

[ORAL ARGUMENT NOT YET SCHEDULED]

**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),

EMPOWER OVERSIGHT
WHISTLEBLOWERS
& RESEARCH,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24-5239

**INTERVENOR-APPELLANT’S OPPOSITION TO MOTION TO
SUPPLEMENT APPENDIX AND TO ACCEPT *EX PARTE* FILINGS**

Intervenor-Appellant Empower Oversight Whistleblowers & Research (“Empower Oversight”) opposes the government’s request to supplement the appendix with sealed documents and to submit a sealed *ex parte* brief. Allowing the government to file additional materials under seal will only further harm the public and hamstring Empower Oversight’s ability to explain why the various applications for non-disclosure orders at issue in this appeal must be released.

Our adversarial “system is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the

question.” *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (cleaned up). This system ensures that, in cases against the government, litigants “will be able adequately to test the government’s case[.]” *Id.* And one “hallmark of our adversary system” is that courts “safeguard party access to the evidence tendered in support of a requested court judgment.” *Abourezk v. Reagan*, 785 F.2d 1043, 1060 (D.C. Cir. 1986), *aff’d mem.*, 484 U.S. 1 (1987) (per curiam).

The government’s request here turns these fundamental principles on their heads. In this appeal, Empower Oversight seeks previously undisclosed applications for non-disclosure orders. And Empower Oversight is already operating with one arm tied behind its back, as it only learned about the underlying subpoena and non-disclosure orders after those orders expired, and Empower Oversight has only been able to see limited portions of the underlying applications. By submitting not only redacted exhibits, but also a redacted *brief*, the government seeks to further limit Empower Oversight’s ability to prosecute this appeal. Empower Oversight cannot fairly “test the government’s case” because it doesn’t fully know what the government’s case is in this appeal. *Penson*, 488 U.S. at 84. That is reason enough to deny the government’s motion.

It is no answer for the government to point to this Court’s rules or to other cases where this Court has “considered *ex parte* materials.” *See* Mot. 3–4 (citing D.C. Cir. R. 47.1(d)(2); D.C. Cir. R. 47.1(e)(2); *In re Sealed Case*, 77 F.4th 815, 831

(D.C. Cir. 2023)). While sealing may be available elsewhere, that does not mean it is appropriate or available here. Yet the government's motion asks this Court to accept its naked *ipse dixit* that the *ex parte* materials here are functionally identical to materials that this Court has previously allowed to remain under seal in other cases. They are not. As Empower Oversight explained in detail in its opening brief, the applications it seeks are covered by the common-law and First Amendment rights of access. *See* Opening Br. 17–40 (common law); 40–47 (First Amendment). The motion to submit an *ex parte* sealed brief and supplemental appendix should thus be rejected not only because the government's motion begs the question by assuming that the very documents that are the subject of this appeal are properly sealed, but also to ensure that Empower Oversight is allowed to meaningfully participate in the adversarial process.

Respectfully submitted,

/s/ Brian J. Field

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document complies with the type-face requirements of Fed. R. App. P. 32(a)(5) & (6) and the 5,200-word type-volume limitation of Fed. R. App. P. 27(d)(2)(A) in that it uses Times New Roman 14-point type and contains 499 words. The number of words was determined through the word-count function of Microsoft Word.

/s/ Brian J. Field

Brian J. Field