[redacted]

Ms. Maxwell has appealed Judge Preska's order unsealing the deposition material, *Giuffre v. Maxwell*, Case No. 20-2413 (2d Cir.), and she is now appealing Judge Nathan's order denying the motion to modify the criminal protective order, *United States v. Maxwell*, Case No. 20-3061 (2d Cir.).

[redacted]

Argument

This Court should consolidate the appeal of Judge Preska's order unsealing the deposition material with the appeal of Judge Nathan's order denying the motion to modify the criminal protective order. Consolidation is necessary for a fair and efficient resolution of these appeals.

First, unless this Court consolidates these appeals, it will find itself in the very same position as the two district courts—one panel of this Court will be privy

[redacted]. The government in the criminal case before Judge Nathan refused to agree to a modification of the protective order to allow Ms. Maxwell to inform Judge Preska of the material facts. EXHIBIT G. According to the government, even though all Ms. Maxwell sought was permission to share the requested information with other judicial officers *under seal*, a

[redacted]

[redacted]

Ms. Maxwell asked Judge Preska to briefly stay the

First, Judge Preska might well reconsider her decision to unseal the deposition material if she knew how the government obtained the material despite the civil protective order.[5] In particular, keeping the deposition material sealed preserves Ms. Maxwell's ability to litigate before Judge Nathan in the criminal case the propriety of the government's circumvention of this Court's decision in *Martindell*, which expressly contemplates an affected party's right to move to quash a grand jury subpoena seeking access to information shielded by a valid protective order. *Martindell*, 524 F.2d at 294. If the deposition material is unsealed, Judge Preska will never have the opportunity to reconsider her decision armed with the knowledge [redacted]

And if the deposition material is unsealed, it may foreclose any argument from Ms. Maxwell to Judge Nathan that the perjury counts should be dismissed or other remedies imposed based on the government's circumvention of *Martindell*. All Ms.

[5] It's irrelevant that Ms. Maxwell originally consented to the provision of the criminal protective order that presently prevents her from sharing with Judge Preska [redacted] App. 91–92. At the time Ms. Maxwell consented to that provision [redacted] Ms. Maxwell's earlier consent to this provision in the protective order does not bear on whether good cause exist for its modification.

believed. According to the government, [redacted]

But if that's true, then the government should have moved to intervene before Judge Preska to oppose the unsealing of the deposition material, since, in the government's view, that material is confidential. The (unprincipled) reason for the government's decision not to intervene is obvious: If Ms. Maxwell's depositions are released to the public, the government will argue to Judge Nathan that any violation of *Martindell* was harmless.

It's immaterial that the court stayed *Doe v. Indyke* during discovery while discovery in *Giuffre v. Maxwell* finished in 2017. As this Court recognized in *Louis Vuitton*, "if civil defendants do not elect to assert their Fifth Amendment privilege, and instead fully cooperate with discovery, their 'testimony . . . in their defense in the civil action is likely to constitute admissions of criminal conduct in their criminal prosecution.'" 676 F.3d at 98 (quoting *SEC v. Boock*, No. 09 Civ. 8261(DLC), 2010 WL 2398918, at *2, 2010 U.S. Dist. LEXIS 59498, at *5 (S.D.N.Y. June 15, 2010) (alteration in original)).

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

The Material

The government apparently contacted [redacted] at some time before February 2019 [redacted]. Based on some discussion with [redacted], the government served [redacted] with a subpoena to produce [redacted]. Ms. Maxwell was not served with

any subpoena. [redacted]

In or about February 28, 2019 the government first applied to [redacted] for relief. [redacted] During these *ex parte* proceedings, the government made numerous unchallenged factual assertions. To Ms. Maxwell's knowledge, no one disclosed the pendency of these applications to [redacted]. Certainly, no one -- not the government, any court, or [redacted] -- disclosed to Ms. Maxwell [redacted].

[redacted]

The indictment [redacted]
On July 2, 2020, [redacted], the government arrested Ms. Maxwell. On July 8, the government filed a superseding indictment alleging that Ms. Maxwell "assisted, facilitated, and contributed" to Epstein's abuse of minors. [redacted] the indictment alleges that in 2016 Ms. Maxwell made "efforts to conceal her conduct" by "repeatedly provid[ing] false and perjurious statements" in deposition testimony. Superseding Indictment, Doc. # 17 at 29 ¶ 8.

[redacted]. On the two applications referenced above [redacted] the two SDNY courts rendered a split decision. [redacted] granted the *ex*

[6] The first batch of discovery was provided by the government to NY counsel on August 5, 2020 in the late afternoon on a hard disk. Due to the time upload and securely transfer files, undersigned counsel for Ms. Maxwell (also counsel for her in the *Giuffre* case) only received these materials at 11:38 a.m. on Friday, August 7, 2020.

parte application. [redacted] denied the application. [redacted].[7]

Counsel for Ms. Maxwell then learned, [redacted]

The pressing issue that necessitates the filing of this request concerns [redacted] These issues, in turn, impact her rights as the accused in this matter, constitutionally presumed innocent unless and until the government proves her guilt beyond all reasonable doubt.

The Protective Order in this case

The Protective Order in this case prohibits the use of the discovery materials or confidential-designated materials "for any civil proceeding or any purpose other than the defense of this action" absent mutual agreement in writing between the government and defense counsel or if "modified by further order of the Court." Doc. # 36 at ¶¶ 1(a), 10(a), 18. Ms. Maxwell agreed to that limitation after assurances by the government, consistent with their representation to this Court, that "the Government rarely *provides* any third party, including a witness, with any material they did not already possess," and therefore "concerns defense counsel raises about future use in civil litigation are not likely to occur." Letter of Alex Rossmiller at 6 (Doc. # 33) (July 28, 2020). This Court relied on that representation in its ruling that government witnesses should not be limited in their use of materials gained from the government in any related civil litigation. Memorandum Op'n & Order at 3 (July 30, 2020). Yet as described above, the government must have given a copy of the sealed order to [redacted]

Paragraph 18 of the Protective Order permits modification by the Court. Further, any concerns that the government may raise concerning their on-going grand jury investigation will be obviated by submission of these materials under seal in the other matters.

The reasons this Court should grant the request

[redacted].

[7] [redacted]

There are at least three compelling reasons to modify the Protective Order. First, [redacted]

The partial secrecy surrounding the Material has also fundamentally undermined the fairness of the adversarial process. Although the grand jury subpoena and government investigation were known to [redacted]

[redacted] "The rule does not impose any obligation of secrecy on witnesses." Fed. R. Crim. P. 6, Advisory Committee Note to Subdivision 6(e)2. [redacted] Too many questions remain unanswered including exactly what was said between the government and [redacted], when was it said, and precisely what was turned over. [redacted] Without the ability to use the Material in the very limited fashion proposed Ms. Maxwell she is unfairly disadvantaged [redacted] Moreover, instead of candidly revealing the fact of the subpoena [redacted]

Second, [redacted]

[redacted].

Further, and as this Court knows, ample Second Circuit authority supports staying a civil case pending the resolution of a related criminal case. *See SEC v. Blaszczak*, No. 17-CV-3919 (AJN), 2018 WL 301091, at *1 (S.D.N.Y. Jan. 3, 2018) (granting motion to stay civil case and holding that "[a] district court may stay civil proceedings when related criminal proceedings are imminent or pending, and it will sometimes be prudential to do so" (quoting *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 98 (2d Cir. 2012))). Among other things, the stay vindicates the Fifth Amendment and guards against witnesses learning information in the civil case and then "conforming" their testimony in the criminal case to what was disclosed in the civil case. This concern is all the more real when [redacted]

Ms. Maxwell further anticipates the very immediate need to disclose the Materials to [redacted]

Notably, the Material at issue is not accuser-related or sensitive in any regard. These *ex parte* pleadings, hearings, and rulings are already known to [redacted]. These materials, absent sealing, would enjoy a presumptive right of public access as judicial documents. Given that the Material has been ***disclosed in this case*** by the government under the terms of this Court's Order, and without any application to the sealing courts, the government has conceded that this Court has the authority to authorize use of the Material under the terms of this Court's Protective Order. And, the government has previously agreed that the appropriate forum to consider issues related to the civil Protective Order is in the civil litigation, positing the opinion "that neither it nor this Court is well-positioned to, or should, become the arbiter of what is appropriate or permissible in civil cases." Doc. # 33 at 7. What Ms. Maxwell asks is that she be allowed to disclose, under seal, the Material so that [redacted].

The Protective Order in this case [redacted]

The Material, as part of the court files in the United States District Court for the Southern District of New York, [redacted]

[redacted]).[8]

[redacted].

Conclusion

Ms. Maxwell requests that this Court modify the Protective Order to allow her to refer to and file under seal in [redacted]he Material at issue in this letter motion.

Respectfully Submitted,

Jeffrey S. Pagliuca

CC: Counsel of Record (via Email)

[8] [redacted]

[redacted]

Moreover, the government has made repeated, highly public statements, including at the press conference following Ms. Maxwell's indictment,[2] in the press conference following Mr. Epstein's indictment,[3] in a press conference convened at the doorstep of Mr. Epstein's former New York mansion,[4] and in other publicly-released statements[5] that its investigation into associates of Mr. Epstein is ongoing and active.

[redacted]. The process to evaluate whether a judicial document should remain under seal is clear. Once a determination is made that the materials are judicial documents the Court is required to determine whether any countervailing interests outweigh the presumptive right to public access. *Brown v. Maxwell*, 929 F.3d 41, 49-50 (2d Cir. 2019).

Frankly, Ms. Maxwell does not believe that the government has established a countervailing interest compelling enough to justify continued sealing of the documents. [redacted] It is also likely that these same documents will be the subject of future motion practice in this Court, [redacted]

However, Ms. Maxwell has no interest in additional pretrial publicity related to any of these documents and submits that protecting her right to a fair trial is the countervailing interest that, at this point, requires her proposed redactions and the continued sealing of the materials with the exception of her limited request to file the materials under seal [redacted]

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[2] "These charges to be announced today, are the latest result of our investigation into Epstein, and the people around him who facilitated his abuse of minor victims. That investigation remains ongoing." (https://www rev.com/blog/transcripts/announcement-transcript-of-charges-against-ghislaine-maxwell-in-new-york-jeffrey-epstein-associate-arrested).

[3] "This in no way is over, OK. There's going to be more investigative steps they're going to take place and the FBI with the U.S. attorney here is going to continue to investigate." http://transcripts.cnn.com/TRANSCRIPTS/1907/08/ath.01 html).

[4] Sarah Nathan and Kate Sheey, "Prince Andrew refuses to cooperate with feds in Jeffrey Epstein probe," NY Post (Jan. 27, 2020) (https://nypost.com/2020/01/27/prince-andrew-refuses-to-cooperate-with-feds-in-jeffrey-epstein-probe/).

[5] Alan Feuer, "Prince Andrew and U.S> Prosecutor in Nasty Dispute Over Epstein Case," NY Times (June 8, 2020) (https://www nytimes.com/2020/06/08/nyregion/jeffrey-epstein-prince-andrew html).

[redacted]

[redacted]. The government's *ad hominem* suggestion that Ms. Maxwell has "cherry-pick[ed] materials" to seek an "advantage in their efforts to defend against accusations of abuse" or "delay court-ordered disclosure of previously sealed materials" reveals a fundamental (or feigned) lack of understanding [redacted]. It also begs the question, to be fleshed out at a later time, [redacted]

Ms. Maxwell simply seeks to alert the judicial officers in the related Civil Litigation to facts about which her adversary is already aware.

Issuance of the Subpoenas Not "Standard Practice":

Second, the government tries to normalize, without citation to authority, its conduct as "standard practice." Resp. at 2. To the contrary, the controlling case in this Circuit, *Martindell v. Int'l Telephone & Telegraph Corp.*, 594 F.2d 291, 293 (2d Cir. 1979), mandates a wholly different procedure: the use of a non-*ex parte* subpoena with an opportunity for the aggrieved party to move to quash. Similar cases in this district demonstrate the "non-standard" nature of the government's conduct regarding these subpoenas. For example, Judge Koeltl observed when considering whether to release a single deposition transcript to the government: "the Second Circuit has made clear that the Government may not use its 'awesome' investigative powers to seek modification of a protective order merely to compare the fruits of the plaintiff's discovery in a civil action with the results of a prosecutorial investigation in a criminal action." *Botha v. Don King Prods., Inc.*, No. 97 CIV. 7587 (JGK), 1998 WL 88745, at *3 (S.D.N.Y. Feb. 27, 1998) (citing *Minpeco S.A. v. Conticommodity Servs., Inc.*, 832 F.2d 739, 743 (2d Cir. 1987) and *Martindell*, 594 F.2d at 297). [redacted]

[redacted] *see also Palmieri v. State of New York*, 779 F.2d 861 (2d Cir. 1987); *Abbott Laboratories v. Adelphia Supply USA*, Case 2015-cv-5826 (CBA) (MDG), 2016 WL 11613256 (S.D.N.Y. Nov. 22, 2016) ("In the Second Circuit, there is a presumption in favor of enforcing protective orders against grand jury subpoenas."); *United States v. Kerik*, 07 CR 1027, 2014 WL 12710346 (S.D.N.Y. July 23, 2014). It seems that a majority of courts in this district have rejected the claimed "standard practice" arguments made by the Government [redacted]. A notable difference is that the other applications were not conducted *ex parte*. [redacted] Ms. Maxwell is not asking this Court to decide that question today.

But Ms. Maxwell is seeking [redacted]

The Government Does Not Explain How Any "Secret" Investigation Will be Compromised. Third, the government claims that the materials at issue are "Confidential" because the "full scope and details" of their very-public proclamations of an ongoing criminal investigation "have not been made public." Resp. at 3. This argument too is nonsensical: the sealed materials that Ms. Maxwell seeks to file, *under seal*, [redacted] Certainly the subpoena recipient, otherwise known as counsel for the adverse party to the Civil Litigation, knows the two things that Ms. Maxwell seeks to file *under seal* in

that matter: [redacted].[2]

The government does not explain, because they cannot, how it will harm an ongoing criminal investigation to reveal the sealed materials under seal to two arbiters: [redacted] Clearly those judicial officers are fully capable of maintaining files under seal and confidences. Nor is there any support for the argument that this limited request will "permit dissemination of a vast swath of materials." Resp. at 3. The slippery slope contention is belied by the limited nature of Ms. Maxwell's request. The sealed materials are a discrete set of judicial documents, not a "vast swath of materials," and Ms. Maxwell seeks to file them under seal for those Courts to use in their determinations. Hyperbole aside, the request is appropriately limited.

Further, the government's suggestion that "there is no impediment to counsel making sealed applications to Court-1 and Court-2, respectively, to unseal the relevant materials" is, at best, baffling. Resp. at 3 n.5. Such a "sealed application" in furtherance of her Civil Litigation would be "using" the materials for the civil case, exactly the conduct proscribed by the Protective Order here. If the Court disagrees, Ms. Maxwell is more than happy to make such sealed applications to those judicial officers. The government does not explain its thinking, nor did the government suggest this course of action during the conferral process.

The Sealed Materials Are Important to [redacted]

Fourth, the government decries the sealed materials' lack of relevance to [redacted]

[redacted]

[redacted]

[2] Ms. Maxwell strenuously opposes the government's suggestion that it "further elaborate on the nature of the ongoing grand jury investigation" in a supplemental *ex parte* and sealed pleading. This Court is overseeing the criminal case pertaining to Ms. Maxwell and any *ex parte* pleading concerning this case to this judicial officer is inappropriate. *See* Standard 3-3.3 Relationship with Courts, Defense Counsel and Others, "Criminal Justice Standards for the Prosecution Function," American Bar Ass'n (4th ed. 2017) ("A prosecutor should not engage in unauthorized *ex parte* discussions with, or submission of material to, a judge relating to a particular matter which is, or is likely to be, before the judge.").

[redacted]

Protective Orders May Be Modified As Circumstances Change

Finally, the government suggests in a myriad of ways without directly arguing that this Protective Order cannot be modified, that Ms. Maxwell somehow waived her ability to seek modification by agreeing to a Protective Order before she knew what was contained in the criminal discovery, or that there is no precedent for such a modification. These suggestions are disingenuous. Of course, the Government ignores that the Protective Order itself provides that it may be modified "by further order of the Court." *Id*, ¶ 18(b).

There is no precedence for this case. That is true because the Second Circuit has outlined a process for the government to seek civil materials subject to protective orders for use in grand jury investigations, a process the government circumvented. It also is true because typically, the government is the party to intervene in civil cases and seek a stay where materials the government has marked "Confidential" may be disclosed publicly or where the government contends the rules of criminal discovery will be circumvented. Finally, there is no other case that defense counsel has located where [redacted]

That Ms. Maxwell did not know what was in the sealed materials before she signed the Protective Order, or proposed a draft, is self-evident. That a Court can modify a protective order at any time is likewise well-established. Fed. R. Crim. P. 16(d)(1) authorizes the Court to regulate discovery through protective orders and modification of those orders. *See Smith Kline Beecham Corp. v. Synthon Pharmaceuticals, Ltd*., 210 F.R.D. 163, 166 (M.D.N.C. 2002) ("[c]ourts have the inherent power to modify protective orders, including protective orders arising from a stipulation by the parties"); *see also United States v. Gurney*, 558 F.2d 1202, 1211 n.15 (5th Cir. 1977) (trial court's decisions as to which documents "will be placed in the public domain, and which are entitled to privacy and confidentiality" are discretionary and "form an integral part of trial management"); *United States v. Wecht*, 484 F.3d 194, 211 (3d Cir. 2007), *as amended* (July 2, 2007) ("it would have been proper for the District Court to unseal the records pursuant to its general discretionary powers"); *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532 & 535 (1st Cir. 1993).

"The standard of review for a request to vacate or modify a protective order depends on the nature of the documents in question. There is a presumptive right of public access to judicial

documents, that is, documents that are 'relevant to the performance of the judicial function and useful in the judicial process.'" *Kerik*, 2014 WL 12710346, at *1 (S.D.N.Y. July 23, 2014), (*quoting United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995)).

The Materials that Ms. Maxwell seeks to disclose (to judicial officers under seal) are, without question, judicial documents. [redacted] And, at a minimum, Ms. Maxwell's opponent in the Civil Litigation knows both that the Government obtained an *ex parte* order to subpoena the information and what was produced. Accordingly, the argument that somehow grand jury secrecy will be compromised by disclosure, under seal to judicial officers reviewing the very material at issue, is absurd. Ms. Maxwell has demonstrated good cause for her very limited request to present a discrete set of sealed materials under seal to [redacted] The government has not articulated a cogent reason for that information to be kept from the other judicial officers.

Sincerely,

Jeffrey S. Pagliuca

CC: Counsel of Record (via ECF)

[redacted] And Ms. Maxwell's deposition testimony in the civil case provides the substantive basis for two of the six charges she faces. App. 27–29.

As explained in Ms. Maxwell's opening brief, Doc. 60, her motion to consolidate, Doc. 17, and the reply in support, Doc. 54, [redacted] For example, in balancing the qualified First Amendment presumption of access (a presumption that is significantly less as applied to the deposition material than the summary judgment material this Court released in *Brown v. Maxwell*), Judge Preska and this Court must evaluate countervailing considerations including, most prominently, Ms. Maxwell's reliance on the civil protective order. *Giuffre v. Maxwell*, No. 20-2413, Doc. 40, pp 21–28. [redacted] Ms. Giuffre's attorneys repeatedly used the existence of the civil protective order to deflect Ms. Maxwell's arguments about her right to privacy, her right against self-incrimination, and her concern that Ms. Giuffre would use documents in the civil action to support a criminal investigation. *Giuffre v. Maxwell*, No. 20-2413, Doc. 111, p 20. Ms. Maxwell then did not invoke her Fifth Amendment right to remain silent and instead testified at two depositions. *Id.* [redacted] Ms. Giuffre's attorneys

the criminal protective order, that [redacted] should not be used except in the criminal case and therefore should not be released publicly.[8]

This Court tasked Judge Preska with evaluating whether and to what extent the civil case filings should be unsealed considering the totality of the circumstances. *Brown v. Maxwell*, 929 F.3d 41, 47 & n.13 (2d Cir. 2019). Judge Preska is performing this task ignorant of the fact that [redacted] Unless the criminal protective order is modified, Judge Preska will remain in the dark, and she will never be given the opportunity to consider the circumstances in their totality.

The government appears to have abandoned the argument it made to Judge Nathan that modifying the protective order threatens the secrecy of the ongoing grand jury investigation. Op.Br. 31–32. And for good reason. Ms. Maxwell has never sought to make public material the criminal protective order shields from disclosure. All she seeks is permission to share, *under seal*, information [redacted]

[8] The government's view that [redacted] should not be released, and Judge Nathan's order to that effect, also lend support to Ms. Maxwell's contention that the release of the deposition material by Judge Preska [redacted] will unfairly prejudice her right to a fair trial by an impartial jury. *See* U.S. CONST. amends. V, VI; *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598 (1978).