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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI`I

UNITED STATES OF AMERICA, Plaintiff, vs. KATHERINE P. KEALOHA et al., Defendants.	MISC. NO. 18-477 [CR NO. 17-00582 JMS-RLP-1] MEMORANDUM IN SUPPORT OF MOTION TO UNSEAL COURT RECORDS

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According to the indictment, a deputy prosecuting attorney and the chief of police—among other things—defrauded a man, framed him for a crime, and conspired with other police officers to cover-up their wrongdoing. If true, these allegations against Defendant Katherine P. Kealoha and others strike at the integrity of the criminal justice system in Hawai`i. With such charges of public corruption, it is especially important

that this Court ensure the public remains informed concerning the progress of the case. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality opinion); *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984) ("Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.").

A series of recent filings in this case, however, have been sealed without apparent explanation. Pursuant to the public's First Amendment and common law rights of access, the Civil Beat Law Center for the Public Interest (Law Center) respectfully moves to unseal:

- Dkt. 268: 9/10/18 Ex Parte Application by Def. K. Kealoha
- Dkt. 269: 9/12/18 Order re Dkt. 268
- Dkt. 270: 9/12/18 Motion by Def. K. Kealoha
- Dkt. 271: 9/17/18 Order re Dkt. 270
- Dkt. 272: 9/28/18 EO re Def. K. Kealoha
- Dkt. 281: 11/19/18 Motion by United States
- Dkt. 282: 11/19/18 EO re Def. K. Kealoha re Dkt. 281
- Dkt. 283: 11/26/18 Opposition by Def. K. Kealoha re Dkt. 281
- Dkt. 284: [Missing from Docket, but referenced in Dkt. 285]
- Dkt. 285: 11/30/18 Order re Dkt. 281, 284
- Dkt. 286: 12/4/18 EO re Def. K. Kealoha
- Dkt. 287: 12/5/18 EO re Def. K. Kealoha

If there is a compelling reason for sealing these records in the entirety, it must be stated in findings on the record. *E.g.*, *Press-Enter.*, 464 U.S. at 510; *United States v. Bus. of the Custer Battlefield Museum & Store*, 658 F.3d 1188, 1195 (9th Cir. 2011) [*Custer Battlefield*].

I. THE PUBLIC HAS A PRESUMED CONSTITUTIONAL RIGHT OF ACCESS TO RECORDS OF CRIMINAL PROCEEDINGS.

The constitutional right of public access to criminal proceedings is among those rights that, "while not unambiguously enumerated in the very terms of the [First] Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982). "A major purpose of that Amendment was to protect the free discussion of governmental affairs." *Id.*; *Richmond Newspapers*, 448 U.S. at 575 (plurality opinion) (the freedoms in the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government"). Thus, to the extent that the constitution guarantees a qualified right of public access, "it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Globe Newspaper*, 457 U.S. at 605; *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring) ("Implicit in this structural role is not only the principle that debate on

public issues should be uninhibited, robust, and wide-open, but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.").

"By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper*, 457 U.S. at 604. "[T]he public has an intense need and a deserved right to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, police officers, other public servants, and all the actors in the judicial arena; and about the trial itself." *Richmond Newspapers*, 448 U.S. at 604 (Blackmun, J., concurring). "[Openness] gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Id.* at 569; *accord Press-Enter.*, 464 U.S. at 508 ("[T]he sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known.").

"A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected

outcome can cause a reaction that the system at best has failed and at worst has been corrupted." *Richmond Newspapers*, 448 U.S. at 571 (plurality); *Globe Newspaper*, 457 U.S. at 606 ("[P]ublic access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process.").

The same First Amendment standards for closing courtroom proceedings apply to sealing documents for criminal pretrial proceedings. *E.g.*, *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983). As the Ninth Circuit has observed:

> There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them. Indeed, the two principal justifications for the first amendment right of access to criminal proceedings apply, in general, to pretrial documents. Those two justifications are: "first, the criminal trial historically has been open to the press and general public," and "second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole." There can be little dispute that the press and public have historically had a common law right of access to most pretrial documents — though not to some, such as transcripts of grand jury proceedings. . . . We thus find that the public and press have a first amendment right of access to pretrial documents in general.

Id. (citations omitted).

To preserve the societal values reflected in the First Amendment, the U.S. Supreme Court held that "[c]losed proceedings, although not

absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enter.*, 464 U.S. at 509. "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 510; *accord Globe Newspaper*, 457 U.S. at 606-07.

II. THE PUBLIC ALSO HAS A PRESUMED COMMON LAW RIGHT OF ACCESS TO RECORDS OF CRIMINAL PROCEEDINGS.

The Ninth Circuit has recognized only a narrow range of judicially filed documents that are not subject to the common law right of access "because the records have traditionally been kept secret for important policy reasons." *Custer Battlefield*, 658 F.3d at 1192. Those categorically exempt records include grand jury transcripts and warrant materials during pre-indictment investigation. *Id.* For all other judicial records, "a strong presumption in favor of access is the starting point." *Id.* at 1194.

For the common law analysis, the "party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by . . . articulating compelling reasons . . . that outweigh the general history of access and the public policies favoring disclosure." *Id.* at 1194-95. A court presented with a motion to seal "must base its decision on a compelling

reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Id.* at 1195. "[T]he court may not restrict access to the documents without articulating both a compelling reason and a factual basis for its ruling." *Id.* at 1196.

III. NO MOTION NOR FINDINGS HAVE BEEN MADE TO JUSTIFY SEALING THESE JUDICIAL RECORDS.

The only motion to seal filed in this case concerned the filing of a transcript from a sealed case as an exhibit to the Government's motion to disqualify the Kealohas' prior counsel. Dkt. 75. There have been no other motions or orders on the public record that justify sealing other documents in this case. But in the last three months, Defendant Katherine Kealoha, the Government, and the Court have filed 12 motions, applications, orders, or other judicial documents under seal without any public findings of fact to explain the compelling reason for closure. "America has a long history of distrust for secret proceedings." *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1084 (9th Cir. 2014).

"[E]ntry of specific findings allows fair assessment of the trial judge's reasoning by the public and the appellate courts, enhancing trust in the judicial process and minimizing fear that justice is being administered clandestinely." *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 951

(9th Cir. 1998). Here, there are no findings. And the generic titles in the docket entries (*e.g.*, "Sealed Motion", "Sealed Ex Parte Application", "Opposition", or "Sealed Order") further confounds public access and confidence because it is impossible to determine the basic nature of the proceedings—the first step in analyzing the extent to which public access is required.

In the absence of a proper motion to seal and specific findings of fact by the Court, the documents identified in the Law Center's motion should be unsealed.

CONCLUSION

Based on the foregoing, the Law Center respectfully requests that the Court grant its motion to unseal the court records.

DATED: Honolulu, Hawai`i, December 14, 2018

/s/ Robert Brian Black
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