

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

IN RE: APPLICATION OF THE
UNITED STATES FOR AN ORDER
PURSUANT TO 18 U.S.C. § 2705(b),

No. 24-5239

EMPOWER OVERSIGHT
WHISTLEBLOWERS & RESEARCH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

**APPELLANT’S OPPOSITION TO MOTION
TO HOLD CASE IN ABEYANCE**

Intervenor-Appellant Empower Oversight Whistleblowers & Research (“Empower Oversight”) opposes the Government’s request to hold this case in abeyance. The Government’s abeyance motion fails to identify any reasonable basis for delaying the current briefing schedule. Rather, the Government’s motion reflects a misunderstanding of this case and the allegedly similar case, *In re Sealed Case*, No. 24-5089 (“*Sealed Case*”). Once those misunderstandings are corrected, there is no basis for delay.

Further, granting the motion will harm Empower Oversight and the public by continuing to shield the explanations the Department of Justice (“DOJ”) provided the district court when requesting non-disclosure orders (“NDOs”) related to the subpoenas DOJ sought for communications records of those in Congress who were actively engaged in oversight of DOJ. The Court should therefore deny the Government’s abeyance request.

1. The Government significantly overstates any similarities between this case and *Sealed Case*. In *Sealed Case*, a service provider—X Corporation—moved to vacate an NDO to which X was subject. *See* X Br. at 1, No. 24-5089 (May 14, 2024). In doing so, X challenged the lawfulness of “‘omnibus’ nondisclosure order[s],” which “apply prospectively to subpoenas issued investigation-wide up to a year (or more) later, not to specific subpoenas issued to specific providers for specific accounts.” *Id.* at 1. That key issue in *Sealed Case* is irrelevant to this appeal, which does not challenge the legality of omnibus NDOs, but instead seeks access to particular NDO applications and later extension requests. The Court’s holding on the lawfulness of omnibus NDOs will have no bearing here.

The same is true of other issues raised in *Sealed Case*. For instance, the First Amendment is implicated in *Sealed Case* much differently than it is here, where X claimed that the “omnibus” NDO was an unlawful prior restraint on its speech, because the NDO prevented X from informing subscribers about the underlying subpoena. *Id.* at 27–28, 30–33. Again, that is not relevant here. Rather, Empower Oversight demonstrated that it has a First Amendment right of *access* to the information DOJ included in the NDO applications because those applications are court filings on which the court based its decision to issue the NDO.

Overlooking these significant differences, the Government grabs hold of an apparent similarity between *Sealed Case* and this appeal. *See* DOJ Abeyance Mot. at 2–3. But any overlap is illusory. True, the parties in *Sealed Case* addressed whether X generally had a right to the NDO applications. *Id.* at 3. But even the question about general access to NDO applications arose in *Sealed Case* differently than here. X claimed a *due-process* right to the omnibus NDO application, *see* X Br. at 37–50 (No. 24-5089); Empower Oversight has *not* claimed a due-process right to the underlying NDO applications. Rather, Empower Oversight asserts

common-law and First Amendment rights of access. *See* Empower Op. Br. at 17–45.

Additionally, when opposing X’s motion to vacate the omnibus NDO, the Government cited a “compelling interest in preserving grand[-]jury secrecy in an *ongoing* investigation.” DOJ Br. at xiv, No. 24-5089 (July 12, 2024) (emphasis added). Not so here, where the NDOs, any related grand-jury proceedings, and the investigations themselves have now concluded. *See* Empower Op. Br. at 11.

Accordingly, it is unlikely that the Court’s resolution in *Sealed Case* will impact the issues presented in this appeal, and DOJ’s speculation about what the *Sealed Case* panel will address in its decision cannot warrant a lengthy delay of the briefing schedule here, particularly where such a delay will harm Empower Oversight and the public.¹ Rather, the more efficient approach is for the parties to file short supplemental briefs *if* the *Sealed Case* decision implicates any of the issues raised in this appeal.

¹ There can be no dispute that the Government’s abeyance motion is riddled with speculation. *See* DOJ Abeyance Mot. at 3 (stating that *Sealed Case* panel “could reverse” on various grounds; *Sealed Case* “will likely factor heavily” here; “the parties probably will request ... supplemental briefing”).

2. The Government also significantly understates the harm caused by holding this case in abeyance, where the Government's request will delay briefing in this case by several months—or longer. The Government moves to hold this case in abeyance “pending issuance of the *mandate* in *In re Sealed Case*.” DOJ Abeyance Mot. at 1 (emphasis added). But the Court has not yet issued a decision in that case, and there is no way to know when the decision will be issued. Moreover, once the *Sealed Case* decision is released, the mandate will not issue for nearly two more months. *See* Fed. R. App. P. 40, 41(b). And even that timeline assumes that neither party in *Sealed Case* seeks rehearing or *certiorari*, which will only further delay issuance of the mandate.

Considering the lack of overlap between the cases, there is no reason for the briefing here to be held hostage by the schedule in *Sealed Case*. Rather, as Empower Oversight already demonstrated, there is a significant public interest in understanding more about what DOJ told the district court when seeking the NDOs at issue in this appeal. Indeed, DOJ's actions already triggered an investigation by the Office of Inspector General, and the resulting report has only increased the need to learn what steps (if any) DOJ took to inform the district court that it

was attempting to obtain communications records from the very people engaged in DOJ oversight.

3. Finally, granting the Government's motion would also be inequitable. DOJ knew months ago about any alleged overlap between this case and *Sealed Case*. Empower Oversight filed its notice of appeal on October 10, 2024, but the Government had already filed its *Sealed Case* brief months earlier. Yet DOJ failed to request abeyance before Empower Oversight filed its opening brief.² By waiting until after Empower Oversight filed its opening brief, DOJ improperly seeks to have several additional months with that brief before filing its opposition.

Moreover, DOJ's approach runs counter to Empower Oversight's role as Appellant. If *Sealed Case* is relevant, Empower Oversight should have the opportunity to address it in the first instance. By delaying its

² That failure may be due to DOJ's internal rules. As Government counsel from the district court proceedings explained (repeatedly) to undersigned counsel for Empower Oversight, DOJ refuses to assign an attorney to an appeal until after the appellant files its opening brief. That is why, for instance, DOJ was unable to participate in any discussion about the contents of the appendix in this case, and it is likely why DOJ failed to file a timely abeyance motion. But DOJ's internal rules do not excuse DOJ's untimely abeyance request, nor do they justify the significant harm that granting the request would impose on Empower Oversight and the public.

abeyance request, DOJ improperly seeks to keep for itself the opportunity to first address this Court's forthcoming opinion in *Sealed Case*.

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For each of the foregoing reasons, the Court should deny the Government's abeyance request. The more efficient way forward is for the parties to adhere to the current briefing schedule and then file short supplemental briefs *if* the *Sealed Case* decision implicates any of the issues raised in this appeal. But it is unreasonable and prejudicial to delay for months resolution of an appeal that has significant public interest.

Respectfully submitted,

/s/ Brian J. Field

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Dated: April 23, 2025

CERTIFICATE OF COMPLIANCE

1. This motion opposition complies with the length limits of Fed. R. App. P. 27(d)(2) because it was produced using a computer and contains 1,226 words.

2. This motion 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font.

Dated: April 23, 2025

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