

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

ABU AGILA MOHAMMAD
MAS'UD KHEIR AL-MARIMI,

Defendant.

:
:
:
:
:
:
:
:
:
:
:
:

Case No. 22-cr-392 (DLF)

NOTICE OF FILING OF PARTIALLY REDACTED PLEADINGS

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this notice of filing of two partially redacted pleadings. Full version of the pleadings attached to this document were filed under seal at ECF 274-1 and 275-1.

Respectfully submitted,

JEANINE FERRIS PIRRO
UNITED STATES ATTORNEY

By: /s/ Erik M. Kenerson
ERIK M. KENERSON (OH Bar No. 82960)
CONOR MULROE (NY Bar No. 5289640)
BRITTANY KEIL (D.C. Bar No. 500054)
Assistant United States Attorneys
JEROME J. TERESINSKI (PA Bar No. 66235)
Special Assistant United States Attorney
United States Attorney's Office
601 D Street NW, Washington, D.C. 20530
(202) 252-7201 // Erik.Kenerson@usdoj.gov

KATHLEEN CAMPBELL (MD Bar No. 9812170031)
JENNIFER BURKE (MD Bar No. 9706250061)
Trial Attorneys, Counter Terrorism Section
National Security Division
950 Pennsylvania Avenue NW, Washington, D.C. 20530

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

ABU AGILA MOHAMMAD
MAS'UD KHEIR AL-MARIMI,

Defendant.

:
:
:
:
:
:
:
:
:
:

Case No. 22-cr-392 (DLF)

[REDACTED]

**GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO
ACCEPT REDACTED DEPOSITION TRANSCRIPT AT SUPPRESSION HEARING**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this response to the defendant's Motion to Accept Redacted Transcript at Suppression Hearing of Rule 15 Testimony (ECF 260-2) and to the questions posed in the Court's minute order of December 31, 2025.

For the following reasons, the government agrees with the defense that the Rule 15 deposition [REDACTED] under seal as originally ordered. First, the deposition is a separate proceeding from the hearing on the defendant's Motion to Suppress Statements, and the public has no right of access to a pretrial deposition.

Second, [REDACTED], it can be admitted as an exhibit, played in court, or otherwise made part of the record at the suppression hearing. That is appropriate because the evidentiary rules applicable to the suppression hearing permit the admission of and reliance upon hearsay testimony,

Third, the government recommends that it would be appropriate to play an audio recording of [REDACTED] testimony in open court during the hearing, as well as to accept a transcript of this testimony as evidence at the hearing. This approach would grant the public robust access to all facts relevant to the Court's decision-making (*see In Re Associated Press*, 162 F.3d 503, 512-13

(7th Cir. 1998); *United States v. McDougal*, 103 F.3d 651, 659 (8th Cir. 1996). while still protecting the parties' legitimate interests, as the law requires.

BACKGROUND

[REDACTED]
[REDACTED]
[REDACTED]. Those same facts are relevant to the hearing scheduled on the defendant's pending motion to suppress, ECF 159.

In July of 2025, the government moved for a Rule 15 deposition [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

On August 19, 2025, the Court granted the government's motion for a Rule 15 deposition [REDACTED]. *See* ECF 140. The Court further ordered that the deposition itself and all related docket activity be "sealed until further order of the Court." *Id.* at 6-7 (citing Fed. R. Crim. P. 15(e); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984)).
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED] Those are the same facts relevant to the defendant's suppression motion. Accordingly, the government expects that [REDACTED]

[REDACTED].²

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Along with its intention to offer [REDACTED] recorded testimony, the government anticipates calling at least one live witness at the suppression hearing to (among other things) (1) describe the sequence and timing of events by which the U.S. government obtained the statement from the Libyan government, and (2) summarize evidence that corroborates the accuracy and voluntariness of the statement. The government also understands that the defense may call one or more witnesses. As a result, the suppression hearing will involve additional live testimony even if [REDACTED] testimony is accepted in recorded form.

ARGUMENT

The government agrees with the defense that the Rule 15 deposition of [REDACTED] [REDACTED] under seal. The government also agrees that the substance of that deposition can thereafter be unsealed for the limited purpose of being made part of the record at the suppression hearing for the Court to consider in resolving the defendant's motion to suppress. As the defense correctly

² Although the Federal Rules of Evidence would apply to Rule 15 testimony for trial but not suppression hearing testimony, the government expects that little or none of [REDACTED] suppression testimony, at least on direct examination, would be inadmissible at trial.

argues, ECF 260-2 at 2-3, it is beyond dispute that hearsay is admissible at suppression hearings, and the parties' proposal would represent nothing more than a straightforward application of that rule, with the Court considering an out-of-court statement for the truth of the matters asserted.

The government's position differs from the defense's in one respect: while the defense contemplates that a transcript of the testimony would be made part of the suppression hearing record, the government submits additionally that an audio recording of the testimony should be played in open court.³ In view of the public's interest in access to the suppression hearing, our proposed approach is justified both formally and pragmatically.

A Rule 15 deposition and a suppression hearing are distinct proceedings subject to different public-access standards. [REDACTED], not during a suppression hearing, and the public does not have a right of access to Rule 15 depositions unless and until they are offered during a public proceeding. Once that happens — here when the government offers [REDACTED] hearsay testimony at the suppression hearing — the public has a qualified right of access to the evidence, which would be appropriately vindicated under our proposal.

From a pragmatic standpoint, the proposed approach would serve judicial economy and the legitimate interests of both the government and the defense. It would avoid needlessly duplicative testimony, it would protect [REDACTED]

[REDACTED] Moreover, the public's knowledge and understanding of the proceedings would be just as great as under any of the possible alternatives.

³ By playing only the audio, and not the video, [REDACTED] identity would be protected to the same extent as if [REDACTED] testified from behind a screen. If the Court agrees with this proposal, the government may consider seeking to alter the audio to make [REDACTED] voice less identifiable.

Accordingly, the Court should [REDACTED]

[REDACTED] admit an audio recording that testimony at the suppression hearing.

A. The public has a qualified right of access to suppression hearings, but not to Rule 15 depositions.

The public’s qualified right to attend and access information about certain proceedings flows both from the First Amendment and from the common law. We discuss these authorities in turn, and then explain why they provide a qualified right of access to suppression hearings but not to Rule 15 depositions.

1. Sources of the right of access.

a. First Amendment.

The First Amendment prohibits the government from “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” In *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court held that the First Amendment also confers a “right to attend criminal trials to hear, see, and communicate observations concerning them.” 448 U.S. 555, 576 (1980). This right is “implicit in the guarantees of the First Amendment,” because “[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could... be foreclosed arbitrarily.” *Id.* at 577.⁴

⁴ The defense relies on an earlier case, *Gannett Co., Inc. v. DePasquale*, to argue that the Sixth Amendment right to public proceedings is his alone and that the public and press “possess no similar right.” ECF 260-2 at 4 (citing 443 U.S. 368, 381 (1979)). But the public does possess a right of access, albeit one arising from the First Amendment and common law rather than the Sixth Amendment. As the Supreme Court explained after *DePasquale*, “a majority of the Justices” in that case “concluded that the public had a qualified constitutional right to attend [suppression] hearings” under the First Amendment. *Waller v. Georgia*, 467 U.S. 39, 45 (1984) (citing opinions in *DePasquale* of Powell, J., and Blackmun, J., joined by Brennan, White, and Marshall, JJ.). And under the First Amendment, “[t]he public has a right to be present whether or not any party has asserted the right.” *Presley v. Georgia*, 558 U.S. 209, 214 (2010).

Since *Richmond Newspapers* was decided, courts have evaluated whether, and to what extent, the public's First Amendment right of access extends to various criminal proceedings other than trials. For example, the Supreme Court has found the right extends to *voir dire* proceedings and preliminary hearings, and the D.C. Circuit has found the right extends to completed plea agreements but not "unconsummated" plea agreements. See *United States v. Brice*, 649 F.3d 793, 795 (D.C. Cir. 2011) (collecting cases). The analysis depends on "considerations of experience and logic," requiring public access when "(1) there is an 'unbroken, uncontradicted history of openness,' and (2) public access plays a significant positive role in the functioning of the proceedings." *Matter of Pub. Def. Serv. for Dist. of Columbia to Unseal Certain Records*, 607 F. Supp. 3d 11, 20 (D.D.C. 2022) ("*Matter of PDS*") (quoting *Press-Enter. Co. v. Superior Court of California for Riverside Cnty.*, 478 U.S. 1, 9 (1986); *Brice*, 649 F.3d at 795).

However, "even when a right of access attaches, it is not absolute." *Press-Enter. Co. v. Superior Court of California for Riverside Cnty.*, 478 U.S. 1, 9 (1986) ("*Press-Enter. I*"). Instead, "[p]roceedings may be closed and, by analogy, documents may be sealed if 'specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Matter of New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) (quoting *Press-Enter. II*, 478 U.S. at 13-14). Applying this standard involves conducting a "balancing test mandated by the First Amendment" that weighs the public's interest in transparency against case-specific factors like "fair trial and privacy interests" and the possible chilling effect that unqualified access could have on future litigants. *Id.*

As for the specific bases upon which courts have relied to close proceedings: Courtroom closure is "amply justified" when necessary to prevent the public from learning the identities of undercover officers. *Ayala v. Speckard*, 131 F.3d 62, 72 (2d Cir. 1997). Closure can also be

appropriate when it is necessary to help child victims “effectively communicate their stories at trial.” *United States v. Yazzie*, 743 F.3d 1278, 1289 (9th Cir. 2014). Whatever the nature of the interest warranting closure, “[t]he court must articulate the interest at stake ‘along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.’” *Yazzie*, 743 F.3d at 1286 (quoting *Press-Enter. Co. v. Superior Court of California, Riverside Cnty.*, 464 U.S. 501, 510 (1984) (“*Press-Enter. I*”).

The required strength of the interest being asserted depends on the degree of closure being sought. *See Ayala*, 131 F.3d at 70 (collecting cases and explaining, “the more extensive is the closure requested, the greater must be the gravity of the required interest and the likelihood of risk to that interest”). Closure is considered “limited” when, for example, it applies to the testimony of only one witness and a transcript is subsequently made available. *Id.* at 72. *See also Bowden v. Keane*, 237 F.3d 125, 129 (2d Cir. 2001) (identifying factors that make closure “narrow” including when “the public can learn (through transcripts, for example) what transpired while the trial was closed” (citing *Ayala*, 131 F.3d at 72; *Herring v. Meachum*, 11 F.3d 374, 379-80 (2d Cir. 1993))).

Finally, before ordering complete closure of a proceeding, the court must consider less-restrictive alternatives. For example, as alternatives to the complete closure of *voir dire* and wholesale sealing of the transcript, the Supreme Court has suggested the alternatives of (1) releasing partial transcripts; or (2) releasing transcripts that disclose the substance of jurors’ answers without revealing their identities. *See id.* at 70 (discussing *Press-Enter. I*, 464 U.S. at 513).

b. Common law.

Alongside the First Amendment right to access proceedings, there is also a “broader, but weaker, common law right to judicial documents.” *United States v. El-Sayegh*, 131 F.3d 158, 160 (D.C. Cir. 1997) (citing *Washington Legal Found. v. U.S. Sentencing Comm’n*, 89 F.3d 897, 898 (D.C. Cir. 1996)). This right of access attaches to “judicial records,” which include “court orders

themselves” as well as other documents that are “intended to influence the court” and about which the court “make[s] decisions.” *In re Leopold to Unseal Certain Elec. Surveillance Applications & Orders*, 964 F.3d 1121, 1128 (D.C. Cir. 2020) (quoting *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 668 (D.C. Cir. 2017)).

Once a document is deemed a judicial record, a court must balance the public’s interest in disclosure of the document against any objecting parties’ interests in maintaining secrecy, doing so according to the factors set forth in *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980).

Those factors are:

- (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.

E.E.O.C. v. Nat’l Children’s Ctr., Inc., 98 F.3d 1406, 1409 (D.C. Cir. 1996).

2. The public has a qualified right of access to suppression hearings.

The weight of authority indicates that the public has a right to access suppression hearings pursuant to the First Amendment. On the “experience” prong of the “logic and experience” test, Judge Contreras has observed that “at minimum there is a consensus that the suppression hearings themselves and documents filed in conjunction with the hearings have been historically open to the public, although there is some disagreement on whether that right always extends to exhibits filed in connection with those motions.” *Matter of PDS*, 607 F. Supp. 3d at 22 (collecting cases). And on the “logic” prong, courts likewise have held that “[p]ublic disclosure of [suppression] proceedings enhances the basic fairness of the judicial process and the appearance of fairness that is essential to public confidence in the system.” *Matter of New York Times Co.*, 828 F.2d at 114. That is so because of the “legitimate public interest in knowing the grounds on which government

conduct in obtaining evidence is challenged.” *Id.* (quoting *Application of The Herald Co.*, 734 F.2d 93, 101 (2d Cir. 1984)).

Of course, as with other proceedings subject to a qualified right of access, the public’s right to access suppression hearings can be overcome by overriding factors. Courts appear to apply the same general balancing test to all types of proceedings where there is a qualified right of access, rather than calibrating the scales differently for suppression hearings versus trials. Accordingly, the countervailing factors noted above — such as protecting undercover officers’ identities, facilitating testimony by child victims, and preventing chilling effects — would all be eligible reasons to close a suppression hearing. And, as discussed above, the required strength of the countervailing interest depends on the degree of closure, with less weighty justifications needed for “limited” closures and more weighty justifications needed for total closure.

The Supreme Court provided an example of First Amendment balancing at a suppression in *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979). In that case (which predated *Richmond Newspapers*), the Court declined to decide whether the public had a First Amendment right of access to suppression hearings. But assuming that such a right existed, the Court found that the trial court had given that right “all appropriate deference” by “balanc[ing] the constitutional rights of the press and the public against the defendants’ right to a fair trial.” *Id.* at 392. Striking this balance in favor of the defendant’s legitimate interest in minimizing pretrial publicity was especially appropriate because “any denial of access in this case was not absolute but only temporary.” *Id.* at 393. “Once the danger of prejudice had dissipated, a transcript of the suppression hearing was made available,” giving the press and public “a full opportunity to scrutinize the suppression hearing.” *Id.*

3. The public has no right of access to Rule 15 depositions unless and until they are used in a judicial proceeding.

Federal Rule of Criminal Procedure 15 allows that “a prospective witness be deposed in order to preserve testimony for trial.” Several provisions of the rule make clear that a Rule 15 deposition is not an ordinary judicial proceeding to which the public presumptively has access.

First, the Rule provides that, with limited exceptions, “a deposition must be taken and filed in the same manner as a deposition in a civil action.” Fed. R. Crim. Pro. 15(e). It is well established that “pretrial depositions and interrogatories are not public components of a civil trial.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). *See also* Wright & Miller, Federal Practice and Procedure § 2041 (3d ed.) (“[I]t should be noted that it has been held that neither the public nor representatives of the press have a right to be present at the taking of a deposition.”). As for “filing” depositions, the civil rules mandate that depositions “*must not* be filed until they are used in [a] proceeding or the court orders filing.” Fed. R. Civ. Pro 5(d)(1)(A) (emphasis added). And “the courts of appeals have uniformly held that the public has no common law or constitutional right of access to materials that are gained through civil discovery but neither introduced as evidence at trial nor submitted to the court as documentation in support of motions or trial papers.” *United States v. Kravetz*, 706 F.3d 47, 55 (1st Cir. 2013) (collecting cases).

Second, Rule 15 provides that “[a]n order authorizing a deposition to be taken under this rule does not determine its admissibility. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.” Fed. R. Crim. Pro. 15(f). This provision, along with the time limitation on “filing” noted above, confirms that a deposition is not itself a proceeding where any question is being decided by the court; it is rather a means of preserving testimony that may or may not be offered, in whole or in part, at a future proceeding.

Third, Rule 15 includes provisions that are incompatible with public attendance as a practical matter. It requires the party seeking the deposition to “give every other party reasonable notice of the deposition’s date and location,” but says nothing about notice to the public. Fed. R. Crim. Pro. 15(b)(1). And it contemplates depositions being held outside the United States, with a requirement that an absent defendant be able to “meaningfully participate” but no contemplation of remote access by the public. Fed. R. Crim. Pro. 15(c)(3).

Consistent with these provisions, Rule 15 depositions are routinely taken in private, only being made public when they are introduced or otherwise used at an actual judicial proceeding. Courts have consistently ruled that such practice comports with the public’s right of public access to judicial proceedings and records.⁵ That is true even when the public interest in the testimony is especially strong, like when deponent is the current or former President of the United States:

In *United States v. McDougal*, after a Rule 15 deposition was taken privately of then-President Clinton, the Eighth Circuit held that the public’s right of access was satisfied by portions of the tape being played at trial and a redacted transcript being released – just like the government is proposing here. Through these means, “members of the public, including the press, were given access to the information contained in the videotape” and thereby “received all the information to which they were entitled under the First Amendment.” 103 F.3d 651, 659 (8th Cir. 1996) (citing and discussing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609, 98 S. Ct. 1306, 1318, 55 L. Ed. 2d 570 (1978)).

⁵ For the same reasons, the sealing a Rule 15 deposition does not depend on the consent of the defendant, notwithstanding the defendant’s comment that he “is choosing to waive his personal Sixth Amendment right to a public proceeding [REDACTED].” ECF 260-2 at 5. No such right exists as applied to Rule 15 depositions.

In *United States v. Poindexter*, after a Rule 15 deposition was taken privately of former President Reagan, the court arranged for a transcript to be released and the video screened for interested viewers. Because the press and public were able “to read the words of the testimony on the transcript and to hear and see them spoken on the videotape,” they were “placed in precisely the same position they would have occupied had the former President testified during the trial itself and had they attended the trial sessions,” and therefore had “hardly any valid cause for complaint.” 732 F. Supp. 170, 173 (D.D.C. 1990).

And in *United States v. Fromme*, the court ordered that then-President Ford be deposed pursuant to Rule 15 on videotape in the presence of “attorneys for the Government” and “co-counsel for defendant,” with a U.S. District Judge presiding. 405 F. Supp. 578, 583 (E.D. Cal. 1975). According to a footnote in the *Poindexter* opinion, “a copy of the videotaped deposition of President Ford was not released to the public prior to trial, but a transcript was made available to the public and the press at the time the tape was played at the trial.” *Poindexter*, 732 F. Supp. at 173 n.5 (citing *Fromme*, 405 F. Supp. 578).⁶

The same goes for non-Presidential deponents. In *Application of ABC, Inc.*, the court denied the media’s request to copy videotapes of witness’s Rule 15 deposition, noting that “[t]he videotape and the transcript of her deposition have remained under seal and will not be made public until the appropriate point in the... trial.” 537 F. Supp. 1168, 1170 (D.D.C. 1982)

In short, Rule 15 depositions are nonpublic events where neither experience nor logic counsel in favor of a presumptive right of access.

⁶ Additionally, then-President Carter testified by means of videotaped deposition in a federal criminal trial in Georgia. Contemporaneous media reporting suggests that the tape became public when it was played at trial. *See* New York Times, “Carter's Testimony, on Videotape, Is Given to Georgia Gambling Trial” (Apr. 20, 1978).

B. Because [REDACTED], the public has no right to be present for the deposition.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A decision of the Seventh Circuit, *In re Associated Press*, confirms that Rule 15 testimony remains protected against public access even when close in time and place to the proceeding at which it is expected to be offered. *See* 162 F.3d 503, 506 (7th Cir. 1998). In that case, the defense subpoenaed the Governor of Illinois as a witness, but trial was canceled the day of his planned testimony because of a juror’s illness. *Id.* at 505. Because the Governor was about to leave for a three-week trip, the parties and Court agreed to take his testimony by deposition pursuant to Rule 15. *Id.* Over the objection of the Associated Press, the deposition was taken in a closed session and videotaped; when trial resumed, the video was played in open court and later made available to the public in video and transcript form. *Id.* at 506-507. After the trial, the Associated Press appealed to challenge the district court’s sealing of the Rule 15 deposition, arguing that “the Governor’s testimony was actually trial testimony that was merely disguised as a Rule 15 deposition.” *Id.* at 512. In rejecting this argument, the Seventh Circuit framed the question as purely one of legal

form: “Our resolution of this issue depends on the validity of the Press’ characterization of the videotaping as trial testimony as opposed to a Rule 15 deposition.” The court found that, because the videotaping of testimony had been ordered under Rule 15, and because “the district court acted well within its discretion” in so ordering, sealing of the testimony was proper under the “well established” principle that “discovered but not-yet-admitted evidence is not ordinarily within the scope of press access.” *Id.* at 512-13 (citing *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897-98 (7th Cir. 1994)).

The same reasoning that applied to the mid-trial deposition in *Associated Press* should apply to the pre-suppression hearing deposition here. The deposition and the suppression hearing are separate events. Even if it seems a near-certainty that the deposition will be offered at the suppression hearing, that does not mean it becomes *de facto* suppression testimony “disguised as a Rule 15 deposition,” like the Associated Press unsuccessfully argued about the Governor’s testimony.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In *Associated Press*, the Governor was unavailable at the time his deposition was played, but that fact played no part in the court’s reasoning. Indeed, in almost any case involving Rule 15 testimony being offered at trial in lieu of live testimony, the witness will be unavailable; that follows inevitably from the rule against

hearsay, which would otherwise forbid admission of the prior testimony. At a suppression hearing, by contrast, the Court can consider hearsay, such as a prerecorded deposition, regardless of whether the witness is unavailable. *See* ECF 260-2 at 2-3 (“Hearsay evidence is routinely presented and accepted at suppression hearings.”). Given those relaxed rules, it follows *a fortiori* that what is permissible in the trial context is also permissible in the pretrial context.

The Court’s minute order identified *United States v. Pahlawan, et al.*, EDVA no. 24-cr-41, as a case that “employed similar measures.” That case was unusual in that the Rule 15 depositions were open to the public. The government is aware of no other case that has involved public Rule 15 depositions. We did, however, locate one other federal case in which a court (over the government’s objection) ordered that videotaped Rule 15 depositions of eight defense witnesses be taken for use at a suppression hearing to save the cost of the witnesses’ traveling from southern California to Colorado. *See United States v. Laymon*, 127 F.R.D. 534, 535 (D. Colo. 1989). The depositions were ordered to be taken at a place of the parties’ choosing, with no provision for notice to or access by the public. *Id.* at 536. After the depositions were concluded, the “court could then view the video tape at the suppression hearing.” *Id.* at 535.

Additionally, some state systems have a more common practice of depositions in criminal cases, and there are federal cases on *habeas* review that make reference to the admission of deposition transcripts in state suppression hearings. *See, e.g., Hardy v. Jones*, no. 3:14-cv-144, 2016 WL 5110502, at *20 (N.D. Fla. Mar. 1, 2016) (“[D]efense counsel presented [witness’s] testimony by admitting the transcript of his deposition into evidence at the suppression hearing.”). We have found no indication that this practice has ever been challenged as a violation of the public’s right of access; instead, the weight of state-court authority holds that the public is appropriately excluded from depositions until they become part of a proceeding. *See, e.g., Palm*

Beach Newspapers, Inc. v. Burk, 504 So. 2d 378, 383 (Fla. 1987) (“[W]e do not see how it can be plausibly argued that the press has a first amendment right to be present at deposition proceedings or to obtain access to such depositions prior to their being introduced at trial or become the subject of a suppression hearing.”).

C. The proposed approach appropriately balances the public’s right of access to the suppression hearing against the parties’ legitimate interests.

For the reasons above, [REDACTED] Rule 15 deposition is properly considered as extrinsic to the suppression hearing. However, even if the Court views it differently, the same procedures would be justified as a limited closure of the suppression hearing. Either way, the parties’ proposal should be accepted because the procedures would be narrowly tailored to protect both parties’ legitimate interests while still fully vindicating the public’s interest in openness. Before addressing the specific tests in turn, we explain in practical terms the interests at play.

The government has at stake several interests affecting the merits of the case: first, obtaining a recorded deposition of [REDACTED] to preserve his testimony in the event he later becomes unavailable; second, ensuring the Court when deciding the suppression motion has the benefit of [REDACTED] firsthand account of events; and third, [REDACTED] [REDACTED] [REDACTED]. Concurrent with these objectives, the government has a continuing interest in ensuring that the defendant receives a fair trial and that the public, and especially victims of the offense, have meaningful access to the proceedings. The best way of achieving all these goals is through the government’s proposal.

For starters, [REDACTED] cannot give live testimony and videorecorded testimony at the same time. [REDACTED] [REDACTED]

[REDACTED]

[REDACTED].⁷ Moreover, videorecording [REDACTED] testimony at the suppression hearing would be incompatible with Federal Rule of Criminal Procedure 53, which forbids the “taking of photographs in the courtroom during judicial proceedings.” (As discussed above, Rule 15 depositions are not judicial proceedings and are routinely videorecorded.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷ [REDACTED]

[REDACTED]

Additionally, for legitimate reasons, parties in litigation generally seek to avoid having their witnesses give the same testimony on more occasions than is necessary: it creates a risk that jurors will give undue weight to unintentional and immaterial variances that inevitably arise, or perceive that the delivery has become rote from repetition and thereby less credible and compelling.

Meanwhile, the public interest would be minimally served by a requirement that [REDACTED] testify live at the suppression hearing. Under the government's proposal, spectators would be able to hear a nearly complete audio recording of the testimony.⁸ Although they would not see [REDACTED] the same would be true if [REDACTED] testified live, because in that scenario a visual screen would be in place to conceal [REDACTED] identity. And for those members of the public not in attendance, a transcript would subsequently be available, just like if [REDACTED] had testified as part of the hearing. Consequently,

⁸ If the testimony includes details that could be used to identify [REDACTED]

[REDACTED] We expect that this could be accomplished without delaying the proceedings. The opportunity to selectively conceal such sensitive details from public consumption, [REDACTED]

[REDACTED] is another reason the government has a strong interest in having [REDACTED] testimony proceed in the manner requested.

the only practical differences between the requested approach and live testimony would be [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On the first point, the government is aware of no authority suggesting that physical proximity to a witness is relevant to the public's right of access. Experience would suggest the opposite: in this District, trials of significant public interest are commonly broadcast via audio-visual feed to a "media room," and members of the press often view the trial from this location rather than the courtroom because they deem access to electronic devices to be more important than seeing proceedings in the flesh. And regardless, the overwhelming majority of the public learns about judicial proceedings secondhand. Even in 1980, in the seminal public-access case *Richmond Newspapers*, the Supreme Court recognized that "most people receive information concerning trials through the media" rather than by "relying on personal observation or reports from neighbors as in the past." 448 U.S. at 577 n.12. That statement is even truer today, meaning that most members of the public will have no reason to know or care whether the suppression hearing involved [REDACTED].

Nor would any minor delay harm the public's interest. In fact, compared to the likely potential alternative — [REDACTED] — there would be no delay at all; attendees would hear the testimony on the same timeline regardless of whether it was prerecorded or delivered live a second time. But even if the relevant point of comparison is [REDACTED] Rule 15 testimony, the delay would likely be only one or two days, and in the meantime the Court would not be deciding the suppression motion or taking any other action on it that the public might wish to evaluate. For all purposes relevant to

the public's right of access, playing the recorded testimony would be functionally indistinguishable from presenting live testimony.

In light of the considerations above, the government's proposed approach is warranted regardless of how [REDACTED] testimony is procedurally characterized. We apply the relevant tests below:

1. If the testimony is viewed as extrinsic to the suppression hearing, partial sealing is warranted under the *Hubbard* factors.

As discussed above, the government's position is that [REDACTED]

[REDACTED]. If the Court accepts that reasoning, the extent public access depends on (1) whether, by being introduced during the suppression hearing, the deposition becomes a "public record"; and (2) if so, whether the public's interest in disclosure outweighs the parties' interest in withholding. *See supra* Section A.1.b.

On this point the reasoning in *McDougal*, the case noted above involving then-President Clinton's deposition, is instructive. There, members of the press sought physical access to the videotape so that they could copy it. *See McDougal*, 103 F.3d at 653. An edited version of the tape was played at trial, and a correspondingly edited transcript was made part of the record and released to the public.⁹ *Id.* at 653. The Eight Circuit affirmed the district court's denial of the press request for physical access, for two independently sufficient reasons.

First, the court held "as a matter of law that the videotape itself is not a judicial record to which the common law right of public access attaches." *Id.* at 656.¹⁰ It reached that conclusion

⁹ The tape and transcript were edited "to delete certain portions that generally contained objections and arguments of counsel." *McDougal*, 103 F.3d at 653.

¹⁰ The court noted there was some difference of opinion on this point. *See McDougal*, 103 F.3d at 656-57 (citing *Application of ABC, Inc.*, 537 F. Supp. 1168, 1171-72 (D.D.C. 1982), as holding tapes not judicial records and *Application of CBS, Inc.*, 828 F.2d 958, 958 (2d Cir. 1987),

because the tape was not a “recording[] of the primary conduct of witnesses or parties,” but “merely an electronic recording of witness testimony,” which under common law the public “had a right to hear and observe the testimony at the time and in the manner it was delivered to the jury in the courtroom,” but not “to obtain, for purposes of copying, the electronic recording.” *Id.* The Court further noted that this holding put deposition witnesses on “equal footing” with in-court witnesses, whose testimony cannot be taped. *Id.* (citing Fed. R. Crim. Pro. 53; *Application of ABC, Inc.*, 537 F. Supp. at 1171-72).

Second and alternatively, the Eighth Circuit explained that “[e]ven if we were to assume that the videotape is a judicial record subject to the common law right of public access,” the district court was still within its discretion to deny physical access by finding the public’s interest in access was outweighed by a compelling government interest in denying access. *Id.* at 657. Those justifications included that “substantial access to the information provided by the videotape had already been afforded;” that “release of the videotape would be inconsistent with the ban on cameras in the courtroom under Fed. R. Crim. P. 53;” and that “there exist[ed] a potential for misuse of the tape” by tampering with the footage. *Id.* at 658.

The compelling government interest in preventing misuse of recorded testimony is even stronger today than it was when *McDougal* was decided in 1986. Today, “videos of all types are routinely and widely shared on the Internet, where (as far as we can predict now) it appears they will be available in perpetuity for unlimited viewing, further dissemination, and easy manipulation; their subjects are unable to escape them.” *Mirlis v. Greer*, 952 F.3d 51, 56 (2d Cir. 2020). Recognizing that reality, the Second Circuit explained in 2020 that online release of sensitive

as holding the opposite). As noted below, the Second Circuit has more recently called *Application of CBS* into question given the realities of the modern internet.

videotaped testimony would constitute an “intense intrusion on [the deponent’s] privacy interests,” and consequently distinguished a prior case granting access to videotaped deposition testimony as the product of a different “era.” *Id.* (distinguishing *Application of CBS, Inc.*, 828 F.2d 958, 958 (2d Cir. 1987)).

Accordingly, in its treatment of the videorecorded deposition of ██████ this Court should follow the only on-point case from this District of which the government is aware, *Application of ABC, Inc.* There, just like in *McDougal*, the court held that a “videotape recording” of a Rule 15 deposition “is not encompassed by the common law right of access to judicial records and the broadcasters, therefore, have no right to copy and broadcast the recording,” and that even if it were, concerns for the deponent’s “privacy” and “personal safety” required that access be denied. 537 F. Supp. at 1171–72 (D.D.C. 1982).

The same is true here under the *Hubbard* factors. In particular, factor one (“the need for public access to the documents at issue”) carries almost no weight, because the public will have access to the transcript and no legitimate need to see ██████ face or, for those who do not attend the suppression hearing, to hear ██████ voice. And factor five (“the possibility of prejudice to those opposing disclosure”) weighs heavily, for the reasons discussed above from the government’s perspective as well as those argued separately by the defense.

Accordingly, the public’s common-law right of access would be more than adequately vindicated by the government’s proposal, in which attendees at the suppression hearing could hear ██████ testimony and all members of the public could subsequently review a transcript with personal identifying details redacted. There is no need to take the further steps of letting the public watch the deposition live or making the recording available for download.

2. If the testimony is viewed as a closed portion of the suppression hearing, that closure is narrow and justified.

In the event the Court disagrees with the above analysis and with the Seventh Circuit in *In re Associated Press*, and finds instead that [REDACTED] Rule 15 testimony to be “actually [suppression testimony] that [is] merely disguised as a Rule 15 deposition,” 162 F.3d at 512, the proposed approach would still be warranted notwithstanding the public’s qualified right of access to suppression hearings. That is because the closure would be a “narrow” one that is justified by the parties’ overriding interests as described above and in the defense’s submission.

For the same reason that the *Hubbard* factors support the proposed approach, the First Amendment balancing test does too. Courts have found that courtroom closures are “narrow” when, among other things, “the public can learn (through transcripts, for example) what transpired while the trial was closed.” *Bowden*, 237 F.3d at 129. That would be the case here, and in fact the government’s proposal would go one better by allowing members of the public who attend the suppression hearing to listen to the testimony just as if they had been sitting in the room when it was delivered. Consequently, those interested in the proceedings will be fully able to “to independently evaluate the parties’ arguments and the Court’s conclusion,” which is the interest served by the public’s First Amendment right of access. *Matter of PDS*, 607 F. Supp. 3d at 21.

This minimal impairment of the public’s right of access would be more than outweighed by the interests of the parties. We will let the defense speak for itself on that point, but even standing alone the government’s interests are sufficient to justify a limited closure. The need to protect [REDACTED] identity at this stage is analogous to the protection of undercover agents, which has been held an adequate justification for closure. *See, e.g., Ayala*, 131 F.3d at 72.

Accordingly, while the government maintains that [REDACTED] Rule 15 testimony is not part of the suppression hearing, the First Amendment would not preclude the testimony being narrowly “closed” even if the Court ruled differently on that threshold question.

CONCLUSION

For the above reasons, the Court should [REDACTED] and then, on motion of the parties, play the recorded audio during the suppression hearing. A transcript, but not the actual recording, should be released to the public.

Respectfully submitted,

JEANINE FERRIS PIRRO
UNITED STATES ATTORNEY

By: /s/ *Conor Mulroe*
CONOR MULROE (NY Bar No. 5289640)
ERIK M. KENERSON (OH Bar No. 82960)
BRITTANY KEIL (D.C. Bar No. 500054)
Assistant United States Attorneys
JEROME J. TERESINSKI (PA Bar No. 66235)
Special Assistant United States Attorney
601 D Street NW, Washington, D.C. 20530
(202) 740-4595 // Conor.Mulroe@usdoj.gov

KATHLEEN CAMPBELL (MD Bar No. 9812170031)
JENNIFER BURKE (MD Bar No. 9706250061)
Trial Attorneys, Counter Terrorism Section
National Security Division
950 Pennsylvania Avenue NW, Washington, D.C. 20530

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

ABU AGILA MOHAMMAD
MAS'UD KHEIR AL-MARIMI,

Defendant.

:
:
:
:
:
:
:
:
:
:

Case No. 22-cr-392 (DLF)



MOTION FOR LIMITED UNSEALING OF RULE 15 DEPOSITION OF ALLEN
FERADAY AND RELATED PLEADINGS

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this motion for limited unsealing of the deposition of Allen Feraday. At the government’s request, the deposition of Allen Feraday was taken under seal. The defendant has filed two motions to which Mr. Feraday’s testimony is relevant: (1) a motion to exclude expert testimony pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals* (ECF 170), and (2) a motion to exclude inadmissible testimonial hearsay (ECF 243-2). The former was briefed on the open docket, and the latter was briefed under seal.

For the reasons that follow, the government requests that the Court permit limited unsealing of Mr. Feraday’s deposition so that the parties may reference that deposition on the open record in argument regarding ECF 170, and so that the Court may reference them in rulings, but the government requests that transcript itself remain under seal. *Cf.* Minute Order dated December 12, 2025 (finding that the translation of the entirety of the defendant’s statement should remain under seal despite being a judicial record, but permitting the parties to quote and rely on portions of the defendant's alleged statement in their filings and argument during public hearings). Undersigned counsel have consulted with counsel for the defendant, and the defense has informed

the government that it opposes the government's request for limited unsealing of the transcript and that its position is that any public argument on ECF 170 should not reference the fact that Mr. Feraday has already given testimony.

PROCEDURAL HISTORY

On August 19, 2025, the Court granted the government's motion for a deposition of Allen Feraday pursuant to Fed. R. Crim. P. 15 and ordered that the deposition be sealed. *See* ECF 140 at 2-4 (authorizing deposition) & 6-7 (authorizing sealing based on Fed. R. Crim. P. 15(e)'s requirement that depositions "must be taken and filed in the same manner as a deposition in a civil action" and the holding from *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) that "pretrial depositions . . . are not public components of a civil trial").

On October 3, 2025, the defendant filed a motion on the public docket to exclude Feraday's testimony pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*. ECF 170 ("*Daubert* Motion"). In its response, which was also filed on the public record, the government asked the Court not to rule on the motion until after a *Daubert* hearing, noting that "[t]he testimony from Mr. Feraday relevant to a *Daubert* hearing will be elicited during the Rule 15 testimony." ECF 187 at 1, n.1. Mr. Feraday's deposition was conducted under seal [REDACTED]

[REDACTED] The defendant's *Daubert* Motion is among the motions the Court is expecting to hear argument on at the hearing on Monday, January 12, 2026. *See* ECF 254, ¶ 8.

ARGUMENT

To present effective argument on the defendant's *Daubert* motion, the government will necessarily need to refer to and quote from the transcript of Feraday's Rule 15 deposition. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹ The government believes it will greatly aid the Court's resolution of the defendant's *Daubert* motion to compare the requests in the defendant's motion to the testimony that was actually elicited at the deposition, as the government suggested in its response that motion. *See* ECF 187 at 1, n.1.

The government further expects that the hearing on the defendant's *Daubert* motion will be conducted on the open record, given that the briefing for that motion has been conducted on the open record. *Daubert* motions are typically conducted pretrial and on the open record, and argument and decisions on *Daubert* issues are similarly generally conducted on the open record. Limited unsealing to allow the parties to refer to or quote from the portions of the transcript that support their position, and for the Court to do the same in any ruling, would promote efficient judicial decision-making and promote the public's interest in access to judicial proceedings.² The

¹ [REDACTED]

² Although, as the Court is aware, there is a First Amendment right of access to a number of proceedings, including trials and suppression hearings, the extent of that right of access (if it exists at all) is much murkier as it relates to motions *in limine*. *See Matter of Public Defender Service*, 607 F. Supp. 3d 11, 19-29 (D.D.C. 2023) (concluding, in analyzing competing cases, that

government submits that the *Hubbard* factors support sealing of the transcript for all the reasons stated in the government's initial motion to seal Mr. Feraday's Rule 15 deposition, *See* ECF 123, as well Rule 15(e) and *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), but that those factors do not extend to the parties' and the Court's ability to refer to and quote from the transcript in advancing their legal positions on the defendant's *Daubert* motion.

CONCLUSION

For the above reasons, the Court should permit limited unsealing of the transcript of the deposition of William Feraday to allow the parties and the Court to refer to or quote from it in arguing or ruling on the defendant's *Daubert* Motion.

Respectfully submitted,

JEANINE FERRIS PIRRO
UNITED STATES ATTORNEY

By: /s/ Erik Kenerson
ERIK M. KENERSON (OH Bar No. 82960)
CONOR MULROE (NY Bar No. 5289640)
BRITTANY KEIL (D.C. Bar No. 500054)
Assistant United States Attorneys
JEROME J. TERESINSKI (PA Bar No. 66235)
Special Assistant United States Attorney
601 D Street NW, Washington, D.C. 20530
(202) 252-7201 // Erik.Kenerson@usdoj.gov

KATHLEEN CAMPBELL (MD Bar No. 9812170031)
JENNIFER BURKE (MD Bar No. 9706250061)
Trial Attorneys, Counter Terrorism Section
National Security Division
950 Pennsylvania Avenue NW, Washington, D.C. 20530

there is no First Amendment right of access to materials related to motions *in limine*, but that the common law right of access attaches).