

In The  
**Supreme Court of the United States**

---

---

VIRGINIA DEPARTMENT OF STATE POLICE,

*Petitioner,*

v.

THE WASHINGTON POST, THE VIRGINIAN-PILOT,  
RICHMOND TIMES-DISPATCH, VIRGINIA PRESS  
ASSOCIATION, THE ASSOCIATED PRESS,  
MEDIA GENERAL OPERATIONS, INCORPORATED  
and EARL WASHINGTON, JR.,

*Respondents.*

---

---

**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fourth Circuit**

---

---

**REPLY BRIEF IN SUPPORT OF THE  
PETITION FOR A WRIT OF CERTIORARI**

---

---

|   |  |
|---|--|
| JUDITH WILLIAMS JAGDMANN<br>Attorney General of Virginia                                      | MARTIN L. KENT<br>Senior Assistant Attorney<br>General   |
| WILLIAM E. THRO<br>State Solicitor General<br><i>Counsel of Record</i>                        | JAMES O. TOWEY<br>Assistant Attorney General<br>Office of the Attorney General<br>900 East Main Street<br>Richmond, Virginia 23219<br>(804) 786-2436<br>(804) 371-0200 (facsimile) |
| CARLA R. COLLINS<br>ERIC A. GREGORY<br>JOEL C. HOPPE<br>Associate State Solicitors<br>General |  |
| March 10, 2005  | <i>Counsel for Petitioner</i>  |

TABLE OF CONTENTS

|   | Page |
|---|------|
| TABLE OF AUTHORITIES.....   | ii   |
| I. THE PETITION IS NOT MOOT .....   | 2    |
| II. THE COMMONWEALTH'S NOTICE OF<br>APPEAL TO THE FOURTH CIRCUIT WAS<br>PROPER.....   | 2    |
| III. THIS COURT SHOULD RESOLVE THE<br>TENSION BETWEEN THE PUBLIC'S RIGHT<br>OF ACCESS TO COURT DOCUMENTS AND<br>THE GOVERNMENT'S NEED TO MAINTAIN<br>THE INTEGRITY OF CRIMINAL INVESTI-<br>GATIONS..... | 3    |
| CONCLUSION .....  | 5    |

## TABLE OF AUTHORITIES

## Page

## CASES

|   |      |
|---|------|
| <i>Badger Pharmacal v. Colgate-Palmolive Co.</i> ,<br>1 F.3d 621 (7th Cir. 1993)..... | 3    |
| <i>Foman v. Davis</i> ,<br>371 U.S. 178 (1962) .....                                  | 3    |
| <i>Gannett Co. v. DePasquale</i> ,<br>443 U.S. 368 (1979) .....                       | 2    |
| <i>In re Motions of Dow Jones &amp; Co.</i> ,<br>142 F.3d 496 (D.C. Cir. 1998).....   | 4    |
| <i>In re Special Proceedings</i> ,<br>373 F.3d 37 (1st Cir. 2004) .....               | 1, 4 |
| <i>Press-Enterprise Co. v. Superior Court</i> ,<br>478 U.S. 1 (1986) .....            | 2    |
| <i>SEC v. VanWaeyenberghe</i> ,<br>990 F.2d 845 (5th Cir. 1993).....                  | 3    |
| <i>United States v. Smith</i> ,<br>123 F.3d 140 (3rd Cir. 1997).....                  | 4    |

## CONSTITUTIONAL PROVISIONS

|                            |               |
|----------------------------|---------------|
| U.S. Const. amend. I ..... | <i>passim</i> |
|----------------------------|---------------|

## COURT RULES

|                            |   |
|----------------------------|---|
| Fed. R. App. P. 3(c) ..... | 3 |
|----------------------------|---|

## OTHER AUTHORITIES

|  |   |
|--|---|
| 20 James W. Moore, <i>Moore's Federal Practice</i><br>(3d ed. 1998)..... | 3 |
|--|---|

**REPLY BRIEF IN SUPPORT OF THE  
PETITION FOR A WRIT OF CERTIORARI**

The Virginia Department of State Police (“Commonwealth”), by and through its counsel, Virginia Attorney General Judith Williams Jagdmann, submits this Reply Brief in support of its Petition for a Writ of Certiorari.

Nothing in the Brief in Opposition calls into question the need for this Court to grant certiorari and resolve the question of whether the First Amendment presumptive right of access applies to a sealed court document that is also part of an ongoing criminal investigation. Indeed, the Respondents do not seriously contest that: (1) the First Circuit established a bright line rule denying access to sealed court documents that are part of an ongoing criminal investigation, *In re Special Proceedings*, 373 F.3d 37, 46-47 (1st Cir. 2004); (2) the First Circuit’s bright line rule directly contradicts the decision reached by the Court below; and (3) this Court should resolve the conflict.

Rather, the Respondents contend that (1) the Petition is moot and/or not ripe; (2) the Commonwealth’s Notice of Appeal to the Fourth Circuit was defective; and (3) the First Circuit’s decision in *In re Special Proceedings* is distinguishable because the documents at issue there and in other cases are somehow different.

In Reply, the Commonwealth makes three points. First, the Petition is not moot. Second, the Commonwealth’s Notice of Appeal to the Fourth Circuit was proper. Third, this Court should resolve the tension between the public’s right of access to court documents and the government’s need to maintain the integrity of criminal investigations. Certiorari should be granted.

## **I. THE PETITION IS NOT MOOT.**

The mere production of documents did not extinguish the case or controversy. In most instances, at the time the press would seek to obtain information of an ongoing investigation, an indictment and trial would ordinarily follow to fruition in a shorter time than it would take for an appeal of the document production issue to be filed in this Court. Before this Court could consider the merits of a petition, the information sought by the press would likely have become public record at trial. Thus, disclosure of the contents of an ongoing investigation fits squarely within this Court's "capable of repetition but evading review" jurisprudence, and the Petition is not moot. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 6 (1986); *Gannett Co. v. DePasquale*, 443 U.S. 368, 377 (1979).

Furthermore, the Respondents insinuate that the special prosecutor has abandoned the investigation. *Resp'ts Br. in Opp'n* at 2. Their contention is baseless. In a letter dated May 14, 2004, Richard E. Moore, the Special Prosecutor, informed the parties of the "ongoing" and "continuing" nature of his investigation in conjunction with the Virginia State Police. *App.* at 43-44. Moreover, when it imposed sanctions upon the Respondents for violating a protective order, the district court rejected the Respondents' assertions to the contrary and found that "there is still an ongoing investigation into the Williams murder." *App.* at 35.

## **II. THE COMMONWEALTH'S NOTICE OF APPEAL TO THE FOURTH CIRCUIT WAS PROPER.**

Citing the "Notice of Petition for Writ of Mandamus and/or Prohibition and Interlocutory Appeal and Application for Emergency Stay" ("Notice of Appeal"), the

Respondents contend that the Commonwealth “appealed only from the order denying reconsideration, rather than from the order to unseal and release the documents.” *Resp’ts Br. in Opp’n* at 6. This argument must be rejected.

The Notice of Appeal reveals the intent to appeal “from the Order entered March 23, 2004 . . . directing the release of certain documents previously filed under seal.” *J.A.* at 472. Under the liberal construction afforded to notices of appeal, the Commonwealth’s Notice of Appeal complied with the requirements of Federal Rule of Appellate Procedure 3(c). See *SEC v. VanWaeyenberghe*, 990 F.2d 845, 847 n.3 (5th Cir. 1993); *Badger Pharmacal v. Colgate-Palmolive Co.*, 1 F.3d 621, 624-26 (7th Cir. 1993). See also *Foman v. Davis*, 371 U.S. 178, 181 (1962); 20 James W. Moore, *Moore’s Federal Practice* § 303.21(3)(c)(ii) (3d ed. 1998). Moreover, the Respondents do not claim to have been prejudiced.

### **III. THIS COURT SHOULD RESOLVE THE TENSION BETWEEN THE PUBLIC’S RIGHT OF ACCESS TO COURT DOCUMENTS AND THE GOVERNMENT’S NEED TO MAINTAIN THE INTEGRITY OF CRIMINAL INVESTIGATIONS.**

The Respondents fail to address the key problem that makes the Petition worthy of the grant of certiorari, namely that the First Amendment’s presumptive right of access does not apply to information gathered in an ongoing criminal investigation. This issue places at odds two compelling public interests: the access to court filings and the integrity of criminal investigations.

Under the Fourth Circuit's rule, information gathered in an ongoing criminal investigation is subject to a presumptive right of access. *App.* 19-20. In other jurisdictions, the public does not have this presumptive right of access to court documents that are part of an ongoing investigation, see *In re Special Proceedings*, 373 F.3d at 46-47, or to documents presented to a grand jury. See *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 499-500 (D.C. Cir. 1998); *United States v. Smith*, 123 F.3d 140, 150-51 (3rd Cir. 1997). Given the approach of the First Circuit, and by extension the Third and District of Columbia Circuits, matters before the grand jury as well as the investigations that result in a presentation to a grand jury are confidential. Yet, the Fourth Circuit's approach negates the secrecy inherent in grand jury proceedings by imputing a presumption of access to those same documents during the investigation. The secrecy of the investigation and the grand jury proceedings is shattered. This conflict between the circuits should be addressed.



**CONCLUSION**

For the reasons stated in the Petition and above, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

|   |  |
|---|--|
| JUDITH WILLIAMS JAGDMANN<br>Attorney General of Virginia                                      | MARTIN L. KENT<br>Senior Assistant Attorney<br>General   |
| WILLIAM E. THRO<br>State Solicitor General<br><i>Counsel of Record</i>                        | JAMES O. TOWEY<br>Assistant Attorney General<br>Office of the Attorney General<br>900 East Main Street<br>Richmond, Virginia 23219<br>(804) 786-2436<br>(804) 371-0200 (facsimile) |
| CARLA R. COLLINS<br>ERIC A. GREGORY<br>JOEL C. HOPPE<br>Associate State Solicitors<br>General |  |
| March 10, 2005  | <i>Counsel for Petitioner</i>  |