011) (addressing constitutional claims of "procedural due process," "overbreadth," and "vagueness"); Tebo v. Tebo, 550 F.3d 492, 503-504 (5th Cir. 2008) (employing "stigma-plus" analysis determined to be part of procedural due process inquiry by this Court in Hill).

Moreover, none of the cited cases concerning unindicted co-conspirators relate to applications by the public for access to their identities and are focused on factual issues not present in this case. In Briggs, relied upon heavily by Doe, the Court was reacting to the lack of procedural due process in a naming of a co-conspirator, although unindicted, ***by the grand jury in the indictment itself***. This peculiar concern, a grand jury's "[p]ublic accusation of misconduct through use of a non-indicting indictment" (Briggs, 514 F.2d at 803), is not present here. In fact, the Fifth Circuit in Briggs specifically stated that "[a]n unindicted conspirator anonymously designated as an 'other person' or as 'John Doe' may be unmasked in a bill of particulars" because "[t]he bill of particulars is . . . the statement of the prosecutor and does not carry the imprimatur of credibility that official grand jury action does." Id. at 805; accord Robbins, supra at V.1 n.3 ("Because a bill of particulars does not have the legal imprimatur of a grand jury indictment and because

measures can be taken to keep it private, the production of a bill of particulars does not affect the due process rights of the unindicted co-conspirator in the same way as being named in an indictment.").

The concern of naming of unindicted co-conspirators by a grand jury was also the issue addressed in In re Smith, 656 F.2d 1101, 1106 (5th Cir. 1981); United States v. Chadwick, 556 F.2d 450, 450 (9th Cir. 1977); Application of Jordan, 439 F. Supp. 199, 204 (S.D.W.Va. 1977); and United States v. Ferguson, No. 06-137, 2008 WL 113660 (D. Conn. Jan. 5, 2008). The cases cited by Doe make clear that the concerns surrounding the naming of unindicted co-conspirators by a grand jury in an indictment do not apply in other contexts. In fact, in United States v. Holy Land Found. For Relief & Dev., 624 F.3d 685, 692 (5th Cir. 2010), also cited by Doe, the Fifth Circuit held that a district court did not abuse its discretion in declining to expunge the identity of an unindicted co-conspirator from a pre-trial brief. In reviewing this decision, the Fifth Circuit noted that "the particular context in which an accusation was made" is important to the inquiry and that, because the identification of the unindicted co-conspirator was located in a pre-trial brief, it "did not improperly enjoy the imprimatur of grand jury approval, nor was it erroneously conceded, implicitly or explicitly, as part of any plea." Id. at 691-93.

This concern is not present where, as here, the individual's name does not appear in the indictment itself. Doe's argument that the harm of being named in an indictment is also inflicted when an individual is named in a bill of particulars

because "a true bill of particulars is 'regarded as [a] supplement[] to the indictment'" (Br. at 46) is a misleading contortion of the cited cases. This Court treated a bill of particulars as a supplement to the indictment in Smith and Capital Cities ***for the purposes of finding that the public's rights of access attached***. Smith, 776 F.2d at 1111 ("We conclude that the First Amendment right of access . . . extend[s] to bills of particulars because we think them more properly regarded as supplements to the indictment than as the equivalent of civil discovery."); Capital Cities, 913 F.2d at 93. Neither court equated the inclusion of an individual's name in a bill of particulars with being identified as a co-conspirator by the grand jury. See also A195 (Government explaining that bill of particulars may identify individuals who, in the sole opinion of the Government, are co-conspirators for purposes of Fed. R. Evid. 801(d)(2)(E), which imposes a lower standard of proof than necessary to charge an individual with a crime); Anderson II, 55 F. Supp. 2d at 1168 (acknowledging that "an 801(d)(2)(E) coconspirator is not necessarily a criminal. All that is required is that he or she be a 'joint venturer' in a common plan.").

Doe cites United States v. Crompton Corp., 399 F. Supp. 2d 1047, 1049 (N.D. Cal. 2005), for the claim that "District courts cannot refuse to expunge the name of an unindicted coconspirator from an indictment because no government interest is sufficient to justify 'stigmatizing private citizens as criminals' without affording them 'access to any forum for vindication.'" (quoting Briggs, 514 F.2d at 804). However, the district court in Crompton made this pronouncement as part of its

ruling that a plea agreement naming an unindicted co-conspirator should be unsealed without redaction because the policy concerns surrounding the naming of an unindicted co-conspirator are not present when the identification occurs other than in the indictment itself.

Finn v. Schiller, 72 F.3d 1182, 1190 (4th Cir. 1996) is also not analogous to this matter. There, a prosecutor referred to the unindicted plaintiff's participation in criminal activity extensively throughout a statement submitted in connection with a plea agreement. The case did not involve any application by the public for access under the First Amendment or the common law. Nor did it involve any consideration of the plaintiff's due process rights. Rather, the Court of Appeals considered only whether there was a private right of action for a prosecutor's violation of the grand jury secrecy rule (it held there was not) and remanded the matter for consideration of appropriate sanctions. United States v. Henderson, No. 10-117, 2012 WL 787575 (N.D. Okla. Mar. 9, 2012), similarly did not concern an application by the public for access under the First Amendment or the common law. In United States v. Gray, 91 F.3d 135 (4th Cir. 1996), the Court of Appeals cited Briggs but found that there was no plain error where the trial court denied a motion for a new trial based upon closing arguments during which the prosecutor identified trial witnesses as some of the unnamed "known individuals" referred to in the indictment.

To the extent that Doe v. Hammond, 502 F. Supp. 2d 94, 102 (D.D.C. 2007), Anderson II, or other cases concern identifications of unindicted co-conspirators

other than in an indictment and find that due process requires a weighing of the individual's interest in being free from implication without an opportunity for vindication at trial, these cases do not implicate the ***public's*** right of access or weighing of those rights against the interests of unindicted co-conspirators. Doe offers no reasonable explanation why such procedural due process issues are not fully addressed by the Smith analysis.

Therefore, the authority cited by Doe from other circuits and his arguments based on that authority entirely miss the point. Only Smith addresses the competing interests implicated by Media Appellees' application for access to the Conspirator Letter. Further, analysis under the Smith standard entails consideration of the same reputational/privacy interests of the unindicted co-conspirators and therefore constitutes whatever procedural due process may be constitutionally required.

D. Doe's Misguided Due Process Arguments Would Render Smith Meaningless.

Doe misconstrues the import of the cases he cites by concluding that the public disclosure of the identities of unindicted co-conspirators *per se* constitutes a violation. This position is impossible to reconcile with this Court's opinion in Smith, which provides an analytical framework for granting that very access. Tellingly, none of the cases cited by Doe in connection with his due process argument involves an application for access to a bill of particulars by the public. If, as Doe apparently contends, public disclosure of the identity of an unindicted co-conspirator ***always*** results in a due process violation regardless of the procedures employed, the

balancing inquiry provided for in Smith would amount to nothing more than a meaningless illusion.

IV. THE DISTRICT COURT PROPERLY DENIED DOE'S APPLICATION FOR A STAY.

Doe's final argument is that the District Court erred in denying his motion for a stay of the May 10th and May 13th Orders. It is difficult to see how this portion of Doe's appeal is not moot in light of this Court's issuance of the requested stay. Nevertheless, the denial of Doe's request for a stay was proper. For the reasons set forth above, it is clear, and was clear during proceedings before the District Court, that there is no merit to any of Doe's arguments. The District Court therefore properly concluded that Doe had not established the required likelihood of success.

CONCLUSION

For the reasons set forth herein, Doe's appeal is without merit and the Court should affirm the May 10th and May 13th Orders of the District Court.

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CERTIFICATE OF SERVICE

I, Bruce S. Rosen, Esq. hereby certify that on May 27, 2016, I filed the foregoing Answering Brief on behalf of Media Appellees with the U.S. Court of Appeals for Third Circuit via the Court's electronic filing system pursuant to Local Appellate Rule 25.1 and Local Appellate Rule Misc. 113. All other parties to this matter are Filing Users and were served electronically via the Notice of Docket Activity generated by the Court's electronic filing system.

I further certify that ten paper copies of the foregoing Answering Brief were filed with the Clerk for the convenience of the Court via federal express pursuant to Local Appellate Rule 25.1(a).

I further certify that one copy of the foregoing Answering Brief were sent regular mail to Jenny Kramer, Esq., counsel for John Doe, and Mark E. Coyne, Chief, Appeals Division, counsel for United States of America.

By: /s/ Bruce S. Rosen
Bruce S. Rosen

Dated: May 27, 2016

CERTIFICATE OF COMPLIANCE

I, Bruce S. Rosen, Esq. hereby certify that the foregoing Answering Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the foregoing Answering Brief (excluding the corporate disclosure statement, table of contents, table of authorities, and certificates of counsel) contains 13,707 words according to the word count feature of Microsoft Word 2013.

The foregoing Answering Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the foregoing Answering Brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

By: /s/ Bruce S. Rosen
Bruce S. Rosen

Dated: May 27, 2016

CERTIFICATE OF TEXT AND VIRUS SCAN

I, Bruce S. Rosen, Esq. hereby certify pursuant to Local Appellate Rule 31.1(c) that the text in the electronic version of the foregoing Answering Brief is identical to the text of the paper copies.

I further certify that a virus detection program has been run of the electronic file of this document and no virus was detected. The virus detection program used was AVG Cloud Care, Version 3.4.1

By: /s/ Bruce S. Rosen
Bruce S. Rosen

Dated: May 27, 2016

CERTIFICATE OF ADMISSION TO BAR

I, Bruce S. Rosen, Esq. hereby certify pursuant to Local Appellate Rule 28.3 that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

By: /s/ Bruce S. Rosen
Bruce S. Rosen

Dated: May 27, 2016