16-308 (L)

16-353 (CON), 16-1068 (CON), 16-1094 (CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

HSBC BANK USA, N.A., and HSBC HOLDINGS PLC,
Defendants-Appellants,

HUBERT DEAN MOORE, JR.,
Appellee.

On Appeal From The United States District Court For The
Eastern District of New York (Gleeson, J.)

OPENING BRIEF FOR THE UNITED STATES

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STATEMENT OF JURISDICTION

Both the government and defendants HSBC Bank USA, N.A., and HSBC Holdings PLC (collectively, "HSBC") appeal two related interlocutory orders of the district court in a criminal case. The district court had subject-matter jurisdiction under 18 U.S.C. § 3231 and entered the two orders on January 28 and March 9, 2016. SPA 1-17.[1] The government filed timely notices of appeal on February 4 and April 7, 2016, JA 251, 272, and HSBC filed timely notices of appeal on February 1 and April 8, 2016. JA 250, 273. *See* Fed. R. App. P. 4(b)(1). As explained in more detail below, this Court has jurisdiction under 28 U.S.C. § 1291 and the collateral-order doctrine, or, in the alternative, pursuant to 28 U.S.C. § 1651(a). *See* Argument, Part I, *infra*.

[1] "JA" refers to the joint appendix, "SPA" refers to the special appendix, and "Doc." refers to an entry on the district court's docket, which is available at JA 1-14.

ISSUES PRESENTED

1. Whether the Court has jurisdiction to review the district court's interlocutory decision.

2. Whether the district court erred in ordering the partial unsealing of a report prepared by a compliance monitor pursuant to a deferred prosecution agreement.

STATEMENT OF THE CASE

These consolidated appeals arise out of a deferred prosecution agreement ("DPA") between the government and HSBC in a criminal case. The DPA required HSBC to retain an independent monitor to oversee HSBC's compliance with the agreement and further provided that the monitor would provide written reports of his findings to HSBC and the government. After holding that it had an obligation to monitor the DPA's execution and implementation, the district court (Hon. John Gleeson[2]) required the parties to file one of the monitor's reports with the court. Although the court initially placed that report under seal, it ultimately ordered the public filing of a redacted version. SPA 1-17. Both the government and HSBC now challenge

[2] Judge Gleeson has since retired from the bench, and this case has been reassigned to Judge Ann M. Donnelly.

that ruling, and the district court has stayed its order pending resolution of these consolidated appeals.

I. PROCEDURAL HISTORY & RELEVANT FACTS

A. The Deferred Prosecution Agreement and Criminal Information

On December 11, 2012, following an investigation that lasted more than four years, the government filed a four-count criminal information charging HSBC Bank, USA, N.A. with willfully failing to develop, implement, and maintain an effective anti-money laundering program, in violation of 31 U.S.C. §§ 5318(h) and 5322(b) (Count 1); and willfully failing to conduct due diligence on correspondent bank accounts held on behalf of foreign persons, in violation of 31 U.S.C. §§ 5318(i) and 5322(d) (Count 2). JA 25-27, 124; *see also* Doc. 11. The information also charged defendant HSBC Holdings with knowingly, intentionally, and willfully facilitating prohibited financial transactions for sanctioned entities in Iran, Libya, Sudan, Burma, and Cuba, in violation of 50 U.S.C. §§ 1702 and 1705 and 50 U.S.C. App. §§ 3, 5, and 16 (Counts 3 and 4). JA 28-29.

The government filed the criminal information pursuant to its five-year DPA with HSBC. JA 31-32. The government tailored the DPA to punish HSBC and deter future misconduct by others while still affording HSBC the ability to permanently fix its systemic shortcomings. JA 126, 130-32. In the

DPA, HSBC agreed to the filing of the information and waived its right to indictment, as well as all rights to a speedy trial and any objection to venue. JA 31-32. HSBC also admitted responsibility for the acts charged in the information and set forth in a statement of facts attached to the DPA. JA 32; *see also* JA 64-93 (statement of facts).

The DPA required HSBC to cooperate fully with the government and to implement significant remedial measures. JA 34-41. In addition, HSBC agreed to forfeit $1.256 billion to the United States. JA 41-42. For its part, the government agreed to move to dismiss the information with prejudice if HSBC fully complied with its obligations under the DPA. JA 47. However, if the government, "in its sole discretion," determined that HSBC had breached the agreement, the DPA provided that HSBC would be subject to prosecution, including on the charges in the information. JA 47-49. In addition, if the government, "in its sole discretion," determined that HSBC had knowingly violated a DPA provision, the government could extend the term of the DPA. JA 32-33.

The DPA also required HSBC to retain an independent compliance monitor pursuant to a specified process.[3] JA 44-46. The district court had no

[3] The monitor's duties were set forth in Attachment B to the DPA. JA 45, 94-104.

role in this selection process. *See* JA 44-46, 111 (court notes that the selection of the monitor "doesn't involve judicial participation"). The DPA further provided that the monitor would prepare periodic reports, to be shared with HSBC and the government, that assessed HSBC's compliance with the terms of the DPA and recommended areas for improvement. JA 97-102.[4] The DPA did not provide for the disclosure of the monitor's reports to the district court. *See* JA 94-104.

The DPA reflected the parties' understanding that the monitor's reports would "likely include proprietary, financial, confidential, and competitive business information" and that "public disclosure of the reports could discourage cooperation, impede pending or potential government investigations and thus undermine the objectives of the Monitorship." JA 103-04. The parties therefore agreed that the monitor's reports were "intended to remain and shall remain non-public, except as otherwise agreed to by the parties in writing, or except to the extent that the Department [of Justice] determines in its sole discretion that disclosure would be in furtherance of the

[4] The Board of Governors of the Federal Reserve System in the United States and the Financial Conduct Authority in the United Kingdom imposed similar monitoring requirements as part of their agreements with HSBC Holdings. JA 134. The same monitor assumed those responsibilities, *see* JA 134, 204, and the DPA contemplated that he would disclose his reports to those authorities as well. JA 99.

Department's discharge of its duties and responsibilities or is otherwise required by law." JA 104.

B. The District Court "Approves" the DPA and Orders That the Case Be Held in Abeyance for Five Years

When it filed the criminal information and DPA, the government, with HSBC's consent, asked the district court to hold the case in abeyance for the five-year term of the DPA and to exclude that time from the statutory speedy-trial clock. JA 15. At a hearing shortly thereafter, the district court asked the parties "what [they] contemplated of the Court's participation, if any, in the proceedings as they go forward." JA 109. Government counsel explained that the parties "had not asked the Court to actively take part in overseeing the deferred prosecution agreement" and had "simply asked the Court to accept the information for filing and exclude time during the period of the deferred prosecution agreement." JA 109. The government also confirmed that the court would not participate in the selection of the monitor. JA 111. The district court asked the parties to explain in writing why the court should accept the DPA. JA 110-11, 114. The parties later filed the requested submissions and also advised the district court that they had selected a monitor. JA 116-45.

On July 1, 2013, the district court issued an order "approv[ing] the DPA pursuant to the Court's supervisory power" and granting the parties'

application to place the case in abeyance for five years pursuant to the Speedy Trial Act. JA 146. In analyzing the speedy-trial issue, the court applied 18 U.S.C. § 3161(h)(2), which allows for the exclusion of time for "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." JA 148. The court concluded that, "under a plain reading of this provision, a court is to exclude the delay occasioned by a deferred prosecution agreement, but only upon approval of the agreement by the court." JA 149-50.

Contrary to the position of the parties, the court then held that it had "authority to approve or reject the DPA pursuant to its supervisory power." JA 150; *see also* JA 152 ("Both parties assert that the Court lacks any inherent authority over the approval or implementation of the DPA."). The court acknowledged that "[t]he government has absolute discretion to decide not to prosecute" and "near-absolute power under Fed. R. Crim. P. 48(a) to extinguish a case that it has brought." JA 153; *see also* JA 158-59. In the court's view, however, the DPA presented a different situation because "the contracting parties ha[d] chosen to implicate the Court in their resolution of this matter" by filing and maintaining criminal charges. JA 154. The court reasoned that, "[b]y placing a criminal matter on the docket of a federal court,

the parties have subjected their DPA to the legitimate exercise of that court's authority." JA 154. The court stated that this "inherent supervisory power" would ensure that the court did not "lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety." JA 154.

The court recognized that the exercise of supervisory power in this context was "novel." JA 154. Nonetheless, the court stated that it was "easy to imagine circumstances in which a deferred prosecution agreement, or the implementation of such an agreement, so transgresses the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court." JA 155. *See* JA 155-57 (providing examples). Although "mindful of the limits of the supervisory power," JA 157, the court asserted that it had ongoing "authority to ensure that the implementation of the DPA remains within the bounds of lawfulness and respects the integrity of this Court." JA 164. The court therefore approved the DPA "subject to a continued monitoring of its execution and implementation."[5] JA 157. The court also directed the parties to file quarterly reports with the court "to keep it apprised of all significant developments in the implementation of the DPA." JA 164.

[5] The court noted that "the decision to approve the DPA [was] easy," JA 159, and that, in the court's view, "much of what might have been accomplished by a criminal conviction has been agreed to in the DPA." JA 164.

C. The Court Orders the Government to File the Monitor's Report

Pursuant to the district court's order of July 1, 2013, the government began filing quarterly reports with the court that described the implementation of the DPA. JA 165-85. The April 2014 quarterly report explained that the monitor had submitted his initial report and that the government and the monitor believed that HSBC was acting in good faith to meet the DPA's requirements. JA 169. The court did not require the parties to file this initial monitor's report. *See* JA 7.

The following year, the government's April 2015 quarterly report informed the court that the monitor had submitted his first annual follow-up report (the "Monitor's Report"). JA 180. The quarterly report provided a general description of the Monitor's Report and the monitor's conclusions regarding HSBC's ongoing compliance with the DPA. JA 180-83. The quarterly report further stated that the government had "reviewed and analyzed" the Monitor's Report, had discussed it with both the monitor and HSBC, and agreed with the monitor's assessment that HSBC was continuing to act in good faith to meet the DPA's requirements. JA 180. The quarterly report also stated that the government would "continue to closely monitor" HSBC's compliance with the DPA and "st[ood] ready to pursue all available remedies should HSBC fail to adhere to the DPA's terms." JA 184-85.

On April 28, 2015, the district court ordered the government to file the Monitor's Report with the court. JA 7. In response, the government requested leave to file the report under seal. JA 186-99. In making this request, the government reiterated its position that the court's "authority in connection with the DPA is limited to the approval of the exclusion of time under the Speedy Trial Act," but acknowledged the court's contrary view. JA 190. The government supported its sealing request with an affidavit from the monitor, as well as submissions from the Federal Reserve System and the regulatory authorities of the United Kingdom (the Financial Conduct Authority ("FCA")), Hong Kong, and Malaysia. JA 200-217.

In his affidavit, the monitor stated that maintaining the confidentiality of the Monitor's Report was "in the best interests of an effective monitorship." JA 201 ¶ 7. The monitor explained that, "[t]o be fully effective," he must obtain confidential information about HSBC clients from foreign banking regulators. JA 201 ¶ 8. So far, the foreign regulators had granted the monitor access to this confidential information, but "the presumption of confidentiality ha[d] been a critical component" in securing the regulators' cooperation. JA 201 ¶ 9. The monitor stated his belief, based on his prior experience, that at least some regulators would stop assisting his efforts if the Monitor's Report became public. JA 202 ¶ 10. The monitor also expressed concern that the

public disclosure of the Monitor's Report could have a chilling effect on the cooperation he received from HSBC employees and could reveal information that would-be criminals might exploit. JA 202 ¶¶ 11-12.

The monitor opined that it was possible to produce a redacted version of his report that would not negatively affect his work. JA 202 ¶ 13. The monitor cautioned, however, that redacting "sensitive factual content" from the Monitor's Report would probably "materially change[]" the report and result in a document that "might lack the factual support that gives it its critical context and meaning and might appear to be too conclusory to be persuasive, or even to be fully comprehensible."[6] JA 202 ¶ 13; *see also* JA 212 (FCA states that it shares this view).

The submissions from the Federal Reserve System and the foreign regulatory authorities raised similar concerns about unsealing the Monitor's Report. *See* JA 203-17. HSBC also supported the government's application to file the Monitor's Report under seal. JA 218-23.

[6] The Monitor's Report includes six appendices and is more than 1000 pages long. JA 202 ¶ 13. Without the appendices, the report itself is more than 250 pages long. SPA 3 n.3.

D. The Court Orders the Partial Unsealing of the Monitor's Report

The district court initially accepted the filing of the Monitor's Report under seal. *See* JA 8. In November 2015, however, appellee Herbert Dean Moore, Jr., sent a letter to the court, expressing his belief that the Monitor's Report "ha[d] a bearing" on his own mortgage-related complaint against HSBC. JA 228. The court construed Moore's letter as a motion to unseal the Monitor's Report, and the parties filed letters opposing unsealing. JA 8, 231-47. The government's letter stated that, although the government had complied with the court's order to file the Monitor's Report, it was continuing to assert that "the Court lack[ed] any inherent authority over the implementation of the DPA." JA 233 n.10 (internal quotation marks and punctuation omitted).

On January 28, 2016, the district court granted in part the motion to unseal the Monitor's Report, subject to future redactions by the court. SPA 14. The court first concluded that the Monitor's Report was a "judicial document" – *i.e.*, that it was "relevant to the performance of the judicial function and useful in the judicial process." SPA 4. The court explained that it had retained the authority "to ensure that the DPA remains within the bounds of

lawfulness and respects the integrity" of the court, SPA 4,[7] and that it could not perform that judicial function without "updates from the parties about HSBC's compliance with the DPA." SPA 4-5. The court further stated that it had ordered the government to file the Monitor's Report because, in its view, the report qualified as a "significant development" in the implementation of the DPA. SPA 5.

The court rejected the government's contention that the Monitor's Report was irrelevant to the court's duties and therefore was not a judicial document. SPA 5-6. The court stated that its prior approval of the DPA had been "preliminary" and "was and remains contingent upon [the court's] 'continued monitoring of its execution and implementation.'" SPA 5 (quoting JA 157). The court explained that the Monitor's Report was "critical" to the court's duty to "oversee the unfolding of the criminal case that the government chose to file in [this] court." SPA 6. By way of example, the court suggested that, if the Monitor's Report revealed that HSBC was laundering money for drug traffickers and the government took no action, "it would demean this institution" if the court also "[sat] by quietly." SPA 6. The court also

[7] The court attributed this description of its authority to the government motion for leave to file the Monitor's Report under seal. *See* SPA 4 (quoting JA 191). In fact, that motion repeated the government's position regarding the court's limited authority but noted that the court had taken the contrary view expressed in the above quotation. *See* JA 191.

reasoned that the Monitor's Report would be "integral to the future resolution of the case," insofar as the court would either have to approve the dismissal of the information or oversee an "adjudication of the four pending charges." SPA 6.

The district court next held that the Monitor's Report was subject to a First Amendment right of access under the "experience and logic" test.[8] SPA 7. With respect to the "experience" prong, the court acknowledged "scant historical evidence of public access to documents in the precise public posture of the Monitor's Report." SPA 8. The court reasoned, however, that a deferred prosecution agreement is a substitute for a plea agreement or trial, both of which are subject to a First Amendment right of access. SPA 8. Because the court believed that the Monitor's Report was "integral to the fulfillment of [the court's] continuing obligation to monitor the execution and implementation of the DPA," it concluded that "experience" supported unsealing the Monitor's Report. SPA 8. The court found that "logic" also supported this result because the public had an interest in overseeing both the criminal case, which involved widespread criminal conduct by a large

[8] Because of this First Amendment holding, the court did not decide whether the public also had a common-law right of access to the Monitor's Report. SPA 7.

international bank, and the implementation and monitoring of the DPA. SPA 9-10; *see also* SPA 6.

In the final step of its analysis, the court largely rejected the parties' arguments that sealing the Monitor's Report was "essential to preserve higher values." SPA 10. The court concluded that certain "targeted redactions" would address any concern that unsealing would either have a chilling effect on HSBC employees' cooperation with the monitor or provide would-be criminals a "road map" to exploit weaknesses in HSBC's programs. SPA 11-12. The court also found that the government's interest in prohibiting public access "for the sake of its future law enforcement efforts" was "minimal" because the government could choose not to file a criminal case in the first place. SPA 12. The court did, however, credit the parties' claim that public release of the Monitor's Report would negatively affect the monitor's relationship with foreign regulators and thus would negatively affect the monitor's work product. SPA 12-13. The court therefore retained five of the six appendices to the Monitor's Report under seal but held that "the majority" of the report itself and the remaining appendix would be made public, subject to redactions. SPA 13.

The court directed the parties to propose redactions to the Monitor's Report and noted that the following categories of information were appropriate

for redaction: (1) identifying information about HSBC employees; (2) information detailing processes by which criminals could exploit HSBC; and (3) country names and explicit references to confidential material, as identified by those foreign jurisdictions. SPA 14; *see also* JA 264 (confirming that the January 28 order identified the areas that the court believed were "properly the subject of redactions").

Thereafter, on March 9, 2016, the court issued a public order announcing that it had redacted from the Monitor's Report the three categories of information listed above, as well as "[i]nformation implicating [certain] U.S. federal banking laws and supervision governing certain confidential information" and "[i]nformation containing sufficient detail to invoke HSBC's privacy interest in commercially sensitive or proprietary business information." SPA 16. The court noted that it had accepted all the government's proposed redactions but rejected many of HSBC's. SPA 16-17. After quoting a short passage from the Monitor's Report that HSBC had asked the court to redact as commercially sensitive or proprietary, the court stated, "This is not sensitive or proprietary business information." SPA 17. The court further stated that, with

the exception of this excerpt, the Monitor's Report would remain under seal and the matter would be stayed pending appeal.[9] SPA 17.

II. RULINGS UNDER REVIEW

The government appeals the district court's orders unsealing the redacted Monitor's Report. SPA 1-18.

SUMMARY OF ARGUMENT

The district court erred in ordering the partial unsealing of a report prepared by an independent compliance monitor – *i.e.*, the Monitor's Report – pursuant to the deferred prosecution agreement (DPA) in this case. This decision stemmed from the district court's mistaken belief that it had the authority and duty to monitor the ongoing implementation and execution of the DPA. In fact, the entry and monitoring of a deferred prosecution agreement are core exercises of prosecutorial discretion, and the district court improperly intruded on these Executive Branch functions when it concluded

[9] In conjunction with the filing of this brief, the government has submitted a disk to the Clerk's Office that contains an electronic copy of the Monitor's Report, including its six appendices, and has moved for permission to file the report as a sealed *ex parte* appendix. The copy of the report in the government's proposed appendix includes the district court's redactions to the portions of the report that the court ordered unsealed (*i.e.*, the report itself and one appendix). Because the Monitor's Report is more than 1000 pages long, the government has submitted this document on disk only but will provide the Court with paper copies upon request.

that it had "supervisory authority" over the DPA and thus required the filing of the Monitor's Report.

Because the district court's actual authority regarding the DPA was limited to excluding time under the Speedy Trial Act and ruling on any future motion to dismiss the indictment, the Monitor's Report was irrelevant to any judicial function or process. The Monitor's Report therefore does not constitute a "judicial document" to which a presumption of public access attaches. Furthermore, even if the Monitor's Report were a judicial document, it is not subject to a First Amendment right of public access because "experience and logic" do not support making the report available to the public. Finally, even if the public did have a right of access to the Monitor's Report, the report should remain sealed because its public disclosure, even in redacted form, would impede the use of compliance monitors in this and other cases.

For all of these reasons, the Court should reverse the district court's decision to unseal the Monitor's Report.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE DISTRICT COURT'S DECISION

A. The Court Has Jurisdiction Under the Collateral-Order Doctrine

This Court has jurisdiction over these consolidated appeals under the collateral-order doctrine. This doctrine is "a narrow exception to the general rule that interlocutory orders are not appealable as a matter of right" and "is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." *United States v. Graham*, 257 F.3d 143, 147 (2d Cir. 2001). To fit within the collateral-order doctrine, an interlocutory decision must: (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." *Id.* *See also Sell v. United States*, 539 U.S. 166, 176 (2003).

The district court's decision to unseal the Monitor's Report satisfies all three requirements. First, this decision conclusively determined a disputed question: whether the Monitor's Report should be unsealed, either in whole or in part. Second, the district court's decision to unseal the Monitor's Report resolves an issue "completely separate from the merits" of the underlying criminal case because this Court may rule on the propriety of the district

court's order without considering or addressing the allegations in the criminal information. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 118-19 (2d Cir. 2006); *see SEC v. TheStreet.com*, 273 F.3d 222, 228 (2d Cir. 2001) (holding that the second prong of the collateral-order doctrine was met because "the issue of disclosure of the Confidential Testimony was wholly separate from the underlying merits of the action, which involved alleged violations of the securities law").

Third, the district court's decision to unseal the Monitor's Report is effectively unreviewable on appeal from a final judgment, in part because the very purpose of the DPA is to avoid any final judgment in this case. Furthermore, once the district court unseals the Monitor's Report, "[t]he genie is out of the bottle" because this Court "simply do[es] not have the power . . . to make what has thus become public private again." *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004); *see Al Odah v. United States*, 559 F.3d 539, 544 (D.C. Cir. 2009) ("Once the information is disclosed, the cat is out of the bag and appellate review is futile.") (internal quotation marks omitted); *In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008) (explaining, in finding collateral-order jurisdiction, that "[s]ecrecy is a one-way street: Once information is published, it cannot be made secret again.").

Consistent with this analysis, this Court has repeatedly found that it has jurisdiction under the collateral-order doctrine to review district court decisions regarding the potential public release of documents. For example, in *United States v. Erie County, N.Y.*, 763 F.3d 235 (2d Cir. 2014), the Court concluded that it had jurisdiction under the collateral-order doctrine to review a district court's decision on a motion to unseal compliance reports filed with the district court pursuant to a settlement agreement. *Id.* at 238 n.5. Likewise, in *Graham*, this Court relied on the collateral-order doctrine in holding that it had jurisdiction to review a district court order that released copies of tapes played at a pretrial hearing to broadcast media. 257 F.3d at 147-48. And in *United States v. Haller*, 837 F.2d 84 (2d Cir. 1988), the Court applied the doctrine in reviewing two orders sealing a plea agreement. *Id.* at 86. The same reasoning applies here.

B. In the Alternative, the Court May Issue a Writ of Mandamus

In the alternative, the Court has jurisdiction to correct the district court's error pursuant to a writ of mandamus. *See* 28 U.S.C. § 1651(a) (authorizing this Court to "issue all writs necessary or appropriate in aid of" its jurisdiction "and agreeable to the usages and principles of law"). Although a writ of mandamus is "an extraordinary remedy," the Court may issue such a writ when: (1) the party seeking issuance of the writ has "no other adequate means

to attain the relief it desires"; (2) the petitioner demonstrates that the "right to issuance of the writ is clear and indisputable"; and (3) the Court, in an exercise of its discretion, is "satisfied that the writ is appropriate under the circumstances." *In re City of New York*, 607 F.3d 923, 932-33 (2d Cir. 2010) (quoting *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380-81 (2004)) (brackets omitted).

If the collateral-order doctrine did not apply, the government's challenge to the district court's decision would meet all three of these requirements. First, without the collateral-order doctrine or a writ of mandamus, the Court would lack jurisdiction to review the district court's decision, and the government would therefore have no other means to challenge it. Second, the government's right to a writ of mandamus would be "clear and indisputable" because the district court's decision amounts to both "a judicial usurpation of power" and "a clear abuse of discretion" for the reasons set forth in Part II, *infra*. *In re City of New York*, 607 F.3d at 943 (quoting *Cheney*, 542 U.S. at 380). Third, issuance of the writ would be "appropriate under the circumstances" because the district court's decision raises several "novel and significant questions of law" – most notably, whether the public has a right of access to documents like the Monitor's Report. *Id.* at 939-40. Accordingly, if the Court concludes that the collateral-order doctrine does not apply, it should construe

these consolidated appeals as petitions for a writ of mandamus and issue the writ to correct the district court's decision.

II. THE DISTRICT COURT ERRED BY ORDERING THE PARTIAL DISCLOSURE OF THE MONITOR'S REPORT

A. Standard of Review

This Court reviews de novo a district court's ruling regarding the scope of its authority. *United States v. Murdock*, 735 F.3d 106, 113 (2d Cir. 2013). In reviewing an order to seal or unseal, this Court examines the district court's factual findings for clear error, its legal determinations de novo, and its ultimate decision to seal or unseal for abuse of discretion. *Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 814 F.3d 132, 139 (2d Cir. 2016). Because the district court's decision implicates the First Amendment, the Court "give[s] the documents and proceedings 'close appellate scrutiny'" and has "traditionally undertaken an independent review of sealed documents, despite the fact that such a review may raise factual rather than legal issues." *Erie County*, 763 F.3d at 238 (2d Cir. 2014) (quoting *Newsday LLC v. County of Nassau*, 730 F.3d 156, 163 (2d Cir. 2013)).

B. General Principles

In evaluating a district court's order to unseal a document, the Court first considers whether the document in question is a "judicial document" – *i.e.*, "a filed item that is 'relevant to the performance of the judicial function and

useful in the judicial process.'" *Bernstein*, 814 F.3d at 139 (quoting *Lugosch*, 435 F.3d at 119). "Such documents are presumptively public so that the federal courts 'have a measure of accountability' and so that the public may 'have confidence in the administration of justice.'" *Id.* (quoting *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*")). "The 'presumption of access' to judicial documents is secured by two independent sources: the First Amendment and the common law." *Id.* at 141.

First, the public and the press have a "qualified First Amendment right" of access to certain judicial documents. *Lugosch*, 435 F.3d at 120. To determine whether this First Amendment right attaches to a particular judicial document, the Court evaluates whether "experience and logic" support making that type of document available to the public.[10] *Erie County*, 763 F.3d at 239. This inquiry requires the Court to consider: (a) whether such documents "have historically been open to the press and general public," and (b) whether "public access plays a significant positive role in the functioning of

[10] The First Amendment also "protects access to judicial records that are 'derived from or a necessary corollary of the capacity to attend the relevant proceedings.'" *In re New York Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 409 (2d Cir. 2009) (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004)). Because the Monitor's Report is neither derived from nor a necessary corollary of any public proceedings, the district court understandably did not apply this approach.

the particular process in question." *Id.* (quoting *Lugosch*, 435 F.3d at 120). When the public does have a First Amendment right of access to a particular judicial document, a court may seal the document only if it makes on-the-record findings demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* (quoting *Lugosch*, 435 F.3d at 120).

Second, the common law provides a public right of access to some judicial documents. *Bernstein*, 814 F.3d at 142. To determine whether this common-law right applies to a particular judicial document, the Court determines the "weight" of the presumption of access by evaluating "the role of the material at issue in the exercise of Article III judicial power" and "the resultant value of such information to those monitoring the federal courts." *Id.* When a document's role in the performance of Article III duties is "negligible," the weight of the presumption is low. *Id.* (quoting *Amodeo II*, 71 F.3d at 1050). After determining the weight of the presumption, the Court balances the value of public disclosure against countervailing factors, such as "the danger of impairing law enforcement or judicial efficiency" and "the privacy interests of those resisting disclosure." *Id.* at 143. The Court will deny the public access to the document if competing considerations against public disclosure outweigh the presumption of access. *Erie County*, 763 F.3d at 239.

C. The Monitor's Report Is Not a Judicial Document

The mere filing of a paper or document with a court does not render that paper a "judicial document" subject to the right of public access. *Lugosch*, 435 F.3d at 119 (citing *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*")). Rather, a document filed with the court is a judicial document only if it is "relevant to the performance of the judicial function and useful in the judicial process." *Erie County*, 763 F.3d at 239 (quoting *Lugosch*, 435 F.3d at 119); *Amodeo I*, 44 F.3d at 145. In applying this standard, the Court evaluates "the relevance of the document's specific contents to the nature of the proceeding" and "the degree to which access to the document would materially assist the public in understanding the issues before the court, and in evaluating the fairness and integrity of the court's proceedings." *Bernstein*, 814 F.3d at 139 (internal quotation marks, brackets, and ellipsis omitted).

In holding that the Monitor's Report met this standard, the district court relied on an overly broad and erroneous view of its "judicial function" with respect to the DPA. In fact, the district court's authority in the DPA context is limited to excluding time under the Speedy Trial Act, which the court has already done, and ruling on any future motion to dismiss the criminal information pursuant to Federal Rule of Criminal Procedure 48(a). Because the Monitor's Report is irrelevant to the performance of these judicial

functions, it is not a judicial document to which a presumption of access attaches.

1. The entry and monitoring of a deferred prosecution agreement are matters of prosecutorial discretion that are not subject to judicial oversight

The district court's errors in this case began before the unsealing motion even arose, with the court's previous misapprehension of its authority regarding the DPA. Specifically, the court incorrectly concluded in its July 2013 order that it had the authority and responsibility to oversee the execution and implementation of the DPA, which in turn led the court to hold that the Monitor's Report was relevant to this oversight role. In fact, as the D.C. Circuit recently held, the entry and monitoring of a deferred prosecution agreement are core exercises of prosecutorial discretion that are not subject to judicial oversight.

It is well-settled that "[t]he decision as to whether to prosecute generally rests within the broad discretion of the prosecutor." *United States v. Stewart*, 590 F.3d 93, 122 (2d Cir. 2009) (quoting *United States v. Sanders*, 211 F.3d 711, 716 (2d Cir. 2000)); *see United States v. Armstrong*, 517 U.S. 456, 464 (1996). "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607 (1985) (listing factors in this decision that "are not readily

susceptible to the kind of analysis the courts are competent to undertake"). Indeed, this Court has explained that "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought." *United States v. Ross*, 719 F.2d 615, 620 (2d Cir. 1983) (quoting *United States v. Berrigan*, 482 F.2d 171, 180 (3d Cir. 1973)).

Of particular relevance here, a district court has very limited authority to oversee a prosecutor's decision regarding whether to move to dismiss a particular prosecution. Although a prosecutor must obtain "leave of court" before dismissing charges against a criminal defendant, Fed. R. Crim. P. 48(a), "the Supreme Court has declined to construe [this] requirement to confer any substantial role for courts in the determination whether to dismiss criminal charges." *United States v. Fokker Servs., B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016).

Instead, the Supreme Court has explained that "[t]he principal object of the 'leave of court' requirement is apparently to protect a defendant against prosecutorial harassment . . . when the Government moves to dismiss an indictment over the defendant's objection." *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977); *cf. United States v. Pimental*, 932 F.2d 1029, 1033 n.5 (2d Cir.

1991) (explaining that Rule 48(a) generally requires a district court to grant a prosecutor's motion to dismiss "unless dismissal is 'clearly contrary to manifest public interest'" (quoting *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975))). "So understood, the 'leave of court' authority gives no power to a district court to deny a prosecutor's Rule 48(a) motion to dismiss charges based on a disagreement with the prosecution's exercise of charging authority." *Fokker*, 818 F.3d at 742. "For instance, a court cannot deny leave of court because of a view that the defendant should stand trial notwithstanding the prosecution's desire to dismiss the charges, or a view that any remaining charges fail adequately to redress the gravity of the defendant's alleged conduct." *Id.* Rather, "[t]he authority to make such determinations remains with the Executive." *Id.*

Although this Court has yet to address the interplay between these principles and deferred prosecution agreements, the D.C. Circuit considered this issue earlier this year in *Fokker* and found limited judicial authority in the context of such agreements. In *Fokker*, as here, the government entered into a deferred prosecution agreement with a corporate defendant and, pursuant to that agreement, filed criminal charges against the company. 818 F.3d at 737. In conjunction with those charges, the government asked the district court to suspend the speedy-trial clock pending the government's assessment of the

company's compliance with the deferred prosecution agreement. *Id.* After the district court denied the government's speedy-trial motion on the ground that the deferred prosecution agreement in that case was too lenient, the D.C. Circuit granted a writ of mandamus and reversed, holding that the district court lacked authority to second-guess the government's decisions regarding that agreement. *Id.* at 737-38.

The D.C. Circuit explained that deferred prosecution agreements "afford a middle-ground option to the prosecution when, for example, it believes that a criminal conviction may be difficult to obtain or may result in unwanted collateral consequences for a defendant or third parties, but also believes that the defendant should not evade accountability altogether." *Fokker*, 818 F.3d at 738. Under a deferred prosecution agreement, the government formally initiates prosecution but agrees to dismiss all charges if the defendant abides by negotiated conditions over a prescribed period of time. *Id.* at 737. The D.C. Circuit therefore concluded that the context of a DPA, like that of a motion to dismiss under Rule 48(a), "concerns the prosecution's core prerogative to dismiss criminal charges." *Id.* at 743.

The D.C. Circuit reasoned that the government's decision to seek dismissal pursuant to a DPA follows from the defendant's compliance with that agreement but "ultimately stems from a conclusion that additional

prosecution or punishment would not serve the public interest." *Fokker*, 818 F.3d at 743. Accordingly, "the Judiciary's lack of competence to review the prosecution's initiation and dismissal of charges equally applies to review of the prosecution's decision to pursue a DPA and the choices reflected in the agreement's terms." *Id.* at 744 (internal citation omitted). "As with conventional charging decisions, a DPA's provisions manifest the Executive's consideration of factors such as the strength of the government's evidence, the deterrence value of a prosecution, and the enforcement priorities of an agency, subjects that are ill-suited to substantial judicial oversight." *Id.*

The D.C. Circuit then held that, "although charges remain pending on the court's docket under a DPA, the court plays no role in monitoring the defendant's compliance with the DPA's conditions." *Fokker*, 818 F.3d at 744. "Rather, the prosecution – and the prosecution alone – monitors a defendant's compliance with the agreement's conditions and determines whether the defendant's conduct warrants dismissal of the pending charges." *Id.* Accordingly, "defendants who violate the conditions of their DPA face no court-ordered repercussions." *Id.* Indeed, the D.C. Circuit identified only two roles that a district court will perform in the context of a DPA: (1) excluding

time under the Speedy Trial Act, *id.* at 744-45; and (2) approving a prosecutor's motion to dismiss charges under Rule 48(a).[11] *Id.* at 744-46.

This Court should apply the same reasoning here and hold that the district court exceeded its authority when it sought to monitor the implementation and execution of the DPA. *Cf. In re United States*, 503 F.3d 638, 641 (7th Cir. 2007) (holding that a court would "intrude[] impermissibly into the activities of the Executive Branch" if it attempted to "supervise" the process by which a prosecutor made a decision regarding whether a defendant's cooperation warranted the filing of a § 5K1.1 motion); *United States v. Lau Tung Lam*, 714 F.2d 209, 210 (2d Cir. 1983) ("[T]he federal judiciary's supervisory power[] over prosecutorial activities that take place outside the courthouse is extremely limited, if it exists at all."). This conclusion is consistent both with the separation-of-powers principles described above and with the terms of the DPA, which provide that the government retains the "sole discretion" to determine whether HSBC has complied with that agreement. JA 47. Although the district court may not want to "sit by quietly while the government [takes] no action" in response to conduct that the court

[11] The D.C. Circuit also reserved whether a district court "has authority to reject a DPA if it contains illegal or unethical provisions." *Fokker*, 818 F.3d at 747. No such claim has been raised about the DPA here, which the district court approved in 2013. JA 157.

views as a breach of the DPA, SPA 6, the court cannot force the government to proceed with a prosecution or revise the terms of the DPA.

2. The Monitor's Report is neither relevant to the performance of a judicial function nor useful in the judicial process

As explained above, the district court's authority regarding the DPA is limited to excluding time under the Speedy Trial Act and ruling on any future motion to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 48(a). The Monitor's Report is relevant to neither of those functions and therefore is not a judicial document. With respect to the Speedy Trial Act, the district court has already excluded the five-year duration of the DPA from the speedy-trial clock, and it did so before the monitor prepared the Monitor's Report. *See* JA 146. To state the obvious, the Monitor's Report played no role in that decision. Likewise, the Monitor's Report would play no role in any future dismissal decision because the status of HSBC's compliance with the DPA has no bearing on the district court's limited authority to rule on a Rule 48(a) motion. *See* Part II.C.1, *supra* (explaining the limitations on this authority).

The district court was also wrong to conclude that the Monitor's Report would be "integral to the future resolution of the case" through an adjudication of the charges in the criminal information. SPA 6. Although the district court

would oversee any future adjudication of the pending criminal charges, the Monitor's Report is irrelevant to that potential judicial oversight role. If the government did pursue a prosecution against HSBC, it might seek to use the Monitor's Report in future proceedings. But that hypothetical possibility does not mean that the Monitor's Report, or any other document that may become relevant to a future adjudication, currently constitutes a judicial document.

Furthermore, even if the district court's understanding of its supervisory power were correct, the Monitor's Report still would not be a judicial document. When the court first "approved" the DPA, it stated that it was "retain[ing] the authority to ensure that the implementation of the DPA remains within the bounds of lawfulness and respects the integrity of this Court." JA 164. To carry out that alleged authority, the court directed the government "to file quarterly reports with the Court to keep it apprised of all significant developments in the implementation of the DPA." JA 164. In light of these quarterly reports, the district court did not need the Monitor's Report to evaluate whether the DPA's implementation remained lawful and respected the integrity of the Court. Rather, the Monitor's Report would be relevant only to an effort by the district court to double-check or second-guess the government's summary of the monitor's findings in the April 2015 quarterly report. *Cf.* SPA 3 (stating that the government's quarterly report "purport[ed]

to summarize" the Monitor's Report). Such an effort encroaches on the Executive Branch's prosecutorial discretion and is not a legitimate judicial function, even under the district court's conception of its authority.

In short, the Monitor's Report "play[s] no role in the performance of Article III functions" and therefore is not a judicial document to which a presumption of public access attaches. *Amodeo II*, 71 F.3d at 1050. Rather, it "lie[s] entirely beyond the presumption's reach and stand[s] on a different footing than . . . [a] document which is presented to the court to invoke its powers or affect its decisions." *Id.* (internal citation omitted); *see also United States v. El-Sayegh*, 131 F.3d 158, 162 (D.C. Cir. 1997) ("If [no judicial decision] occurs, documents are just documents; with nothing judicial to record, there are no judicial records.").

3. This Court's decisions in *Amodeo I* and *Erie County* do not compel a different result

At its core, the Monitor's Report informs the government's evaluation of whether HSBC has complied with the terms of the DPA or has acted in a way that warrants additional penalties or prosecution. Although the Monitor's Report has some superficial similarities to the judicial documents this Court

considered in *Amodeo I* and *Erie County*, those documents, unlike the Monitor's Report, were relevant to judicial functions and useful to the judicial process.

In *Amodeo I*, this Court held that the district court had properly treated as a judicial document an investigative progress report that a "court officer" appointed pursuant to a consent decree had prepared and filed with the court. 44 F.3d at 142, 146. This report was relevant to the district court's duties for several reasons, none of which apply to the Monitor's Report. First, the court itself had appointed the court officer, and reviewing the report would help the court determine whether its own officer was fulfilling the duties of that appointment. 44 F.3d at 146. Second, the consent decree vested the court officer with "the powers of a Receiver," which also suggested that the court had the discretion to discharge or retain the officer and that the officer's reports would inform the court's exercise of that discretion. *Id.* Third, the consent decree authorized the court officer to ask the district court to enforce her court-conferred powers, and the officer's report would be "germane" to the court's assessment of such an application. *Id.* at 143, 146. Fourth, the consent decree provided that any party could apply to the district court for enforcement of, or relief from, the decree's provisions, and the court could consider the entire record, including the officer's report, in ruling on this request. *Id.* at 146.

Similarly, the documents at issue in *Erie County* were relevant to judicial functions and useful to the judicial process for reasons that do not apply to the Monitor's Report. The *Erie County* documents were reports that a settlement agreement required party-selected compliance consultants to file with the district court. 763 F.3d at 237, 240-41. The district court had the authority to enforce the terms of the settlement agreement, either on the parties' motion or acting *sua sponte*, and would consider the compliance reports in making any such decision. *Id.* at 240. Based on these facts, the Court understandably concluded that the compliance reports were judicial documents. *Id.* at 240-41.

The features that were central to the Court's reasoning in *Amodeo I* and *Erie County* are not present in this case. Unlike the district courts in *Amodeo I* and *Erie County,* the district court in this case has no authority to enforce the terms of the DPA. Likewise, the monitor here exercises no authority comparable to that of the court officer in *Amodeo I*, much less judicially conferred authority. *See SEC v. Am. Int'l Grp.*, 712 F.3d 1, 4-5 (D.C. Cir. 2013) ("*AIG*") (distinguishing *Amodeo I* on this basis). Nor, as in *Erie County*, did the district court approve an agreement that contemplated that a report prepared by a party-selected compliance consultant would later be subject to the court's review. Indeed, the DPA provided that the monitor would give his reports only to HSBC, the government, and two other regulatory bodies, *see* JA 99,

and the Monitor's Report ended up on the district court's docket only because the court ordered the government to place it there.

The closest analogs to the Monitor's Report are not the judicial documents in *Amodeo I* or *Erie County* but rather the reports of an independent consultant that the D.C. Circuit considered in *AIG*. In that case, a consent decree required the corporate defendant to hire an independent consultant to evaluate its internal policies and past transactions and prepare reports of his findings and conclusions. 712 F.3d at 2-3. The district court played no role in selecting, appointing, or supervising this independent consultant and had no authority to extend the consultant's tenure or modify his authority. *Id.* at 4. Furthermore, the consent decree did not require the consultant to file his reports with the court, and the reports did not "record, explain, or justify the court's decision" to approve the consent decree. *Id.* Based on these facts, the D.C. Circuit concluded that the consultant's reports were not judicial documents "because the district court made no decisions about them or that otherwise relied on them." *Id.* at 3-4.

The same analysis applies here because the Monitor's Report is irrelevant to the district court's limited duties regarding the DPA. Indeed, the government filed the Monitor's Report with the court only because the court directed the government to do so based on an erroneous understanding of its

judicial authority. In this respect, this case is similar to *Gambale*, where the district court's "rather off-hand request for confidential information" during a hearing led to the inclusion of "arguably legitimately confidential data" in a transcript. 377 F.3d at 143 n.8. Although the public had a presumptive right of access to the hearing transcript in that case, the Court noted that there was "a troubling element of bootstrapping" about this presumption, *id.*, and concluded that the district court would abuse its discretion by unsealing the transcript without first redacting all confidential information from it. *Id.* at 144. A finding that the Monitor's Report is a judicial document would present similar bootstrapping concerns.

D. Experience and Logic Do Not Support a First Amendment Right of Public Access to the Monitor's Report

Even if the Monitor's Report were a judicial document to which a presumption of access applies, it would not be subject to a First Amendment right of access because "experience and logic" do not support making the report available to the public.[12]

The "experience" prong of this approach asks whether documents like the Monitor's Report "have historically been open to the press and general

[12] The Monitor's Report also would not be subject to a common-law right of access. Although the district court did not decide this issue, *see* SPA 3, the weight of any common-law presumption of access would be "low" because the Monitor's Report plays at most "a negligible role in the [district court's]

public." *Erie County*, 763 F.3d at 239 (quoting *Lugosch*, 435 F.3d at 120). As the district court acknowledged, "there is scant historical evidence of public access to documents in the precise posture of the Monitor's Report," SPA 8, which weighs against a finding that "experience" supports unsealing. *See Erie County*, 763 F.3d at 241-42 (relying on evidence that "reports like the ones at hand have been accessible to the public" in holding that "experience" supported unsealing).

In holding that "experience" nonetheless favors public access to the Monitor's Report, the district court reasoned that "a DPA is, at its core, a substitute for a plea agreement or a trial – to both of which the public has historically had a First Amendment right of access." SPA 8. A DPA is similar to a plea agreement in some respects, but "[u]nlike a plea agreement – and more like a dismissal under Rule 48(a) – a DPA involves no formal judicial action imposing or adopting its terms." *Fokker*, 818 F.3d at 746. Rather, the entire object of a DPA is to enable the defendant to avoid criminal conviction and sentence by demonstrating good conduct and compliance with the law. *Id.* Furthermore, the parties agree to a DPA's provisions without the involvement

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performance of Article III duties." *Amodeo II*, 71 F.3d at 1050. The competing considerations against public disclosure, including the considerations set forth in this section and in Part II.E, *infra*, therefore would outweigh any presumption of common-law access.

of the court, and the court has no occasion to adopt the agreement's terms as its own. *Id.*

In any event, even if the DPA were analogous to a plea agreement for purposes of this Court's analysis, the government publicly filed the DPA at the beginning of this case, thereby ensuring that the public had access to that document. The Monitor's Report stands on a different footing, however, and is not a "substitute" for a plea agreement or trial. Instead, it serves to inform the deliberations of the Executive Branch as to whether to dismiss the information, much as notes from a proffer session with a defendant or evidence gathered from a crime scene may serve to inform the Executive Branch's deliberations about the terms of a potential plea agreement. There is no history of openness regarding these types of documents, which bear on the Executive Branch's exercise of prosecutorial discretion. *Cf.* Part II.C.1, *supra*; *Fokker*, 818 F.3d at 745 ("[E]ven in the context of reviewing a proposed plea agreement under Rule 11, a district court lacks authority to reject a proposed agreement based on mere disagreement with a prosecutor's underlying charging decisions."). "Experience" therefore does not support a First Amendment right of access to the Monitor's Report.

The district court also erred in holding that "logic" favors public disclosure of the Monitor's Report – *i.e.*, that "public access plays a significant

positive role in the functioning of the particular process in question." *Erie County*, 763 F.3d at 239 (quoting *Lugosch*, 435 F.3d at 120). As discussed in Part III.C, *supra*, the Monitor's Report is not relevant to the district court's limited judicial functions regarding the DPA. The Monitor's Report therefore will not help inform the public about whether the judge is doing his job, which further distinguishes this case from *Amodeo I* and *Erie County*.

The Monitor's Report does serve to inform the Executive Branch's deliberations as to whether or not to dismiss the criminal information – *i.e.*, the Executive Branch's exercise of prosecutorial discretion. But public access to judicial documents does not "play[] a significant positive role in the function of [that] particular process." *Erie County*, 763 F.3d at 239 (quoting *Lugosch*, 435 F.3d at 120). As the D.C. Circuit has explained, "evaluating the performance of the Department of Justice or other law enforcement agencies" in their dealings with a criminal defendant "is not the judicial function, and proper public oversight of the executive neither requires nor justifies claims of access to the records of the judiciary." *El-Sayegh*, 131 F.3d at 163; *see also AIG*, 712 F.3d at 5 ("[T]he value of the records for proper oversight of the Executive does not itself justify disclosure under the judicial records doctrine."). *But see Erie County*, 763 F.3d at 243 (explaining in analyzing the "logic" prong that it

was important for the court and the Department of Justice to know that the public has access to the documents which form the basis of their decisions).

E. Sealing the Monitor's Report Is Necessary to Preserve Higher Values and Is Narrowly Tailored to Serve That Interest

Even if the public had a First Amendment right of access to the Monitor's Report, the Monitor's Report should nonetheless remain sealed in its entirety because "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Erie County*, 763 F.3d at 239 (quoting *Lugosch*, 435 F.3d at 120).

Here, the district court found that unsealing the Monitor's Report in its entirety would "negatively affect the Monitor's relationship with foreign regulators, and thus would negatively affect the work product the Monitor could produce." SPA 12. Specifically, the court concluded that the public release of the Monitor's Report would: (1) contravene assurances the monitor had given to foreign regulators; (2) cause those regulators to "feel misled"; (3) prompt the regulators to withdraw their consent to the monitor's site visits; and/or (4) compel the regulators to restrict the monitor's access to confidential information. SPA 12-13. The monitor's sealing affidavit supports these findings and further establishes that unsealing the Monitor's Report would

likely chill HSBC employees' cooperation with the monitor. *See* JA 201-02 ¶¶ 7-11.

The district court's findings and the monitor's affidavit establish that public disclosure of the Monitor's Report, even in redacted form, would hinder the monitor's ability to supervise HSBC. And because the government relies on the monitor's work when assessing HSBC's compliance with the DPA, unsealing the Monitor's Report would also compromise the government's ability to determine whether or not to dismiss the charges in the criminal information. The regulatory authorities who likewise depend on the monitor's work would face similar challenges in their efforts to oversee HSBC. *See* JA 205, 211. The continued sealing of the Monitor's Report is therefore necessary to protect the monitor's relationship with his cooperating sources and to ensure that the monitor, the government, and the relevant regulatory authorities can continue to properly supervise HSBC. *See Amodeo II*, 71 F.3d at 1050 (recognizing that sealing may be warranted if the public release of a document would likely deter future cooperation and thereby impair law enforcement).

Releasing the Monitor's Report in redacted form would not assuage these concerns and could inhibit the effectiveness of the monitor in this case, as

well as monitors in other cases.[13] Specifically, if foreign regulators and private citizens see that portions of a monitor's work can become public, they may decline to share information with monitors because they want to ensure the information's ongoing confidentiality. Indeed, even if a redacted version of the Monitor's Report protected all confidential information in that report from public disclosure, potential cooperating parties cannot be sure that future courts will adopt a similar approach when redacting subsequent reports in cases involving monitorships. Thus, publicly releasing the Monitor's Report – even in redacted form – would diminish the ability of monitors to earn the cooperation of regulators, employees, and others upon whom the monitors rely.

Furthermore, as the monitor explained, redacting "the sensitive factual content" from the Monitor's Report would "materially change[]" the report and result in redacted document that "might lack the factual support that gives it its critical context and meaning and might appear to be too conclusory to be persuasive, or even to be fully comprehensible." JA 202 ¶ 13. The Court considered similar facts in *Amodeo II*, where redactions rendered the first part

[13] Although the monitor stated in his affidavit that he believed that it would be possible to publish a redacted version of the Monitor's Report without negatively affecting his work in this case, he did not address the potential impact this publication would have on the work of other monitors. JA 202 ¶ 13.

of a report "unintelligible," and concluded that this part of the report should remain under seal in its entirety because releasing it in redacted form was "more likely to mislead than to inform the public." 71 F.3d at 1052. The Court should apply the same logic here and seal the Monitor's Report in its entirety.

In the alternative, even if the concerns described above did not justify sealing the Monitor's Report in its entirety, the district court's redactions to the Monitor's Report do not sufficiently protect the parties' interests in confidentiality. Specifically, the court's January 28 order limited the types of information the court would redact, *see* SPA 11-14, and these limitations constrained the government's subsequent proposed redactions. Although the court ultimately accepted all of the redactions that the government did propose, the government likely would have proposed additional redactions absent the restrictions in the January 28 order. Accordingly, in the event that the Court affirms the district court's decision to unseal a redacted version of the Monitor's Report, the government respectfully requests that the Court remand this matter to the district court so that the government may propose redactions without the limitations set forth in the January 28 order.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's decision to unseal a redacted version of the Monitor's Report.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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