No. 13-35243
[NO. 12-GJ-00149RAJ, USDC, W.D. Washington]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
INDEX NEWSPAPERS LLC,
DBA *The Stranger,*
Intervenor-Appellant,
v.
MATTHEW DURAN,
Defendant-Appellee.

ANSWERING BRIEF OF PLAINTIFF-APPELLEE

Appeal from the United States District Court
for the Western District of Washington at Seattle
The Honorable Richard A. Jones
United States District Judge

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PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

In this appeal, Index Newspapers LLC, doing business as *The Stranger*, seeks an order of this Court directing the district court to disclose pleadings and records associated with contempt proceedings arising out of a grand jury investigation. *The Stranger* argues that there is a First Amendment and/or common law right of access to such proceedings and, at a minimum, that the records of those proceedings should be produced in a redacted fashion so as to permit disclosure of everything other than matters actually occurring before the grand jury.

The Stranger's argument fails because there is neither a First Amendment nor a common law right of access to proceedings associated with a grand jury, or the records maintained in connection with those proceedings. Courts have recognized that public access to such proceedings is fundamentally incompatible with the grand jury's function. The district court's denial of *The Stranger*'s motion to disclose court records related to a grand jury investigation was proper and consistent with that case law.

The district court also acted well within its discretion in refusing *The Stranger*'s request to provide redacted copies of the pleadings and

other court filings in the contempt proceedings (many documents, it turns out, *The Stranger* already possesses in non-redacted form). Since there is no right of access to these records in the first place, there is likewise no right to access select portions of these files. Moreover, the very nature of these contempt proceedings guaranteed that every document in the court file would reveal matters that occurred before the grand jury. Although these records no doubt contain some non-secret information, the court reasonably concluded that redacting them to exclude all references to matters protected by grand jury secrecy would be unnecessarily burdensome, and would result in documents so heavily redacted as to likely be meaningless.

ISSUES PRESENTED

I. Did the district court correctly conclude that there is no public right of access to the court files of a contempt proceeding arising out of a secret grand jury investigation?

II. Did the district court abuse its discretion in refusing to order the disclosure of redacted documents maintained by the court in connection with a grand jury contempt proceeding?

JURISDICTION

The district court had jurisdiction over the grand jury contempt proceedings at issue pursuant to 28 U.S.C. § 1826(a), and this

jurisdiction extended to *The Stranger*'s motion for disclosure of documents filed in that proceeding. A district court's order denying a third-party's motion for access to grand jury materials is a final order, and thus this Court has jurisdiction pursuant to 28 U.S.C. § 1291.[1] *See In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778, 783-84 (9th Cir. 1982); *see also Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 233 (1979) (Rehnquist, J. concurring).

The district court's order granting in part and denying in part *The Stranger's* motion for access to the files of the grand jury contempt proceedings was entered on February 4, 2013, ER_4-15; CR_33, [2] and the court's order denying reconsideration was entered on February 27, 2013. ER_1-3; CR_38. Because they are independent of the criminal

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[1] By contrast, an order denying a third-party's request for disclosure of sealed material filed in an active criminal prosecution is not an appealable order, and is reviewable only through a writ of mandamus. *See The Oregonian Publishing Co. v. United States District Court for the District of Oregon*, 920 F.2d 1462, 1464 (9th Cir. 1990); *Seattle Times Co. v. United States District Court for the Western District of Washington*, 845 F.2d 1513, 1515 (9th Cir. 1988).

[2] "CR_" refers to the United States District Court Clerk's record of the case; "ER_" to Appellant's Excerpts of Record; "DER_" to Appellee Duran's Excerpts of Record; "OB_" to Appellant's Opening Brief, and "DAB_" to Appellee Duran's Answering Brief.

investigation, motions for disclosure of grand jury material are treated as civil proceedings. *See*, *e.g.*, *In re Grand Jury*, 490 F.3d 978, 983-84 (D.C. Cir. 2007); *In re Special Grand Jury 89-2,* 450 F.3d 1159, 1168-69 (10th Cir. 2006); *United States v. Miramontez*, 995 F.2d 56, 58 (5th Cir. 1993). Accordingly, *The Stranger*'s notice of appeal, filed on March 26, 2013, was timely. ER_16-19; CR_40. *See* Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE CASE

I. The Grand Jury Contempt Proceedings.

The motions leading to this appeal are the direct result of a federal grand jury investigation, and in particular, contempt proceedings ancillary to the investigation. As the district court noted in its order, "one or more grand juries empaneled in the United States District Court for the Western District of Washington subpoenaed Katherine Olejnik and Matthew Duran to provide testimony." ER_4. Duran (and Olejnik) moved to quash the subpoena, but the district court refused. CR_1, 7. Thereafter, in separate proceedings, the district court held each witness in contempt and directed the witnesses be confined because they each refused to answer at least some of the questions asked during a grand jury appearance. ER_5. Duran was

held in contempt during a hearing that took place on September 13, 2013. ER_5; CR_8, 20; DER_104-30.[3] The district court held Olejnik in contempt during a hearing that took place two weeks later. ER_5.

The procedures used by the district court for these contempt proceedings were essentially identical. Consistent with the requirement of Fed. R. Crim. P. 6(e)(5), the district court first heard the evidence supporting a finding of contempt in a hearing closed to the public because this evidence disclosed matters occurring before a grand jury. ER_10; DER_105-24. Among other things, the court reporter who recorded the testimony during Duran and Olejnik's grand jury appearance, read the questions asked and the answers given into the record. ER_10; DER_110-15. After hearing the evidence and arguments based on that evidence and making findings of fact, ER_10-11; DER_115-24, the court then opened the hearing to publically announce

[3] Appellee Duran's excerpts of record contain copies of the full transcripts of the hearing on his motion to quash (a sealed proceeding), DER_131-80, and the contempt hearing (a partially sealed proceeding), DER_104-30, both of which took place on September 13, 2012. CR_7-8. Although the district court provided Duran's counsel with access to these sealed transcripts "for the sole purpose" of prosecuting Duran's appeal from the contempt order, ER_55, they have nevertheless been used to support *The Stranger*'s present appeal.

its conclusion that the particular witness should be held in contempt.[4] ER_5, 11; DER_124-29. The transcripts of the open portions of the hearings were available to the media and the public in general. ER_5.

Duran appealed the district court's contempt finding. CR_12. On October 19, 2010, this Court affirmed. ER_85-88; CR_23. (The Court also affirmed Olejnik's contempt order, but those sealed documents are not in the record). Duran and Olejnik were ordered released from custody on February 27, 2013. ER_20-25.

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[4] *The Stranger (*and Appellee Duran) insists that, notwithstanding the district court's unambiguous order opening the final stage of the contempt proceeding, DER_124, the courtroom remained closed to the public. OB_10; DAB_9. The only evidence of this is a declaration from Duran's counsel stating she heard that unnamed "members of the public" were denied access. ER_43. Since *the Stranger* submitted this declaration in a reply brief in support of its motion to unseal, ER_2, CR_26, 28, the government had no opportunity to rebut this allegation (which was nothing more than hearsay). In any event, whether anyone was actually excluded from the public portion of this contempt proceeding has no relevance to this appeal. While Appellee Duran suggests that ordering the "non-secret portions of the record" disclosed will help "provide the public the unfettered assess that it . . . originally deserved," DAB_24, that is most certainly not the case. The transcript of the open portion of the contempt hearing has always been publicly available, ER_5, and it is the availability of this transcript — not anything else in the file — that will help cure any error caused by any person's exclusion from that public proceeding.

II. *The Stranger's* Motions To Unseal The File Of The Contempt Proceedings

On November 5, 2012, *The Stranger* filed two essentially identical motions "to unseal and make available to the public, the court files involving the contempt proceedings against Mr. Duran and Ms. Olejnik." ER_4-5; CR_24.[5] In these motions, *The Stranger* described itself as "an independent news weekly in Seattle, owned by Index Newspapers, LLC," and asserted its interest in unsealing these files was based on the fact that a reporter for the paper had written several stories about the grand jury investigation and the contempt findings pertaining to Duran and Olejnik. CR_24 at 3. *The Stranger* further asserted that the two contempt findings had attracted "much publicity" in the Pacific Northwest and "throughout the world." CR_24 at 3.

The Stranger asserted that contempt proceedings, even when associated with grand jury matters, need not be closed, and argued that

[5] Because of the identical nature of the motions, citation in this brief is only to the motion filed in the Duran case (the motion in the Olejnik case is included as an exhibit to *The* Stranger's mandamus petition in Case No. 13-71021). The docket sheet in the Duran case mistakenly indicates that the motion to unseal was filed by Appellee Duran. ER_148. The motion papers themselves confirm they were filed by *The Stranger*. CR_24, 26-28, 33.

the contempt proceedings for Duran and Olejnik, and the related grand jury investigation, involved a matter where public scrutiny was needed "to insure that First Amendment rights" were not abused, pointing to claims that the government had searched for "anti-government" literature in connection with its investigation. CR_24 at 5-6. *The Stranger* also argued that closing contempt proceedings is inappropriate where there was a public interest in keeping them open, portraying Duran's and Olejnik's proceedings as such matters. CR_24 at 5-6. *The Stranger* cited an article from the English language version of *Al Jazeera* comparing Duran and Olejnik to the members of the band Pussy Riot, who were jailed in Russia as a result of a protest. CR_24 at 6. *The Stranger* suggested that given the allegations of government misconduct during the investigation, the complete files related to Duran's and Olejnik's contempt proceedings should be unsealed to provide public reassurance. CR_24 at 6.

In these motions, *The Stranger* did suggest the government should be allowed to redact any reference to "sensitive matters that cannot be released to the public" with the approval of the district court, but also asserted that redactions should be "kept to a minimum." CR_24 at 7.

The Stranger also suggested that because the two witnesses had provided public statements about their refusals to testify before the grand jury, there was no reason to withhold the contents of the files even if the files contained grand jury material, thereby suggesting that there was now a public right of access to these files. CR_24 at 7.

III. The District Court's Order Granting In Part And Denying In Part *The Stranger*'s Motions To Unseal.

After receiving a response from the government, CR_25, and a reply memorandum and supporting exhibits from *The Stranger*, CR_26-28, the district court ruled on both motions in a consolidated written order filed on February 4, 2013. CR_32; ER_4-15. In that order, the district court granted in part, and denied in part, the motions to unseal the files relating to the Duran and Olejnik contempt proceedings. ER_4. Specifically, the court authorized *The Stranger* to obtain transcripts of the public portions of the hearings during which the court held the witnesses in contempt, providing the names of the court reporters and instructions for obtaining such transcripts. ER_5, 15. The court also made clear that Duran and Olejnik could make whatever public statements they wished, and were free to disclose any filings "they have submitted or received in these proceedings" if they chose to

do so. ER_14. Interpreting *The Stranger*'s motions as a request to unseal as much of these files as possible, the court then concluded the files in these cases should remain sealed in all other respects. ER_4.

To address *The Stranger*'s motions, the court first considered whether the public (and hence the press) had a First Amendment or common law right of access to files maintained in contempt proceedings ancillary to grand jury investigations. In particular, the court considered whether such proceedings were historically open to the public, and whether public access played a significant rule in the functioning of the particular process. ER_7-8. Addressing these factors, the court observed there was no historical public right of access to grand jury proceedings, and concluded that grand jury proceedings would not benefit from public access, citing the various reasons why courts have found grand jury proceedings are secret. ER_7-10. By extension, the court concluded there was no public right of access to proceedings ancillary to grand jury investigations, because such proceedings necessarily "require[] some disclosure of what has occurred before the grand jury." ER_8.

In its analysis, the district court provided examples of the types of information that could be disclosed in various ancillary proceedings. ER_8-9. The court noted that a motion to quash reveals the fact that a witness has been subpoenaed, and the government's response (or motion to compel) must reveal aspects of the grand jury's investigation to justify the issuance of the subpoena. ER_8-9. Before a finding of contempt may be made, the questions asked and answers given by the witness must be disclosed. ER_9. On this basis, the district court concluded that recognition of a public right of access to such ancillary proceedings would necessarily grant public access to matters occurring before the grand jury, a result foreclosed by precedent. ER_9. The court also cited the various provisions of Rule 6 of the Federal Rules of Criminal Procedure which dictate that proceedings ancillary to grand jury investigations should remain under seal. ER_9-10.

Although the district court found *The Stranger* was entitled to access transcripts of the public portions of the contempt proceedings, the court concluded the newspaper was not entitled to those portions of the two proceedings during which the government revealed what had occurred before the grand jury. ER_11. In particular, the court found

The Stranger's interest in reporting on the grand jury investigation was not a legal basis to depart from the well-established rules of grand jury secrecy. ER_11-13. After reviewing the various reasons why a court may direct the disclosure of matters occurring before a grand jury, the court found that none of Rule 6(e)'s exceptions to the rules of grand jury secrecy applied to *The Stranger*'s request. ER_12-15.

Specifically, the district court found *The Stranger* had not established a compelling interest to justify the disclosure, and that media attention alone does not establish a basis for disclosure. ER_12-13. The court also found that limited public disclosure of some information related to the investigation did not generally obviate the need for grand jury secrecy, observing that neither the Supreme Court nor this Court has found that disclosure of some information regarding a grand jury proceeding was a sufficient basis to lift *in toto* the secrecy provided to matters occurring before the grand jury. ER_13-15. The court pointed out that, to date, no court has found that grand jury secrecy is waived simply because some grand jury secrets have been disclosed. ER_13. Moreover, the court noted the media reports *The Stranger* had attached to its motions (and now includes in its excerpts

of record, ER_47-84), which purportedly had disclosed the subject of the grand jury investigation, did not obviate the continued need for grand jury secrecy. ER_13-14. Those reports contained information largely obtained from a publically-available search warrant affidavit,[6] and the court observed that while the media may speculate about the connection between the ensuing searches and any grand jury investigation, "that speculation is a far cry from revealing a grand jury secret." ER_14.

Finally, the district court acknowledged the files at issue contain "a mix of secret grand jury material, grand jury material that may have lost its secrecy, legal argument, banal information, and more." ER_14. Observing that although it was "perhaps possible" to segregate the secret material from the non-secret material, the court concluded that, in this case, the disclosures that could be made after such redaction "would likely be an incomplete and sometimes indecipherable 'court file' that would be as likely to mislead the public as to enlighten it." ER_14.

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[6] The affidavit in support of the search warrants was the subject of a separate motion to unseal. *See In Re Search Warrant Issued on October 3, 2012*, No. 12-MJ-534RAJ (W.D. Wash). The affidavit was briefly unsealed due to an oversight by the government. Although the documents were later sealed, in response to a motion by *The Stranger* the district court ordered the affidavit unsealed. ER_26-40.

Moreover, because there was no public right of access to the grand jury materials sought, the court concluded "neither the court nor the Government has an obligation to sift through these grand jury proceedings to determine what is secret and what is not," as there was no obligation to grant public access to "even those aspects of grand jury material that do not reveal grand jury secrets." ER_14-15.

IV. *The Stranger*'s Reconsideration Motion And The Denial Of That Motion.

The Stranger moved for reconsideration, first arguing the district court's factual summary was in error. CR_33 at 1-2. In particular the newspaper pointed to an "unrebutted" declaration by Duran's counsel (submitted as an exhibit to *The Stranger*'s reply papers, CR_28), CR_33 at 3, which states unnamed members of the public claimed they were not told the last part of the contempt proceedings had been opened, and were actually denied access to the courtroom. ER_43. *The Stranger* also took issue with the district court's legal conclusions, arguing that other courts faced with similar claims had ordered files to be made available in redacted form. CR_33 at 2-6.

The district court denied reconsideration in a brief written order filed on February 27, 2013. ER_1-3. With respect to *The Stranger*'s

factual claim, the court noted that its order had only addressed what had taken place inside the courtroom during the hearing, and that the declaration by Duran's counsel was "unrebutted" only because *The Stranger* had submitted this declaration with its reply brief, thereby depriving the government of any opportunity to take issue with counsel's assertion.[7] ER_1-2. The court also observed *The Stranger* had not pointed to any document from the contempt proceedings that had been publicly disclosed by a grand jury witness or anyone else, and that *The Stranger* was not prevented from disclosing any such documents in its possession, although the newspaper had not done so. ER_2-3.

V. The Notice Of Appeal And Petition For A Writ Of Mandamus.

On March 26, 2013, *The Stranger* filed a notice of appeal, now docketed in this Court as Case No. 13-35243, seeking review of the district court's orders. CR_14; ER_16, By a petition signed one day

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[7] *The Stranger* says it "cited to Internet accounts of this closure in its opening pleading," and asserts that because the government did not respond to these allegations, this should be "seen as a concession that one of Mr. Duran's contempt hearing[s] was in fact closed to the public." OB_10 n.13. The "Internet account" *The Stranger* points to — an anonymous posting on the Pugetsoundanarchist.org website, ER_77 — amounts to nothing more than inadmissible hearsay. *See Larez v. City of Los Angeles*, 946 F.2d 630, 643-44 (9th Cir. 1991).

earlier, *The Stranger* also sought review through a separate petition for a writ of mandamus, docketed in this Court as Case No. 13-71021. On September 11, 2013, the Court referred the mandamus petition to the merits panel assigned to this appeal, and ordered the mandamus petition and appeal be calendared for oral argument together.

ARGUMENT

I. The District Court Correctly Ruled There Is No Public Right Of Access To Contempt Proceedings Arising Out Of A Grand Jury Investigation.

The Stranger insists it has a public right of access to the "non-secret portions of the proceedings in Mr. Duran's [contempt] case that are ancillary to the grand jury proceedings." OB_13. In particular, *The Stranger* seeks assess to the following materials that purportedly "do not contain any secret matters": "the briefing and court orders related to the motion to quash the subpoena, the contempt hearings and the release hearings, the transcripts for any portion of the proceedings that do not involve secret information, the docket of the case, and the pleadings and court orders related to the motion to unseal itself."[8]

[8] *The Stranger* also asserts it is entitled to access to the files pertaining to "Mr. Duran's recalcitrant witness appeal." OB_23. (continued . . .)

OB_13-14, 23. What *The Stranger* neglects to mention, however, is that it already has access to a large portion of these documents.

The Stranger no doubt has all the briefing filed in connection with its own motion to unseal. *E.g.,* ER_41-84. *The Stranger* also has the court orders filed in connection with that motion, ER_1-15; the motion papers filed in connection with the motion to quash, ER_89-144; this Court's order affirming Duran's contempt citation, ER_85-88; the district court's order releasing Duran and Olejnik from custody, ER_20-25; and the district court's docket sheet in the Duran case. ER_145-49. The district court also made clear that the transcript of every public proceeding — *i.e.*, those portions of the various hearings where grand jury matters were not discussed — is available upon payment of the required fee to the court reporter. ER_5, 15. Further, since *The Stranger* is not subject to Rule 6(e)'s secrecy requirement, *see* Fed. R. Crim. P. 6(e)(2)(A), the newspaper is free to do anything it likes with almost all the materials in its possession, regardless of the fact that

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(continued . . .)
Unexplained is how the district court was supposed to order the unsealing of this Court's files.

they contain grand jury material.[9] It thus appears *The Stranger*'s appeal is largely moot. *See United States v. Smith*, 123 F.3d 140, 146 (3d Cir. 1997). It is also meritless.

A. Standard Of Review.

Whether any public right of access exists to a particular proceeding or class of judicially-maintained documents is a legal question this Court reviews de novo. *See United States v. Business of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1192 (9th Cir. 2011).

B. Historically, Matters Occurring Before The Grand Jury Have Been Secret.

There is no doubt that the Supreme Court has long recognized a First Amendment right of access to most criminal proceedings. *See*, *e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980). That right, however, is not unlimited and it is also a well settled that there is no First Amendment right of access to grand jury proceedings. *Press-*

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[9] The lone exceptions are the declaration Appellee Duran submitted in support of his motion for release from confinement, DER_27-39, and the transcripts of the sealed portions of the motion to compel and the Duran contempt hearing, DER_104-24, 131-80, documents *The Stranger* presumably received when Appellee Duran filed his excerpts of record. While Rule 6(e) does not bar *The Stranger* from publishing these documents, this Court's Rule 27-13 does, as the file in this appeal has been sealed by the Court.

Enterprise Co. v. Superior Court, 478 U.S. 1, 8-9 (1986) (*Press-Enterprise II*); *In re: Motions of Dow Jones & Company*, 142 F.3d 496, 499 (D.C. Cir. 1998). There is likewise no public right of access to grand jury proceedings "under a common law theory." *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989).

Nor does the press enjoy any special right of access to what transpires in a grand jury. "Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings . . . ." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). Moreover, since the right of access to documents filed in a proceeding is coextensive with the right of access to the proceeding itself, *see Associated Press v. United States District Court for Central District of California*, 705 F.2d 1143, 1145 (9th Cir. 1983), there is also no right of access to documents filed in connection with a grand jury's investigation. *See Times Mirror Co.*, 873 F.2d at 1218-19. As the Supreme Court has observed, "[s]ince the 17th century, grand jury proceedings have been closed to the public, and records of such

proceedings have been kept from the public eye."[10] *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 n.9 (1979).

This history of secrecy is reflected in the restrictions on disclosure contained in Fed. R. Crim. P. 6(e). This rule prohibits the disclosure of all "matter[s] occurring before the grand jury," Fed. R. Crim. P. 6(e)(2)(B), 6(e)(5), 6(e)(6), allowing for disclosure only under limited circumstances. Specifically, with respect to third parties — including the news media — disclosure is permitted only to the extent that it is "preliminary to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). Even then, disclosure will be warranted only if the third party makes a particularized showing that disclosure "is needed to avoid a possible injustice *in another judicial proceeding*."

[10] The Supreme Court identified five reasons supporting the policy of grand jury secrecy: "'(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.'" *Douglas Oil Co.*, 441 U.S. at 219 n.10 (citation omitted).

Douglas Oil Co., 441 U.S. at 222 (emphasis added); *accord U.S. Industries, Inc. v. United States District Court for the Southern District of California,* 345 F.2d 18, 22-23 (9th Cir. 1965) (cited in OB_36-37). Absent a need to prevent injustice in a separate judicial proceeding, disclosure of grand jury materials to third parties "is not permitted" by Rule 6(e). *United States v. Baggot*, 463 U.S. 476, 480 (1983).

While *The Stranger* makes a passing suggestion that it is entitled to disclosure under "Rule 6(e) itself," OB_13, *The Stranger* has never suggested it is seeking these grand jury materials for use in some other judicial proceeding. No doubt it is for this reason that *The Stranger* tries to characterize its request as not actually asking for "any material that would qualify as secret under Rule 6(e)." OB_13. Instead, *The Stranger* fashions its claim as a narrow request for files that do not fall within the scope of the grand jury secrecy rules, and then seeks to characterize the contempt proceedings and all related documents as proceedings "that do not contain any secret matters" and to which there is a claimed right of public access. OB_13-14, 23. As such, *The Stranger* is trying to justify what is in reality a broad request for materials squarely within the ambit of Rule 6(e).

What *The Stranger* (and Appellee Duran) fails to recognize is that the rule against grand jury disclosure extends beyond matters that are still in fact a "secret." OB_13, 25-29; DAB_15-17. What is protected from disclosure is any "matter occurring before the grand jury," Fed. R. Crim. P. 6(e)(2)(B), 6(e)(5), 6(e)(6), regardless of whether the public is already aware of that matter. Simply stated, "'Rule 6(e) does not create a type of secrecy which is waived once public disclosure occurs.'" *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994) (citation omitted). *The Stranger* also ignores the connection between these ancillary contempt proceedings and matters occurring before the grand jury. It is the connection to the grand jury, and the necessary disclosure of matters occurring before the grand jury, that transforms such contempt proceedings into ones where only very limited disclosure is appropriate.

The Supreme Court has developed a two-part test to determine whether a right of access attaches to a particular proceeding or documents filed in connection therewith. *See Press-Enterprise II*, 478 U.S. at 8-9. That test requires a court to consider: (1) whether the place and proceeding in question has historically been open to the press and public; and (2) whether public access plays a significant positive

role in the functioning of the particular process in question. *Id*. With respect to the first *Press-Enterprise II* factor, documents reflecting what occurred before the grand jury, no matter in what context they are filed, are prime examples of the type of matters to which the public and press have never enjoyed a historical right of access. Treating these document as secret has always been the norm to preserve the secrecy of grand jury proceedings. *See Petrol Stops Northwest*, 441 U.S. at 218; *In re Sealed Case*, 151 F.3d 1059, 1069 71 (D.C. Cir.1998).

With respect to the second factor, the Supreme Court has concluded the grand jury is a "classic example" of a governmental function that would be frustrated if conducted in public. *Press-Enterprise II*, 478 U.S. at 9. That finding obviously extends to both proceedings and records that reveal matters before the grand jury. *See Petrol Stops Northwest*, 441 U.S. at 218-19 n.9. As a result, courts have routinely barred the press and public from access to materials revealing what occurred before the grand jury. *See In re Sealed Case*, 199 F.3d 522, 525-26 (D.C. Cir. 2000) (rejecting press organizations' requests for public docketing of grand jury ancillary proceedings); *In re Grand Jury Subpoena*, 103 F.3d 234, 242-43 (2d Cir. 1996) (press had no right of

access to sealed records from hearing to compel disclosure of surveillance information that revealed grand jury material); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 509-10 (1st Cir. 1989) (newspaper had no First Amendment right of access to grand jury records in investigations ending in "no bill" because "[t]he public has no right to attend grand jury proceedings," and therefore no right to its records); *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559, 1563-64 (11th Cir. 1989) (newspapers had no First Amendment right to documents prepared for or testimony given in grand jury proceedings or related proceedings). It is the application of these principles that are at play in this case.

C. There Is No Public Right Of Access To Contempt Proceedings Arising From A Grand Jury Investigation.

The central premise of *The Stranger*'s argument is the claim that because there is a right of public access to contempt proceedings generally, there must also be a right of access to contempt proceedings involving recalcitrant grand jury witnesses. OB_16-21. But courts that have considered the question have never extended the public right of access to hearings where matters occurring before the grand jury were required to be disclosed. *See In re Grand Jury Matter*, 906 F.2d 78, 86-

87 (3d Cir. 1990). As such, there is no tradition that contempt proceedings ancillary to a grand jury investigation be open to the public in their entirety. *In re: Motions of Dow Jones & Company, Inc.*, 142 F.3d at 502. Indeed, no court has so found.

In *Levine v. United States*, 362 U.S. 610 (1960), the Supreme Court examined the intersection between the need for grand jury secrecy and due process rights in a summary contempt proceeding resulting from a witness's refusal to answer the grand jury's questions. The Court recognized that because it was a "necessary initial step in the proceedings" to read the record of what had occurred before the grand jury, "the courtroom had been properly, indeed, necessarily cleared" when doing so. *Id.* at 614. The only question remaining was whether due process required the proceedings be opened to the public for the actual finding of contempt and imposition of sanction.

On this question, the Supreme Court held that due process did not demand that the portion of the hearing during which court reviewed the questions posed by the grand jury that the contemnor refused to answer be open to the public. *Id.* at 618. Rather, due process required only that, at the request of the contemnor, the courtroom be open solely for

the final stage of the proceeding, that is, where the finding of contempt is entered and the sanction is imposed. *Id*. at 618-19. The holding in *Levine* is reflected in Fed. R. Crim. P. 6(e)(5), which addresses contempt proceedings arising out of a grand jury investigation. Consistent with *Levine*, Rule 6(e)(5) provides: "Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury."

Although *Levine* addressed the due process rights of the contemnor and not the public's right of access, there can be no doubt the public's right of access is no broader than those due process rights. *Cf. Presley v. Georgia*, 558 U.S. 209, 212 (2010) (First Amendment right of access to jury selection is coextensive with the defendant's Sixth Amendment right to a public trial). The general purpose for affording public access to judicial proceedings is to provide confidence in the judicial process. *See Press-Enterprise. Co. v. Superior Court*, 464 U.S. 501, 508 (1984). However, that interest is outweighed in the grand jury context, as the ability of a grand jury to function properly would be "totally frustrated" if its proceedings were open to the public.

Press-Enterprise II, 478 U.S. at 9. A contempt proceeding involving a recalcitrant witnesses is plainly "ancillary to the grand jury [proceeding] and designed as an aid to it," *Harris v. United States*, 382 U.S. 162, 165 (1965), so the same overriding need for secrecy applies. Indeed, those courts that have been presented with questions of the public's right of access to proceedings ancillary to a grand jury investigation have not found a right of access that exceeded the due process rights of the contemnor.

In *United States v. Smith*, *supra*, for example, the Third Circuit considered the public's right of access to a contempt hearing on whether grand jury materials had been improperly disclosed. Citing *Levine*, the court noted that for proceedings ancillary to a grand jury investigation "there is no requirement that the entire proceeding, including the questions that the contemnor refused to answer, be made public." 123 F.3d at 149 n.13. "All that must be accessible to the public, upon the contemnor's request, is the 'final stage' of the contempt proceedings," namely the district court's adjudication of contempt. *Id.* (quoting *Levine*, 362 U.S. at 618). The *Smith* court rejected any suggestion that the hearing should be conducted in a fashion where the

courtroom would be closed only for those aspects of the hearing where the court determined matters occurring before the grand jury would be revealed. *Id.* at 153-54. The court noted that such a practice would "cumbersome, impractical and inefficient." *Id.* at 153.

The District of Columbia Circuit reached a similar conclusion in *In Re: Motions of Dow Jones & Company*, *supra*, a case involving a motion by the press for access to proceedings ancillary to the grand jury investigation by the Independent Counsel into whether Monica Lewinski and others committed violations of federal law in connection with *Jones v. Clinton*. The District of Columbia Circuit observed that "[t]o suppose that the First Amendment compels the court to conduct such hearings by placing the witness behind a screen and by emptying the courtroom each time a grand jury matter reaches the tip of an attorney's or the judge's tongue is to suppose the ridiculous," and thus courts are not "compelled to do so." 142 F.3d at 501-02. The court did note that some hearings might be structured in a way that permitted some public access without the risk of disclosing matters occurring before the grand jury, and that Rule 6(e)(5) contemplates that this be done where possible. *Id.* at 502. Nonetheless, the court observed that

such a practice would be put into place "because the Federal Rules of Criminal Procedure confer this authority on district courts not because the First Amendment demands it." *Id.*

The district court in the Duran and Olejnik contempt proceedings followed precisely the procedure required by Rule 6(e)(5) and outlined in *Levine*. The court closed the courtroom for the portion of the proceeding where the transcript of the questions asked of the witness and the answers given were read into the record and other grand jury matters were discussed. ER_10-11; DER_105-124, The court then opened the hearing for the "final stage," namely the announcement of the court's contempt finding and the confinement of the witness. ER_11; DER_124-130. *The Stranger* has access to the transcripts of this portion of the proceedings. ER_5, 15. More is not required.[11]

The cases cited by *The Stranger* (OB_16-17) do not support a contrary conclusion. All these cases involved contempt proceedings that were *completely* closed to the public. *See In re* Oliver, 333 U.S. 257

[11] *The Stranger* suggests the district court's unsealing order does not go far enough because the public purportedly cannot "access[] those same transcripts." OB_23. However, the court made clear that "any other member of the public[] is entitled to access the transcripts of the public portions of these hearings." ER_5.

(1948); *In re Grand Jury Matter*, 906 F.2d 78, 86-87 (3d Cir. 1990); *In re Fula*, 672 F.2d 279, 283 (2d Cir. 1982); *In re Rosahn*, 671 F.2d 690, 696-97 (2d Cir. 1982). Here, by contrast, the district court fully complied with mandate of Rule 6(e)(5) and *Levine* and did not close the final stage of the contempt adjudication to the public. As such, this authorities cited by *The Stranger* are inapposite.

Indeed, all *The Stranger* really offers to support its argument that the contempt proceedings in this case should be opened to public scrutiny is a bald assertion that this step is necessary "to ensure that First Amendment rights are not abused." OB_20. This is then followed by a hyperbolic argument that there have been claims the grand jury has been used as a tool of harassment and, as a result, there is need for public "reassurance." OB_21. What *The Stranger* fails to mention is that this Court, in affirming Duran's (and Olejnik's) contempt citations, has already found the witnesses' First Amendment rights were not violated when they were called before the grand jury. ER_85-88. More generally, if mere allegations of grand jury abuse were enough to defeat the legitimate and long-standing rule of grand jury secrecy, this exception would quickly swallow the rule.

The arguments raised by Appellee Duran in his brief supporting *The Stranger*'s appeal are equally unavailing. Duran argues that unsealing the files at issue would not undermine the rationales behind grand jury secrecy because they will not increase the risk that targets will flee, or put witnesses in danger, or otherwise interfere with the grand jury's investigation. DAB_20-22. These arguments are red herrings. Nothing in the case law limits grand jury secrecy to situations where disclosure would necessarily threaten the witnesses or the investigation. Similarly, Duran's stated preference for full disclosure of the files to vindicate him in the activist community — as proof he did not cooperate with the grand jury (something obvious given Duran's well-publicized confinement for contempt), DAB_25-26; *see also* DER_66-68, 71-73, 82, 89-90, 92, 94 — is also legally irrelevant.

D. There Is No Right Of Access To Pleadings And Court Records Maintained In Connection With Contempt Proceedings Ancillary To A Grand Jury Investigation.

Since there is no public right of access to contempt proceeding ancillary to a grand jury investigation, the question that remains is whether there is any right of access to the associated pleadings and court records. Since the public's right of access to judicially-maintained

documents is no broader than the public's right of access to the proceeding in which they were filed, *see Associated Press*, 705 F.2d at 1145, the answer to this question has to be "no." And, indeed, a public right of access has never been afforded to documents that disclose matters occurring before the grand jury. Thus, although this Court has recognized "that the press and public have historically had a common law right of access to most pretrial documents," the Court expressly excluded transcripts of grand jury proceedings from among such documents. *Id.* at 1146. Indeed, in *In re Special Grand Jury (For Anchorage, Alaska)*, 674 F.2d 778 (9th Cir. 1982), the Court held that although the public had a common law right of access to certain ministerial records of the grand jury, that right extended only to those portions of the ministerial records which did not compromise the long-standing rule of grand jury secrecy. [12] *Id.* at 780 81. In *Times*

[12] These "ministerial records" included the order authorizing the summons of the Special Grand Jury, the order extending the term of that grand jury, the roll sheets reflecting the composition of the jury and attendance records, voting records related to the extension of the term of the grand jury, and the names of persons who received information about matters occurring before the grand jury as defined in what was then Rule 6(e)(3)(A)(ii). The Court made clear that while these records were labeled ministerial, this did not reflect a judgment (continued . . .)

Mirror Co., the Court reiterated that grand jury proceedings "are not accessible to the public under a common law theory." 873 F.2d at 1219.

This rule of non-disclosure must also apply to documents and records filed in proceedings ancillary to a grand jury investigation, since those records "relat[e] to grand-jury proceedings" and will inevitably reveal "matter[s] occurring before a grand jury" Fed. R. Crim. P. 6(e)(6); *see also Smith*, 123 F.3d at 149-50. If a document reveals the object of a grand jury's investigation, it discloses a matter occurring before a grand jury. *See United States v. Dynavac, Inc.*, 6 F.3d 1407, 1410, 1414 (9th Cir. 1993). This includes not only disclosure of "'the substance of testimony, the strategy or direction of the investigation,

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(continued . . .)
that these record did not constitute "matters occurring before the grand jury." *In re Special Grand Jury*, 674 F.2d at 780 n.1. Following this decision, Rule 6(e) was amended to specify that all "[r]ecords, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Fed. R. Crim. P. 6(e)(6). Thus, the common law right of access to ministerial grand jury records "has been supplanted" by this amendment to Rule 6(e), which now governs. *In re: Motions of Dow Jones & Company*, 142 F.3d at 504. To the extent that such records offer any insight into a matter occurring before a grand jury, they may not be disclosed to third parties absent some compelling need not demonstrated here. *See generally* Fed. R. Crim. P. 6(e)(3)(E)(i).

the deliberations or questions of the jurors, and the like,'" *Standley v. Department of Justice*, 835 F.2d 216, 218 (9th Cir. 1987) (citation omitted), but also documents which disclose the identity of any witness called to testify before a grand jury. *See In re Grand Jury Proceedings*, 914 F.2d 1372, 1374 (9th Cir. 1990).

As the district court aptly observed, ER_8-9, documents filed in a grand jury contempt proceeding will most certainly reveal matters occurring before the grand jury. For example, all documents in such a proceeding, including the docket itself, will identify the contemnor as a grand jury witness.[13] Litigation involving a motion to compel will require the government to disclose something about the investigation to

[13] As *The Stranger* points out, OB_22, in *In re: Motions of Dow Jones & Company, Inc.*, *supra*, the District of Columbia Circuit stated that while a grand jury witness's identity is protected by Rule 6(e), that information could lose its Rule 6(e) status if the witness himself made sufficient public disclosure of the fact that he had been subpoenaed. *See* 142 F.3d at 505; *accord In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 155 (D.C. Cir. 2007). While the government agrees with almost all of the District of Columbia Circuit's discussion of grand jury secrecy principals in *Dow Jones*, the government respectfully takes issue with this passage. Simply put, a witness should not have the right to unilaterally override the rule of grand jury secrecy by disclosing information that is, by definition, a matter occurring before the grand jury. While the witness is perfectly entitled to make that disclosure, this should not somehow confer a public right of access to information that is otherwise subject to grand jury secrecy.

justify the grand jury's subpoena (as was done in this case, ER_89-92, 111-12, 207). And the contempt proceeding will require the disclosure of what questions the witness refused to answer, again tending to show the subject of the investigation (as was true in this case, DER_113-14). All such disclosures reveal "a matter occurring before a grand jury," and thus the records in which these disclosures occur "relate[] to grand-jury proceedings" and are subject to grand jury secrecy under Rule 6(e)(6). *The Stranger*'s claim to the contrary ignores the operative language of this rule. OB_25-28, 35.

Case law from other appellate courts supports this conclusion. In *In re: Motions of Dow Jones & Company*, *supra*, the District of Columbia Circuit held that the news media did not have a common law right of access to pleadings and hearings that were ancillary to the grand jury investigation involving President Clinton despite the importance of the investigation and associated ancillary proceedings. 142 F.3d at 504. Citing this Court's opinion in *Times Mirror Co.*, the District of Columbia Circuit reiterated that any common law right of access is not absolute, and specifically does not cover "documents which have traditionally been kept secret for important policy reasons," such

as materials revealing matters occurring before the grand jury. *Id.* at 504. As the Third Circuit has likewise observed, "not only are grand jury materials themselves to be kept secret, but so are all materials that 'relate to' grand jury proceedings." *Smith*, 123 F.3d at 149. Accordingly, "[t]he secrecy afforded to grand jury materials under Fed.R.Crim.P. 6(e) extends beyond the actual grand jury proceeding to collateral matters, including contempt proceedings, which relate to grand jury proceedings and may potentially reveal grand jury information." *In re Newark Morning Ledger Co.*, 260 F.3d 217, 226 (3d Cir. 2001).

Because there is no common law or First Amendment right of access to the grand jury materials sought, *The Stranger* must demonstrate a particularized need in order to obtain access to these documents, and must also show they are needed in connection with another judicial proceeding. *See* Fed. R. Crim. P. 6(e)(3)(E)(i); *Douglas Oil Co.*, 441 U.S. at 222. *The Stranger* has made no effort to meet this showing, and the newspaper's mere assertions of a public interest in the proceedings are an insufficient basis for a third party to obtain grand

jury materials.[14] *See Baggot*, 463 U.S. at 480. The district court thus properly refused to unseal the files of the grand jury contempt proceedings at issue.

II. The District Court Did Not Abuse Its Discretion In Declining To Provide A Redacted Version Of The Court Files Maintained In Contempt Proceedings Ancillary To A Grand Jury Investigation.

The Stranger (and Appellee Duran) argues that, at a minimum, the district court should have ordered the pleadings and other documents in these grand jury contempt proceedings be redacted of any information revealing matters occurring before the grand jury, and then directed that these redacted materials be disclosed. OB_23-26; DAB_26-28. In particular, *The Stranger* points to the court's observation that it

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[14] It is worth noting *The Stranger* already has access to documents that could vindicate the public interest it has identified. *The Stranger* says disclosure is needed so "the community" can learn that Appellee Duran was afforded a panoply of due process rights in connection with his contempt adjudication — *e.g.* appointed counsel, a neutral judge, and a right to appeal — and thereby assure "those who are suspicious of the grand jury system" that Duran's proceeding "appeared to be consistent with the Rule of Law." OB_28-29. But the due process afforded Duran is evident from the public portions of the contempt hearing to which *The Stranger* has access, ER_5, 15, DER_124-29, so there is nothing stopping *The Stranger* from reporting on that fact if it deems it newsworthy. There is also nothing stopping *The Stranger* from reporting on the purportedly "onerous and punitive conditions of Mr. Duran's confinement" while being held in contempt. OB_28.

was "perhaps possible" to redact these files, ER_14, misconstruing the court's words as rejecting this possibility as "too much trouble." OB_13. In fact, the court concluded that because the public has no right to access this material "neither the court nor the Government has an obligation to sift through these grand jury proceedings to determine what is secret and what is not," and that, in any event, redaction would yield an "incomplete and sometimes indecipherable 'court file' that would be as likely to mislead the public as to enlighten it." ER_14. This ruling was a provident exercise of discretion.

A. Standard Of Review

A district court's order denying a third-party's request for access to grand jury materials is reviewed for abuse of discretion. *See In re Grand Jury Proceedings*, 62 F.3d 1175, 1178 (9th Cir. 1995).

B. The District Court Had No Obligation To Provide Access To Redacted Versions Of Records Subject To Grand Jury Secrecy.

Having found the files in these contempt proceedings were not subject to any public right of access (except for the transcripts of any public hearings), the district court concluded it had no obligation to afford *The Stranger* access to redacted versions of these documents,

even if it would be possible to redact them so as to exclude all references to matters occurring before a grand jury. ER_14-15. This conclusion is unassailable.

If a document is not subject to the public's right of access, that is the end of the matter. A court is simply not required to produce a redacted version of a document to which the public has no right of access in the first instance.[15] *See United States v. McDougal*, 559 F.3d 837, 840-41 (8th Cir. 2009) (rejecting blanket request for unsealing of grand jury contempt proceeding); *In re Sealed Case*, 199 F.3d at 525-26 (rejecting blanket request for public docketing of ancillary grand jury proceedings). While a district court is certainly permitted to provide access to such a redacted document, *see, e.g.*, *Smith*, 123 F.3d at 153-54; *cf. In re Grand Jury Subpoena*, 97 F.3d 1090, 1095 (8th Cir. 1996) (ordering limited unsealing of appellate file), it is not required to do so.

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[15] *The Stranger* suggests that W.D. Wash. Local Civ. R. 5(g) required the district court to selectively redact the files in these grand jury contempt proceedings. OB_32-33. The district court rejected this argument, ER_12 n.2, and this Court generally defers to a district court's interpretation of its local rules. *See Bias v. Moynihan*, 508 F.3d 1212, 1223 (9th Cir. 2007). In any case, *The Stranger* is simply wrong. W.D. Wash. Local Crim. R. 6(j)(2) specifically provides for the filing under seal of all papers "related to Grand Jury matters."

This is especially true where, as in the present case, the district court has found that providing a redacted version of the file would likely result in the production of documents so redacted that they would be unintelligible or possibly even misleading. ER_14.

The Stranger's arguments to the contrary are unpersuasive. *The Stranger* asserts that because the district court opened some of the contempt proceedings to the public, this demonstrates the transcripts and pleadings from those contempt proceedings should be unsealed. OB_22. The district court has already made the transcripts of the open portions of those proceedings available. ER_5, 15. Insofar as *The Stranger* is arguing this limited disclosure somehow warrants the complete unsealing of all files related to those hearings, that argument is illogical. The district court was careful to open the courtroom to the public only for those parts of the proceedings that did not disclose grand jury matters.[16] ER_10-11. This limited disclosure does nothing to

[16] During the open portion of the Duran contempt hearing, the district court and the prosecutor mistakenly identified Appellee Duran as a grand jury witness. DER_125-26, 128. *The Stranger*, of course, cannot be restrained from publishing a fact disclosed in open court, even if that fact is a grand jury matter. *In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990).

undermine the need for maintaining the secrecy of the rest of the grand jury contempt proceedings and related pleadings.

The Stranger also contends that the pleadings related to Duran's motion to quash should be unsealed, reasoning that because they were filed before Duran's grand jury appearance, they supposedly cannot contain any grand jury secrets. OB_25. *The Stranger* similarly claims the briefing on its motion to unseal and the district court's docket sheet do not reveal any grand jury matters. OB_27. *The Stranger* already has access to unredacted versions of the docket sheet, ER_145-49, the pleadings filed in the motion to quash, ER_89-144, and obviously its own motion to unseal. That being so, *The Stranger*'s reasons for pressing this argument are hard to understand.

In any event, the government cannot respond to a motion to quash without disclosing grand jury matters, such as the fact that a particular witness has been subpoenaed, some description of the nature of the grand jury investigation, and the witness's believed role. As previously discussed, all of this information relates to a matter before a grand jury and thus is protected by Rule 6(e). It is also clear that such disclosures occurred in the motion to quash litigation, ER_89-93, 111-12, 114-18, in

the litigation over *The Stranger*'s motion to unseal, CR_24 at 2, 6; CR_25 at 1-2; CR_26 at 1, 3-5; CR_32 at 1-2, ER_41-45, and even on the district court's docket sheet. ER_145-49. This conclusively rebuts *The Stranger's* assertions that these documents are devoid of any grand jury material. OB_25-28, 35.

The Stranger further argues there is no basis for continued grand jury secrecy in this case because the district court has already recognized that Duran and Olejnik are free to disclosure their briefing, and any briefs filed by the government in their possession, to *The Stranger* (or anyone else) if they so desire. OB_34-36. But the fact that a grand jury witness is free to disclose information does not defeat the need for grand jury secrecy. It simply cannot be the case that the veil of grand jury secrecy can be lifted unilaterally by a witness who is willing to divulge what transpired before that body. As noted earlier, "'Rule 6(e) does not create a type of secrecy which is waived once public disclosure occurs.'" *In re North*, 16 F.3d at 1245 (citation omitted). Indeed, even the extended passage of time does not defeat the rules of grand jury secrecy. *See McDougal*, 559 F.3d at 841.

In short, the district court's denial of *The Stranger*'s unsealing request was not incorrect — much less an abuse of discretion — where all of the pleadings and records sought pertain to the grand jury's desire for testimony from a witness, and that witness's refusal to testify despite a court order. Similarly, since the documents themselves all relate to a grand jury proceeding and are thus materials protected by Rule 6(e)(6), the court's decision not to require redaction in order to allow for the release of what would then be incomplete and at times indecipherable files likewise cannot be seen as an abuse of discretion. Even where there is a public right of access, "the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files. . . ." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). Where the documents and records at issue relate to grand jury matters, this observation applies with even greater strength.

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CONCLUSION

For all of the foregoing reasons, the district court's order granting in part, and denying in part, *The Stranger*'s motion to unseal should be affirmed.

Dated this 4th day of October, 2013.

Respectfully submitted,

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STATEMENT OF RELATED CASES

To the best of appellee counsel's knowledge, the only related cases are *The Stranger*'s petition for a writ of mandamus (No. 13-71021), which has been consolidated with this appeal, and the decided appeals by two recalcitrant witnesses from the district court's findings of contempt. Because these recalcitrant witness appeals are under seal, case numbers have not been provided.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing brief is proportionally spaced, has a Century Schoolbook typeface of 14 points, and contains 9,405 words.

Dated this 4th day of October, 2013

s/Michael S. Morgan
MICHAEL S. MORGAN
Assistant United States Attorney
Western District of Washington

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2013, I electronically filed the foregoing Answering Brief of the United States with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

DATED this 4th day of October, 2013.

/s/ Susan Burker
SUSAN BURKER
Paralegal