No. 09A-140

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

REPLY IN SUPPORT OF APPLICATION TO EXTEND STAY

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

The Diocese submits this Reply in support of its Application 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.

INTRODUCTION

The Newspapers ignore two key facts showing why a limited stay should issue to preserve the *status quo* while this Court considers the Diocese's petition for certiorari. First, the Newspapers fail to acknowledge that, absent a stay, the lower court may release the documents before this Court can determine whether the issues warrant certiorari review. While the Diocese does not concede that disclosure would moot the issues, the threat that a short lapse of time could effectively deprive this Court of jurisdiction is a ground to issue a stay, especially where, as here, the proposed petition is neither frivolous nor insubstantial.

Second, the Newspapers' efforts to blame the Diocese for the delay in public disclosure obscures their own dilatory behavior. They hovered on the sidelines of this litigation for nearly a decade – all the while reporting on the underlying cases and complaining of the protective orders – but they made no effort to seek immediate access to the documents for the reasons they assert now. Indeed, they waited until fully a year after the Diocese had settled the cases (in reasonable reliance on the continuing confidentiality of the documents). The dissents in both decisions of the Connecticut Supreme Court demonstrate that the Diocese raised substantial objections to the Newspapers' belated contentions. The Newspapers cannot be heard now to blame the Diocese for "delay." They cannot credibly contend that there now is an imperative need for immediate disclosure of

these stale documents and that preserving the *status quo* for a few additional weeks to enable the full Court to consider the certiorari petition would irreparably injure them or the public.

As discussed below, the bulk of the Newspapers' arguments in opposition to extending the stay lack merit, and only reinforce the reasons why an order should issue to preserve the *status quo* until this Court concludes its review of the petition for certiorari.

ARGUMENT

I. The Diocese Reasonably Relied On The Protective Orders As Preserving The Right To Invoke The Constitutional Privileges During Later Review Of Any Application To Unseal The Confidential Materials.

The Newspapers assert that (i) the protective orders were granted solely to protect the Diocese's fair trial rights (Opp 1-2), and (ii) the Diocese did not reasonably rely on the protective orders in settling, because the orders were subject to revision (Opp. 10-11).

A. Protecting The Diocese's Fair Trial Rights Was Not The Only Purpose Of Judge Levin's Orders.

The Newspapers assert that the documents "were sealed for one specific and temporary purpose: to protect the Diocese's fair trial rights." Opp. 1, 8-10. In their description of the procedural history behind the protective orders, however, the Newspapers selectively omit a key fact: that the Diocese raised First Amendment grounds as one of *three* bases for a protective order. *Compare* Opp. 8-9 ("The *Rosado* defendants sought the protective order on <u>two</u> grounds": reputational harm in connection with the Diocese's religious mission, and fair trial rights (emphasis added)), *with* App. 4-5 (quoting extensively from Diocese's First Amendment arguments in its memoranda submitted in support of its motions for protective orders). *See also infra* at 3-4. Thus, the assertion that the protective

orders did not preserve the Diocese's First Amendment privilege claim after the cases settled without trial rests on a false premise.

Indeed, even Judge Alander rejected the Newspapers' argument that the protective orders expired once the cases settled. See *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp*., 2006 WL 3756521, at **2-3 (Conn. Super. Ct. Dec. 6, 2006). As former Chief Justice Sullivan explained, after analyzing the structure and content of the protective orders: "the trial court, *Levin, J*., clearly recognized that there might be considerations other than ensuring the defendants' right to a fair trial that would justify sealing some of the documents permanently." *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 34-35 (2009) ("Rosado II") (Sullivan, J. *dissenting*).

B. The Diocese's First Amendment Objections Extended Beyond Documents That The Diocese Was Not Required To Produce.

The Newspapers also assert that the Diocese's First Amendment objections did not extend to the materials actually disclosed to the plaintiffs pursuant to the protective orders. They assert that, because Judge Levin granted the Diocese's motion to exclude materials concerning certain non-party priests, the objections extended only to those documents that "did not become part of the court file," Opp. 4. That contention, too, is false. As shown by the Diocese's brief supporting its motion for protective order, the Diocese claimed First Amendment privilege for what turned out to be hundreds of internal church documents actually produced under the protective order, as well as the depositions of two Bishops taken under that protection. Specifically, the Memorandum stated:

> "Federal Constitutional rules relating to freedom of religion limit the permissible scope of this Court's inquiry into the Diocese's personnel decisions relating to its ordained clergy. Excessive judicial intervention

> into such priest personnel decisions could cause this Court to become excessively entangled in the internal affairs of the Roman Catholic Church. Such excessive entanglement is prohibited by the free exercise clause of the religion clause of the First Amendment to the United States Constitution. [citations omitted] Thus, much priest personnel information obtained through those requested depositions may not be admissible into evidence during the trial of this lawsuit. Any such potentially inadmissible information should certainly not be disseminated to non-parties."

See Memorandum Of Law Filed By The Defendants Bishop Walter Curtis et al In Support Of Their Motion For Protective Order Regarding The Use And Dissemination of Discovery Information Obtained Through Depositions Of Bishop Curtis And Bishop Edward M. Egan (Sec. 4 - The Right to the Free Exercise of Religion) (Sept. 14, 1994) (A1732-1733).

C. Any Ambiguity In Judge Levin's Original Opinion Must Be Resolved Against Constitutional Waiver.

The Newspapers emphasize the Supreme Court of Connecticut's *dicta* that, if the Diocese "had intended to pursue claims of privilege that were not addressed by the trial court, it was their responsibility to move for an articulation to clarify the basis of the trial court's ruling or to ask for a ruling on any overlooked matter." Opp. 4-5, 14 (quoting *Rosado II*, 292 Conn. at 25 n.38). This statement exemplifies how the lower court got the federal constitutional waiver standard backwards. In the context of constitutional privileges, the operative presumption in the face of 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).

The protective orders themselves expressly contemplated a deferred privilege review process that would occur no later than jury selection. *See* App. 5-6, (A867-57); Opp. 9-10. Any uncertainty about whether the Diocese's participation in sharply circumscribed

discovery under this process deliberately and intentionally "waived" its expressly-asserted privileges must resolved by the presumption against waiver of federal constitutional rights.

D. The Diocese Reasonably Relied On The Promise Of A Deferred Privilege Review Process Embedded In The Protective Orders.

At minimum, the protective orders guaranteed a procedure where the Diocese would be permitted an opportunity (to occur no later than jury selection) to persuade the trial judges, document by document, that *public* disclosure of the discovery materials would violate the Diocese's core First Amendment rights. This procedure never occurred because the cases settled before trial. *See generally Rosado II*, 292 Conn. at 34-35 (Sullivan, J. *dissenting*) (explaining that the majority's inference of *unreasonable* reliance on the protective orders was unsound, because "rather than clearly and expressly providing that the sealing orders were temporary, the sealing orders clearly and expressly provided, at least with respect to the marked documents, that no determination as to their temporal duration had yet been made").

The Newspapers argue that the Diocese's reliance on the continuing confidentiality of these protective orders was "unreasonable" simply because the orders were subject to revision. Opp. 10-11. This assertion suggests the question to be presented by the Diocese's petition for certiorari:

> Does a litigant, particularly a Church, "deliberately abandon" a constitutional privilege against general public dissemination of internal documents when it produces them under seal, simply because the court (1) reserves the power to render privilege determinations at a later point and (2) reserves the power to modify the protective/sealing order?

As a matter of law, such reliance cannot be termed "unreasonable," since the rule established by the court below sweeps aside otherwise valid constitutional privileges that the

litigant *actually* believed that it was preserving. Such a rule contradicts this Court's repeated insistence that constitutional privileges are waived only by deliberate, knowing, and intelligent decisions to abandon them. By contrast, as the Newspapers' arguments show, the decision below imposes a forfeiture of constitutional privileges unless the party asserting the privilege goes into contempt rather than relying on the benefit of the protective order that it obtained to protect the privilege. Protective orders generally permit a party the opportunity to contest any subsequent attempt to modify the protective order – the very right that the Connecticut Supreme Court denied the Diocese when the Newspapers sought to modify the orders.

II. The Newspapers Sidestep The Constitutional Waiver Question That The Diocese Will Present To This Court For Review.

The Newspapers contend that, because the Diocese produced various documents under the cloak of the protective orders (after lodging Religion Clauses objections to discovery), the Diocese "failed to carry its burden of demonstrating that it had raised a First Amendment objection to the documents it produced to the plaintiffs." Opp. 4. But the Diocese has not disputed that, *after* obtaining the protective orders, the Diocese did not continually reassert the First Amendment objections at each point of discovery disclosure. *See* App. 10. Nor was their any need to do so.

The Newspapers' position begs the precise question to be presented to this Court: whether the lower court dismissed the Diocese's constitutional objections too easily by holding that the Diocese "waived" its constitutional rights, where the Diocese disclosed documents and testimony relying on a future privilege review procedure described in the protective orders. *Compare United States* v. *Kordel*, 397 U.S. 1, 7-10 (1970) (cited at Opp.

5, 15) (corporate officer waived right against self incrimination when answering government interrogatories on corporation's behalf when he failed to invoke his Fifth Amendment privilege "*at any time*" (emphasis added)).

The holder of a privilege "does not 'voluntarily' disclose privileged matter when she does so pursuant to judicial compulsion …. [D]isclosure is 'voluntary' [only] if the privilege is not asserted." 26A Charles Wright, FEDERAL PRACTICE AND PROCEDURE § 5026 (1992).

The Newspapers rely on cases holding that, under some circumstances, there may be no right of immediate appeal from an order to produce privileged documents, unless the party goes into contempt. These cases are beside the point. They turn on questions of "finality" for purposes of appellate jurisdiction.[3] They do not suggest that compliance with discovery under a protective order absolutely *waives* the privilege claims as against third parties. *See, e.g.*, *United States* v. *Ryan*, 402 U.S. 530, 532-33, 532 n.3 (1971) (witness could not immediately appeal objection to subpoena *duces tecum*, unless he went into contempt, but "may still object to the introduction of the subpoenaed material or its fruits against him at a criminal trial," without discussion of waiver of constitutional privileges).

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[3] *See United States Catholic Conference* v. *Abortion Rights Mobilization, Inc*. 487 U.S. 72, 76 (1988) (discussing appealability of non-party's contempt citation in case addressing whether non-parties may challenge court's subject matter jurisdiction to issue third-party subpoena; no issue of "waiver" presented); *Cobbledick* v. *United States*, 309 U.S. 323, 325, 328 (1940) (determining whether order denying motion to quash subpoena *duces tecum* directing witness to appear before grand jury is an appealable "final decision," without discussion of waiver of constitutional privileges); *Alexander* v. *United States*, 201 U.S. 117, 121-22 (1906) (discussing nature of appellate jurisdiction when witness resists discovery, and how absent contempt "the proceedings are interlocutory in the original suit," without discussion of waiver of constitutional privileges).

In *Marrese* v. *American Academy of Orthopaedic Surgeons*, *see* Opp. 15, another case discussing the reviewability of contempt orders, Judge Posner noted that a district judge, faced with First Amendment contentions of an organization resisting discovery on one hand, and antitrust claims of the other party, has "various devices … to reconcile the parties' competing needs." 726 F.2d 11, 28-36 (7th Cir. 1984). These devices include *in camera* review, redaction, and protective orders. *Id.* The particular protective order utilized by the trial judge in that case "was not well designed to protect the privacy of the Academy's members," because it allowed the opposing party "to depose anyone whose names they found in the files." *Id.* at 36-38. The court did not suggest that the protective order was inappropriate because it would yield constitutional waiver of the First Amendment privileges asserted by the Academy. To the contrary, Judge Posner assumed that a properly fashioned protective order – like the orders in this case – would allow the pretrial proceedings to unfold without forcing (or causing) a forfeiture of the underlying privilege claim.

The trial judges here effectively "reconcile[d] the parties' competing needs" by tailoring protective orders to the circumstances at hand – permitting discovery of sensitive church documents and testimony to proceed, while precluding all public disclosure, and deferring privilege review until trial. *See Rosado II*, 292 Conn. at 35 (determining that "the sealing orders had two functions": (1) "they immediately prohibited the disclosure of *any* information and materials through the depositions of the defendants" and (2) "they recognized that at least some of these materials, which were to be marked 'CONFIDENTIAL: SUBJECT TO COURT ORDER' could be entitled to protection *even after jury selection*." (Sullivan, J., *dissenting*) (emphasis added)). The lower court's waiver holding transforms the trial judge's tailored approach to nothing short of a "bait and switch."

See also id. (analyzing how the parties settlement incentives would have been utterly different, if the Diocese had not expected that the documents would remain sealed).

III. The Lower Court's Analysis Of The "Judicial Documents" Concept Is Intertwined With Its Construction of Federal Authorities and This Court Has Jurisdiction to Review It.

As the Diocese explained in its Application, the Connecticut Supreme Court cannot evade review of its "judicial documents" definition by simultaneously disclaiming reliance on federal law and yet relying almost exclusively on federal authorities in reaching its determination. So too the drafters of the Connecticut Practice Book expressly relied on federal authorities construing the scope of public access. This reliance on a view of federal case law suffices to create jurisdiction to review the state court's decision. *See* App. 30-33. 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.

At the very least, any questions about whether this case falls with the *Michigan* v. *Long* doctrine, sustaining this Court's jurisdiction to review state decisions intertwined with federal law, should not be resolved in addressing the application for a stay. They are more properly evaluated on the merits or, at a minimum, at the petition stage.

IV. The Newspapers' Arguments Underscore Why The Equities Favor A Stay.

A. Post-Settlement Changes to Internal Church Procedures Demonstrate That There Is No Immediate, Urgent Need To Release The Documents Before This Court Considers Whether to Grant Review.

The Newspapers argue that the documents should be released because, in the intervening years since the Diocese settled the cases, the Catholic Church (including the Diocese) has implemented a series of sweeping reforms to its internal procedures for addressing the allegations of sexual abuse of minors. Opp. 6-7. The Newspapers' recital misses the point for two reasons. First, the intervening reforms in the Church's procedures undermine any argument that there is some *urgent* need to disclose documents relating to allegations more than twenty or thirty years old, before this Court can even consider the Diocese's petition for certiorari. Second, and equally fundamental, the Newspapers persist in ignoring the point recognized even by the courts below: the sole purpose for the "presumptive right of access" to "judicial documents" – whatever the scope of that concept – is to allow the public to evaluate how the *courts* are performing their adjudicative responsibilities, not to serve as a tool to excavate material for a historical expose on the activities of private litigants. Thus, the Newspapers rely on an irrelevant factor when they argue that the balance of equities tips in their favor, because they supposedly have an urgent interest in learning how the Diocese evaluated priests decades ago. Opp. 18-19.

B. The Newspapers' Own Laxity Demonstrates That There Is No Immediate, Urgent Need To Find Out How The Diocese Evaluated Its Priests.

Putting aside the irrelevance of their stated goal in seeking the sealed files – to investigate the Catholic Church's historical practices – the Newspapers concede that this dispute concerns files in cases that were settled eight years ago and involved allegations

dating back to events occurring twenty, thirty, or even forty years ago. They ignore the fact that they did nothing to seek access to the sealed files in these cases during the seven years between their reporting on the sealing of the records and the Diocese's decision to settle the case.[4] None of the accused priests is in active ministry or has been in ministry for many years.

At bottom, the key issue for the purposes of the stay application is whether, after so many years of delay, much of it directly attributable to the Newspapers themselves, the stay should be continued for the modest period necessary to allow the full Court to decide for itself whether the issues are sufficiently important to warrant certiorari.

C. A Stay Is Warranted To Preserve The Full Court's Opportunity To Consider The Certiorari Petition.

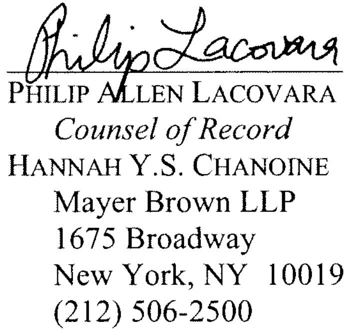
The Newspapers assiduously ignore the concern raised in the Application – that if a stay is denied and the confidential files are immediately released, the Newspapers will argue that the case has been mooted. App. 2, 33. At least where a petition cannot be characterized as frivolous or unsubstantial, due regard for the "Rule of Four" suggests that a limited stay should issue to avoid effectively depriving the full Court of the opportunity to evaluate the certiorari petition. This respect for the role of the full Court in exercising discretionary jurisdiction over certiorari petitions is especially appropriate here, where there is no compelling reason why these old records must be disclosed immediately.

[4] Nor did the Connecticut Supreme Court appear to see urgency in this matter, scheduling oral argument nearly a year after the case was fully briefed.

CONCLUSION

The Diocese 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.

Respectfully submitted.



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