No. 16-308 (L)

Nos. 16-353 (CON), 16-1068 (CON), 16-1094 (CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

HSBC BANK USA, N.A. and HSBC HOLDINGS PLC,

Defendants-Appellants,

HUBERT DEAN MOORE, JR.,

Appellee.

On Appeal from the United States District Court for the
Eastern District of New York, No. 12-cr-763 (JG)

BRIEF *AMICUS CURIAE* OF BETTER MARKETS, INC., IN SUPPORT OF THE APPELLEE

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October 27, 2016

CERTIFICATION OF CONSENT FROM ALL PARTIES

In accordance with Rule 29(a) of the Federal Rules of Appellate Procedure, undersigned counsel for Better Markets, Inc. ("Better Markets") certifies that counsel for all parties have consented to the filing of the brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Better Markets states that it has no parent corporation and that there is no publicly held corporation that owns any stock in Better Markets. Better Markets is a nonpartisan, nonprofit, public-interest organization organized under section 501(c)(3) of the Internal Revenue Code.

Dated: October 27, 2016

/s/ Dennis M. Kelleher
Dennis M. Kelleher
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IDENTITY AND INTEREST OF BETTER MARKETS[1]

Better Markets, Inc. ("Better Markets") is an independent, nonprofit, nonpartisan organization that promotes the public interest in the financial markets. Founded in the wake of the devastating financial crisis of 2008, its overarching goal is the establishment of a robust system of financial regulation and enforcement that prevents financial crashes, protects consumers from fraud and abuse, and restores the rule of law on Wall Street.

Better Markets pursues these objectives through comment letters, litigation, in-depth research, and public advocacy, focused on three essential components of financial reform: (1) strong regulations to enhance financial stability; (2) vigorous enforcement to bring genuine accountability to financial institutions that have regularly flouted the law; and (3) transparency, not only to promote fair and competitive markets but also to ensure that both Wall Street and the government—regulators, prosecutors, and courts alike—act in accordance with the law and the public interest.

Financial Stability. Through its advocacy, Better Markets pursues reforms

[1] Pursuant to Second Circuit Rule 29.1(b), amicus states: no party or party's counsel authored any part of this brief; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no other person—other than amicus, its members, or its counsel—contributed money intended to fund the preparation or submission of this brief.

necessary to stabilize our financial system and prevent another financial crisis.[2] For example, focusing on the regulatory implementation of Dodd-Frank, Better Markets has submitted more than 175 comment letters to U.S. and international regulators, advocating for strong and swift implementation of comprehensive reforms in the securities, commodities, and banking sectors.[3] Better Markets also testified before the U.S. Senate Banking Committee about the importance of the designation authority of the Financial Stability Oversight Council ("FSOC") in preventing financial crises.[4] And as an amicus in court, it has defended rules challenged by industry as well as agency actions that address threats to financial stability.[5]

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[2] The illegal activities of the nation's largest financial institutions contributed greatly to the recent crisis, the worst financial disaster since the Great Crash of 1929 and the worst economy since the Great Depression of the 1930s. It destroyed millions of jobs, triggered a tidal wave of home foreclosures, caused untold human suffering, and obliterated at least $20 trillion in gross domestic product. *See* BETTER MARKETS, THE COST OF THE CRISIS: $20 TRILLION AND COUNTING (2015), www.bettermarkets.com/costofthecrisis.

[3] *See* Better Markets' Comment Letters, http://www.bettermarkets.com/rulemaking.

[4] *See FSOC Accountability: Nonbank Designations: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 114th Cong. (2015) (statement of Dennis Kelleher), http://www.banking.senate.gov/public/_cache/files/a4f38084-7f40-447c-9342-e37c9d6b18ad/23C6AE00CC53D93492511CC744028B5E.kellehertestimony32515.pdf.

[5] *See, e.g., Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 369–70 (D.C. Cir. 2014) (reflecting Better Markets' arguments in upholding the SEC's economic analysis of its disclosure rule on conflict minerals), *overruled on other grounds by Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 377–80 (D.C. Cir. 2013) (reflecting Better Markets' arguments in upholding

Enforcement and Accountability. Better Markets has also fought for much stronger enforcement and accountability in the financial sector. For example, as an amicus, it has opposed efforts to undermine the federal laws available to punish and deter financial crime. *See* Better Markets Amicus Br., ECF No. 147, No. 15-496, *United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.* (2d Cir. filed Aug. 5, 2015) (defending the so-called "self-affecting" theory of FIRREA liability under 12 U.S.C. § 1833a); *see also* Better Markets Amicus Br. in Supp. of Cert., No. 16-130, *Advocates for Basic Legal Equality v. U.S. Bank, N.A.* (U.S. Supreme Ct. filed Aug. 26, 2016) (proposing limits to the False Claims Act's public-disclosure bar) (the Court since called for the views of the Solicitor General). And Better Markets has called upon regulators and the Department of Justice to enforce the law more vigorously, impose stiffer penalties against lawbreaking financial institutions, and pursue individual executives responsible for fraud.

Transparency. Finally, at the core of Better Markets' advocacy is the pursuit of transparency throughout financial-market regulation. Congress has recognized transparency as the hallmark of effective markets in every landmark law from the

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the CFTC's economic analysis of its registration rule for commodity-pool operators); *Sec. Indus. & Fin. Mkts. Ass'n v. CFTC*, 67 F. Supp. 3d 373, 387 (D.D.C. 2014) (citing Better Markets' description of the bailout funds channeled through AIG to its counterparties); *see also* Better Markets Amicus Br., No. 16-5086, *MetLife, Inc. v. Fin. Stability Oversight Council* (D.C. Cir. filed June 23, 2016).

Securities Act of 1933 to Dodd-Frank. Transparency is an essential attribute in the financial markets themselves, the government's regulatory oversight of those markets, and the courts that consider the validity of challenged rules and oversee enforcement against wrongdoers. Better Markets has fought for regulatory measures to enhance transparency in the financial markets, including, for example, the development of a robust consolidated audit trail to help regulators oversee securities trading, detect abuses, and reconstruct flash crashes. *See* Cmt. Ltr. of Better Markets to SEC Re: Consolidated Audit Trail (File No. 4-698) (July 18, 2016), https://www.sec.gov/comments/4-698/4698-17.pdf. Better Markets has also promoted transparency within the agencies, including, for example, by urging the SEC to adopt a PACER-like system for documents filed before its administrative law judges. *See* Cmt. Ltr. of Better Markets to SEC Re: Rules of Practice (File No. S7-19-15) (Dec. 4, 2015), https://www.sec.gov/comments/s7-19-15/s71915-7.pdf. Similarly, Better Markets has advocated for greater transparency in the FSOC's operations. *See* Cmt. Ltr. of Better Markets to FSOC on Implementation of FOIA (May 25, 2015), https://www.bettermarkets.com/sites/default/files/FSOC-%20Comment%20Letter-%20FOIA%205-25-11.pdf

A prime example of Better Markets' ongoing fight to enhance transparency in financial regulation is its appeal in *MetLife v. FSOC*, No. 15-5188 (D.C. Cir. filed

June 28, 2016), a historic case in which a district court invalidated FSOC's designation of MetLife for enhanced prudential regulation to safeguard our financial system. *See MetLife v. FSOC*, 2016 WL 1391569, *1 (D.D.C. Mar. 30, 2016). Better Markets moved to intervene to seek access to the record, over two-thirds of which remains sealed. The district court granted intervention but denied all unsealing relief. Better Markets is currently pursuing an appeal of that ruling.

Better Markets has devoted special attention to the need for greater transparency in the enforcement realm, which is vital because so much enforcement against financial crime is conducted behind closed doors, through non-public proceedings, including no-admission settlements and DPAs. As a regular amicus and occasional party, Better Markets has challenged settlements that concealed too much information from the public, prevented a meaningful assessment of whether the punishment sufficed, and evaded independent judicial review. *See, e.g.*, Better Markets Amicus Br., ECF No. 334, No. 11-5227, *SEC v. Citigroup Global Mkts. Inc.* (2d Cir. filed Jan. 28, 2013).

This appeal threatens all these goals: stability, accountability, and transparency. Better Markets has an interest in this case because either outcome will alter the role of transparency in the government's approach to enforcement on Wall Street. And if transparency is diminished, then the other goals of a healthy regulatory system—stability and accountability—inevitably suffer as well.

Most immediately at stake is the public's ability, through access to the Monitor's Report, to fully understand the efficacy of the government's response to one of the most brazen criminal schemes ever perpetrated by a prominent bank. Endorsing the level of secrecy that the government and HSBC seek to maintain regarding the Monitor's Report will further erode the public's already tenuous faith in the ability of prosecutors to mete out justice and hold powerful institutions accountable.

More ominous is the prospect of a ruling that marginalizes the court's already modest oversight role in cases involving the often secretive devices used to address financial institutions' lawbreaking. In defending these agreements, prosecutors and defendants are no longer adversaries because they equally crave finality, the government by declaring victory (and conserving resources) and the bank by declaring redemption (and escaping prosecution). Under these circumstances, the only institution capable of objectively ensuring justice is a court. Its oversight role is thus essential to ensure that the process is minimally lawful. Without this oversight, the government, the Monitor, and the bank are less accountable. As a result, enforcement of and respect for the law will inexorably weaken.

Such weaknesses in law enforcement in turn will ultimately undermine our ability to prevent another financial crisis. At the heart of the 2008 crisis, major gaps in our regulatory architecture combined permitted extraordinary misconduct, aided and abetted by secrecy. Undeterred, Wall Street continues to flout the law, from

money laundering to tax evasion and market manipulation. Unless the government adequately punishes this behavior, some in the financial industry will continue to exploit the markets for their own gain at the expense of the broader economy, with the very real possibility of precipitating another financial crisis.

The district court's effort to preserve a meaningful supervisory role in the enforcement process is not only lawful under controlling precedent but also commendable in the service of transparency, accountability, and ultimately financial stability and our national prosperity.

SUMMARY OF ARGUMENT

The public's right of access to judicial records is a cornerstone of democratic accountability and the public legitimacy of the courts. Under either the First Amendment or common-law right of access, this Court should affirm the orders of the district court, which vindicate the public's right of access to the Monitor's Report while preserving legitimate privacy interests through tailored redactions.

The Report is a judicial record, relevant and useful both to the district court's supervision of an open criminal case on its docket and to the court's inevitable action—either ruling on a motion to dismiss or conducting a trial—at the conclusion of the deferred-prosecution agreement ("DPA"). The appellants' contention that a court has no judicial function in these actions is unavailing. Tellingly, Rule 48(a) of the Federal Rules of Criminal Procedure, which governs criminal dismissals, does

not even appear in HSBC's table of authorities and earns a mention only in a footnote. And both appellants' characterizations miss the mark on the district court's supervision of the DPA's implementation; the district court is not usurping the Monitor's role—jet-setting to London to double-check HSBC's records itself—but is merely guarding, in the context of a DPA that confers tremendous discretion to the government, against the possibility that the court becomes an instrument of lawlessness or impropriety in the exercise of that discretion. And contrary to the appellants' assertion, a judicial record can be identified contemporaneously, not only retrospectively—the public's right of access should not be deferred just because the prosecution was. Nor is the DPA's "non-public" self-description in any way binding on the district court or as absolute as HSBC insists.

Under the stronger First Amendment right, both experience and logic confirm that the public should enjoy access to the Report. Moreover, higher values militate strongly in favor of transparency, for DPAs generally and this one particularly, because they benefit from the salubrious effects of sunlight and affect the broader public profoundly. Among that broader public to whom the Report remains a secret are not only the victims of HSBC's crimes, Better Markets, and the appellee but also some of HSBC's regulators that the government excluded from its inner circle, notably the New York State Department of Financial Services. As recently disclosed in a congressional report, the federal government sought to one-up New York in the

hasty filing of the DPA at issue, not only undermining the suggestion that all regulators would prefer the Report remain sealed but also underscoring the need for judicial supervision of the DPA's implementation.

This Court may also affirm the district court's orders on the basis of the common-law right of access to judicial records. HSBC is wrong to leap to the conclusion that the common-law right is unavailable in the alternative to the First Amendment right. Although the common-law right is subject to less rigorous scrutiny for narrow tailoring, the very privacy interests that can be found to outweigh the public interest in disclosure were solicited by the district court in its consideration of which portions of the Report to redact. This Court has before it, under seal, the complete Report with the redactions approved by the district court. It ought not be difficult to determine whether these redactions (or those rejected) constituted an abuse of discretion. The district court's thoughtful discussion of those proposed redactions—and its example of HSBC's self-evidently over-inclusive proposals—strongly suggests that it acted well within its discretion.

In the end, criminals' privacy rights yield somewhat to public safety when courts strike a thoughtful balance. This is as true of a terrorist or narcotrafficker as his accomplices, human and corporate alike. If the possible public airing of a company's crimes and attempted rehabilitation occasions the sound and fury seen in HSBC's brief, transparency may prove to be the best tool available for deterring

corporate recidivists. But this Court need not police Wall Street from 40 Foley any more than the district court flew to London; all that is required is that this Court apply settled law and affirm the district court's orders that vindicate the public's right of access to this judicial record while respecting the appellants' valid confidentiality interests.

ARGUMENT

I. THE MONITOR'S REPORT IS A JUDICIAL RECORD.

The threshold inquiry for whether a document is subject to either the First Amendment or common-law right of public access is whether it is a judicial record. In this Circuit, a document's status as a judicial record is determined by the role it plays "in the judicial process," that is, whether it "is 'relevant to the performance of the judicial function and useful in the judicial process.' " *United States v. Erie Cty.*, 763 F.3d 235, 239 (2d Cir. 2015) (quoting *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006)). To affirm, this Court need not go nearly so far as the Third Circuit and find every document filed on a court docket to be a judicial record. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 781 (3d Cir. 1994) (test is whether document was "filed with the court"). The district court correctly identified the Monitor's Report as a judicial record because it is relevant and useful both to the court's supervision of an ongoing criminal case on its docket and to the inevitable resolution of that case by either trial or a motion to dismiss under Rule 48(a)

of the Federal Rules of Criminal Procedure. *See* SPA4–7.[6]

A. The Report Is Relevant And Useful To Supervision Of The Case.

As the first basis for finding the Report relevant and useful, the district court invoked its ongoing supervision of the open criminal case on its docket. That the court would supervise the case during the DPA was announced in its July 1, 2013 order, which granted the appellants' application to exclude time under the Speedy Trial Act, 18 U.S.C. § 3161(h)(2). In granting the application, the court "maintain[ed] supervisory power over the implementation of the DPA and direct[ed] the government to file quarterly reports with the Court while the case is pending." J.A. 146. The Speedy Trial Act protects not only the defendant's but also "the *public's* . . . interest[] in a speedy trial," *Zedner v. United States*, 547 U.S. 489, 499 (2006) (emphasis added), an interest that may be overcome only "with the approval of the court," 18 U.S.C. § 3161(h)(2).

The district court carefully evaluated the DPA to determine whether its terms were consistent with the public interest. It found the DPA sufficient on those terms, and so approved it. Had it done otherwise, and denied the application to exclude time because of a disagreement with the charging decisions of the government, such a

[6] Following the parties' conventions, this brief cites the Special Appendix as "SPA_" and the appellants' briefs as "Gov't Br." and "HSBC Br." This brief refers to the two HSBC-affiliated defendants-appellants collectively as "HSBC," to the government and HSBC collectively as "the appellants," and to Hubert Moore as "the appellee."

decision would have directly conflicted with a recent D.C. Circuit decision on which the appellants' briefs place so much reliance. *See United States v. Fokker Servs. B.V.*, 818 F.3d 733, 738 (D.C. Cir. 2016) ("We hold that the [Speedy Trial] Act confers no authority in a court to withhold exclusion of time pursuant to a DPA based on concerns that the government should bring different charges or should charge different defendants."), *overruling* 79 F. Supp. 3d 160, 166 (D.D.C. 2015) (finding the DPA deficient because, *inter alia*, no individuals were charged and no independent monitor would verify the defendant's compliance with the DPA's terms: "One can only imagine how a company with such a long track record of deceit and illegal behavior ever convinced [DOJ] to agree to that! . . . [T]he Court concludes that this agreement does not constitute an appropriate exercise of prosecutorial discretion and I cannot approve it in its current form.").

If this Circuit were someday to adopt *Fokker*'s holding, the district court's July 2013 evaluation of the sufficiency of the DPA would be superfluous. But that order is not before this Court, and this Court cannot here decide the *Fokker* question of whether a court may decline to exclude time under the Speedy Trial Act because of its disagreement with charging decisions. Unable to rely on *Fokker*'s inapposite holding, the appellants nevertheless quote its dicta at great length in an effort to show that the necessary implication is that a district court lacks supervisory authority over an open criminal case on its docket during the pendency of a DPA. But a careful

reading shows that *Fokker*'s dicta is much narrower: "The key point is that, although charges remain pending on the court's docket under a DPA, the court plays no role in monitoring *the defendant's compliance with the DPA's conditions*." 818 F.3d at 744 (emphasis added).

Did the district court here seek to usurp the Monitor and play the role itself of monitoring HSBC's compliance with the DPA's conditions? Hardly. The district court did not interview any HSBC employees, did not peek at any customer spreadsheets, and certainly did not visit London to make an on-the-ground assessment of the pace of change in the criminally lax culture HSBC admitted having in the statement of facts. It sought only to read the Report.

No one need speculate about whether the district court's concerns were those identified as inappropriate by *Fokker*'s dicta. The district court explained why it would supervise the criminal case during the DPA, but said nothing about its supervision serving to ensure "the defendant's compliance with the DPA's conditions." *Id.* Instead, supervision would "protect the integrity of judicial proceedings." J.A. 151 (citing, *inter alia*, *United States v. Hasting*, 461 U.S. 499, 505 (1983); *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980); *McCarthy v. United States*, 394 U.S. 459 (1969); *McNabb v. United States*, 318 U.S. 332, 340 (1943)).

How? By monitoring not HSBC's compliance with the DPA but the government's obedience to law. *See* J.A. 155–57. The district court astutely observed that

a defendant under a DPA is "less likely to raise a purported impropriety with the process, let alone seek the court's aid in redressing it, given the risk of derailing the deferral of prosecution." *Id.* at 155. The district court noted that, in the context of DPAs, the government, operating with power that borders on absolute, has opprobriously pushed the envelope in abrogating attorney-client privilege and work-product protections as well as the Fifth and Sixth Amendment rights of defendants' employees. *See id.* at 155–56 & n.10, n.11, n.12. The district court worried less about one slipup in anti-money-laundering operations abroad than conflicted shenanigans at home: "What if, for example, the 'remediation' [for a breach] is an offer to fund an endowed chair at the United States Attorney's *alma mater*? . . . What if the [Monitor's] replacement's only qualification for the position is that he or she is an intimate acquaintance of the prosecutor proposing the appointment?" *Id.* at 156–57.[7] Without attempting "to catalog all of the possible situations that might implicate the Court's supervisory power," *id.* at 157, the district court nevertheless left no doubt about what animated its desire to keep its eyes on the case: It did not seek to monitor HSBC

[7] To the casual observer, raising these possibilities may sound like rank conspiracy-mongering. Suffice it to say that this order's author was no casual observer. *See* Hon. John Gleeson, Federal Judicial Center, Biographical Directory of Federal Judges (served as an Assistant United States Attorney for the Eastern District of New York from 1985 until taking the bench in 1994), http://www.fjc.gov/servlet/nGetInfo?jid=867; *cf.* J.A. 159 ("Judges (even, and perhaps especially, judges who themselves once exercised prosecutorial discretion) need to be mindful that they have no business exercising [prosecutorial] discretion . . . .")

but to monitor the Monitor, the government, and the relationship among them. The court would keep things kosher from the sidelines.

Ongoing supervision is especially appropriate in this case because of the tremendous discretion the DPA gave the government:

- The government has the right to "determine[], *in its sole discretion*, that the HSBC Parties have knowingly violated any provision of this Agreement." *Id.* at 32 (emphasis added).

- In case of breach, "an extension or extensions of the Term of the Agreement may be imposed by the Department, *in its sole discretion*, for up to a total additional period of one year." *Id.* at 32–33 (emphasis added).

- "Conversely, in the event the Department finds, *in its sole discretion*, that the provisions of this Agreement have been satisfied, the Term of the Agreement may be terminated early." *Id.* at 33 (emphasis added).

- Payment is to be made "pursuant to payment instructions as directed by the Department *in its sole discretion*." *Id.* at 42 (emphasis added).

- "If the Department, *in its sole discretion*, is not satisfied with the candidates proposed," it may seek additional nominations. *Id.* at 44 (emphasis added).

- "The Department maintains the right, *in its sole discretion*, to accept or reject any Monitor candidate proposed" by HSBC. *Id.* at 45 (emphasis added).

- "If, during the Term of this Agreement, the Department determines, *in its sole discretion*, that" HSBC has committed any subsequent crime, provided any false, incomplete, or misleading information, or breached, HSBC will be charged. *Id.* at 47 (emphasis added).

- "The decision whether conduct or statements of any current director or employee . . . will be imputed to the HSBC Parties . . . shall be *in the sole discretion* of the Department." *Id.* at 49 (emphasis added).

- "The decision whether any public statement . . . contradicting . . . the Statement of Facts will be imputed to the HSBC Parties for the purpose of determining whether they have breached this Agreement shall be *at the sole discretion* of the Department." *Id.* at 50–51 (emphasis added).

It cannot be that any conceivable exercise of this remarkable breadth of discretion automatically receives the imprimatur of the court. What if the government rejected a proposed monitor on the basis of race? More realistically, what if the government threatened to declare a breach because an HSBC employee invoked her right against self-incrimination under the Fifth Amendment in a conversation with the Monitor? Would HSBC inform the court—or pressure its employee into testifying? The appellants would find the court to be powerless in these circumstances.

These concerns about "illegal or unethical provisions" or implementation of a DPA were expressly carved out by the *Fokker* Court from its narrow Speedy Trial Act holding. *See* 818 F.3d at 747 (citing J.A. 157). Monitoring the monitor—and the prosecutor—for lawfulness is a far cry from the improper "belief that the prosecution has been unduly lenient in its charging decisions and in the conditions agreed to in the DPA." *Id.*

The DPA vests the government nine times over with unfettered "sole discretion," but surely this discretion has an outer bound, one that only the court, on whose docket the government placed the case, can supervise. That modest task is all that the district court here proposed to do. This was not an abuse of discretion but the

fulfillment of an obligation.[8] Critically, neither appellant contests the relevance or usefulness of the Report to this judicial function, a finding expressly made by the district court, *see* SPA6 ("the instant Report [is] critical to the execution of my duties"); they contest only the existence of the judicial function. So if this Court agrees that the judicial supervision of an open criminal case is a "judicial function," the district court's orders should be affirmed.

B. The Report Is Relevant And Useful To The Inevitable Resolution Of The Case.

The district court invoked a second judicial function for which the Report is relevant and useful—resolution of the case. *See* SPA6–7. HSBC has no answer for this: Its table of authorities omits both Rule 48(a) of the Federal Rules of Criminal Procedure, which provides that a case may be dismissed only "with leave of court," and *United States v. Pimentel*, 932 F.2d 1029, 1033 n.5 (2d Cir. 1991), which provides that Rule 48(a) motions should be denied where they are "clearly contrary to

[8] This remains true even if this Court disagrees with the district court about its obligation hypothetically to act in the face of governmental passivity about a disclosure of ongoing criminality. *See* SPA6 ("If, for example, the Monitor's Report disclosed that HSBC were systematically and extensively laundering money for drug traffickers, it would demean this institution for me to sit by quietly while the government took no action.") (citing *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995), and *Erie Cty.*, 763 F.3d at 240). This example arguably conflicts with the dicta of *Fokker* to the extent that the district court implied that it could *sua sponte* order the government to take a particular action with respect to HSBC's compliance with the DPA. But it also raises serious concerns that *Fokker* had no occasion to address.

manifest public interest." This is an astounding omission in light of the prominence both authorities enjoy in the district court's discussion of its judicial function. *See* SPA6–7. HSBC's only engagement with Rule 48(a) is in a footnote, *see* HSBC Br. 36 n.5, in which it proposes that such a motion is hypothetical and that the Report is thus not a judicial record, at least not yet, to which this brief turns in Part I.C, *infra*.

The government, meanwhile, does address Rule 48(a), relying heavily on *Fokker*'s dicta—recall that *Fokker* was a Speedy Trial Act case, not a Rule 48(a) case. But the government offers no explanation of why the Report is irrelevant to the court's concededly circumscribed inquiry into whether dismissal is "clearly contrary to manifest public interest." *Pimentel*, 932 F.2d at 1033 n.5. Ironically, the government cites *United States v. Lau Tung Lam*, 714 F.2d 209, 210 (2d Cir. 1983), for the proposition that "supervisory powers over prosecutorial activities that take place outside the courthouse is extremely limited," when of course a Rule 48(a) motion is made and adjudicated *in* the courthouse. As the appellee notes, even the D.C. Circuit holds that Rule 48(a) "entitles the judge to obtain and evaluate the prosecutor's reasons" for seeking to dismiss a criminal case. *United States v. Ammidown*, 497 F.2d 615, 622 (D.C. Cir. 1973); *accord In re Richards*, 213 F.3d 773, 789 (3d Cir. 2000) ("a court [may] force prosecutors to publicly reveal their reasons for not proceeding before granting a requested dismissal").

The appellants are incorrect in asserting that deciding a Rule 48(a) motion is

a ministerial rather than judicial function. And neither appellant contests the district court's factual finding that the Report is beyond relevant and useful to a Rule 48(a) motion. *See* SPA6 ("integral").

The only alternative to a Rule 48(a) motion is a prosecution. Neither appellant contests that, if the government elects to prosecute at the end of the DPA, overseeing that trial or plea is a core judicial function to which the Report will be relevant and useful. Perhaps the appellants have in mind some other resolution, but it cannot be a permanent purgatory. But by the DPA's own terms, it may be extended but only "up to a total additional period of one year." J.A. 32–33.[9] One of two things happens at that point, prosecution or a motion to dismiss: Both implicate judicial functions, and the Report is relevant and useful to each.

C. A Judicial Record Exists Before A Case Is Closed.

If this Court were persuaded that the Report is relevant and useful only to the resolution of the case and not to its supervision, a question arises of whether the district court's orders were premature. The appellants both contend as much, suggesting that any resolution of the case is too hypothetical or remote to find that the

[9] Imagine if this one-year limitation were lacking: A DPA infinitely extendable at the government's sole discretion would raise serious due-process concerns, further underscoring the necessity of the court's supervision.

Report is, today, a judicial document. *See* Gov't Br. 34 ("But that hypothetical possibility does not mean that the Monitor's Report, or any other document that may become relevant to a future adjudication, currently constitutes a judicial document."); HSBC Br. 36 n.5 ("But any assertion of judicial authority based on a *hypothetical* future Rule 48 motion is plainly premature at this stage of the proceedings.") (citing *SEC v. Am. Int'l Grp.*, 712 F.3d 1, 3 (D.C. Cir. 2013)).

This contention poses an interesting chronological-existential question. On the appellants' view, the Report is Schrödinger's document, either a judicial record or not, but with a status unknowable until revealed. Indeed, this enigmatic approach appears to have some foothold in the D.C. Circuit, which has suggested that a document's status as a judicial record cannot be ascertained until a "judicial decision" issues and relies on the document. *Am. Int'l Grp.*, 712 F.3d at 3. If the appellants' theory that judicial records can be identified only retrospectively were correct, no non-party could ever challenge a seal until final judgment. Such a proposition would eviscerate the democratic right of *contemporaneous* public oversight of the judicial process. It would be akin to Congress's saying to the public: You may read the statutes we pass but you may not attend our floor debates.

The Second Circuit has wisely avoided this pitfall. *Lugosch* decisively rejected the restrictive and opaque theory that a court cannot know whether documents are judicial records until after it has ruled. *See* 435 F.3d at 120–21. And *Erie County*

found that a monitor's report was a judicial record notwithstanding that any future judicial action was entirely hypothetical. *See* 736 F.3d at 240–41. Even where a court has *not* relied on a particular pleading, this Circuit still found it to be a judicial record where it was useful or relevant to an inchoate alternative decision. *See Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 814 F.3d 132, 140 (2d Cir. 2016). The government (perhaps inadvertently) concedes that, in *Amodeo*, a judicial record was found to presently exist where, in the future, "any party *could* apply to the district court for enforcement of, or relief from, the decree's provisions, and the court *could* consider the . . . officer's report[] in ruling on this request." Gov't Br. 36. (emphasis added). To the extent that the appellants urge this Court to revisit its holdings that permit contemporaneous identification of a judicial record, this Court should decline the invitation. The public's right of access should not be deferred just because this prosecution was.

D. The "Non-Public" Provision Of The DPA Binds The Appellants But Not The Court.

HSBC contends that the DPA's provision that describes the Monitor's Report as "non-public" prohibits the district court from unsealing it. *See* HSBC Br. 41–44. HSBC selectively cites to part of one sentence, which says that the Report's contents "are intended to and shall remain non-public," while omitting the rest: "except to the extent that the Department determines in its sole discretion that disclosure would be

in furtherance of the Department's discharge of its duties and responsibilities or is otherwise required by law." J.A. 104. An order from a federal court that requires unsealing is an exception to the "non-public" nature of the Report that the DPA plainly permits—unsealing that is "otherwise required by law."

Moreover, the DPA by its express terms does not bind the district court. In a section entitled, "Limitations on Binding Effect of Agreement," the DPA states: "This Agreement is binding on the HSBC Parties and the Department, but specifically does not bind . . . any other authorities." J.A. 52. This clear-as-day language, unacknowledged by HSBC, wholly undercuts its contention that the district court failed to "enforce the DPA's . . . provisions as written." HSBC Br. 43.

II. EXPERIENCE, LOGIC, AND HIGHER VALUES CONFIRM THAT THE PUBLIC DESERVES MAXIMAL ACCESS TO THE REPORT UNDER THE FIRST AMENDMENT.

Application of the First Amendment right of access to a particular judicial record turns on the twin prongs of experience and logic. *See N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 297 (2d Cir. 2012). The appellee's brief ably explains why the long experience of access to analogous records satisfies the experience prong. *See* Appellee's Br. 36–39. Better Markets agrees that because DPAs are a novel governmental practice, direct experience informs less than experience with analogous practices like plea agreements that DPAs have supplanted: Innovations in prosecutorial practice should not erode the public's constitutional

rights. The appellee also persuasively canvasses the salutary effects that transparency has on the court, public confidence, prosecutors, and monitors, and as an outlet for community sentiment and victims, demonstrating that the logic prong is satisfied. *See id.* at 39–45.

Better Markets disagrees with the appellants' assertions that "higher values" might nevertheless overcome the presumption of access to this judicial record. *See* HSBC Br. 51–55 (reciting concerns that the district court already addressed through tailored redactions); Gov't Br. 43–46 (implausibly concluding that the "district court's findings . . . establish that public disclosure . . . , even in redacted form, would hinder the monitor's ability to supervise HSBC" and evincing a jaundiced view of the federal courts in suggesting that, even if this district court "protected all confidential information . . . , potential cooperating parties cannot be sure that future courts will adopt a similar approach").

The government places special emphasis on the difficulty that unsealing would allegedly inflict on "regulatory authorities who likewise depend on the monitor's work." *Id.* at 44. Indeed, the DPA contemplates sharing the Report with the Federal Reserve and the United Kingdom's Financial Conduct Authority. *See* J.A. 99. Notably absent from that provision is the domestic regulator of the defendant-appellant HSBC Bank USA, N.A., whose principal office is in New York, where they maintain 145 branches, a majority of all their branches in the United States. *See*

Fact Sheet, HSBC Bank USA, N.A. 1–2 (July 2016), http://www.about.us.hsbc.com/~/media/us/en/hsbc-in-the-usa/hbus_factsheet.pdf. That regulator is the New York State Department of Financial Services. Unmentioned in the DPA, NYSDFS is, like HSBC's victims, the appellee, and Better Markets, just another member of an undifferentiated public to whom the appellants would deny access to even the redacted Report.

This omission took on new meaning with the publication, just before the appellants' briefs were filed, of a scathing congressional report about this DPA. *See* Majority Staff of U.S. H.R. Comm. on Fin. Servs., *Too Big to Jail: Inside the Obama Justice Department's Decision Not to Hold Wall Street Accountable* (July 11, 2016), http://financialservices.house.gov/uploadedfiles/07072016_oi_tbtj_sr.pdf. Its executive summary concluded: "DOJ and federal financial regulators were rushing at what one Treasury official described as 'alarming speed' to complete their investigations and enforcement actions involving HSBC in order to beat the New York Department of Financial Services." *Id.* at 1. Internal communications, obtained through subpoenas by the House Financial Services Committee, evinced recklessness by the federal regulators, "apparently in hopes of avoiding being beaten to the punch again by the NY Department of Financial Services." *Id.* at 21 (internal quotation marks omitted). Perturbed that New York had settled an enforcement action with Standard Chartered—another United Kingdom-based bank with New York

branches that conducted business with sanctioned countries like Iran—before the federal agencies could, those agencies' "various prosecutors and regulators [were] scrambling . . . with almost alarming speed" to be first to file. *Id.* at 20–21. "In its haste to complete its enforcement action against HSBC, DOJ transmitted settlement numbers to HSBC before consulting with [the Office of Foreign Assets Control] to ensure that the settlement amount accurately reflected the full degree of HSBC's sanctions violations." *Id.* at 21. Better Markets submits that this turf war–inspired access to the Report for only favored regulators does not embody a "higher value" that can justify wholesale sealing of a judicial record. Quite the opposite.

And what can be said about HSBC's professed fear of "criminals [obtaining] a road map to exploit any deficiencies in HSBC's compliance programs"? HSBC Br. 52. Not long ago, all that terrorists and drug kingpins needed was a Rand McNally atlas and the address of the nearest HSBC branch. But now, able to parse a heavily redacted summary of compliance deficiencies, reportedly largely corrected, criminal enterprises will flourish financially, HSBC frets. They will decode and exploit HSBC's subtlest vulnerabilities, which escaped the notice of HSBC, the government, the monitor, the district court, and this Court. To state this concern is to refute it: HSBC's unsupported and implausible speculation cannot call into question the district court's work, with the appellants' assistance, to redact any and all "information detailing the processes by which criminals could exploit HSBC."

SPA12; *see also* SPA16 ("I have redacted . . . [i]nformation detailing the processes by which criminals could exploit HSBC, including dates of proposed implementation of policies that would strengthen HSBC's anti-money laundering and sanctions compliance programs.").

"Higher values" is a useful frame in which to place the ultimate question of public access to a redacted version of the Report. Better Markets contends that the value of transparency outweighs—by orders of magnitude—the picayune counterweights appellants highlight, all soundly addressed by the district court's generous redactions (it appears that around two-thirds of the Report, including its appendices, will remain sealed). Indeed, transparency in the judicial process is an essential tool for informing the public and policymakers about ongoing, systematic breakdowns in ethics and compliance at financial institutions.

The Wells Fargo phony-accounts scandal is a case in point. Customers victimized by fake accounts tried to go to court, only to be shunted into private arbitration without public access. *See* James Rufus Koren, *Even in Fraud Cases, Wells Fargo Customers Are Locked into Arbitration*, L.A. TIMES (Dec. 5, 2015), http://www.latimes.com/business/la-fi-wells-fargo-arbitration-20151205-story.html; *see also Jabbari v. Wells Fargo & Co.*, No. 15-cv-2159, Order Granting Def.'s Mot. to Compel Arbitration, ECF No. 69 (N.D. Cal. Sept. 23, 2015), http://www.courthousenews.com/2015/09/24/wells%20fargo%20order.pdf. As this

and countless other pre- and post-crisis scandals demonstrate, our courts—and the transparency that they foster—are a vital bulwark against the financial malfeasance that best festers in the shadows.

III. THIS COURT MAY AFFIRM UNDER THE COMMON-LAW RIGHT OF ACCESS.

The appellee correctly notes that the common-law right of access remains applicable in this case. *See* Appellee's Br. 34. The government does not address the common-law right, while HSBC dedicates one footnote to an illogical *ipse dixit*: "[T]he First Amendment presumption is 'stronger and can only be overcome under more stringent circumstances than the common law presumption.' Thus, if this Court holds that there is no First Amendment right of access to the Report, then *a fortiori* there would be no common law right of access." HSBC Br. 45 n.6 (quoting *Erie Cty.*, 763 F.3d at 241). Consider that leap carefully. It is akin to reasoning: "If the Second Amendment does not protect anti-aircraft missiles, then *a fortiori* it does not protect hunting rifles." The common-law right of access applies to a broader swath of documents than the First Amendment but requires less of a showing to preserve a seal; indeed, several circuits have declined to extend the First Amendment to civil cases and apply only the common-law right there. *See, e.g.*, *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 935 (D.C. Cir. 2003); *Anderson v. Cryovac Inc.*, 805 F.2d 1, 11 (1st Cir. 1986).

This Court can affirm on any grounds the record supports. *See McNally Wellman Co. v. N.Y. State Elec. & Gas Corp.*, 63 F.3d 1188, 1194 (2d Cir. 1995). Because the district court solicited the appellants' proposed redactions, it has already considered both the confidential information implicated by banking laws and the "proprietary business information" of HSBC; it then made appropriate redactions. *See* SPA16 & n.2 ("I credit these concerns."). Accordingly, the district court has already, if without the label attached, engaged in the balancing required by the common-law right of access, that is, weighing the public's right to know against the privacy concerns of the resisting party. *See United States v. Hubbard*, 650 F.2d 293, 317–22 (D.C. Cir. 1980) (balancing test for the common-law right of access). Because the government has filed with this Court the original sealed Report alongside the district court's redacted version, this Court has all the information necessary to determine whether the district court abused of its discretion. *See* Dkt. Nos. 103 (motion to file under seal), 107 (sealed appendix in CD-ROM form).

If the Court finds this path preferable to the First Amendment's, it should not hesitate to affirm on alternative grounds. Although the public has not yet seen the Report even in redacted form, the district court's thoughtful discussion of those proposed redactions—and its example of HSBC's self-evidently over-inclusive proposals—strongly suggests a decision well within its discretion.

CONCLUSION

For these reasons, the orders of the district court should be affirmed.

Respectfully submitted,

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Dated: October 27, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that this amicus brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 7,000 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I further certify that this amicus brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word, with 14-point Times New Roman font.

Executed this 27th day of October, 2016.

/s/ Dennis M. Kelleher
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on October 27, 2016.

I hereby further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: October 27, 2016

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