UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): ______________________ ______________ Caption [use short title] ______________

Motion for: ______________________

Set forth below precise, complete statement of relief sought:

____

____

____

____

MOVING PARTY:______________________ **OPPOSING PARTY:** ______________________

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: ______________________ **OPPOSING ATTORNEY**: ______________________

[name of attorney, with firm, address, phone number and e-mail]

______________________ ______________________

______________________ ______________________

______________________ ______________________

______________________ ______________________

Court-Judge/Agency appealed from: ______________________

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☐ Yes ☐ No (explain):______________________

____

Opposing counsel's position on motion:

☐ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:

☐ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:______________________

____

____

Is oral argument on motion requested? ☐ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☐ No If yes, enter date:______________________

Signature of Moving Attorney:

______________________**Date:** ______________ Has service been effected? ☐ Yes ☐ No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: ______________________ By: ______________________

Form T-1080

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORK CIVIL LIBERTIES UNION,

Plaintiff-Appellee,

v.

NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellant.

Case No. 10-0372-CV

MOTION OF THE NEW YORK TIMES COMPANY, ADVANCE PUBLICATIONS, INC., ALM MEDIA PROPERTIES, L.L.C., ASSOCIATED PRESS, DOW JONES & COMPANY, INC., GANNETT CO., INC., THE HEARST CORPORATION, THE MCCLATCHY COMPANY, THE NEWSPAPER ASSOCIATION OF AMERICA, THE NEW YORK NEWS PUBLISHERS ASSOCIATION, THE NEW YORK PRESS ASSOCIATION AND NYP HOLDINGS, INC., FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29, the *Press Amici* state as follows:

The New York Times Company

The New York Times Company has no parent company and no publicly held company holds 10% or more of its stock.

Advance Publications, Inc.

Advance Publications, Inc. has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

ALM Media Properties, L.L.C.

ALM Media Properties, L.L.C. has no publicly-traded parents, subsidiaries or affiliates, and no publicly held corporation owns 10% or more of its stock.

Associated Press

AP has no parents, subsidiaries or affiliates that have any outstanding securities in the hands of the public.

Dow Jones & Company, Inc.

Dow Jones and Company, Inc. certifies that News Corporation, a publicly held company, is the indirect parent corporation of Dow Jones, and Ruby Newco LLC, a subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. No publicly held company owns 10% or more Dow Jones stock.

Gannett Co., Inc.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. JP Morgan Chase & Co. owns more than 10% of Gannett Co., Inc.'s stock.

The Hearst Corporation

Hearst Corporation is privately held by The Hearst Family Trust and has no other parent. None of Hearst's subsidiaries or affiliates is publicly held, with the exception of the following companies, in which Hearst and/or its subsidiaries own minority interests: MediaNews Group, Inc., Fimilac SA (owner of Fitch Group, Inc.), Local.com, drugstore.com, and Sirius Satellite Radio, Inc.

The McClatchy Company

More than 10% of the stock in the McClatchy Company is owned by Bestinver Gestion, a Spanish company.

The Newspaper Association of America

The Newspaper Association of America has no publicly held stock and has no parents or related corporate entities with publicly held stock.

The New York News Publishers Association

The New York News Publishers Association has no publicly held stock and has no parents or related corporate entities with publicly held stock.

The New York Press Association

The New York Press Association has no publicly held stock and has no parents or related corporate entities with publicly held stock.

NYP Holdings, Inc.

NYP Holdings, Inc., publisher of the *New York Post*, is a wholly-owned subsidiary of News America Incorporated, whose ultimate parent company, News Corporation, is a publicly held corporation. No publicly held corporation owns 10 percent or more of the stock of News Corporation.

The New York Times Company, Advance Publications, Inc., ALM Media Properties, L.L.C., Associated Press, Dow Jones & Company, Inc., Gannett Co., Inc., The Hearst Corporation, The McClatchy Company, The Newspaper Association of America, The New York News Publishers Association, The New York Press Association and NYP Holdings, Inc., respectfully move this Court, pursuant to Federal Rule of Appellate Procedure 29, for permission to file a brief *amici curiae* in support of Plaintiff-Appellee New York Civil Liberties Union. In support of this motion, proposed *amici* state as follows:

1. Proposed *amici* are news organizations and trade associations whose journalists and members gather information for publication in newspapers and magazines, on television and radio, and via the Internet. Proposed *amici* regularly report on the actions of government, including administrative agencies. *See, e.g.*, Karen Zraick, "Transit Court Should Have Translators, Group Says," N.Y. TIMES, at A26 (Sept. 24, 2010).

2. To do their job, the proposed *amici* routinely rely upon the public's constitutional right of access to government proceedings and their official records. They have substantial experience in proceedings involving the application of the First Amendment right of access, *see, e.g.*, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006); *United States v. Alcantara*, 396 F.3d 189 (2d Cir. 2005); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004); *ABC v.*

Stewart, 360 F.3d 90 (2d Cir. 2004), and they have a significant interest in ensuring the proper application in this case of the standards that govern this constitutional right.

3. In the instant appeal, Appellant New York City Transit Authority ("Transit Authority" or "TA") misconstrues and attacks these standards. In asking this Court to reverse the district court's judgment that the public's qualified First Amendment right of access applies to administrative adjudications as conducted by the Transit Adjudication Bureau, the TA proposes a narrow constitutional standard that has never previously been adopted and that contravenes the reasoning and holdings in prior decisions of the Supreme Court and this Court.

4. Accepting the Transit Authority's arguments would have a significant, direct, adverse impact on proposed *amici*'s ability to gather the news, and would radically restrict the scope of the access right and defeat its very purpose. Such a result would seriously jeopardize proposed *amici*'s work.

5. Proposed *amici* believe the Transit Authority's position is fundamentally flawed and respectfully request permission to file a brief *amici curiae* that would address those flaws. (A copy of the proposed brief is attached hereto as Exhibit A.) Specifically, proposed *amici* contend that the qualified First Amendment right of access is not limited to the judiciary, but rather extends to executive branch proceedings and administrative hearings. And contrary to the TA's argument, a

tradition of public proceedings dating back centuries is not a prerequisite to the recognition of a constitutional access right to a government proceeding. Rather, the existence of the right is tied to the "complementary considerations" of a history of openness and the extent to which public access plays a "significant role" in promoting the proper functioning of government. Under this approach, the "crucial" consideration is whether societal interests are served by public access, and the "logic" of access alone can support the existence of the constitutional right.

6. Proposed *amici*'s brief further addresses the significance of the long history of open administrative hearings that exists in this country, and demonstrates for the Court the special importance of public access to such proceedings, given the vast power exercised by administrative agencies.

7. These points do not duplicate the arguments made in the brief on the merits filed by Appellee New York Civil Liberties Union. And proposed *amici* respectfully submit that their brief will aid the appellate panel as it considers this appeal, which has substantial implications for democratic oversight of the massive, modern form of administration through agency adjudication.

8. Counsel for the proposed *amici* sought the Transit Authority's consent to file this brief without need for leave of court, but appellant declined.

Accordingly, proposed *amici* respectfully request this Court to grant leave to file their accompanying Brief Amici Curiae.

Dated: New York, NY
October 4, 2010

Respectfully submitted,

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EXHIBIT A

10-0372-cv

United States Court of Appeals

for the

Second Circuit

NEW YORK CIVIL LIBERTIES UNION,

Plaintiff-Appellee,

– v. –

NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellant,

DALE H. HEMMERDINGER, ELLIOT G. SANDER,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* THE NEW YORK TIMES COMPANY, ADVANCE PUBLICATIONS, INC., ALM MEDIA PROPERTIES L.L.C., ASSOCIATED PRESS, DOW JONES & COMPANY, INC., GANNETT CO., INC., THE HEARST CORPORATION, THE McCLATCHY COMPANY, THE NEWSPAPER ASSOCIATION OF AMERICA, THE NEW YORK NEWS PUBLISHERS ASSOCIATION, THE NEW YORK PRESS ASSOCIATION AND NYP HOLDINGS, INC. IN SUPPORT OF PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

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INTEREST OF *AMICI CURIAE*

Amici curiae are news organizations and trade associations whose journalists and members gather information for publication in newspapers and magazines, on television and radio, and via the Internet (the "Press Amici").[1] The Press Amici regularly report on the actions of government, including administrative agencies. To do their job, the Press Amici routinely rely upon the public's constitutional right of access to government proceedings and their official records. They have substantial experience with and a significant interest in the proper application of the First Amendment right of access.

Appellant New York City Transit Authority ("Transit Authority" or "TA") asks this Court to hold that the public's qualified First Amendment access right does not exist outside of the judicial branch, something no court has ever held. Alternatively, it asks this Court to adopt a standard that would recognize a

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[1] The Press Amici are: The New York Times Company, Advance Publications, Inc., ALM Media Properties, L.L.C., Associated Press, Dow Jones & Company, Inc., Gannett Co., Inc., The Hearst Corporation, The McClatchy Company, The Newspaper Association of America, The New York News Publishers Association, The New York Press Association and NYP Holdings, Inc. A description of each of the Press Amici is set forth in the Addendum to this brief.

Pursuant to Local Rule 29.1(b), the Press Amici state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Press Amici, their members, or their counsel made a monetary contribution to its preparation or submission.

constitutional access right only in proceedings that were conducted publicly at the time the First Amendment was written, a position that contravenes the reasoning and holdings in prior decisions of the Supreme Court and this Court. Accepting these positions would radically restrict the scope of the access right and significantly limit Press Amici's ability to gather the news. This Court, a firm guardian of the public's constitutional right of access, *see, e.g.*, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006); *United States v. Alcantara*, 396 F.3d 189 (2d Cir. 2005); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004); *ABC v. Stewart*, 360 F.3d 90 (2d Cir. 2004), should reject the TA's unfounded arguments.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(b), the Press Amici move for leave to file.

SUMMARY OF ARGUMENT

1. The First Amendment access right is not limited to judicial proceedings and records. The access right plays a "structural role" in securing and fostering self-government, and no principled basis exists to limit this First Amendment right to the judicial branch. Although the Supreme Court has yet to address the scope of the right outside of a criminal prosecution, other courts routinely have done so, and many have applied the right to executive branch proceedings and administrative hearings like those conducted by the Transit Authority.

2. The First Amendment access right is not limited to proceedings that were conducted publicly at the time of our Nation's founding. The scope of the right is determined by evaluating *both* historic practices and the practical impact of openness, and courts—including the Supreme Court—have found the access right to exist in proceedings for which there was no ancient counterpart. While consideration of history is relevant, because it carries the "favorable judgment of experience," what is "crucial" to the existence of the access right is whether "access to a particular government process is important in terms of that very process." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring).

3. Since the advent of the administrative state, agencies have routinely conducted the adjudication of individual rights in open proceedings. The Supreme Court sanctioned the delegation of authority to administrative agencies with the express understanding that due process requires "fair and open" hearings whenever liberty or property rights are adjudicated. The public has an independent interest in maintaining access to agency adjudications because openness promotes the proper functioning of such proceedings, advances the perceived legitimacy of their outcomes, and allows the exercise of democratic oversight.

4. The existence of the qualified constitutional right of public access in the administrative arena is particularly important, given the vast power exercised by

administrative agencies over "the whole gamut of human affairs." Because administrative agencies host a volume of adversarial proceedings equal to the judiciary, the right of access is particularly valuable in the administrative arena.

ARGUMENT

I.
THE TRANSIT AUTHORITY SERIOUSLY MISCONSTRUES THE STANDARDS GOVERNING THE CONSTITUTIONAL ACCESS RIGHT

The Transit Authority contends that no constitutional right of access exists anywhere outside a courtroom, and alternatively asserts that administrative hearings cannot be subject to the First Amendment access right because such proceedings were unknown in 1791. These arguments misapprehend both the constitutional source and purpose of the public access right.

A. The First Amendment Access Right is Not Limited to Judicial Proceedings

The TA treats the public's access right as an appendage to a criminal defendant's right to a "public trial," but the Supreme Court in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), found this right to be embraced within the First Amendment, not the Sixth. *See Huminski v. Corsones*, 396 F.3d 53, 80-83 (2d Cir. 2005) (distinguishing between defendant's Sixth Amendment right and public's First Amendment access right).

The public's qualified right of access was first defined by the Court in *Richmond Newspapers*, a case involving a criminal trial that the State of Virginia

had conducted entirely in secret. This secrecy was impermissible under the First Amendment, Chief Justice Burger explained, because:

> [t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.

448 U.S. at 576-77. The Court thus found a qualified right of public access to certain government proceedings and information implicit in the guarantees of free speech and press, just as a right of privacy, the right to be presumed innocent, and other rights are implicit in the provisions of the Bill of Rights. *Id.*

The First Amendment access right articulated in *Richmond Newspapers* plays a "structural role" in securing and fostering democratic self-government. "Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust and wide-open,' but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed." *Id.* at 587 (citation omitted) (Brennan, J., concurring). The First Amendment access right "protects the public and the press from abridgement of their rights of access to information about the operation of their government." *Id.* at 584 (Stevens, J., concurring).

Revisiting the access right just two years later, the Court emphasized that it seeks "to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v.*

Superior Court, 457 U.S. 596, 604 (1982). This need for an informed citizenry is the wellspring of the constitutional access right. *See also Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*") (recognizing First Amendment right of access to *voir dire* proceedings); *Press- Enterprise v. Superior Court,* 478 U.S. 1 (1986) ("*Press-Enterprise II*") (recognizing First Amendment right of access to pre-trial criminal proceedings).

The First Amendment access right is a qualified right, not an absolute one.[2] But it is unambiguously an affirmative individual right, enforceable by any member of the public or the press against abuse and over-reaching. *E.g.*, *Lugosch*, 435 F.3d at 120 (press afforded standing to enforce the constitutional access right); *Huminski*, 396 F.3d at 83 (any individual "denied access to court has and can assert a presumed right of access even if he or she is the only person excluded").

Because "the First Amendment of its own force … secures the public an independent right of access," *Richmond Newspapers*, 448 U.S. at 584-85 (Brennan, J., concurring), there is no proper basis to limit the right to the judicial branch. The First Amendment has long been held to impose its limits on all branches of

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[2] The right of access may be overcome by a properly tailored order where there exists a substantial probability of prejudice to a compelling interest and no adequate alternative is available. *See, e.g., Lugosch*, 435 F.3d at 124 ("[C]ontinued sealing of the documents may be justified only with specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim.").

government. As Justice Black explained in rejecting a presidential claim of "inherent power" to enjoin publication of a classified document, the "essential purpose" of the First Amendment was to

> curtail and restrict the general powers granted to the Executive, Legislative and Judicial Branches … The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedom of press, speech, religion and assembly.

N.Y. Times Co. v. United States, 403 U.S. 713, 715-16 (1971) (Black, J., concurring).

Indeed, courts applying the *Richmond Newspapers* standard have routinely found a constitutional right of access to Executive branch and agency proceedings. For example, the Court of Military Appeals readily concluded that the First Amendment right of public access applies to military courts-martial conducted within the Department of Defense. *See United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987). And in considering public access to deportation hearings conducted by the Immigration and Naturalization Service, both the Sixth Circuit and the Third Circuit rejected the argument that the constitutional access right exists only in the judicial branch. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002) (finding First Amendment access right to deportation hearings); *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 220 (3d Cir. 2002) (rejecting argument that access right applies only to court proceedings, but finding

no access right to deportation proceedings that "present significant national security concerns"). *See also, e.g.*, *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 960 F.2d 105, 108-10 (9th Cir. 1992) (constitutional right of access to Agriculture department voters list); *Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569, 574-75 (D. Utah 1985) (constitutional access right to administrative hearing), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987); *ABC v. Powell*, 47 M.J. 363, 365-66 (C.A.A.F. 1997) (First Amendment right of access to preliminary hearings in military prosecutions).

In short, the TA is flatly incorrect in claiming that the access right was never meant to apply beyond a "*court* proceeding (and in fact only a *criminal* court proceeding)." TA Br. 38.[3] As Justice Stevens explained, *Richmond Newspapers* "unequivocally holds that an arbitrary interference with access to *important information* is an abridgement of the freedoms of speech and of the press protected by the First Amendment." 448 U.S. at 583 (emphasis added) (Stevens, J. concurring).

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[3] The TA's suggestion that the access right may not even extend to civil lawsuits is so misguided it has been expressly rejected by this Court and every other Court of Appeals to have addressed it. *See, e.g.*, *Westmoreland v. CBS, Inc.*, 752 F.2d 16, 22-23 (2d Cir. 1984); *Rushford v. New Yorker Magazine Inc.*, 846 F.2d 249, 253 (4th Cir. 1988); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178-79 (6th Cir. 1983).

B. "Centuries" of Experience Are Not Required for the Access Right to Apply to a Government Proceeding

To determine what government proceedings are subject to the constitutional access right requires examination of *both* historic practices and the practical impact of access. In *Richmond Newspapers,* the Court reviewed the history of open criminal trials back to the Norman Conquest in concluding that tradition supported the recognition of a constitutional right of access to trials. It then considered the "logic" or policy reasons for finding such an implied constitutional right, identifying at least five ways in which openness improves the operation of a criminal trial, by (a) ensuring that proper procedures are being followed; (b) discouraging perjury by witnesses, misconduct by participants, and abuse by judicial officers; (c) providing an outlet for community hostility; (d) ensuring public confidence through the appearance of fairness; and (e) educating the public about the methods followed and remedies granted by government. *See Richmond Newspapers*, 448 U.S. at 569-71. The Court also underscored the significant role that access plays in legitimizing the outcome of a trial. "[O]pen societ[ies] do not demand infallibility from their institutions," the Court stressed, "but it is difficult for them to accept what they are prohibited from observing." *Id*. at 572.

The Supreme Court has continued to apply this same analysis to determine where the First Amendment right of access exists, considering whether

proceedings traditionally have been available to the public and whether public access plays a "significant role" in promoting the proper functioning of government. *See, e.g.*, *Globe Newspaper*, 457 U.S. at 605-07; *Press-Enterprise II*, 478 U.S. at 8-9. This Court has likewise examined these "complementary considerations." *Hartford Courant*, 380 F.3d at 92; *see also ABC*, 360 F.3d at 98 (right of access to voir dire derives from historic openness and the benefits of openness "'to both the defendant and to society as a whole'") (citation omitted).

The TA grossly misstates the analysis required by this precedent. It argues that there can be no access right absent a history of openness dating "from before the First Amendment was ratified or from the early days of the Republic," and contends that history *alone* determines the existence of the right. *See* TA Br. at 40; *see also id.*, at 37 (right requires a "long, indeed ancient, history of free public access"); 28 (access right requires practice of openness "sufficiently well understood (by the Framers)"). The TA thus dismisses as irrelevant any consideration of the public "advantages" of openness identified by the Supreme Court—labeling them simply the "felicitous circumstances accompanying the historical fact" of access to criminal trials. *Id.,* at 35-37 (urging that policy considerations deserve only "to be presented to legislative bodies"). Each step of this argument is mistaken.

First, a history of openness going back to 1791 is *not* necessary. Case law makes plain that consideration of "experience" does *not* require a tradition of access traceable back centuries, but rather entails consideration of the experience of openness within a proper context. In *Press-Enterprise II*, the Supreme Court noted with approval that some courts had found the constitutional right of access to apply to pre-trial proceedings that had "no historical counterpart," due to the "importance of the proceeding" to the criminal process. 478 U.S. at 10 n.3. In *United States v. Cojab*, 996 F.2d 1404, 1407 (2d Cir. 1993), this Court similarly noted the existence of a constitutional right of access to pretrial proceedings in a criminal prosecution, even though "under the common law there was no public right to attend" such proceedings. *See also Detroit Free Press*, 303 F.3d at 700 (rejecting argument that "the tradition of open hearings must have existed . . . at the adoption of the Bill of Rights"); *Cal-Almond, Inc.*, 960 F.2d at 109 (finding access right based on review of current state statutes); *Applications of NBC*, 828 F.2d 340, 344 (6th Cir. 1987) (finding right based on experience between 1924 and 1984).

Second, the access right is not properly determined by a consideration of history alone. The Supreme Court has instructed that experience and logic are "two complementary considerations." *Press Enterprise II*, 478 U.S. at 8. This Court, too, has noted that a proper analysis "requir[es] examination of both logic

and experience." *Hartford Courant*, 380 F.3d at 92 (internal quotation marks omitted). In *Westmoreland v. CBS, Inc.*, 752 F.2d 16 (2d Cir. 1984), for example, this Court did not simply rely upon a history of open civil trials, but found that the constitutional access right applies to civil proceedings,

> because public access to civil trials enhances the quality and safeguards the integrity of the factfinding process, fosters an appearance of fairness, and heightens public respect for the judicial process, while permitting the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self government.

Id. at 23 (internal quotation marks and citations omitted). Indeed, neither the Supreme Court nor this Court has ever found the constitutional access right to apply to a proceeding by considering history alone and ignoring policy considerations. *See, e.g.*, *Globe Newspaper*, 457 U.S. at 605-06 (concluding that access "plays a particularly significant role in the functioning of the judicial process"); *Press-Enterprise II*, 478 U.S. at 8-9 (concluding that openness enhances both the basic fairness of criminal trials and an appearance of fairness that is "essential" to public confidence); *Alcantara*, 396 F.3d at 198-99 (assessing the values served by access to sentencing proceedings); *Hartford Courant*, 380 F.3d at 93-96 (analyzing the societal interests served by access to docket sheets).

Third, far from being irrelevant, the public interest in access can be dispositive, even in the absence of any extensive history of access. As Justice

Brennan explained, history is relevant because the right of access "has special force" when it carries the "favorable judgment of experience," but what is "crucial" in deciding where an access right exists "is whether access to a particular government process is important in terms of that very process." *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring). *See Detroit Free Press*, 303 F.3d at 701 (even a brief historical tradition can be "sufficient to establish a First Amendment right of access where the beneficial effects of access to that process are overwhelming and uncontradicted"); *In re Application of Herald Co.*, 734 F.2d 93, 98 (2d Cir. 1984) (finding "a significant benefit to be gained" from public access to a pretrial criminal proceeding with no long historical counterpart).

While *consideration* of both prongs is proper, the "logic" prong is so critical that many courts have found a First Amendment right of access in the absence of any tradition of openness. In *United States v. Suarez*, 880 F.2d 626 (2d Cir. 1989), this Court held that "the public has a qualified First Amendment right of access to" Criminal Justice Act ("CJA") forms even though "the CJA itself is, in terms of 'tradition,' a fairly recent development, having been enacted in 1964." *Id.* at 631.

> The lack of "tradition" with respect to the CJA forms does not detract from the public's strong interest in how its funds are being spent in the administration of criminal justice and what amounts of public funds are paid to particular private attorneys or firms.

Id. *See also In re New York Times*, 828 F.2d 110, 114 (2d Cir. 1987) (finding right of access to pre-trial hearing to suppress wiretap evidence based solely upon the "logic" that openness enhances the "basic fairness" of the process, with no discussion of historic practices); *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 n.2 & 1027 (9th Cir. 2008) (if logic favors disclosure, "it is necessarily dispositive" even without historical experience); *United States v. Simone*, 14 F.3d 833, 838-40 (3d Cir. 1994) (finding right of access to post-trial hearings on juror misconduct because "logic counsels" that openness will "have a positive effect" and the "'experience' prong . . . provides little guidance"); *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1516-17 (9th Cir. 1988) (finding First Amendment right because "public scrutiny" would "benefit" the proceedings, despite lack of an "unbroken history of public access"); *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) ("lack of an historic tradition of open bail reduction hearings does not bar our recognizing a right of access").

In short, the TA is seriously mistaken in its understanding of the "experience and logic" analysis required to determine the existence of the constitutional access right: the right is not limited to courts, the history of access need not go back centuries, the First Amendment policies advanced by openness must be considered, and the "logic" of access alone can support the existence of the constitutional right.

II.
THE "FAVORABLE JUDGMENT OF EXPERIENCE" AFFIRMS THE RIGHT OF ACCESS TO ADMINISTRATIVE ADJUDICATIONS

As demonstrated by Appellee New York Civil Liberties Union, the "experience" and "logic" analysis required by *Richmond Newspapers*, properly applied, confirms that a First Amendment right of access extends to the type of administrative hearing conducted by the Transit Adjudication Bureau ("TAB"). The district court made the proper inquiries, applied the proper standards and reached the right result. This *amicus* Brief will not repeat the Appellee's analysis, but underscores the Transit Authority's failure to apprehend the significance of the long history of open administrative proceedings in this Nation. The TA claims (wrongly) that history is the only relevant consideration, but then misses the meaning of the history that exists.

A. Agencies Have Traditionally Required "Fair And Open" Administrative Adjudications

As the Transit Authority observes, "[t]he Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002) (cited at TA Br. 30).[4] The multiplication of administrative agencies

[4] The Transit Authority cites language in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), (TA Br. at 30), without acknowledging that the functional analysis used by the Court *supports* the district court's holding here. In that case, the Court "catalogued the similarities between

and expansion of their functions to include the adjudication of private rights was "one of the dramatic legal developments" of the early twentieth century. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36-37 (1950). While the Framers did not foresee this massive, modern form of administration, "[a] government operating in the shadow of secrecy stands in complete opposition to the society" they did envision. *Detroit Free Press*, 303 F.3d at 710. To avoid that unacceptable result, a presumptively public hearing has been a characteristic of the "administrative state" in this country since its infancy. *See*, *e.g.*, *E. Griffiths Hughes, Inc. v. F.T.C.*, 63 F.2d 362, 363-64 (D.C. Cir. 1933) (reflecting that by 1933 policies requiring open hearings had been embraced by regulatory agencies and were considered "wholly consonant with the modern view of functions of government").

A 1941 Attorney General's report, which President Franklin D. Roosevelt demanded "before approving any legislation relating to administrative procedure,"[5]

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civil litigation in federal courts and the [challenged agency adjudication]," and held that "[w]hen the proceeding 'walks, talks, and squawks' like a lawsuit, sovereign immunity bars a private citizen from requiring the state's presence," just as it protects states from lawsuits. *Conn. Dep't of Envtl. Prot. v. OSHA*, 356 F.3d 226, 232 (2d Cir. 2004). So also here, an administrative proceeding that functions just "like a lawsuit" is subject to the same access right that applies to lawsuits.

[5] Comm. on Commc'ns & Media L., N.Y.C. Bar Ass'n, *"If it Walks, Talks and Squawks . . . ." The First Amendment Right of Access to Administrative Adjudications: A Position Paper*, 23 CARDOZO ARTS & ENT. L.J. 21, 61 (2005) ("*Squawks*").

thus noted that administrative hearings as they had evolved in this country are "almost invariably" public. It observed:

> The few exceptions where hearings are private are for the benefit of the individual involved. Hearings conducted by the Social Security Board are private whenever "intimate matters of scandalous nature are involved." Veterans' Administration cases, usually involving medical testimony, are private, unless the veteran waives his right to privacy. . . .
>
> **In all cases except ones such as these, hearings are open to the public.** This is as it should be; the practice is an effective guarantee against arbitrary methods in the conduct of hearings. Star chamber methods cannot thrive where hearings are open to the scrutiny of all.

FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, at 68 (1941) ("*1941 AG Report*") (emphasis added).

This presumption of openness was carried forward into law when Congress first passed the Administrative Procedure Act ("APA") in 1946, which provided that the procedural requirements developed by the agencies were not repealed by the Act. Pub. L. No. 79-404, at § 12, 60 Stat. 244 (codified as amended at 5 U.S.C. § 500 *et seq.*); *see also* S. Rep. No. 79-752, at 8 (1945) (proposing that the APA contain broad public disclosure obligations because "all administrative operations should as a matter of policy be disclosed to the public"); S. Rep. No. 94-354, at 26 (1975) (noting that under the APA "'many aspects of the adjudicative process . . . are generally now open to the public'").

Indeed, the Supreme Court sanctioned the delegation of vast power to administrative authorities only after concluding that administrative adjudications are generally subject to due process protections, including specifically an obligation for "fair and open" proceedings. Today the government's authority to endow administrative agencies with adjudicatory powers is well-settled,[6] but at its birth, the administrative state was subjected to prolonged and substantial attacks on its legitimacy and legality. *See* James O. Freedman, CRISIS & LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978) at 9-11. As then-Justice Harlan Fiske Stone framed it, the professional challenge of his time was to bring "into our law the undoubted advantages of the new agencies as efficient working implements of government, surrounded, at the same time, with every needful guarantee against abuse." Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 17 (1936).

Confronting this challenge in 1937, the Supreme Court declared that due process in the administrative context requires a "fair and open" hearing when individual rights are being adjudicated or penalties imposed. Because "power has been bestowed so freely" to administrative agencies acting through quasi-judicial proceedings, the Court explained, it is all the more important

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[6] *See, e.g.*, *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985) ("Congress is not barred from acting pursuant to its powers under Article I to vest decision making authority in tribunals that lack the attributes of Article III courts").

> that the inexorable safeguard of a fair and open hearing be maintained in its integrity. The right to such a hearing is one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.

Ohio Bell Tel. Co. v. Pub. Utils. Comm's of Oh., 301 U.S. 292, 304-05 (1937) (internal quotation marks and citations omitted).

The Court elaborated on this due process requirement the following year:

> The vest [sic] expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that ***in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process.***

Morgan v. United States, 304 U.S. 1, 14-15 (1938) (emphasis added). *See also R.R. Comm'n of Cal. v. Pac. Gas & Elec. Co.*, 302 U.S. 388, 393 (1938) ("right to a fair and open hearing is one of the rudiments of fair play" guaranteed under the Constitution).[7]

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[7] State courts, too, widely recognized that due process requires an open administrative adjudication of rights. *E.g.*, *Petition of New England Tel. & Tel. Co.*, 136 A.2d 357, 362 (Vt. 1957) (open hearing is "vital to the validity" of

The legal battles over the expansion of administrative authority were resolved, "in large part, because [courts] long ago concluded that 'due process' . . . would apply to adjudicatory proceedings conducted by government regulators and administrative agencies." *Squawks*, 23 CARDOZO ARTS & ENT. L.J. at 24. As the Supreme Court put it: "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U.S. 420, 442 (1960). And those "traditional procedures" include a presumption of openness.

Thus, in *Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir. 1972), a civil service reinstatement hearing was required to be open to the public because "due process in administrative hearings does not yield to administrative 'convenience or expediency.'" *Id*. at 767 (citation omitted). Likewise, in *Pechter v. Lyons*, 441 F. Supp. 115 (S.D.N.Y. 1977), deportation hearings were required to be open to the public, even over the respondent's objection. "[W]hen performing quasi-judicial functions, agencies" must employ "the basic concepts of fair play," which

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administrative regulation); *Adams v. Marshall*, 512 P.2d 365, 371 (Kan. 1973) (open hearing "inherent in our idea of due process"); *Freitas v. Admin. Dir. of Courts*, 92 P.3d 993, 999 (Haw. 2004) (due process requires driver's license revocation hearings to be public); *Fucelli v. ASPCA*, 23 N.Y.S.2d 983, 984 (N.Y. City Ct. 1940) ("fair and open hearing" required before Health Department may order destruction of a cocker spaniel).

indisputably include "an open or public hearing." *Id*. at 119 (internal quotation marks and citations omitted). *See also Garvey v. Freeman*, 397 F.2d 600, 612 (10th Cir. 1968) ("the basic concepts of fair play" require informal proceedings affecting an individual's rights to be "done in an open forum").[8]

Given the obligations of due process, it is now well settled that administrative adjudications of individual rights must be presumptively open. *See, e.g.*, Ronald M. Levin, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 20 (2002) ("agency hearings generally must be open to the public"); 3 K. Davis, ADMINISTRATIVE LAW TREATISE § 14:13, at 58-61 (2d ed. 1980) (prevailing practice is "to open all hearings of a somewhat formal character, overriding interest in privacy and in confidentiality") (*quoted in Detroit Free Press*, 303 F.3d at 703).

This same due process presumption is reflected in the regulations and case law of New York under which the TA operates. New York State regulations, for

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[8] The TA points to the legislature's ability to allocate "judicial" power to an administrative tribunal (TA Br. at 42-43), but sidesteps the question of what procedures such tribunals must employ. As this authority establishes, the proceedings must be open. Otherwise, to draw "sharp lines between administrative and judicial proceedings would allow the legislature to artfully craft information out of the public eye." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 696 (6th Cir. 2002). *See also* Judith Resnik, *Detention, the War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 670-71 (2010) ("Article III could be read to require that devolution of 'judicial power'. . . be accompanied by … [the] openness that has come to be definitional of adjudication").

example, provide that "hearings generally should be open to the public," and explain that, in the absence of a statute, the public and the press "have a presumptive right to attend those proceedings."[9] New York City regulations equally require that "[o]ther than settlement conferences, all proceedings shall be open to the public, unless the administrative law judge finds that a legally recognized ground exists for closure of all or a portion of the proceeding, or unless closure is required by law."[10] *See also Herald Co. v. Weisenberg*, 59 N.Y.2d 378, 381 (1983) (unemployment insurance hearings are presumptively open given "the strong public policy in this State of public access to judicial and administrative proceedings"); *Herald Co. v. Bd. of Parole*, 510 N.Y.S.2d 382, 382 (4th Dep't 1986) (state "parole revocation hearings are presumptively open to the public").

History thus reflects that openness has long been a component of administrative hearings, and precedent establishes that a presumption of openness is a necessary component of the due process obligations of administrative agencies.

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[9] N.Y. State Dep't of Civil Service, MANUAL FOR ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS, at 105, 183 *available at* http://www.cs.state.ny.us/pio/publications/manual_for_hearing_officers.pdf. *See also Randall v. Toll*, 344 N.Y.S.2d 712, 714 (N.Y. Sup. Ct. Suffolk Cty. 1973) (1972 Manual emphasizes that "administrative hearings be open to the public and reiterates the historical reasons for such policy").

[10] N.Y.C. Office of Admin. Trials and Hearings, RULES OF PRACTICE §1-49(a), *available at* http://www.nyc.gov/html/oath/html/hearings/rules_chp1_subd.shtml#149.

B. Courts Have Long Recognized the Public's Independent Interest in Open Administrative Adjudication

Just as the public's First Amendment right is independent of a criminal defendant's fair trial rights, the public has an independent interest in access to administrative adjudications, separate and apart from the due process rights of the parties. *Compare Gannett Co. Inc. v. DePasquale*, 443 U.S. 368 (1979) (no public standing to enforce a defendant's Sixth Amendment right to a public trial) *with Richmond Newspapers*, 448 U.S. at 587-89 (First Amendment independently protects public right of access to a criminal trial). Where due process guarantees a party to a proceeding a presumption of openness, the First Amendment extends a similar presumption to the public.[11]

The First Amendment right to attend criminal trials was recognized, in part, due to the public's independent interest in access to trials. In the context of a trial, access promotes informed discussion about the actions of government, promotes the perception of fairness, provide a therapeutic effect for the community, provides

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[11] The district court was correct to enjoin the TA because its rules allow the presumption of openness to be defeated by a defendant with no consideration of the public's independent interest, something the First Amendment does not allow. *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 7 (distinguishing public's right from the defendant's, who had "requested a *closed* preliminary hearing"); *Richmond Newspapers*, 448 U.S. at 559-61 (finding public right of access despite defendant's motions for closure); *In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987) (recognizing First Amendment right of access to pretrial motion papers despite defendants' objections).

a check against corrupt practices, enhances the performance of participants and discourages perjury. *See Richmond Newspapers*, 448 U.S. at 569-572; *ABC v. Stewart*, 360 F.3d at 98. These very same public benefits flow from public access to administrative hearings at which individual rights are determined through adjudicatory proceedings before an impartial tribunal. In such proceedings, access improves the functioning of the adjudicatory process, prevents abuse and legitimizes outcomes.

Courts recognized early on the public's separate interest in open administrative proceedings, which enhance "'public confidence in the value and soundness of this important governmental process.'" *Petition of New England Tel & Tel. Co.*, 136 A.2d 357, 362 (Vt. 1957) (citations omitted). *See also E. Griffiths Hughes, Inc.*, 63 F.2d at 364 (openness at administrative agencies "prevent[s] abuses arising out of avarice of unprincipled officials or the sale of justice"); *see also Orbach v. N.Y. State Urban Dev. Corp.*, 442 N.Y.S.2d 900, 903 (N.Y. Sup. N.Y. Cty. 1981) (fair and open hearing is "essential to the legal validity of administrative agency and maintenance of public confidence"). A 1939 study of administrative procedures that was deemed "noteworthy for thoroughness, impartiality and vision," *Wong Yang Sung*, 339 U.S. at 38 & n.7, underscored the public's independent interest in openness:

> Public observation of open hearings offers some assurance that those hearings will be conducted in a

> manner satisfactory to the public and to the parties, while at the same time it lessens the likelihood of uninformed public criticism of administrative procedure. The parties themselves are less apt to feel at a disadvantage in public hearings than in hearings conducted *in camera*.

Robert M. Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) (*quoted in Labor Law Op.*, 1959 N.Y. Op. Att'y Gen. 80).

Given the history of openness and the undeniable value of openness to the public, the district court was correct to conclude that the constitutional access right extends to the type of administrative adjudications conducted by the TA.[12] Many other courts have similarly found a constitutional right of access to such adjudicatory administrative proceedings. *See Whiteland Woods L.P. v. Twp. W. Whiteland*, 193 F.3d 177 (3d Cir. 1999) (planning commission hearing); *Detroit Free Press*, 303 F.3d 681 (deportation proceedings); *Soc'y of Prof'l Journalists v.*

[12] As the district court found, "TAB Hearings are, in essence, adjudicative, adversarial, trial-type proceedings," and thus subject to a right of public access *NYCLU v. N.Y. City Transit Auth.*, 675 F. Supp. 2d 411, 435 (S.D.N.Y. 2009). Due process and First Amendment considerations may differ for other forms of agency action, such as non-adversarial or investigative hearings. *See, e.g.*, *N. Jersey Media Group v. Ashcroft*, 308 F.3d at 198, 223-24 (3d Cir. 2002) (Scirica, J., dissenting) (discussing *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000) (distinguishing inquisitorial Social Security proceedings from adversarial hearings)); *Fitzgerald v. Hampton*, 467 F.2d 755, 764 (D.C. Cir. 1972) (noting that due process requirements for "administrative proceedings of a quasijudicial character" may differ from those "in proceedings which are purely investigative and fact-finding"); *Conn. Dep't of Envtl. Prot.*, 356 F.3d at 233 (2d Cir. 2004) (distinguishing investigations from adjudications for purposes of state sovereign immunity).

Sec'y of Labor, 616 F. Supp. 569 (D. Utah 1985) (Mine Safety & Health Administration investigative hearing), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987); *Dep't of Health & Rehabilitative Servs. v. Tallahassee Democrat, Inc.*, 481 So. 2d 958 (Fla. App. 1986) (adoption hearing); *Daily Gazette Co. v. Comm. on Legal Ethics*, 326 S.E.2d 705 (W. Va. 1984) (attorney disciplinary proceeding); *Courier Journal v. Gash*, 9 Media L. Rep. (BNA) 1735 (Ky. Cir. Ct. 1983) (coroner's inquest); *see also Fitzgerald*, 467 F.2d 755 (D.C. Cir. 1972) (due process right to attend Civil Service Commission removal hearing).

III.
RECOGNIZING THE PUBLIC ACCESS RIGHT IS PARTICULARLY IMPORTANT IN THE ADMINISTRATIVE ARENA

The structural role played by the access right—improving governmental processes, enabling democratic oversight, and legitimizing government action—is particularly important in the administrative arena, given the vast power now exercised by our continually expanding "administrative state."

In 1927 Felix Frankfurter surveyed the power of the administrative state and found it even then to "penetrate[] … the whole gamut of human affairs." Felix Frankfurter, *The Task of Administrative Law*, 75 U. PENN. L. REV. 614, 614 (1927). During the New Deal, governments delegated still more authority to an ever-burgeoning number of agencies. *See, e.g.*, *1941 AG Report* at 7-11 (documenting the growth of federal agencies, defined by their "power to determine, either by rule

or by decision, private rights and obligations"). Today, the scope of issues subject to administrative adjudication is vast indeed. *See generally*, *Squawks*, 23 CARDOZO ARTS & ENT. L.J. at 29-31. Administrative hearing officers

> preside over cases involving radio and TV broadcasting licenses; gas, electric, oil and nuclear energy allocation and rates; labor-management relations compliance; consumer product enforcement cases; corporate mergers; health and safety regulatory proceedings; securities trading regulatory proceedings; social security benefit adjustments; international trade cases; and a host of other matters.

Jeffrey A. Wertkin, *A Return to First Principles: Rethinking the ALJ Compromise*, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 365, 365 (2002).

As one commentator has documented, "administrative agencies have become 'court' systems, hosting a volume of adversarial proceedings that far outstrips what takes place in the federal trial courts around the United States." Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes are at Risk*, 81 CHI.-KENT L. REV. 521, 535 (2006).[13] "For hundreds of thousands of claimants, administrative agencies are,

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[13] The Resnick study surveyed four major types of administrative hearings: Social Security, immigration, veterans' benefits, and equal employment within the federal government. It estimated that "more than two-thirds of a million evidentiary proceedings [are held] annually in federal agencies," in contrast to the approximately 85,000 proceedings "involving the taking of evidence and including cases before district, magistrate, and bankruptcy judges." *See* Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes are at Risk*, 81 CHI.-KENT L. REV. at 543-548.

functionally, courts." *Id.* at 525. *See also* Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1343, 1345 (1992) ("ALJs probably decide more 'cases' each year than do their federal judicial counterparts," and ALJs "are numerically overshadowed by" non-ALJ administrative judges, who decide yet "more cases").

In this immense administrative arena, the public's independent right of access is particularly effective and particularly needed. The legal positions advanced by the Transit Authority would move in the opposite direction, removing all administrative agencies from the reach of the First Amendment access right. Its position is legally unfounded and would undermine the public policies that have governed the operation of the administrative state from its inception. It should be rejected by this Court.

CONCLUSION

For the foregoing reasons, the TA's proposed standards for defining the scope of the constitutional access right should be rejected and the judgment of the district court affirmed.

Dated: New York, NY
October 4, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,910 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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ADDENDUM

AMICI CURIAE

The *Press Amici* are as follows:

a. <u>The New York Times Company</u>: The New York Times Company is the owner of *The New York Times*, *The Boston Globe*, *The International Herald Tribune*, 15 other newspapers, and more than 50 websites, including NYTimes.com, About.com, and Boston.com.

b. <u>Advance Publications, Inc.</u>: Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, daily newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. It also owns many internet sites and has interests in cable systems serving over 2.3 million subscribers.

c. <u>ALM Media Properties, L.L.C.</u>: ALM Media Properties, L.L.C. publishes approximately 30 local and national legal and business publications, including *The American Lawyer*, *The National Law Journal*, *Corporate Counsel*, *The New York Law Journal* and the *Connecticut Law Tribune*. It also publishes newsletters and treatises and operates dozens of internet sites, including law.com and globest.com.

d. <u>Associated Press</u>: The Associated Press is a mutual news cooperative organized under the Not-for-Profit Corporation Law of New York. AP gathers and distributes news of local, national and international importance to its

member newspapers and broadcast stations and to thousands of other customers in all media formats across the United States and throughout the world.

e. **Dow Jones & Company, Inc.:** Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, *WSJ.com*, a news website with more than one million paid subscribers, *Barron's*, a weekly business and finance magazine, and through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

f. **Gannett Co., Inc.:** Gannett Co., Inc. is an international news and information company that publishes 81 daily newspapers in the United States, including *USA TODAY*, as well as hundreds of non-daily publications. In broadcasting, the company operates 23 television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operate Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

g. **The Hearst Corporation:** Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include ownership of 15 daily and 38 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle* and *Albany Times Union*; as well as interests in an additional 43 daily and 74 non-daily newspapers owned by MediaNews Group, which include the *Denver Post* and *Salt Lake Tribune*; nearly 200 magazines around the world, including *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E, History and ESPN; as well as business publishing, including a minority joint venture interest in Fitch Ratings; Internet businesses, television production, newspaper features distribution and real estate.

h. **The McClatchy Company:** The McClatchy Company owns 30 daily newspapers in 29 U.S. markets, including *The Sacramento Bee*, *The Fresno Bee*, and *The Merced Sun-Star*, as well as *The Miami Herald*, *The Star-Telegram* of Fort Worth, *The Charlotte Observer*, and about 45 non-daily papers. In each of its daily newspaper markets, McClatchy operates the leading local website, offering readers information, comprehensive news, advertising, e-commerce and other services.

i. **The Newspaper Association of America**: The Newspaper Association of America ("NAA") is a nonprofit organization representing the

interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

j. **The New York News Publishers Association:** The New York News Publishers Association (NYNPA) is the non-profit trade association representing the daily, weekly, and online newspapers of New York State.

k. **The New York Press Association**: The New York Press Association is the trade association representing community newspapers throughout New York State. The 737 weekly and daily newspapers represented by the New York Press Association, and its wholly-owned subsidiary, the New York Press Service, have a combined readership in excess of twelve million adults each week. The New York Press Association is a not-for-profit organization founded in 1853.

l. **NYP Holdings, Inc.:** NYP Holdings, Inc. publishes the *New York Post*, one of the largest newspapers in the United States. NYP Holdings, Inc. is a wholly owned subsidiary of News America Incorporated, whose parent company, News Corporation, is a diversified global media company.

STATE OF NEW YORK)
) ss.: **AFFIDAVIT OF**
COUNTY OF NEW YORK) **CM/ECF SERVICE**

I, Robin M. Zuckerman, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On October 4, 2010

Deponent served the within: Motion to File BRIEF FOR *AMICI CURIAE* THE NEW YORK TIMES COMPANY, ADVANCE PUBLICATIONS, INC., ALM MEDIA PROPERTIES L.L.C., ASSOCIATED PRESS, DOW JONES & COMPANY, INC., GANNETT CO., INC., THE HEARST CORPORATION, THE McCLATCHY COMPANY, THE NEWSPAPER ASSOCIATION OF AMERICA, THE NEW YORK PUBLISHERS ASSOCIATION, THE NEW YORK PRESS ASSOCIATION AND NYP HOLDINGS, INC. IN SUPPORT OF PLAINTIFF-APPELLEE

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via the CM/ECF Case Filing System. All counsel of record in this case are registered CM/ECF users. Filing and service were performed by direction of counsel.

Sworn to before me on October 4, 2010

/s/ Maryna Sapyelkina
Maryna Sapyelkina
Notary Public State of New York
No. 01SA6177490
Qualified in Kings County
Commission Expires Nov. 13, 2011

/s/ Robin M. Zuckerman

Job # 232533