No. 09A -____

In the Supreme Court of the United States

BRIDGEPORT ROMAN CATHOLIC DIOCESAN CORPORATION et al.,
Applicants,

v.

NEW YORK TIMES COMPANY,
HARTFORD COURANT COMPANY, WASHINGTON POST COMPANY,
GLOBE NEWSPAPER COMPANY, GEORGE L. ROSADO, et al.,
Respondents.

ON APPLICATION TO EXTEND STAY OF THE ORDER OF THE SUPREME COURT OF CONNECTICUT AUTHORIZING DISCLOSURE OF PRIVILEGED INFORMATION PENDING FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

APPLICATION TO
EXTEND STAY

PHILIP ALLEN LACOVARA
Counsel of Record
HANNAH Y.S. CHANOINE
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

RALPH W. JOHNSON III
Halloran & Sage LLP
One Goodwin Square
225 Asylum Street
Hartford, CT 06103
(860) 522-6103
Counsel for Applicants

August 6, 2009

RULE 29.6 STATEMENT

The Bridgeport Roman Catholic Diocesan Corporation is a religious corporation organized under Connecticut statutes. It has no securities owned by public shareholders.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF CONTENTS.. ii

TABLE OF CONTENTS...iv

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY OF THE CASE 3

A. Three Superior Court Judges Issue Protective and Sealing Orders. 4

B. In 2001 the Parties Reach Comprehensive Settlement of the Underlying Cases. 7

C. A Year Later, Respondent *Hartford Courant* Violates The Protective Orders. 7

D. The Newspapers Seek to Intervene For the Purpose of Unsealing and Publishing the Confidential Documents. 8

E. The Connecticut Courts Vacate the Protective and Sealing Orders...8

STANDARDS FOR GRANTING A STAY 11

THE DIOCESE SATISFIES THE STANDARDS FOR A STAY 12

I. There Is a "Reasonable Probability" That Certiorari Will Be Granted And A "Fair Prospect" That The Decision Below Will Be Found Erroneous...12

A. The Connecticut Court's Waiver Holding Conflicts With This Court's Waiver Jurisprudence and Poses an Issue of General Significance. 13

1. The First Amendment Prohibits Civil Authority From Intruding Into Internal Church Governance, Including Ministerial Assignments................................13

2. The Standard That the Connecticut Supreme Court Established For Waiver of Federal Privileges Conflicts With The Johnson v. Zerbst Standard.............17

3. The Subsidiary "Selective Waiver" Question is Likewise of Substantial Federal Importance. 22

4. The Waiver Determinations Threaten Serious Consequences for the Administration of Justice. 24

B. The Courts Are Split on the Definition of "Judicial Documents." 25

1. The Federal Common Law Presumption of Public Access. 25

2. The First Amendment Codification of the Common Law Presumption. 26

3. Conflict in the Courts on the Definition of Judicial Documents. 28

4. This Court's Jurisdiction Over The "Judicial Documents" Question Under 28 U.S.C. § 1257. 30

II. Applicants Will Suffer Irreparable Harm If A Stay Is Denied, And The Balance Of The Equities Favors A Stay. 33

CONCLUSION 35

EXHIBITS

Exhibit A -- Order of the Supreme Court of Connecticut granting interim stay pending filing and disposition of an application for a stay in the United States Supreme Court, denying Applicants' motion for stay pending filing and disposition of a petition for a writ of certiorari. (July 30, 2009)

Exhibit B -- *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1 (2009)

Exhibit C -- *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 2006 WL 3756521 (Conn. Super. Ct. Dec. 6, 2006)

Exhibit D -- Order of the Supreme Court of Connecticut denying Applicants' motion for reconsideration and reconsideration en banc (June 30, 2009)

TABLE OF AUTHORITIES

Page(s)

CASES

Aetna Ins. Co. v. *Kennedy*,
301 U.S. 389 (1937) 18, 23

Anderson v. *Cryovac, Inc.*,
805 F.2d 1 (1st Cir. 1986) 27, 28

Barker v. *Wingo*,
407 U.S. 514 (1972) 18, 23

Brookhart v. *Janis*,
384 U.S. 1 (1966) 18

California v. *American Stores Co.*,
492 U.S. 1301 (1989) 12

Chicago Tribune Co. v. *Bridgestone/Firestone, Inc.*,
263 F.3d 1304 (11th Cir. 2001) 26, 27, 29

College Sav. Bank v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*,
527 U.S. 666 (1999) 18

Conkright v. *Frommert*,
129 S. Ct. 1861 (2009) 12

Curtis Publ'g Co. v. *Butts*,
388 U.S. 130 (1967) 21

D.G. Acquisition Corp. v. *Dabah*,
151 F.3d 75 (2d Cir. 1998) 20

Dausch v. *Ryske*,
1993 WL 34873 (N.D. Ill., Feb. 10, 1993),
aff'd in part, 52 F.3d 1425 (7th Cir. 1994) 16

Dellwood Farms, Inc. v. *Cargill, Inc.*,
128 F.3d 1122 (7th Cir. 1997) 22

Diversified Indus., Inc. v. *Meredith*,
572 F.2d 596 (8th Cir. 1977) 22

Elk Grove Unified Sch. Dist. v. *Newdow*,
542 U.S. 1 (2004) 13

TABLE OF AUTHORITIES
(Continued)

Page(s)

CASES

Employment Div., Dept. of Human Res. of Oregon v. *Smith*,
494 U.S. 872 (1990) 16

Emspak v. *United States*,
349 U.S. 190 (1955) 20

Federal Trade Comm'n v. *Standard Fin. Mgmt. Corp.*,
830 F.2d 404 (1st Cir. 1987) 17, 29

Frazer v. *United States*,
145 F.2d 139 (6th Cir. 1944) 19

Fuentes v. *Shevin*,
407 U.S. 67 (1972) 18

Gambale v. *Deutche Bank AG*,
377 F.3d 133 (2d Cir. 2004) 31

Globe Newspaper Co. v. *Super. Ct. for the City of Norfolk*,
457 U.S. 596 (1982) 27, 32

Gonzalez v. *Roman Catholic Archbishop of Manila*,
280 U.S. 1 (1929) 14

Hartford Courant Co. v. *Pellegrino*,
380 F.3d 83 (2d Cir. 2004) 31

Hollins v. *Methodist Healthcare, Inc.*,
474 F.3d 223 (6th Cir. 2007) 21

Houchins v. *KQED*,
438 U.S. 1 (1978) 34

In re Columbia/HCA Healthcare Corp. Billing Practices Litig.,
293 F.3d 289 (6th Cir. 2002) 22

In re Qwest Communications Int'l, Inc.,
450 F.3d 1179 (10th Cir. 2006) 22

In re Reporters Committee for Freedom of the Press,
773 F.2d 1325 (D.C. Cir. 1985) 27, 28, 29, 31

TABLE OF AUTHORITIES
(Continued)

Page(s)

CASES

Indiana State Police Pension Trust v. *Chrysler LLC*,
129 S. Ct. 2275 (2009) 12

Jessup v. *Luther*,
277 F.3d 926 (7th Cir. 2002) 31

Johnson v. *Zerbst*,
304 U.S. 458 (1938) 13, 17, 18, 20

Kedroff v. *St. Nicholas Cathedral*,
344 U.S. 94 (1952) 14

Kreshik v. *St. Nicholas Cathedral*,
363 U.S. 190 (1960) 13

Larkin v. *Grendel's Den, Inc.*,
459 U.S. 116 (1982) 14

Lemon v. *Kurtzman*,
403 U.S. 602 (1971) 14

Leucadia, Inc. v. *Applied Extrusion Techs., Inc.*,
998 F.2d 157 (3d Cir. 1993) 29

Lugosch v. *Pyramid Co. of Onondaga*,
435 F.3d 110 (2d Cir. 2006) 28

Malicki v. *Doe*,
814 So. 2d 347 (Fla. 2002) 17

McClure v. *Salvation Army*,
460 F.2d 553 (5th Cir. 1972) 15

Minker v. *Balt. Annual Conf. of the United Methodist Church*,
894 F.2d 1354 (D.C. Cir. 1990) 10, 14, 16

Mokhiber v. *Davis*,
537 A.2d 1100 (D.C. 1988) 26, 29

Nixon v. *Warner Communications, Inc.*,
435 U.S. 589 (1978) 10, 25, 26, 32

TABLE OF AUTHORITIES
(Continued)

Page(s)

CASES

NLRB v. *Catholic Bishop of Chicago*,
440 U.S. 490 (1979) 16

North Jersey Media Group, Inc. v. *Ashcroft*,
308 F.3d 198 (3d Cir. 2002) 27

Ohio v. *Robinette*,
519 U.S. 33 (1996) 30, 32

Permian Corp. v. *United States*,
665 F.2d 1214 (D.C. Cir. 1981) 22, 23

Petruska v. *Gannon Uni*v.,
462 F.3d 294 (3d Cir. 2006) 14, 15

Press-Enterprise Co. v. *Super. Ct. of California*,
464 U.S. 501 (1984) 25

Press-Enterprise Co. v. *Super. Ct. of California*,
478 U.S. 1 (1986) 27, 32

Pritzlaff v. *Archdiocese of Milwaukee*,
194 Wis. 2d 302 (1995) 16, 17

Publicker v. *Cohen*,
733 F.2d 1059 (3d Cir. 1984) 32

Rayburn v. *Gen. Conf. of Seventh-Day Adventists*,
772 F.2d 1164 (4th Cir. 1985) 15

Richmond Newspapers, Inc. v. *Virginia*,
448 U.S. 555 (1980) 25, 26, 32

Roman Catholic Archbishop of Los Angeles v. *Super. Ct.*,
131 Cal. App. 4th 417 (2005) 17

Roman Catholic Diocese of Jackson v. *Morrison*,
905 So. 2d 1213 (Miss. 2005) 17

Rosado v. *Bridgeport Diocesan Corp.*,
716 A.2d 967 (Conn. Super. Ct. 1998) 17

TABLE OF AUTHORITIES
(Continued)

Page(s)

CASES

Rosado v. *Bridgeport Roman Catholic Diocesan Corp.*,
1994 WL 700344 (Conn. Super. Dec. 8, 1994) 5, 6

Rosado v. *Bridgeport Roman Catholic Diocesan Corp.*,
2006 WL 3756521 (Conn. Super. Ct. Dec. 6, 2006) 8, 9, 19, 20

Rosado v. *Bridgeport Roman Catholic Diocesan Corp.*,
276 Conn. 168 (2005) 8, 9, 31

Rosado v. *Bridgeport Roman Catholic Diocesan Corp.*,
292 Conn. 1 (2009) ....passim

Rweyemamu v. *Cote*,
520 F.3d 198 (2d Cir. 2008)..14

San Jose Mercury News, Inc. v. *U.S. Dist. Court-Northern Dist. (San Jose)*,
187 F.3d 1096 (9th Cir. 1999) 25, 26

Seattle Times Co. v. *Rhinehart*,
467 U.S. 20 (1984)...28

SEC v. *Lavin*,
111 F.3d 921 (D.C. Cir. 1997) 19

Serbian Orthodox Diocese v. *Milivojevich*,
426 U.S. 696 (1976)..14

Shields v. *Sturm, Ruger & Co.*,
864 F.2d 379 (5th Cir. 1989) 19

Three Affiliated Tribes v. *Wold Eng'g, P.C.*,
467 U.S. 150 (1984)..30

United States v. *Amodeo*,
71 F.3d 1044 (2d Cir. 1995)...26

Watson v. *Jones*,
80 U.S. (13 Wall.) 679 (1871) 15

Zacchini v. *Scripps-Howard Broadcasting Co.*,
433 U.S. 562 (1977)..30

TABLE OF AUTHORITIES
(Continued)

Page(s)

CASES

Zemel v. *Rusk*,
381 U.S. 1 (1965) ... 34

CONSTITUTION, STATUTES, AND RULES

U.S. Const. amend. I ... passim

28 U.S.C. § 1257 ... 30

28 U.S.C. § 2101(f) ... 11

Sup. Ct. R. 10(b) ... 13, 30

Sup. Ct. R. 10(c) ... 13

MISCELLANEOUS

Conn. Prac. Book. § 11-20A ... 32

Conn. Prac. Book. § 42-49A ... 32

First Amendment ... passim

Paul Rice, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, § 10:1 (2d ed.
2007) ... 20

To the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court and Circuit Justice for the Second Circuit:

Applicant Bridgeport Roman Catholic Diocesan Corporation and individual applicant members of the clergy[1] (collectively "the Diocese") respectfully move for an order extending the temporary stay of the June 2, 2009, decision of the Supreme Court of Connecticut, pending the filing and disposition of a petition for a writ of certiorari.

PRELIMINARY STATEMENT

This case presents a clash of First Amendment values: the protection of church autonomy under the Religion Clauses versus the presumptive right of public access to judicial proceedings. The Connecticut Supreme Court affirmed, with modification, a decision of the Connecticut Superior Court to vacate a series of sealing and protective orders in twenty-three cases against the Diocese that ultimately had settled. Originally entered during pretrial discovery, the sealing/protective orders secured against public dissemination thousands of pages of confidential discovery materials protected by various privileges, including First Amendment privileges against state interference in matters of internal church governance. Filed with the trial court under seal pursuant to the protective orders, the confidential materials encompass internal church evaluations and the depositions of two Bishops. A year after the parties settled the claims, respondents *New York Times*, *Hartford Courant*, *Washington Post*, and *Boston Globe* (collectively, "the Newspapers") moved to intervene in the closed cases to seek unsealing of the privileged materials.

---

[1] The individual clergyman applicants are: former Bishop (later Cardinal) Edward M. Egan, Rev. Msgr. Thomas Driscoll as executor of the estate of Bishop Walter Curtis, Rev. Msgr. Andrew T. Cusack, and Rev. Msgr. Laurence Bronkiewicz.

The Connecticut Supreme Court did not question the validity of the First Amendment privilege that the Diocese consistently asserted. Instead, applying an impermissibly lax standard for waiving federal constitutional rights, the court ruled that the Diocese had waived its privilege by complying with the protective order to produce the confidential internal documents under seal, even though the order expressly preserved the Diocese's right to object to any future attempt to disclose the information to non-parties or the public. In addition, after recognizing that the federal and state courts are in conflict on the issue, the court decided to adopt an improperly broad definition of the concept of 'judicial documents' to which a presumption of public access attaches.

At least two aspects of the Connecticut court's decision will merit review:

> (1) whether complying with discovery orders to produce confidential documents under seal pending any further order governing their treatment constitutes a complete and absolute "waiver" of the right to assert First Amendment privileges in opposing subsequent applications for general public disclosures of the confidential materials, and
>
> (2) whether, in acknowledged conflict with decisions of other federal and state appellate courts, the Connecticut courts erroneously interpreted federal authorities in determining the scope of the "judicial documents" concept to which a presumptive right of public access applies.

Once the process for unsealing the confidential documents concludes, the Newspapers will disseminate their contents. The harm to the Diocese will be irreparable. Absent a stay, disclosure will likely occur before this Court conferences on the question whether to grant review. The Diocese anticipates that, in that event, the Newspapers will argue that disclosure moots the Diocese's certiorari petition. The threat of depriving this Court of jurisdiction to consider the petition reinforces the grounds for a stay.

There is no urgent need to unseal the files while this Court decides whether to grant review. The documents were produced in pretrial discovery under protective orders entered fifteen years ago. The documents reflect personnel decisions made decades ago relating to allegations dating back as long as forty years. Before seeking to unseal the documents, the Newspapers waited until more than a year had elapsed after the parties settled the underlying cases in 2001 – and more than seven years after the trial judges entered the sealing orders amidst contemporaneous media coverage by these same Newspapers.

On July 30, 2009, the Supreme Court of Connecticut granted an interim stay (attached as Ex. A), preserving the *status quo* temporarily so that this Court may determine whether to extend the stay pending the filing and disposition of the petition for certiorari. For the reasons discussed below, this Court should extend the stay while it considers the petition.

PROCEDURAL HISTORY OF THE CASE

Beginning in early 1993, amidst heavy media coverage, twenty-three lawsuits were filed against the Diocese and individual clergymen in Connecticut state courts alleging sexual abuse of minors. *See Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 5 n.4 (2009) ("Rosado II") (Attached as Ex. B). The cases sought to hold the Diocese liable under tort theories of *respondeat superior* and negligent supervision. The plaintiffs' legal theory was that the Church's hierarchy, including two successive Bishops, had made misjudgments in evaluating the suitability of certain priests for ministerial assignments after they were accused of sexual abuse or after they returned from psychological or medical assessments or treatments. In its Answers to the coordinated cases,

the Diocese raised the First Amendment as an affirmative defense to such theories of imputed liability for allegedly negligent assessment of clerical suitability.

A. Three Superior Court Judges Issue Protective and Sealing Orders.

In August 1994, during pre-trial discovery, the plaintiffs noticed the depositions of two Bishops and issued document production requests. The Diocese promptly objected to such discovery, explicitly invoking the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution. In September 1994, the Diocese moved for (i) a protective order barring forced disclosure of confidential information or documents (A1665-1700), and (ii) a protective order regarding the use and dissemination of any discovery information obtained through the depositions of the two Bishops. (A1701-1740).[2]

The Diocese expressly objected that "the First Amendment of the Federal Constitution" afforded the Diocese "the right to function as a religious institution without undue intrusion or entanglement from any branch of government, including our court system." (A1688). As such, the Diocese sought "a heightened standard of judicial scrutiny to verify some compelling interest" before ordering discovery disclosures such as documentation and information about other priests, "thereby causing any Diocese-affiliated priests to be disabled from performing their priestly ministry." (A1688-89). The First Amendment, argued the Diocese, "calls for this Court to avoid excessive intrusion in the affairs of the Diocese as a religious institution." *Id.* The Diocese also argued that requiring production and dissemination to "non-parties" of confidential files relating to "the Diocese's personnel practices and policies relating to priests serving on the staffs of local churches"

[2] Record references are to the Diocese's Appendix filed with the Supreme Court of Connecticut.

would violate the "free exercise of religion clause of the First Amendment" by invading the "internal affairs of the Roman Catholic Church," and thus much of the information would be inadmissible at a potential future trial. (A1732-33). In addition to First Amendment and other privilege objections, the Diocese contended that the protective orders were necessary to protect the Diocese's fair trial rights and its reputation in connection with its religious mission.

In December 1994, Superior Court Judge Levin granted the Diocese's request to "seal" the information, documents and transcripts sought by plaintiffs through depositions and document requests, but required as an interim measure that they be produced under seal to plaintiff's counsel for their exclusive use in preparing for any potential trial. *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 1994 WL 700344, at **5-8 (Conn. Super. Ct. Dec. 8, 1994). These privileged, protected materials included confidential physical and health information and internal diocesan memoranda reflecting the hierarchy's evaluations of fitness for continued ministry.

The judge also granted the motion for a "protective order," directing that "all information, documents and transcripts which the parties may obtain through the depositions of the defendants," of Church officials, and of Bishop Egan, would be unavailable to the media. Specifically, Judge Levin ordered that these materials could "not be disseminated, shown, disclosed, divulged or transmitted by any one to any person or organization other than the parties … and their respective attorneys . . . ." (A856-57).

Recognizing the "significant potential for abuse" of discovery, especially in cases involving allegations of salacious and scandalous conduct, Judge Levin explained that the protective order was proper because "edification of the public is not a proper purpose of

pretrial discovery." *Rosado*, 1994 WL 700344, at **6-7. The court took judicial notice of the media's coverage of the cases, including the presence of media representatives at the hearing. *Id.* at *7. The protective order had three components:

(1) The prohibition against dissemination to anyone other than counsel and the parties was to remain in effect indefinitely, "[u]ntil further order of the court, which order shall be made not later than the completion of jury selection."

(2) Even if the cases eventually went to trial, the Diocese would have the right to object to any proposal to use the sealed material publicly:

> "2. All such documents and transcripts * * * shall be submitted to the court for review and appropriate order before being released from the protection afforded by this order." (A856-57).

(3) Any materials placed on file with the court in connection with any pretrial motions or proceedings were to be filed under seal and marked conspicuously "CONFIDENTIAL: SUBJECT TO COURT ORDER". (A856-57).

Thus, the order contemplated that the Diocese would have the right to reiterate its privilege objections to any *public* disclosures *before* any public disclosure could take place, even at the instance of the parties to whom the materials had been ordered produced. Two other trial judges in the companion cases adopted Judge Levin's 1994 protective orders. (A410-20; A687-844).

The Diocese reasonably believed that by raising its First Amendment privileges in pursuing the protective orders, (i) it had preserved its constitutional privileges during the ensuing discovery process, and (ii) no disclosure of discovered material subject to an asserted constitutional privilege would be released absent further court review. Moreover, the Diocese reasonably understood that with the court's entry of the protective orders and its

establishment of a privilege review process, the Diocese was now obligated to produce discoverable materials under penalty of contempt. Accordingly, the Diocese did not continually re-assert its constitutional privileges when it disclosed sensitive internal documents and the testimony of two Bishops.

During the course of pre-trial proceedings, 924 documents totaling 12,675 pages, were filed pursuant to the protective orders that immediately placed the confidential information under seal and protected against disclosure to non-parties or the public. The vast majority of the sealed documents were connected to discovery-related motions, motions *in limine*, and motions for summary judgment that were later denied.

B. In 2001 the Parties Reach Comprehensive Settlement of the Underlying Cases.

After extensive settlement negotiations conducted by a federal magistrate judge acting as an independent mediator, the plaintiffs settled and withdrew all twenty-three cases in March 2001, before any of the cases went to trial. (A931, ¶ 5; A935). According to unrebutted evidence, the Diocese relied on its expectation that, following a settlement, the sealed materials in the court's custody, including privileged discovery materials, would remain sealed. (A931, ¶ 8; A938, ¶¶ 7-8).

C. A Year Later, Respondent *Hartford Courant* Violates The Protective Orders.

More than a year after the settlement, Respondent *Hartford Courant* flouted the sealing orders issued by three judges, illicitly obtaining access to the sealed documents that had remained in the court's custody following the comprehensive settlement. In March 2002, the *Courant* published a lurid and lengthy article (A995-1007), detailing the contents of "thousands of documents in lawsuits that [the Diocese] fought, successfully, to keep

sealed from public view." (A995). Acknowledging that the documents upon which the *Courant* had based the article "remain sealed," the newspaper admitted that that it "had obtained copies of much of them," including internal Diocesan memoranda and "personnel files." *Id.*

D. The Newspapers Seek to Intervene For the Purpose of Unsealing and Publishing the Confidential Documents.

Roughly a week later, having failed to act for more than a year since the settlement and more than seven years since the entry of the first of nearly two-dozen widely-publicized protective orders, respondent *New York Times* filed an "emergency" motion to intervene in the settled cases, a motion later joined by three other newspaper publishing companies, respondents *Hartford Courant*, *Washington Post*, and *Boston Globe*. The *Times* sought to vacate the sealing orders, based in part on assertions of the presumptive "rights of public access" found in "the First Amendment of the United States Constitution" as well as Connecticut Rules of Court and the common law.[3]

E. The Connecticut Courts Vacate the Protective and Sealing Orders.

A judge who previously had no connection with the cases (Alander, J.) granted the Newspapers' motion to vacate the sealing orders issued by three of his colleagues and ordered public disclosure of virtually all of the Diocese's internal documents. *See Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 2006 WL 3756521 (Conn. Super. Ct. Dec. 6,

---

[3] The Newspapers' intervention motion initially went before the Supreme Court of Connecticut on a jurisdictional question. *See Rosado* v. *Bridgeport Roman Catholic Diocesan Corporation*, 276 Conn. 168 (2005) ("Rosado I"). The divided court upheld jurisdiction to entertain the Newspapers' application for access. Two justices dissented concluding that, if as alleged the Diocese had relied on the continuation of the protective orders when it agreed to settle the cases, "the court should not grant the motions to intervene
(continued next page)

2006) (attached as Ex. C). The judge recognized that federal and state courts are in conflict about how to identify those "judicial documents" to which the public's presumptive right of access attaches, *id.* at **4-6, and concluded that the Diocese had "waived" its federal constitutional privileges asserted under the Establishment and Free Exercise clauses of the First Amendment by participating in pretrial discovery, *id.* at **10-12. The Diocese had also urged the court in the alternative to recognize the doctrine of "selective waiver," which provides that disclosure of confidential information on a selective basis to a limited category of recipients does not necessarily require the protected party to disclose the information to the world at large. The court declined to apply the selective waiver doctrine. *Id.* at *12.

A divided Supreme Court of Connecticut affirmed. *Rosado II*, 292 Conn. at 7. In defining "judicial documents," the court identified a three-way split among federal and state appellate courts, ultimately holding that the presumption of public access to "judicial documents" applies to *any* document filed with the court on which the court reasonably *could* rely in support of *any* adjudicatory function. *Id.* at 38-43.

The majority upheld the trial court's conclusions (i) that, despite the guarantees provided by the protective orders, the Diocese had waived its federal constitutional privileges by – supposedly – not standing on its claims of First Amendment privilege when disclosing documents and testimony pursuant to discovery obligations, *id.* at 55-60, and (ii) that "selective waiver" was unavailable, because the Diocese could not be permitted to "pick and choose among its opponents," and had – supposedly – failed to assert its selective waiver position "expressly" at the time, *id.* at 60-61 (internal quotation marks and citations omitted).

---

absent a showing of extraordinary circumstances or compelling need." *Id*. at 232 (Sullivan, C.J., *dissenting*).

The Diocese did not challenge Judge Alander's factual finding that, after the entry of the protective orders – secured through motions expressly raising the First Amendment – the Diocese did not continue to lodge its constitutional privilege objections at the time of disclosure. However, the Supreme Court of Connecticut, noting the Diocese had not sought to disturb that finding, suggested that the Diocese had inadequately argued the preservation of its constitutional privileges during pretrial discovery following the entry of the protective orders. *Rosado II*, 292 Conn. at 59 n.38. To the extent that the court generally implied that the Diocese had failed to argue its First Amendment privileges before the high court, the Diocese's briefs to that court demonstrate the contrary.[4] The Diocese's opening brief alone argued over the course of several pages, including a section entitled "The Constitutional Privileges," how the Diocese did not waive its constitutional privileges when it relied on the protective orders.

Similarly, the court suggested that at the hearing before Judge Alander, the Diocese had failed to assert that the privileges had been claimed during discovery. *Rosado II*, 292

---

[4] Br. of the Defendants-Appellants Bridgeport Roman Catholic Diocesan Corporation and its Former Officials (May 15, 2007), at 36-37; *see also id*. at 33-34:

> "Three distinct types of constitutionally-protected communications are at issue: *(1) confidential communications made to clergymen*, including communications between priests of the Diocese and their clerical superiors seeking or obtaining counseling or spiritual guidance about their behavior; *(2) documents prepared by Church officials evaluating particular priests for continued service in the ministry or determining their appropriate assignments within the Church*; and *(3) documents reflecting the results of inquiries made by clerical superiors into facts that, in the judgment of the clerical superiors may bear on the fitness of a particular priest for continued service in ministry* or for a particular assignment within the Church. … *The compelled disclosure of such confidential, privileged communications and deliberations would violate the Religion Clauses of the Federal Constitution* …" (emphases added).

Conn. at 59 n.38. Relevant portions of the hearing transcript show, in contrast, that the court deemed the Diocese's discussion of its privileges in its written submissions to suffice. A181 ("I think it's been well covered in your memorandum, the specific privileges that you're claiming and the basis for them.").[5]

Neither Judge Alander nor the Connecticut Supreme Court denied that the First Amendment privileges that the Diocese had allegedly "waived" are valid privileges or otherwise are applicable here. See *Rosado II*, 292 Conn. at 23 n.36 ("Because we conclude that the trial court properly determined that the defendants waived all privileges . . . , we express no opinion as to whether the first amendment affords any such religious privileges.").

The Diocese's timely motion for reconsideration and for reconsideration en banc was denied on June 30, 2009. (Attached as Ex. D).

STANDARDS FOR GRANTING A STAY

The Court or the Circuit Justice may stay the decision or enforcement of a state court pending the filing and disposition of a petition for a writ of certiorari. *See* 28 U.S.C. § 2101(f). In considering whether to issue a stay pending certiorari, the Court considers "whether the applicant has demonstrated '(1) a ***reasonable probability*** that four Justices will

---

[5] Judge Alander did query counsel on whether Judge Levin had rendered privilege determinations, but had ordered disclosure under seal notwithstanding those determinations. A210. Counsel responded that he did not know because he had not "traced that history" but emphasized that "no production was voluntary." *Id.*; *see also* A179. Counsel also urged Judge Alander that privilege determinations would need to be rendered prior to disclosure. A210. *Compare also* A142 ("commend[ing]" Diocese counsel for providing "comprehensive" privilege log in hard copy and CD, "in a form that will ease the burden" on the court) *with Rosado II*, 292 Conn. at 1 n.6 (inexplicably asserting "no index was provided to indicate which Bates number corresponded to a particular document").

consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a ***fair prospect*** that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay.'" *Indiana State Police Pension Trust* v. *Chrysler LLC*, 129 S. Ct. 2275, 2279 (2009) (per curiam) (quoting *Conkright* v. *Frommert*, 129 S. Ct. 1861, 1862 (2009) (Ginsburg, J., in chambers)) (emphasis added). The "fair prospect" test asks whether "plausible arguments exist for reversing the decision below and [whether] there is at least a fair prospect that a majority of the Court may vote to do so." *See California* v. *American Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers). In addition, the Court may consider in a close case whether (4) the balance of the equities justifies a stay. *Chrysler*, 129 S. Ct. at 2276. This application satisfies all four criteria.

THE DIOCESE SATISFIES THE STANDARDS FOR A STAY

I. There Is a "Reasonable Probability" That Certiorari Will Be Granted And A "Fair Prospect" That The Decision Below Will Be Found Erroneous.

The petition will present at least two issues that are worthy of review and that offer at least a fair prospect for rulings in the Diocese's favor. The first concerns the steps a litigant in civil discovery must take to protect its First Amendment privileges from later assertions of knowing, voluntary and intelligent waiver. Here, the Diocese invoked valid First Amendment privileges regarding the privacy of church records and obtained various protective orders treating discovered records as "confidential" and placing them under seal.

The question for this Court to consider will be whether a party that produces such materials to the opposing party in reliance on such protective orders is making a "knowing,"

"voluntary," and "intelligent" or "deliberate" waiver of constitutional rights under the standard established by *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), and its progeny. *See* Sup. Ct. R. 10(c). This Court also will be asked to consider the subsidiary question whether, even if some limited waiver of constitutional privilege could be inferred from complying with protective orders, the Court should adopt the "selective waiver" concept recognized by some courts and allow the party claiming the constitutional privilege to assert it against third parties and the public at large.

The second issue is whether, in defining "judicial documents" for the purpose of determining the scope of the public's presumptive right of access, the Connecticut Supreme Court relied upon an erroneous interpretation of federal law, which has, as the state court acknowledged, produced a split of authority. *See* Sup. Ct. R. 10(b).

These federal issues are substantial.

A. The Connecticut Court's Waiver Holding Conflicts With This Court's Waiver Jurisprudence and Poses an Issue of General Significance.

1. *The First Amendment Prohibits Civil Authority From Intruding Into Internal Church Governance, Including Ministerial Assignments.*

The First Amendment privilege that the Diocese raised and reiterated throughout the litigation, but was later deemed to have waived, is genuine. It rests on the principle that a Church may not be compelled to disclose internal documents relating to hierarchical determinations regarding fitness for ministry.

The Religion Clauses of the First Amendment govern both legislative and judicial action. *See Kreshik* v. *St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 8 (2004). For at least a century, this Court and lower federal courts have insisted that, under the Religion Clauses, courts are forbidden to

"'interfere [] with ecclesiastical hierarchies, church administration, and appointment of clergy.'" *Rweyemamu* v. *Cote*, 520 F.3d 198, 204-05 (2d Cir. 2008) (quoting *Minker* v. *Balt. Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990) (internal quotation marks omitted)); *id.* (surveying roots of "ministerial exception" as encompassing both Free Exercise and Establishment Clause principles).

As this Court explained in one of the leading cases in the field, "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical policy on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Serbian Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 713 (1976). *See, e.g., Petruska* v. *Gannon Uni*v., 462 F.3d 294, 306 (3d Cir. 2006) ("The Free Exercise Clause protects not only the individual's right to believe and profess whatever religious doctrine one desires, but also a religious institution's right to decide matters of faith, doctrine, *and church governance*" (citing *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (emphasis added; additional internal citation omitted)). *See also Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982) (explaining that one of the two "purposes of the First Amendment guarantees relating to religion" was "to foreclose state interference with the practice of religious faiths"); *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971) (First Amendment forbids excessive governmental entanglement with religion).

In particular, a civil court's effort to second-guess a Church's selection of ministers or its evaluation of their fitness for ministry improperly intrudes upon that Church's First Amendment privileges. *See Serbian Orthodox Diocese*, 426 U.S. at 717 ("[Q]uestions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern"); *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) ("[I]t is

the ***function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them***.") (emphasis added); *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871) (affirming state court decision not to involve itself in church's factional dispute); *Rayburn* v. *Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985) ("right to choose ministers without government restriction underlies the well-being of religious communit[ies]."); *McClure* v. *Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972) ("relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.").

The crux of the twenty-three lawsuits here was an effort to hold the Bishops and Diocese tortiously liable for ministry-assignment decisions that occurred after psychiatric evaluation, confession, and assertions of reform and rehabilitation. Catholic doctrine enshrines forgiveness, redemption and rehabilitation; sinners are deemed to be recoverable rather than permanently damned. That tri-fold belief in remorse, redemption, and rehabilitation is necessarily an ingredient in the Diocese's decision-making whether to restore someone to ministry who has either been accused of or found to have engaged in improper conduct. As the Third Circuit has recognized, ministry assignment decisions are fundamentally religious in nature and as such are constitutionally protected:

> "[T]he church as an institution must retain the corollary right to select its voice. A minister is not merely an employee of the church; she is the embodiment of its message.… Accordingly, the process of selecting a minister is *per se* a religious exercise.… Consequently, any restriction on the church's right to choose who will carry its spiritual message necessarily infringes upon its free exercise right to profess its beliefs." *Petruska*, 462 F.3d at 306-307.

Applying negligence theory to a Church's decision-making necessarily but improperly substitutes the judgment of civil jurors for that of Church authorities and requires the jury to re-weigh the factors the Church may apply to assignment for ministry. As one court explained in barring claims of negligent hiring, training and supervision against an Archdiocese in a case alleging a priest's sexual misconduct against a minor,

> "the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices." *Pritzlaff* v. *Archdiocese of Milwaukee*, 194 Wis. 2d 302, 326 (1995).

Civil juries and civil courts are not to be allowed, in retrospect, to conclude that the Diocese's weighing of these factors resulted in a misguided or negligent decision about how to handle the allegations or the individual minister, even if allegations are confirmed. *Cf. Minker*, 894 F.2d at 1360 ("We also agree that any inquiry into the church's reasons for asserting Minker was not suited for a particular pastorship would constitute an excessive entanglement in its affairs."); *Dausch* v. *Ryske*, 1993 WL 34873, at **6-7 (N.D. Ill., Feb. 10, 1993) (same), *aff'd in part*, 52 F.3d 1425, 1431 (7th Cir. 1994).[6]

Because courts lack a legitimate role under the First Amendment in re-examining a Church's employment decisions regarding its ministers, there exist corollary protections against being required to produce documents or testimony that would be germane only to re-examining or second-guessing the supervisory decision. *See NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) ("It is not only the conclusions that may be reached by

---

[6] Of course, the Church's First Amendment right to make these decisions without civil court supervision does not protect individual clergymen from being held *personally* accountable for their own misconduct in violation of facially neutral legislative norms. *See Employment Div., Dept. of Human Res. of Oregon* v. *Smith*, 494 U.S. 872, 885 (1990).

the Board which may impinge on the rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."); *Pritzlaff*, 194 Wis. 2d 302.

The courts, however, have split on these principles. *See, e.g.*, *Malicki* v. *Doe*, 814 So. 2d 347, 353-65 (Fla. 2002) (discussing split in authority); *Roman Catholic Diocese of Jackson* v. *Morrison*, 905 So. 2d 1213, 1224-37 (Miss. 2005) (same); *see also Malicki*, 814 So. 2d at 367-68 (Harding, J., *dissenting*) ("allowing a tort claim for negligent hiring and supervision against the hierarchy of a religious institution would necessarily require a secular court to impermissibly interpret the religious institution's law, policies, and practices"); *Morrison*, 905 So. 2d at 1248-56 (same) (collecting cases) (Smith, C.J., *dissenting*). *Compare Roman Catholic Archbishop of Los Angeles* v. *Super. Ct.*, 131 Cal. App. 4th 417, 439 (2005) (confidential grand jury proceedings). One of the trial judges here rejected the Diocese's argument that the First Amendment bars a claim against a Church for negligent supervision or retention, but expressly recognized a split in authority on this question. *See Rosado* v. *Bridgeport Diocesan Corp.*, 716 A.2d 967, 969-71 (Conn. Super. Ct. 1998).

As that decision illustrates, the Diocese actively pressed its First Amendment arguments both as a basis for contesting the plaintiffs' legal theory of liability and as a basis for seeking protective orders precluding or limiting disclosure of confidential Church deliberations.

2. *The Standard That the Connecticut Supreme Court Established For Waiver of Federal Privileges Conflicts With The* *<u>Johnson</u>* <u>v.</u> *<u>Zerbst</u>* *Standard.*

In ordering the confidential materials disclosed to the public, neither Judge Alander nor the Connecticut Supreme Court questioned the validity of the First Amendment privilege, relying instead on a far too sweeping concept of "waiver." The "question of a

waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law." *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966). This Court has long required a stringent standard before a state court may find a waiver of federal constitutional rights, even in civil cases: there must be "an ***intentional*** relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added). "Courts should 'indulge in every reasonable presumption against waiver.'" *Barker* v. *Wingo*, 407 U.S. 514, 525 (1972) (quoting *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937)); *accord*, *College Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *Fuentes* v. *Shevin*, 407 U.S. 67, 94, n.31 (1972). The Connecticut Supreme Court's waiver holding upends that standard. Moreover, its waiver holding implies broad-reaching consequences for the administration of justice in both federal and state courts.

Here, the Diocese asserted and preserved its First Amendment privileges. The Diocese timely objected to discovery requests, timely raised the relevant constitutional objections in its motions for protective orders, and successfully persuaded the trial court to provide the shelter of protective and sealing orders in response to specific deposition notices and document production requests. Any document to be filed with the court was to be marked with conspicuous warnings about its privileged status as "CONFIDENTIAL: SUBJECT TO COURT ORDER." As contemplated by the text of the orders, any documents marked in this fashion would not be released publicly absent additional review by the court. Two additional trial court judges agreed to protect the Diocese's confidential materials in this fashion. The Diocese's subsequent participation in discovery occurred within this protective architecture.

Years later, however, a different Superior Court judge suggested that, after obtaining the protective orders, the Diocese was not acting "under the compulsion of a court order" when it produced the materials under seal and "waived" its constitutional privileges by failing to raise its constitutional privilege objections (again) at the time of production under seal. *Rosado*, 2006 WL 3756521, at *11. *See also Rosado II*, 292 Conn. at 55-57 (affirming Superior Court's waiver holding).

The conclusion that these circumstances show that the Diocese "voluntarily" produced privileged documents and testimony "without objection" cannot be squared with the controlling federal standard. The federal standard for finding waiver cannot be so lax that it requires a litigant to continue to refuse to comply with the discovery request, even after the litigant successfully seeks a court's protection and obtains protective orders sealing the materials against any further dissemination to third parties. *Cf. SEC* v. *Lavin*, 111 F.3d 921, 930-31 (D.C. Cir. 1997) (holding no waiver, where respondent and his wife took "all reasonable steps" to protect marital privileged conversations from disclosure by objecting to delivery of taped conversations to regulator, obtaining process where the couple would have opportunity to object to tapes' use, reconfirming privilege assertion against third party); *Shields* v. *Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989) (holding no waiver when attorneys in prior litigation "asserted the privileged character of their work product at every opportunity before the California court," "objected to any disclosure" to the privileged survey, and "disclosed the survey under compulsion by the court, not voluntarily."); *but cf. Frazer* v. *United States*, 145 F.2d 139, 144 (6th Cir. 1944) (holding husband who "declined the hazard" of contempt waived privilege).

Moreover, the operative presumption in the face of any ambiguity is against waiver. *Emspak* v. *United States*, 349 U.S. 190, 195-97 (1955); *D.G. Acquisition Corp.* v. *Dabah*, 151 F.3d 75, 81 (2d Cir. 1998); Paul Rice, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, § 10:1 (2d ed. 2007) (observing that, if attorney-client privilege should "ever be recognized as a *constitutional* right, the standard for waiver would change dramatically" (citing *Zerbst*) (emphasis added)).

Producing the confidential material under the terms of the protective orders could not satisfy this Court's "intentional" waiver standard. Under the protective orders, the Diocese was entitled to preserve the confidential status of documents, *even at or beyond trial*, by marking the documents "CONFIDENTIAL: SUBJECT TO COURT ORDER." Then, if a plaintiff wanted to use the document publicly, the plaintiff would have had to submit the document to "the court for review and appropriate order *before* being released from the protection afforded by this order." *See Rosado II*, 292 Conn. at 31 (protective order) (emphasis added). Thus, even if the cases had progressed to trial, the protective orders expressly contemplated that public disclosure of privileged documents could not occur absent the trial court's permission. As even Judge Alander acknowledged: "Rather, some affirmative step needed to be taken by Judge Levin before the protective order ended or before any documents were released from its protection." *Rosado*, 2006 WL 3756521, at *2.

Built into the contemplated review process was the assumption that the Diocese would have been able to invoke its privileges *at that later point* – to oppose any proposed use that would expose its confidential documents to the public at a trial. If the act of producing the documents to the plaintiffs under the protective orders had constituted a "waiver" of the privileges, there would have been no reason to require court review before the sealed

documents could be used at trial and made public. Because the orders necessarily assumed that the Diocese would not be waiving its privileges *even as against the plaintiffs*, who actually would receive the documents subject to stringent limitations, the Diocese could not have *intentionally* waived the privileges *as against the strangers to the litigation* when it complied with the protective orders.

Under the Connecticut court's decision, however, reliance on the terms of the protective orders was illusory, and adherence to the process that the three trial judges had crafted amounted effectively to an intentional waiver of the privileges. *See Rosado II*, 292 Conn. at 60. The Connecticut court necessarily holds that, to protect its federal constitutional privileges after securing a protective order, the Diocese should have nonetheless refused to produce the information pursuant the orders' terms and gone into contempt. That notion is fundamentally at odds with this Court's standards for finding a waiver of federal constitutional rights. *See Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 145 (1967) ("Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling."); *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007) ("When First Amendment rights are at issue, the evidence must be clear and compelling that such rights were waived." (internal citations and quotation marks omitted)). It is important to the administration of justice for the Court to determine that a litigant producing privileged material under a protective order does not forfeit a constitutional privilege by declining to go into contempt.

3. *The Subsidiary "Selective Waiver" Question is Likewise of Substantial Federal Importance.*

There is also an important, related question: whether "selective waiver" is a valid mechanism for protecting constitutional privileges against unnecessarily broad waivers. If the Diocese in some sense "waived" its right to the absolute confidentiality of its internal deliberations by disclosing them to several lawyers and adverse claimants under stringent judicial protections forbidding any further dissemination to third parties, was it "intentionally" abandoning its right to shield this confidential information from the world at large? There is no rational basis for that conclusion, and nothing in this Court's waiver jurisprudence justifies it.

The "selective waiver" principle recognized by some courts avoids the overbreadth of this kind of waiver inference. *See, e.g.*, *Dellwood Farms, Inc.* v. *Cargill, Inc.*, 128 F.3d 1122, 1124 (7th Cir. 1997) (applying "selective waiver" rule in civil litigation following earlier disclosure of privileged material to another adversary and sustaining privilege); *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc) (same). Other courts, however, refuse to recognize this doctrine, although for conflicting reasons. *See, e.g.*, *In re Qwest Communications Int'l, Inc.*, 450 F.3d 1179, 1186-1201 (10th Cir. 2006); *Permian Corp.* v. *United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981). As another circuit has recognized, selective-waiver case law is beset by "hopeless confusion." *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295 (6th Cir. 2002).

The court below aligned itself with the courts that refuse to recognize this sensible way to avoid the dilemma of forcing a choice between complete obduracy and unlimited waiver of an otherwise valid privilege. *Rosado II*, 292 Conn. at 60-61 (citing D.C. Circuit in

Permian, 665 F.2d at 1220-21) (rejecting selective waiver where party had made affirmative disclosure of privileged material to achieve tactical advantage in earlier proceeding).

Here, the Diocese has asserted its constitutional privileges against all who have sought to pry open its evaluations of fitness for ministry. It did not volunteer to produce this material selectively to some of the plaintiffs in the twenty-three actions while withholding it from others. It was hardly in the Diocese's tactical interests to comply with these discovery demands, and it resisted doing so. Instead, the Diocese merely complied with court orders that treated all plaintiffs equally, both in allowing pre-trial examination and in forbidding *any further* dissemination. There is no basis to conclude that this limited and secure disclosure automatically – and "intentionally" – forfeited the right to keep the Diocese's private records off the front pages of the tabloids.

Moreover, even the D.C. Circuit in *Permian* explained that part of its rationale for rejecting "selective waiver" in the attorney-client privilege context was the narrow construction given to such *evidentiary* privileges. *Permian*, 665 F.2d at 1221. As explained above, however, the opposite presumption applies when a court is called upon to protect federal *constitutional* privileges, because courts "should 'indulge in every reasonable presumption against waiver.'" *Barker*, 407 U.S. at 525 (quoting *Aetna Ins. Co.*, 301 U.S. at 393). Therefore, even if the Diocese's actions waived its right to absolute confidentiality, by providing restricted access to a small number of persons to whom the documents were disclosed under seal, this Court should consider whether federal and state courts must preserve as much of the constitutional privilege as possible by recognizing and applying the "selective waiver" doctrine.

4. *The Waiver Determinations Threaten Serious Consequences for the Administration of Justice.*

The Connecticut court's waiver determination promises to provoke disruption in the administration of justice. Litigants will find themselves forced to challenge discovery orders that otherwise seem to protect their privacy interests rather than participate in a discovery process that – like this one – may lead the parties to resolve their underlying dispute without resort to a trial. In the context of federal constitutional privileges, protective orders will no longer be a reliable tool to limit the scope of discovery. This will increase the incentive for parties to take all-or-nothing positions with respect to privileged matters, rather than seeking reasonable alternative mechanisms of restricted discovery under the shield of a protective order.

In addition, the Connecticut court's holding sharply reduces settlement incentives for those litigating in the context of sensitive information subject to federal constitutional privileges. As the dissenting Justice of the Connecticut Supreme Court observed, the Diocese settled the cases before reaching trial in reasonable reliance on the permanence of the confidentiality protections.

> "The majority's decision is inconsistent with the strong public policy favoring pretrial resolution of disputes because parties to future cases will be subject to the risk of such publicity regardless of whether they settle a case and, therefore, they will have a reduced incentive to settle." *Rosado II*, 292 Conn. at 84 (Sullivan, C.J., *dissenting*).

There is, in sum, a reasonable probability that four justices will vote to grant certiorari on this issue, and a fair prospect that Applicants will prevail on the merits.

B. The Courts Are Split on the Definition of "Judicial Documents."

A reasonable probability also exists that this Court will grant certiorari to resolve the split in authority on the appropriate definition of the "judicial document" concept, to which the limited presumption of public access applies. The Connecticut Supreme Court has erroneously relied on a misinterpretation of federal law to define "judicial documents" broadly as "those filed with the court upon which the court reasonably could rely in the performance of its adjudicatory function, including discovery related motions and their associated exhibits." *Rosado II*, 292 Conn. at 47-48. Other courts follow a narrower view more consistent with the underpinnings of this doctrine.

1. *The Federal Common Law Presumption of Public Access.*

In *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597 (1978), this Court recognized a federal right "to inspect and copy public records and documents." *See San Jose Mercury News, Inc.* v. *U.S. Dist. Court-Northern Dist. (San Jose*), 187 F.3d 1096, 1102 (9th Cir. 1999). The common law presumption of public access to court proceedings predates the adoption of the Federal Constitution and derives from the centuries-old practice of open trials. *See Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 564-73 (1980) (plurality). This Court has extended the presumption to various court documents in the criminal context, *see, e.g., Press-Enterprise Co.* v. *Super. Ct. of California*, 464 U.S. 501 (1984) ("Press-Enterprise I") (transcript of *voir dire* proceedings), and federal and state appellate courts across the country have extended the presumption to assorted court documents in the civil context. *San Jose Mercury News*, 187 F.3d at 1102.

As the Supreme Court of Connecticut itself acknowledged, the presumption's central concern is to permit the public to assess whether ***the judicial process*** functions properly.

Rosado II, 292 Conn. at 34-35. The purpose of the presumptive right of public access is to enable the public to have enough access to judicial proceedings to evaluate how ***the courts*** are performing their important adjudicative role. *See Chicago Tribune Co.* v. *Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001).

The presumption is not absolute. When countervailing considerations outweigh the public's interest in monitoring judicial proceedings, the court may properly refuse public access. *See Nixon*, 435 U.S. at 598 (explaining common law right permitting public inspection of court records may give way to court's "supervisory power over its own records and files" when "court files might have become a vehicle for improper purposes" such as "to promote public scandal"); *San Jose Mercury News*, 187 F.3d at 1102. In particular, the presumptive right of access was never understood as a vehicle for salacious inquiry into individual litigants' private matters. As one court explained,

> "Public access to discovery materials … would focus attention not at all on the courts, but solely on the presumptively private affairs of the parties. * * * [T]he right of access is grounded primarily in the need for scrutiny of the legal process, not simply in the public's desire to learn more about the deeds and misdeeds of the parties." *Mokhiber* v. *Davis*, 537 A.2d 1100, 1110 (D.C. 1988).

See also United States v. *Amodeo*, 71 F.3d 1044, 1048-49 (2d Cir. 1995) ("Amodeo II") ("Unlimited access to every item turned up in the course of litigation would be unthinkable. Reputations would be impaired, personal relationships ruined, and businesses destroyed on the basis of misleading or downright false information.").

2. *The First Amendment Codification of the Common Law Presumption.*

The First Amendment was "enacted against the backdrop of the long history of trials being presumptively open." *Richmond Newspapers*, 448 U.S. at 575. This Court has derived

a qualified constitutional right of access to certain public proceedings from the First Amendment itself, a right that broadly overlaps with the common law presumption. *Press-Enterprise Co.* v. *Super. Ct. of California*, 478 U.S. 1 (1986) ("Press-Enterprise II") (addressing First Amendment right of access to preliminary hearing transcript). As a result, the First Amendment effectively codified and guaranteed whatever the traditional common law originally required as a matter of presumptive public access. *See Globe Newspaper Co.* v. *Super. Ct. for the City of Norfolk*, 457 U.S. 596, 604 (1982). *See also In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1339 (D.C. Cir. 1985) (Scalia, J.) (noting that "[t]o the extent a First Amendment right to post-judgment civil records exists, it does not exceed … the traditional common law right.").

When determining whether the First Amendment extends to new kinds of proceedings or procedures that were unknown at common law, the Court reasons by analogy to determine whether the essential rationale underlying the public access to the courts' activities requires opening the new proceedings. *Press-Enterprise II*, 478 U.S. at 8. *See North Jersey Media Group, Inc.* v. *Ashcroft*, 308 F.3d 198, 204-05, 211-15 (3d Cir. 2002); *Anderson* v. *Cryovac, Inc.*, 805 F.2d 1, 11-12 (1st Cir. 1986); *Reporters Committee*, 773 F.2d at 1332-38 (Scalia, J.) (surveying historic practices regarding prejudgment access and concluding that the First Amendment does not compel public access to pretrial or prejudgment matters). *See also Chicago Tribune*, 263 F.3d at 1310 ("Materials merely gathered as the result of the civil discovery process … do not fall within the scope of the constitutional right of access's compelling interest standard." (internal citations and footnote omitted)).

At bottom, it appears that this Court has held that a court's determination that the common law required some particular form or scope of access means that the First

Amendment also guarantees such access. *See Lugosch* v. *Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006). *Compare Reporters Committee*, 773 F.2d at 1336 (Scalia, J.) (arguing common law tradition of access did not extend to pre-judgment matters), *with id.* (Wright, J., concurring in part and dissenting in part) (arguing historic tradition of access extended to trial-related matters, not just judgments).

3. *Conflict in the Courts on the Definition of Judicial Documents.*

Public access to documents, either at common law or as a matter of constitutional guarantee, depends on the threshold question whether the documents are "judicial documents." *See Lugosch*, 435 F.3d at 119-20. This case frames the question that has divided federal and state appellate courts: What is the scope of this concept of "judicial documents" and how is the presumption of public access to be applied?

This Court has never squarely addressed the type of "judicial document" to which the presumption attaches in a civil dispute between private litigants. *Compare Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 33 (1984) (analyzing whether court order precluding litigant's dissemination of discovery materials was an improper prior restraint, noting "pretrial depositions and interrogatories are not public components of a civil trial" as such proceedings "were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice" (internal citations omitted)).

As the Supreme Court of Connecticut recognized here, courts have divided on how to define "judicial documents." *Rosado II*, 292 Conn. at 38-45 (describing a three-way split in authorities). Some have limited the documents to "materials on which a court [*actually*] *relies* in determining the litigant's *substantive* rights," *Cryovak*, 805 F.2d at 13 (citing

Reporter's Committee, 773 F.2d at 1340) (emphasis added); *accord Federal Trade Comm'n* v. *Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408-09 (1st Cir. 1987).

Other courts, including the court below, view as judicial documents all documents "that *reasonably may be relied upon* in support of *any part* of the court's adjudicatory function." *Rosado II*, 292 Conn. at 39-40 (emphasis added). For example, this approach accords "judicial record" status to those discovery materials attached to discovery-related pretrial motions, or even requests for procedural orders. *Rosado II*, 292 Conn. at 47 ("[A]mong the courts following the majority rule, there is a split as to whether discovery related motions and their associated exhibits should be considered judicial documents"). *Compare Mokhiber*, 537 A.2d at 1111 (holding presumptive right of public access applies to discovery motions and attached materials), *with Chicago Tribune*, 263 F.3d at 1312 (rejecting presumptive right of access in material filed with discovery motions, but holding "discovery material filed in connection with pretrial motions that require judicial resolution of the merits" is subject to presumptive right of access), *and Reporter's Committee*, 773 F.2d at 1338 (Scalia, J.) ("We are certainly unaware of any tradition of public access (pre- or post-judgment) to all documents consulted (or, as appellants would have it, consultable) by a court in ruling on pre-trial motions."). The court below identified a third set of authorities that purport to attach the public right of access to *every* document filed with a court. *See, e.g., Leucadia, Inc.* v. *Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161-62 (3d Cir. 1993).

Here, the Supreme Court of Connecticut deemed to be "judicial records" a vast volume of documents filed under seal, some that had been filed in connection with motions *in limine*, others with discovery-related motions, and others in connection with the motions for summary judgment that were later denied.

In light of the conflict among federal and state appellate courts, *see* Sup. Ct. R. 10(b), there is a reasonable probability that four Justices of this Court will grant certiorari to resolve the question whether the presumptive right of access under the common law and First Amendment extends to all documents submitted to a court in connection with any request for any judicial ruling, regardless of how resolved, and regardless of whether access to the documents has any bearing on the public's ability to evaluate judicial performance. Because of the breadth of the Connecticut court's definition of "judicial documents," there is at least a fair prospect for reversal.

4. *This Court's Jurisdiction Over The "Judicial Documents" Question Under 28 U.S.C. § 1257.*

This Court has multiple bases of jurisdiction under 28 U.S.C. § 1257 to review the Connecticut Supreme Court's definition and application of the "judicial documents" doctrine. For example, this Court possesses § 1257 jurisdiction when a "state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 467 U.S. 150, 152 (1984); *see Ohio* v. *Robinette*, 519 U.S. 33, 37 (1996); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). Several aspects of the Connecticut Supreme Court's analysis are inextricably intertwined with federal law – both First Amendment principles and federal common law.

First, as discussed *supra*, it appears that this Court has concluded that, if the common law historically required certain proceedings to be open to public examination, the First Amendment codified and preserved that traditional requirement. Thus, a determination by a state court about what the "common law" requires necessarily implicates the First

Amendment, at least where, as here, the state court relied on its understanding of traditional common law requirements rather than some state-specific enlargement of the common law. *Cf. Reporter's Committee*, 773 F.2d at 1339 (Scalia, J.) (noting that to "the extent a First Amendment right to post-judgment civil records exists, it does not exceed … the traditional common law right"). The Connecticut Supreme Court expressly acknowledged the overlap between the common law and the First Amendment on this question. *See Rosado I*, 276 Conn. at 216-17 ("'[t]he public has a common law presumptive right of access to [judicial] documents … *and likely a constitutional one as well*'" (emphasis added) (quoting *Gambale* v. *Deutche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004)). The court linked this doctrine to "'values protected by the free-speech and free-press clauses of the First Amendment'" 276 Conn. at 17 (quoting *Jessup* v. *Luther*, 277 F.3d 926, 927-28 (7th Cir. 2002)).

Indeed, the respondent Newspapers themselves relied on overlap between the common law and the First Amendment in their briefs before the Supreme Court of Connecticut, arguing that "the public has a presumptive right of access to court proceedings and documents, a right that traces its roots to the first amendment." Br. of Intervenors-Appellees, at 20 (July 23, 2007) (citing *Hartford Courant Co.* v. *Pellegrino*, 380 F.3d 83, 91-93 (2d Cir. 2004)); *see also* Intervenors' Motion to Access Court Documents or Vacate Protective Orders, ¶ 2 (moving to intervene to obtain access to sealed documents pursuant to "the Connecticut Rules of Court, the common law, and the First Amendment of the United States Constitution.").[7]

---

[7] Inexplicably, despite the Newspapers' express and repeated reliance upon the First Amendment as a basis for accessing the sealed documents, the Connecticut court stated in a footnote that the Newspapers "did not assert any first amendment right of access to the
(continued next page)

This Court also has jurisdiction because, in attempting to ascertain the scope of the "common law" presumption of public access, the Connecticut Supreme Court relied almost entirely upon federal appellate court precedents construing the First Amendment or federal common law. *See Robinette*, 519 U.S. at 37 (sustaining jurisdiction over case purportedly construing the Ohio constitution, where state court cited almost exclusively to federal cases).

In addition, the Connecticut Supreme Court's construction of its procedural rule is wholly bound up in federal jurisprudence. The court held that Connecticut Practice Book § 11-20A "codifies the common-law presumption of public access to judicial documents." *Rosado II*, 292 Conn. at 46. The drafters of § 11-20A expressly invoked this Court's decision in *Nixon* v. *Warner Communications, Inc.* and the First Amendment analysis in the Third Circuit's opinion in *Publicker* v. *Cohen*, 733 F.2d 1059, 1070-71 (3d Cir. 1984), to support the proposition that "[t]he public and press enjoy a right of access to attend trials in civil as well as criminal cases." Conn. Prac. Book. § 11-20A Commentary (2003). The Commentary collects federal authorities construing both the common law and the First Amendment as the basis for construing the procedural rule. *See* Conn. Prac. Book. § 42-49A Commentary (2003) (cited in Commentary to § 11-20A) (right of access "is well settled in the common law *and has been held to be implicit in the first amendment rights* of protecting the freedom of speech, of the press, of peaceable assembly and to petition the government for a redress of grievances") (emphasis added) (citing this Court's decisions in *Globe Newspapers*, *Richmond Newspapers* and *Press-Enterprise II*)).

---

documents in question," and thus purported to "confine" its analysis to the state rules of practice "in light of the common law." *Rosado II*, 292 Conn. at 29 n. 22.

Because the Connecticut Supreme Court relied on a practice rule that expressly adopts federal common law and First Amendment principles, this Court has authority to settle the confusion in the courts about the correct reach of the "judicial documents" doctrine in civil cases.

II. Applicants Will Suffer Irreparable Harm If A Stay Is Denied, And The Balance Of The Equities Favors A Stay.

Once the trial court unseals the documents upon remand, the respondent Newspapers have declared that they will disseminate their contents. The harm to the Diocese will be irreparable. Once the confidential information is released, the Diocese will have no way to "un-ring the bell."

Absent a stay, moreover, disclosure will likely occur before this Court conferences on the question of whether to grant review. The Diocese anticipates that the Newspapers, in opposing the Diocese's petition, will argue that disclosure renders the Diocese's petition moot. While the Diocese does not concede that disclosure will moot the case, potential deprivation of this Court's jurisdiction is a further reason to grant a stay.

Finally, the balance of the equities favors a stay. The Connecticut trial courts entered the earliest sealing order more than fifteen years ago, amidst wide news coverage by the very Newspapers that now seek access to the sealed materials. Yet the Newspapers took no action to seek access to the sealed documents at that time, nor did they attempt to obtain access during the following *seven years* before the cases settled. Still another year elapsed and the Newspapers took no action manifesting any urgent need – or indeed, any need at all – to pursue access to the sealed documents.

The purpose of the presumptive right of public access is to permit the public to monitor *judicial* performance, *see supra* p. 25-26. Some of the judges who were involved in the pre-settlement proceedings in these cases ten or fifteen years ago are no longer even on the bench. The Newspapers cannot credibly claim that a need exists for *immediate* access to these records so the public may evaluate *judicial performance* that occurred *over a decade ago*, or that the Newspapers have any interest at all in obtaining the records for the sole purpose for which the constitutional and common law presumptive right of access exists.[8]

This Court has held that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel* v. *Rusk*, 381 U.S. 1, 16-17 (1965). Nor does the First Amendment guarantee the press unique access to information unavailable to the public at large. *Houchins* v. *KQED*, 438 U.S. 1, 14-16 (1978). The "judicial records" doctrine is not, and never has been, intended as a constitutional or common law right to gather information for investigative journalism into the activities of *private* litigants. The documents relate to events that occurred over three or four decades ago. None of the clerical superiors whose decisions were at issue in the original cases have been in office for years.

In sum, a stay will assure that the Court has sufficient time to evaluate the certiorari petition. The Newspapers cannot claim, with a straight face, that the public must have access to the sealed material urgently, to evaluate the way the Connecticut trial judges supervised these cases ten or fifteen years ago (or even to see *immediately* how clerical superiors

[8] At least one respondent, the *Hartford Courant*, has unclean hands, having explicitly boasted that it based its 2002 articles on its illegal access to sealed files. Only after the *Courant* violated the sealing orders did the competing Newspapers seek to obtain access to the documents through an "emergency" motion. Beyond their laxity in waiting so long, the Newspapers' disrespect for judicial authority is another factor tipping the balance of the equities firmly in the Diocese's favor.

evaluated priests decades ago), and that allowing the Court adequate time to consider the petition would be intolerable.

CONCLUSION

Applicants respectfully requests entry of an order extending the interim stay preserving the *status quo* pending the filing and disposition of a petition for a writ of certiorari, by staying the execution of the Connecticut Supreme Court's June 2, 2009, decision affirming, as modified, the Superior Court's December 6, 2006, order to vacate the protective orders and to grant access to sealed documents in the trial court's custody.

Respectfully submitted.

PHILIP ALLEN LACOVARA
Counsel of Record
HANNAH Y.S. CHANOINE
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

RALPH W. JOHNSON III
Halloran & Sage LLP
One Goodwin Square
225 Asylum Street
Hartford, CT 06103
(860) 522-6103
Counsel for Applicants

August 6, 2009