ORAL ARGUMENT NOT YET SCHEDULED
No. 24-5239

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Appeal from the U.S. District Court
for the District of Columbia
Civil Case No. 1:24-mc-00058-JEB; Hon. James E. Boasberg

REPLY BRIEF OF INTERVENOR-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

*Authorities upon which we principally rely are marked with an asterisk.

Statutes

Rules

Other Authority

GLOSSARY

ABBREVIATION	FULL NAME
App.	Appendix filed with Intervenor-Defendant's Opening Brief
DOJ	United States Department of Justice
Empower Oversight	Empower Oversight Whistleblowers & Research
NDO	Non-Disclosure Order
OIG	Office of the Inspector General
Rule 6(e)	Federal Rule of Criminal Procedure 6(e)
The Act	Stored Communications Act

INTRODUCTION AND SUMMARY

This appeal addresses the Department of Justice's ("DOJ") overreading of Federal Rule of Criminal Procedure 6(e). Empower Oversight Whistleblowers & Research seeks unredacted copies of the applications for non-disclosure orders ("NDO") that DOJ sought with respect to a subpoena issued pursuant to the Stored Communications Act (the "Act"). That subpoena sought communications records of Empower Oversight's founder, Jason Foster, from a time when Mr. Foster served as oversight counsel to the U.S. Senate Judiciary Committee. At that time, Mr. Foster, and others on the Committee, were actively engaged in their constitutional oversight role of DOJ, including communicating with DOJ whistleblowers. DOJ's attempt to obtain the communications records of those performing oversight of DOJ raises grave constitutional concerns. And Empower Oversight seeks to better understand what (if anything) DOJ said about those constitutional concerns when it requested an order prohibiting the subpoena recipients from notifying Mr. Foster or other subscribers about the subpoena.

In DOJ's estimation, however, those applications cannot be released because anything that references a "grand jury" is an ancillary grand-jury record subject to perpetual sealing under Rule 6(e). But DOJ fails to identify support for such a broad rule, particularly with respect to requests for NDOs issued pursuant to the Stored Communications Act, 18 U.S.C. § 2705(b), where Congress has already provided the requirements for sealing records. And DOJ does not even attempt to explain how NDO applications can, at times, be subject to the disclosure standards Congress set forth in the Act and different standards set forth in Rule 6(e). Of course, that is because the Act governs and, when the Act no longer requires sealing, traditional rights of access apply. The district court thus erred when concluding instead that Rule 6(e) applies and granting only limited release of the NDO applications.

However, even if Rule 6(e) applies to these records, the district court nonetheless erred by failing to order their release. Through public reporting, and now the extensive report from the Department of Justice Office of the Inspector General ("OIG"),[1] there has been significant public

[1] *See* Off. Inspector Gen., U.S. Dep't of Just., No. 25-010, A Review of the Department of Justice's Issuance of Compulsory Process to Obtain Records of Members of Congress, Congressional Staffers, and Members of the News Media 1 (Dec. 2024) ("OIG Rep."), https://tinyurl.com/fnpjarsn.

disclosure of the requested material. Rule 6(e) yields when—as here—a matter becomes public.

Accordingly, the Court should remand this matter to the district court for that court to order the release of the underlying NDO application and each renewal application.

ARGUMENT

Under this Court's precedent, the NDO applications are not subject to Rule 6(e). Rather, they are subject to the common-law and First Amendment rights of access. But even if Rule 6(e) applies, the applications must still be disclosed because they are now sufficiently in the public domain.

I. The Requested Records Are Not Subject to Rule 6(e).

The original NDO application and renewal requests that Empower Oversight seeks are not grand-jury materials covered by Rule 6(e), but rather are judicial records subject to the common-law and First Amendment rights of access.[2] That is clear from this Court's decision in

[2] DOJ repeatedly mischaracterizes the nature of the dispute, suggesting that this appeal "is about" the "unsealing of one five-page document." DOJ Br. 1; *accord id.* at 18, 36. Not so. Empower Oversight seeks not only further unsealing of the original NDO application, but also all renewal

In re Leopold to Unseal Certain Electronic Surveillance Applications & Orders, 964 F.3d 1121, 1129 (D.C. Cir. 2020) ("*Leopold II*") (reversing and remanding *In re Leopold to Unseal Certain Elec. Surveillance Appls. & Orders,* 300 F. Supp. 3d 61 (D.D.C. 2018) ("*Leopold I*")). Although DOJ places great weight on *Leopold II* in its brief, DOJ fails to appreciate that *Leopold II* provides the analytical framework and reasoning that leads to the inescapable conclusion that Rule 6(e) is inapplicable.

A. The requested records are judicial records.

The starting point here, as in *Leopold II*, is the judicial-record analysis. 964 F.3d at 1127. To be sure, "not all documents filed with courts are judicial records." *SEC v. Am. Int'l Grp.*, 712 F.3d 1, 3 (D.C. Cir. 2013). But "[c]ourt decisions are the 'quintessential business of the public's institutions.'" *Leopold II*, 964 F.3d at 1128 (quoting *EEOC v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996)). The NDO order is thus plainly a judicial record, and it follows that "applications for such orders and their supporting documents" are also judicial records. *Id.*

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applications. *See* Opening Br. 48 (seeking less-redacted versions of "the original and first extension applications" and "all subsequent extension applications"); App.013 ("DOJ requested *three* additional one-year renewals of the NDOs.").

That is because those applications "are 'intended to influence' the court and the court 'makes decisions about them.'" *Id.* (cleaned up) (quoting *MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 668 (D.C. Cir. 2017)). This standard is not limited to "appellate briefs and appendices," but it extends to "[a]pplications for electronic surveillance orders and their supporting documents," which are "likewise intended to influence the court[.]" *Id.*

Once it is determined that a document is a judicial record, the common-law right of access attaches, subject to certain limitations. *Id.* at 1129. This right of access "'is a fundamental element of the rule of law[.]'" *Id.* at 1127 (quoting *MetLife*, 865 F.3d at 663). It "antedates the Constitution." *Id.* (quoting *MetLife*, 865 F.3d at 674). And it is grounded in "antipathy … to the notion of 'secret law[.]'" *Id.* As this Court explained in *Hubbard*, the common-law right of access to judicial records "serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally." *United States v. Hubbard*, 650 F.2d 293, 314–15 (D.C. Cir. 1980). Empower Oversight's appeal furthers those same interests, as the integrity of judicial proceedings—here, the issuance and renewals of the NDO—is cast into question if DOJ did not provide the district court with a fulsome explanation of its attempt to investigate its overseers, who were actively speaking with DOJ whistleblowers.

1. DOJ forfeited any argument that the common-law and First Amendment rights of access do not require disclosure.

Surprisingly, DOJ ignores the common-law and First Amendment rights of access. Instead, tucked away at the back of its brief (at 37–38) is the extraordinary request that, if this Court agrees that Rule 6(e) does not apply, the Court should not address the common-law or First Amendment rights of access. Rather, DOJ asks the Court to remand for the district court to address these issues. *Id.* But DOJ's willful refusal to address these key issues is forfeiture, and the Court should not follow DOJ's invitation to further delay resolution of this matter.

Under "ordinary forfeiture rules," "where one party has raised an argument and the other has 'offered nothing in opposition,'" the party has "forfeited any counterargument." *Int'l Longshore & Warehouse Union v. Nat'l Lab. Rels. Bd.*, 971 F.3d 356, 363 (D.C. Cir. 2020) (quoting *Tax Analysts v. IRS*, 117 F.3d 607, 610 (D.C. Cir. 1997)). In such cases, this Court "treat[s] the argument as conceded," *Tax Analysts*, 117 F.3d at 610, rather than remanding to the district court to allow the responding party to raise counterarguments it should have raised on appeal.

There is good reason for the Court to follow its usual practice here and treat these common-law and First Amendment arguments as conceded. Empower Oversight fully briefed each issue both here and below. *See* Opening Br. 17–47; App.021–032. But DOJ concedes (at 37) that it opted not to "weigh[] in on those issues" in either forum. DOJ's decision to (again) ignore Empower Oversight's central points means that any potential counterarguments are forfeited twice-over.

Rather than give DOJ a third chance to raise counterarguments on remand, if the Court agrees that Rule 6(e) does not apply, it should hold DOJ to the standard that applies to all other litigants and treat Empower Oversight's arguments as conceded "for the purposes of this case only." *Tax Analysts*, 117 F.3d at 610. The Court has recently done just that in another case involving § 2705(b) due to DOJ's failure to preserve arguments. *In re Sealed Case*, No. 24-5089, 2025 WL 2013687, at *3 (D.C. Cir. July 18, 2025).

2. The common-law and First Amendment rights of access apply.

Not only is holding DOJ to traditional forfeiture rules the only fair result, but—as Empower Oversight explained—it is also correct on the merits since the common-law and First Amendment rights of access apply to the documents Empower Oversight seeks and favor unsealing.

Under *Hubbard*, the public has a strong interest in learning about DOJ's actions, and the information contained in the records Empower Oversight seeks—if not the documents themselves—has been previously disclosed. And, since both the subpoena and the NDOs are public, there is no risk from disclosure. Further mitigating any risk, (1) the NDO applications lack secret information and can be redacted to protect any privacy interests, and (2) the investigations are closed. Moreover, the NDOs were considered as part of judicial decision-making and should be public. Each *Hubbard* factor thus weighs in favor of disclosure.

Beyond the *Hubbard* factors, Empower Oversight also explained why the First Amendment's "experience and logic" test supports unsealing as well. Opening Br. 40–45. Briefly: The forced non-disclosure of subpoenas ended with the expiration of the NDOs, and sealing under the Act is not automatic. Moreover, unsealing the requested documents will ensure fairness and decrease bias in DOJ's actions by increasing the chances that DOJ—subject to public scrutiny—will more carefully justify its actions. Finally, DOJ cannot satisfy strict scrutiny. The NDO applications are boilerplate, and DOJ does not have a compelling interest in keeping them sealed in their entirety to avoid public scrutiny. And any interest it has can be furthered by limited redactions of any non-existent case-specific information there may be.

B. Congress has not fully displaced the common-law right of access for the requested records.

Of course, the common-law right of access is not absolute. It gives way "when Congress has spoken directly to the issue at hand." *Leopold II*, 964 F.3d at 1129 (quoting *MetLife*, 865 F.3d at 669). Here, the Act has "spoken directly" to whether materials issued pursuant to its authority are subject to release—at least for a certain amount of time. As DOJ explains (at 4), the recipients here of a subpoena issued under the Act became grand jury witnesses upon receiving the subpoena. There was no rule preventing them, as witnesses, from speaking about the subpoena. *Id.* So too for the warrants at issue in *Leopold II*: there was no "default sealing or nondisclosure provisions[.]" 964 F.3d at 1129.

That is where § 2705(b) and the NDOs come into play—Congress determined that DOJ may seek to temporarily bar disclosure "'for such period as the court deems appropriate' to protect specified law enforcement interests in connection with ongoing investigations." *Leopold II*, 964 F.3d at 1129 (quoting 18 U.S.C. § 2705(b)). If DOJ satisfies the requirements of § 2705(b), the court may issue the NDO, which is plainly a judicial record.[3] And, as explained above, when an order is a judicial record, so too are the applications filed requesting the order. Thus, § 2705—not Rule 6(e)—is Congress's direction for how and when such records are to be kept out of the public's eye. Properly understood, the records that Empower Oversight seeks are thus independent, statutorily authorized records under the Act, which provides the requisite disclosure standards.

When those standards from the Act are no longer satisfied, it follows that Congress has no longer spoken "directly to the issue at hand," and that the common-law right of access applies. For present purposes, that occurs when the NDO expires, and § 2705(b) no longer requires

[3] The face of the NDO (App.036–043) confirms that it does not divulge anything about a grand-jury proceeding, and there is thus no basis for DOJ's theory that the NDO itself would ever be subject to Rule 6(e).

nondisclosure. At that point, the common-law right of access applies, and DOJ has no basis for arguing that Rule 6(e) suddenly comes into play and requires continued protection for the applications that were underlying the now-released NDO.

C. DOJ fails to show that the NDO applications are subject to Rule 6(e).

DOJ's main response to the foregoing is to focus on differences between the warrants at issue in *Leopold II* and the subpoena and NDO applications at issue here. Those differences are illusory, and DOJ cannot so easily distinguish *Leopold II*.

For instance, DOJ argues (at 26) that Empower Oversight "misunderstands *Leopold II*" to the extent that it understands that case to "read[] the Stored Communication Act to displace Rule 6(e)." But that is exactly what *Leopold II* did. DOJ concedes that *Leopold II* recognized a public right of access to "judicial warrants and § 2703(d) orders" issued under the Act. DOJ Br. 26 (citing 964 F.3d at 1129–31). As Empower Oversight explained, the Court reached that conclusion precisely because "the [Stored Communications Act] contains no default sealing or nondisclosure provisions[.]" Opening Br. 35 (quoting *Leopold II*, 964 F.3d at 1129). DOJ has no answer beyond its own circular *ipse dixit* for why

NDO applications under § 2705(b) of the Act require a different conclusion. Since the Act lacks "default sealing or nondisclosure provisions," so too do its subparts.

Moreover, DOJ is mistaken in trying to confine *Leopold II* to its narrow facts. The portion of *Leopold II* that DOJ cites (at 26–27) specifically states that, "[u]nlike the Stored Communications Act, [Rule 6(e)] expressly directs secrecy as the default position, and thus displaces the common-law right of access." 964 F.3d at 1130. Notably, this Court did *not* say "[u]nlike *the specific subparts of* the Stored Communications Act *addressed herein*…." Rather, *Leopold II* explained that *the Act* is distinct from Rule 6(e), and DOJ cannot read a limitation into *Leopold II* that this Court did not include.

Leopold II's reasoning applies with full force to other orders issued under the Act. As a plurality of the Supreme Court recently explained, it is "usually a judicial decision's reasoning—its *ratio decidendi*—that allows it to have … effect in the disposition of future cases." *Ramos v. Louisiana*, 590 U.S. 83, 103–05 (2020) (plurality opinion). And, under *Leopold II*'s reasoning, DOJ is mistaken when arguing (at 28–29) that the NDO application itself is "directly protected by Rule 6(e)(6) … and

Local Rule 6.1." To hold otherwise would be to subject every party seeking access to judicial records created under the authority of the Act to a game of whack-a-mole to determine whether—at any given time—any particular documents are both ancillary grand-jury materials and documents created under the Act. Such secrecy creep would be inconsistent not only with *Leopold II*, but also with this Court's longstanding rejection of any reading of Rule 6(e) that would "draw 'a veil of secrecy ... over all matters occurring in the world that happen to be investigated by a grand jury'" and impose a "*per se* rule against disclosure of any and all information which has reached the grand jury chambers." Opening Br. 23–24 (quoting *Senate of the Commw. of P.R. on Behalf of Judiciary Comm. v. U.S. Dep't of Just.*, 823 F.2d 574, 582 (D.C. Cir. 1987)).

Nor does DOJ adequately contend with the reality that § 2703 applications—which *Leopold II* discussed—are likely to reveal sensitive grand-jury information. Such requests, after all, must include "specific and articulable facts" that the records and communications sought "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Under *Leopold II*, even the existence of those specific facts is not enough to displace the First Amendment and common-law rights of access since Congress did not expressly displace those rights in the Act.

The same must be true for § 2705(b) orders, as there is no reason to conclude that those orders and applications will present a more significant risk to DOJ's investigatory actions. And, contrary to DOJ's belief that such application must be perpetually sealed, the sealing standard for § 2705(b) is not frozen in time.[4] Rather, to justify continued sealing, "the court would need to give not only 'reason to believe' that disclosure *presently* risks harm, but also 'reason to believe' that risk of harm would *still exist* for a subpoena issued many months later." *In re Sealed Case*, 2025 WL 2013687, at *4 (emphases added). Section 2705(b) thus "requires that a court make a 'reason to believe' determination for

[4] On this, DOJ's selective quotations (at 21) of the Supreme Court's decision in *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979), is misleading. According to DOJ, the *Douglas Oil* Court stated that matters previously before a grand jury "remain protected even after 'the grand jury has ended its activities.'" DOJ Br. 21 (quoting *Douglas Oil*, 441 U.S. at 222). DOJ strips this quotation of its context. The Supreme Court stated instead that "the interests in grand jury secrecy, although reduced, are not eliminated merely because a grand jury has ended its activities." *Douglas Oil*, 441 U.S. at 222. Thus, after a grand jury's activities have concluded, any related secrecy interests are "reduced." And there may be—but are not always—instances when continued sealing is necessary. But *Douglas Oil* does not come close to endorsing the perpetual sealing rule DOJ suggests.

any subpoena (or other legal document) covered by its order." *In re Sealed Case*, 2025 WL 2013687, at *4 (emphasis added). The need for a case-by-case and document-by-document judicial determination of the specific risk of harm before the NDOs can issue sits in considerable tension with DOJ's argument that the NDO applications themselves are automatically sealed as Rule 6(e) materials without the judicial determination required by § 2705(b).

This also shows why DOJ is mistaken to argue (at 18 n.3) that the considerations for the initial NDO application are the same as the considerations for each subsequent extension application. As Empower Oversight explained (at 9–10, 33–34), although DOJ obtained information from the subpoena, DOJ did not include any such information when seeking NDO renewals. Thus, whatever justification for secrecy there may have been at the outset of the investigation, a judge properly undertaking the document-by-document analysis required under § 2705(b) would have less reason to shield extension applications when they are grounded in the same boilerplate considerations as the initial application.

Undeterred, DOJ argues (at 21) that "full unsealing of an application for nondisclosure of a grand-jury subpoena under § 2705(b) would very often disclose" a grand-jury matter. It then spends nearly two pages (at 22–24) presumably explaining—in redacted form—why disclosing the applications at issue here would do just that.

While Empower Oversight is denied the opportunity to respond directly to those arguments, two points are worth making. First, as noted, the orders at issue in *Leopold II* must contain "specific and articulable facts." 18 U.S.C. § 2703(d). Yet the Court still found them subject to the common-law right of access. So, whatever specific facts DOJ hides behind, redactions seem unlikely to require a different outcome here.

Second, the recent OIG report underscores why the NDO applications likely have no such information. As Empower Oversight explained (at 29–30, 32–33, 45–46), that report explains that the § 2705(b) applications at issue here—"both in original and renewal applications"—lacked *any* "case-specific justifications" and were instead "boilerplate." OIG Rep. 44. Not even by hiding behind procedurally unfair redacted arguments can DOJ rebut the Inspector General's public conclusion that no information in these particular applications was specific to a grand-jury investigation.[5]

Given the OIG report, DOJ's pointing to *Leopold I*'s recognition that *some* § 2705(b) orders may "pertain[] to non-disclosure of a grand-jury subpoena" also misses the mark. DOJ Br. 27 (citing *Leopold I*, 300 F. Supp. 3d at 99). Even if, as DOJ argues, certain documents can be issued pursuant to the Act—such that there is no automatic right to sealing—and also be ancillary grand-jury materials—such that non-disclosure is required—that does not mean the NDO applications *here* are such records. Nor can DOJ overcome the fact that the orders themselves have been disclosed by the recipient, as explored more fully below.

These developments are equally fatal to DOJ's reliance on Local Criminal Rule 6.1, which only applies to protect documents concerning a "matter occurring before a grand jury." Local Crim. R. 6.1. When

[5] It also speaks volumes that DOJ relies extensively on the passive voice, discussing what an NDO application "may divulge," "will often discuss," or "will normally reveal." DOJ Br. 22. The question is not what generic NDO applications might address. DOJ refuses to state publicly that the specific NDO applications at issue here discuss or reveal "matters occurring before the grand jury." *See id.*

"continued secrecy is not necessary to prevent disclosure of matters *occurring before the grand jury*," this rule no longer requires sealing. *Id.* (emphasis added). Because there is no reasonable basis for continuing to withhold boilerplate NDO applications, Local Criminal Rule 6.1 is no barrier to further release.[6]

Beyond *Leopold II*, DOJ relies on fatal mischaracterizations of authority when arguing that Rule 6(e) "specifically applies to" "the order not to disclose the grand-jury subpoena" and "the application for the order not to disclosure the grand-jury subpoena." DOJ Br. 18–19 (citing *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154 (D.C. Cir. 2007); *In re Mots. of Dow Jones & Co.*, 142 F.3d 496, 500 (D.C. Cir. 1998)). Neither case DOJ cites supports such a definitive statement. *Dow Jones*, in particular, is far afield from DOJ's suggestion (at 19) that it held that applications for non-disclosure orders are protected under Rule 6(e). Rather, *Dow Jones* provides helpful insights into what will be considered ancillary grand-jury material—*e.g.*, a motion to postpone the date of

[6] DOJ also argues (at 29–30) that the public's interest in the records is irrelevant. But courts applying Local Rule 6.1 "typically assess various discretionary consideration," including "public interests[.]" *In re Press Appl. for Access to Jud. Recs. Ancillary to Certain Grand Jury Proceedings*, 678 F. Supp. 3d 135, 144–45 (D.D.C. 2023) (citing cases).

testimony; a motion to quash a subpoena; a request for an order compelling a witness to answer a subpoena; objections to a grand jury subpoena; and hearings related to such motions. 142 F.3d at 498. Those are substantially closer to the core operations of a grand jury, and they are thus different from the NDOs and applications at issue here. In *Dow Jones*, the Court considered a request for "public access to the hearings and to papers in all of the proceedings relating to the grand jury." *Id.* at 499. The Court also addressed a request for "public access to hearings and transcripts relating to President Clinton's motion to show cause." *Id.* at 506. These proceedings and materials are plainly related to the ongoing operations of a grand jury, and thus obviously subject to Rule 6(e). *Id.* at 501. But they bear no similarity to the documents requested here, and it is quite a stretch to suggest (as DOJ does) that *Dow Jones* held that Rule 6(e) "covers the application for the order not to disclose the grand-jury subpoena." DOJ Br. 19.

For all these reasons, the Court should conclude that Rule 6(e) never applied.

II. Even if Rule 6(e) Applies, the Records Must Be Released.

If the Court nonetheless agrees with the district court's conclusion that the requested records are protected by Rule 6(e), the district court still erred in not requiring additional disclosure. Rule 6(e) is not absolute, and it does not protect records from release in perpetuity. For instance, Rule 6(e) records lose their protection when the matter has been widely reported. *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994) (there "come[s] a time … when information is sufficiently widely known that it has lost its character as Rule 6(e) material"); *accord In re Cheney*, No. 23-5071, 2024 WL 1739096, at *3 (D.C. Cir. Apr. 23, 2024) (per curiam) (holding that once a matter has "been publicly disclosed," "[c]ourts may unseal records containing matters occurring before a grand jury").

As Empower Oversight already demonstrated (at 38–40), DOJ's investigation into whether Members of Congress and their staffers leaked classified information was public when Empower Oversight filed its original motion. And the details of this investigation have only become more public as this case has progressed. The OIG report—which issued while the appeal was pending—confirmed much of what Empower Oversight suspected. Indeed, it confirmed that the NDO renewal applications failed to inform the district court about the serious constitutional implications of DOJ's seeking the communications records of its overseers. Rather, DOJ relied on "boilerplate assertions about the need for non-disclosure[.]" OIG Rep. 4.

Though DOJ argues that this Court cannot consider the OIG report, it admits that this Court has not applied traditional closed-record appellate rules in cases involving a party's attempts to access sealed records where "intervening public disclosure … materially alter[ed] the legal landscape[.]" DOJ Br. 33–34 (quoting *In re Cheney*, 2024 WL 1739096, at *4–5). This is just such a case, and DOJ has no good answer for why the OIG report—which provides significant details about the investigation—does not alone justify the complete disclosure of the NDO application and each extension application.

1. DOJ starts with the incorrect position that everything tangentially related to a grand-jury proceeding is subject to Rule 6(e) and must be perpetually kept under seal. That misreads this Court's decisions applying Rule 6(e). As this Court explained in *Lopez v. Department of Justice*, 393 F.3d 1345 (D.C. Cir. 2005), Rule 6(e) does not draw "a veil of secrecy … over all matters occurring in the world that

happen to be investigated by a grand jury." *Id.* at 1349 (quotation marks removed; ellipses in original). "Quite the contrary: '[t]here is no *per se* rule against disclosure of any and all information which has reached the grand jury chambers.'" *Id.* (quoting *Senate of the Commw. of P.R.*, 823 F.2d at 582). Rather, Rule 6(e)'s sealing requirement is limited to those documents that would "'reveal some secret aspect of the grand jury's investigation, such matters as the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.'" *Id.* (quoting *Senate of the Commw. of P.R.*, 823 F.2d at 582). The records at issue here are not of a similar type, as the OIG report confirmed.

2. DOJ also admits (at 16), as it must, that public disclosure of a grand-jury matter allows courts to unseal grand-jury materials. It also admits, *id.*, that records can be unsealed if they can be redacted "to excise any secret information." Here, as Empower Oversight explained, the OIG report satisfies the publicity exception by explaining the nature of the investigation and the subject of the NDO applications themselves. Moreover, because the OIG report concludes that the records Empower Oversight seeks lack *any* "case-specific justification," OIG Rep. 44, it

satisfies the second exception that allows for public disclosure, as there is no secret information in the NDO applications. Indeed, as the very agency tasked with conducting oversight over DOJ's activities has concluded that the records Empower Oversight seeks are void of any case-specific information, DOJ cannot seriously contend that disclosing such records risks the disclosure of secret information—the records don't contain any.

Likely recognizing this fact, DOJ contends (at 35) that "Empower has not shown that the NDO application at issue in this appeal was connected to the investigations discussed in the OIG report." Not so. The OIG report acknowledges that DOJ used "compulsory process to obtain records of Members of Congress, congressional staffers, and members of the news media" to investigate "the unauthorized disclosure of classified information." OIG Rep. 3. As Empower Oversight explained, Jason Foster, its Founder, was one such congressional staffer. Opening Br. 5–6. And, once the NDOs expired, Google informed him that his records were disclosed to DOJ. *Id.* at 6 (citing App.010, 013–014).

DOJ's suggestion that Mr. Foster's experience—which perfectly aligns with the OIG report's findings—could possibly refer to a *different* investigation is an invitation to suspend reality. This Court elsewhere has refused to "give [its] imprimatur to a fiction of deniability that no reasonable person would regard as plausible" because courts "should not be ignorant as judges of what [they] know as men and women." *See ACLU v. CIA*, 710 F.3d 422, 430–31 (D.C. Cir. 2013) (cleaned up). That general prohibition on turning a blind eye to obvious conclusions applies with full force here.

Indeed, no public disclosure of a criminal investigation will ever be enough if an OIG report summarizing an investigation in detail falls short. And, if DOJ seriously believes the OIG report is referring to a different investigation, DOJ should say so directly. As this Court has recognized, the "factor which weighs most strongly in favor of release" is public disclosure. *In re North*, 16 F.3d at 1240. That factor applies even more strongly when, "[n]ot only is the information widely known, it is widely known incorrectly." *Id.* Here, if the public is wrong that the OIG report references the investigation that led to Mr. Foster's communications records being disclosed, release is even more necessary.

In any event, that DOJ hid behind the fact that the OIG report lacks subpoena numbers leads to only one conclusion: DOJ could not, consistent with its duty of candor, say that the OIG report referenced anything other than the investigation into Mr. Foster and other congressional staffers.

3. DOJ argues in the alternative (at 36) that, because Empower Oversight seeks the applications to learn what they say, the applications necessarily have *not* been publicized and that releasing them now would risk "identify[ing] suspects or targets of the investigation"—dispatching an argument no one made.

Empower Oversight has consistently stated that "it has no objection to the redaction of specific names"—to the extent there are any—in the applications. Opening Br. 32 (citing App.010 n.1). And Empower Oversight showed that the Inspector General—whose office *had* reviewed the applications and extensions that Empower Oversight seeks—concluded that those documents lacked "case-specific justifications" in any event, relying instead on "the same boilerplate assertions" each time. *Id.* at 32–33 (quoting OIG Rep. 44). Given that fact, DOJ cannot suggest that the disclosure of boilerplate language—redacted for personal identifying information—will risk "identifying people who are investigated by the grand jury but never charged with a crime." DOJ Br. 36 (citing *Douglas Oil*, 441 U.S. at 219).

Of course, while DOJ now argues for maximum secrecy, the public version of the OIG report contains only "*limited* redactions of information that the Department determined contains grand jury information or is too sensitive for public release." OIG Rep. 19 (emphasis added). Even those limited redactions did not stop the Inspector General from describing in detail the relevant investigation. The report does not shy away, for example, from summarizing "the Department's use of compulsory process to obtain records of Members of Congress and congressional staffers in certain media leak investigations, as well as the use of NDOs in connection with some of that compulsory process." OIG Rep. 19. Nor does it conceal "the relevant Department policies," "what records were sought and why, the method by which they were obtained, and the use of NDOs in connection with the compulsory process issued." *Id.*[7] If DOJ's Inspector General can discuss such details on the public

[7] The OIG report devotes 30 pages to describing the details of this investigation. OIG Rep. 21–50. It redacted less than a page of that long summary for revealing grand-jury materials. *See generally id.*

record, DOJ's litigating components can surely provide the public with a minimally redacted version of the same NDO applications.

Empower Oversight also showed that DOJ's own actions here weigh against continued secrecy. DOJ itself, for example, "elected to let the NDOs expire" such that Google could—and did—disclose not only the grand-jury subpoena, but also the NDOs to Mr. Foster. Opening Br. 14. That subpoena and the NDOs blocking its disclosure are in the record. App.036–043; App.045–047. So too—after the district court granted Empower Oversight limited relief below—are the redacted versions of the original NDO application and the first extension application. App.093–103. Ignoring the relevance of these public disclosures, DOJ argues (at 29) that Google's decision to disclose the NDOs and DOJ's own decision to let those NDOs expire are "irrelevant" because the applications themselves have never been public. But DOJ never takes the additional step of explaining why this Court should endorse its incoherent position that even though the orders and the investigation are clearly public, this Court should keep the government applications seeking those orders secret. Since the OIG report "included most, if not all, of the 6(e) material" that could even conceivably be included in the

NDO applications Empower Oversight seeks, "the material has already lost [any] protected character" that it may have had. *In re North*, 16 F.3d at 1244.

In short, this investigation is as public as they come. Even if the NDO application and its extensions were—at one point—Rule 6(e) materials, Rule 6(e) applies only as long as "necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Fed. R. Crim. P. 6(e)(6). Here, the need for continued sealing of the NDO application and its extension applications ended when the OIG report revealed them and concluded that they lacked any specific information—if not sooner.

CONCLUSION

DOJ's continued attempt to avoid public accountability for its troubling actions should be rejected. NDO applications are creatures of the Stored Communications Act, not Rule 6(e). And since—unlike Rule 6(e)—the Act provides a standard for sealing, which no longer applies after DOJ allowed the NDOs to expire, Empower Oversight has a common-law and a First Amendment right of access to any judicial records sought under the Act.

However, even if Rule 6(e) applies, the records must still be released because they are already in the public domain, and they do not contain any information that will reveal matters occurring before a grand jury.

DOJ's counterarguments should be rejected. They ignore the record, downplay the OIG report, and seek remand on an issue that DOJ has now neglected to brief in two courts.

The Court should therefore reverse the district court and require DOJ to disclose the substance of the original NDO application and each of its renewal requests.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief of Intervenor-Appellant complies with the type-face requirements of Fed. R. App. P. 32(a)(5) & (6) and the 6,500-word type-volume limitation of Fed. R. App. P. 32(a)(7)(B) in that it uses Century Schoolbook 14-point type and contains 5,817 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f). The number of words was determined through the word-count function of Microsoft Word.

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