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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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NORTH JERSEY MEDIA GROUP, INC., et al.,  
Plaintiffs-Appellees,

v.

JOHN ASHCROFT, Attorney General of the United States, et al.,  
Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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PETITION FOR REHEARING EN BANC

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Steven R. Shapiro  
Lucas Guttentag  
Lee Gelernt  
American Civil Liberties Union  
Foundation  
Immigrants' Rights Project  
125 Broad Street, 18th Floor  
New York, NY 10004  
(212) 549-2616

Edward Barocas  
American Civil Liberties Union  
of New Jersey Foundation  
  
35 Halsey Street, Suite 4B  
Newark, NJ 07102  
(973) 642-2086

David Cole  
Georgetown University Law Center  
60 New Jersey Avenue, NW  
Washington, DC 20001  
(202) 662-9078

Lawrence S. Lustberg  
Shavar D. Jeffries  
Gibbons, Del Deo, Dolan,  
Griffinger & Vecchione,  
P.C.  
One Riverfront Plaza  
Newark, NJ 07102  
(973) 596-4500

Nancy Chang  
Shayana D. Kadidal  
Center for  
Constitutional  
Rights  
666 Broadway, 7th Floor  
New York, NY 10012-

2317

(212) 614-6420

Attorneys for Appellees

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## STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals of the Third Circuit and to the Supreme Court of the United States, including Globe Newspaper v. Superior Court, 457 U.S. 596 (1982); Whiteland Woods v. Township of West Whiteland, 193 F.3d 177 (3d Cir. 1999); United States v. Simone, 14 F.3d 833 (3d Cir. 1994); and United States v. Criden, 675 F.2d 550 (3d Cir. 1983). Furthermore, this appeal involves a question of exceptional importance, *i.e.* whether the government may conduct closed deportation hearings without any individualized showing of need.

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## PRELIMINARY STATEMENT

The plaintiff newspapers respectfully request rehearing en banc of the Court's October 8 decision in North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), upholding the constitutionality of a Justice Department directive mandating the blanket closure - without case-specific findings - of all deportation cases unilaterally deemed by the Attorney General to be of "special interest" to the September 11 investigation. Rehearing is warranted because the decision directly conflicts with Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002), reh'g pet. pending; is irreconcilable with decisions from the Supreme Court and this Court; creates considerable uncertainty regarding the future application of access law in this Circuit; and finally, as both the majority and dissent observed, involves issues of extraordinary importance that "go to the heart of our institutions...." 308 F.3d at 220; id. at 228 (Scirica, J., dissenting).

It is difficult to overstate the implications of the panel's ruling. These hearings determine whether individuals will spend months in detention, be separated from their families, and then be removed from a country in which they may have lived for years. Yet this Court has now held that the government may conduct the hearings behind closed doors. That

is a remarkable proposition.

Beyond the problem of secrecy, the decision raises an issue of even greater significance: whether in the aftermath of September 11, the structural safeguards of our constitutional system will be abandoned, leaving the Executive branch with unprecedented, unilateral and unchecked powers. In this regard, it is critical to note that neither the district court nor the Sixth Circuit held that the government may not close proceedings where necessary, but only that it could not do so categorically and unilaterally, without a case-by-case demonstration that closure is necessary.

Indeed, Judge Scirica's dissenting opinion readily assumed that secrecy might be warranted in "some - or perhaps all - special interest cases." 308 F.3d at 227. But, like the district court and the Sixth Circuit, Judge Scirica was unwilling to take the unprecedented step of wholly relieving the Justice Department of any obligation to demonstrate the need for closure on a case-by-case basis. As Judge Scirica pointedly noted, what is fundamentally "[a]t issue is not whether some or all deportation hearings of special interest aliens should be closed, but who makes that determination." 308 F.3d at 221.

Notably, the majority did not claim that there has ever been a decision that permitted the government to override the

First Amendment categorically and unilaterally and close proceedings without a specific demonstration of need. Instead, the panel avoided the issue by holding that the unilateral closure of deportation proceedings does not even implicate the First Amendment at all, and consequently, that the Justice Department's categorical closure directive need not satisfy any scrutiny whatsoever. To reach that result, however, the panel ignored Supreme Court decisions, implicitly overruled binding precedent of this Court, and called into question a considerable body of First Amendment law developed by this Court over the past two decades.

#### **ARGUMENT**

To determine whether a First Amendment right of access exists, courts look at whether openness would be beneficial to the process (the "logic" prong), and whether the proceeding has traditionally been open (the "experience" or "history" prong). See Richmond Newspapers v. Virginia, 448 U.S. 555, 564-74 (1980); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-9 (1986) "Press-Enterprise II". If the court finds a right of access under this two-prong inquiry, then closure may occur only upon specific findings that closure is the least restrictive means of furthering a compelling interest.

The panel properly rejected the government's contention that this two-prong inquiry did not apply at all to

administrative proceedings, noting that this Circuit has used the test in cases involving both judicial and non-judicial proceedings. 308 F.3d at 207-09. The panel concluded, however, that the deportation proceedings here do not satisfy either the logic or experience prong of the test. Id. at 211-20. That conclusion was erroneous in both respects.

**I. DEPORTATION PROCEEDINGS SATISFY THE LOGIC PRONG.**

Significantly, the panel conceded that deportation proceedings “look very much like judicial trials” and that in general “openness of deportation proceedings performs each of [the] salutary functions” served by open civil and criminal proceedings. Id. at 216-17. That should have been the end of the logic-prong inquiry under existing case law. The panel stated, however, that it was “troubled” by its sense of how the logic inquiry is “currently” conducted under existing cases. Id. at 217. In the panel’s view, the logic prong must look not only at the positive effects of openness, but also the “flip side – the extent to which openness impairs the public good.” Id.

That courts should look at the net effect of openness is a proposition with which the newspapers readily agree; it plainly makes no sense to conclude that openness would be beneficial if, on balance, openness does more harm than good. Where the panel erred, however, is in assessing the positive

and negative effects of openness only in the subset of “special interest” deportation cases, rather than in deportation proceedings generally. Id. at 217-220 (“factoring” national security concerns into logic-prong inquiry).

The logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” United States v. Simone, 14 F.3d 833, 837 (3d Cir. 1994) (emphasis added) (citation and internal quotation marks omitted). The process here is the deportation proceeding, and that process does not change depending on the nature of the substantive claim at issue in a particular proceeding. Thus, as Judge Scirica explained, 308 F.3d at 224:

At this [logic prong] stage, we must consider the value of openness in deportation hearings generally, not its benefits and detriments in ‘special interest’ deportation hearings in particular. If a qualified right of access is found to attach to deportation hearings generally, the analysis then turns to whether particular issues raised in individual cases override the general limited right of access.

As Judge Scirica further noted (at 224), the Supreme Court flatly rejected the majority's "subset" approach in Globe Newspaper v. Superior Court, 457 U.S. 596, 605 n.13 (1982), where the Court stated that the right of access to criminal trials is based "on the recognition that as a general matter criminal trials have long been presumptively open" and that whether the right "can be restricted in the context of any particular criminal trial ... depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction" (emphasis added).

This Court subsequently made clear that the "subset" approach may not be used with respect to either the history or logic prong inquiry. In Simone, 14 F.3d at 840, for example, this Court found a right of access to post-trial voir dire examinations and stressed that the logic prong looks at whether "access to these [voir dire examination] proceedings will in general have a positive effect" and not whether there are particular cases "in which public access will interfere with the goals of the criminal justice system." Id. at 840 (emphasis added) (finding openness beneficial as "a general rule" and stressing that "the trial court has the power to close the proceedings once it makes findings sufficient to justify closure"); see also United States v. Smith, 776 F.2d

1104, 1114-15 (3d Cir. 1985) (rejecting subset approach, stating that the "particular character" of the government corruption cases at issue there was irrelevant to the two-prong inquiry); Publicker Industries v. Cohen, 733 F.2d 1059, 1069-70 (3d Cir. 1984) (looking at value of public access in civil trials generally, not in cases involving sensitive corporate disclosure).

That the majority's analytical approach could not be correct is clear from its implications for criminal and civil trials. The press and public may be excluded from individual criminal and civil cases involving national security if the government demonstrates that closure is the least restrictive means of furthering its interests. But the press and public plainly have a First Amendment right generally to attend such cases; indeed, the press are in regular attendance at the trial of Zacarias Moussaoui, even though he is charged with terrorism. Yet if the majority's approach were the law, the press would no longer have a First Amendment right to attend criminal cases involving national security and could be categorically excluded from the courtroom without any showing of need.

As the majority itself recognized, by shoehorning the government's national security concerns into the threshold question whether a First Amendment right of access exists for

deportation hearings, the Court was able to avoid subjecting the government's affidavits to strict scrutiny. 308 F.3d at 219 n.14. But the very point of the Richmond Newspapers test is to determine which proceedings should generally be open and then to subject the government's interests in closing particular cases to exacting scrutiny. See In re Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986) (finding general right of access to plea and sentencing hearings, but noting that closure may occur on a case-by-case basis if "narrowly tailored" to serve national security interests).<sup>1</sup>

In short, the majority's "subset" approach is directly contrary to controlling law from the Supreme Court and this Circuit. Not only did the panel fail to cite a single decision in support of its subset approach, 308 F.3d at 217, but the government itself did not even advance the analysis employed by the majority, see Gov't Br. at 53-58. Rehearing is required in order to address the inconsistency of the panel majority's approach with that of prior panels of this Court.

## **II. DEPORTATION PROCEEDINGS SATISFY THE HISTORY PRONG.**

The federal government began regulating immigration in

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<sup>1</sup> The majority's analytical error is particularly severe in this case because the category of cases at issue ("special interest" cases) is one that was unilaterally created by the Justice Department and the panel relied on the government's affidavits to conclude that openness would be detrimental in any case falling within this self-created "special interest" category. 308 F.3d at 218-219.

the last quarter of the nineteenth century, and specifically addressed the question of open hearings as early as the 1890s. From that point forward, the governing statutes and regulations expressly closed exclusion hearings, but have never closed deportation hearings. See Appellees Br. at 32-33. Moreover, by regulations dating to 1964, deportation hearings have been expressly open. See 8 C.F.R. §§240.10(b); 3.27 (hearings "shall be open to the public"). As Judge Scirica concluded, this history is "sufficient" under "our [Third Circuit] decisions." 308 F.3d at 222 n.4.

1. The logic and history prongs are "complementary" considerations, Whiteland Woods v. Township of West Whiteland, 193 F.3d 177, 181 (3d Cir. 1999): the logic prong asks whether there are policy reasons in favor of openness; the history prong looks to experience to the extent that it may provide guidance on whether openness is in general beneficial. Thus, courts do not consult history for history's own sake, but rather "because a tradition of accessibility implies the favorable judgment of experience." Id. (citation and internal quotation marks omitted). The touchstone, therefore, is whether history provides "guidance" on the ultimate question whether openness is beneficial or detrimental to a given proceeding. Simone, 14 F.3d at 838.

Given the unique traditions and characteristics of each

procedure, the historical inquiry must necessarily be flexible. In Whiteland Woods, 193 F.3d at 181, for example, this Court held that a thirty-year history of access sufficed for Richmond Newspapers purposes, notwithstanding that, as here, openness was presumed and could be overcome in certain circumstances. This Court has also found a right of access based solely on the logic prong where "neither the parties nor this Court" could establish a history of "openness or closure." Simone, 14 F.3d at 838 (post-trial juror examinations). In fact, even where a given type of proceeding was closed at common law, this Court has found a right of access where the modern "importance" of the proceeding has grown and "the current role of the First Amendment" supports openness. United States v. Criden, 675 F.2d 550, 555 (3d Cir. 1982) (stressing "societal interests in open" pre-trial hearings).<sup>2</sup>

Here, deportation proceedings have been in existence for slightly more than a century, and they have been open for that entire time, the last 40 of which by express regulatory mandate. Whiteland Woods, 193 F.3d at 181 (30 years).

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<sup>2</sup>See Smith, 776 F.2d at 1111 (bills of particular have only a "modern trend" with "brief history"). See also NBC v. Presser, 828 F.2d 340, 344 (6th Cir. 1987) (60-year period); United States v. Chagra, 701 F.2d 354, 363 (5th Cir. 1983) ("the lack of an historic tradition of open bail reduction hearings does not bar our recognizing a right of access"); Phoenix Newspapers v. U.S. District Court, 156 F.3d 940, 947-48 (9th Cir. 1998) (history from 1979).

Moreover, deportation proceedings have clearly become more formal and important over the years. Criden, 675 F.2d at 555. And, even if there were no history of openness, there is clearly no general history of closure; consequently, under Simone, 14 F.3d at 838, the court would proceed to the logic prong.<sup>3</sup>

2. Notwithstanding this tradition of openness, the majority concluded that the history prong had not been satisfied because it was not sufficiently "strong." 308 F.3d at 214; id. at 213. (history too "recent"). That conclusion

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<sup>3</sup> The majority questioned the history of openness as a factual matter, repeating the government's assertion that some deportation hearings might have been closed because they took place in prisons. 308 F.3d at 212. Yet the government offered no evidence that hearings in prison were generally closed. Moreover, its own guidelines state that deportation hearings in prison "are considered public and ... the media ...[and] public are eligible to attend." Bureau Of Prisons, Institutional Hearing Program, Program Statement 5111.01 §12(c) (Apr. 25, 1997).

The majority also suggested that the history of openness was "ambiguous" and "potentially unconsidered." 308 F.3d at 216. Yet the regulation unequivocally states that deportation proceedings "shall be open" to the public. 8 C.F.R. §§3.27; 240.10(b). Nor can it plausibly be claimed that the history of openness was "potentially unconsidered." Over the past 100 years Congress and the Attorney General have amended the statutes and regulations governing access on at least 20 occasions, see Appellees Br. at 32-33, but have never changed the practice of openness for deportation proceedings; indeed, in 1997, the Attorney General focused on the issue and chose to open up the exclusion process to bring those previously-closed proceedings in line with deportation proceedings. See 62 Fed.Reg. 10312 (Mar. 6, 1997) (codified at 8 C.F.R. §240.10(b)).

conflicts with this Court's case law.

The majority did not dispute that "within the geographic confines of [this] Circuit, a showing of openness at common law is not required," 308 F.3d at 213, nor did the panel dispute Judge Scirica's observation that this Court has not "framed a bright-line test for determining when a historical tradition is lengthy enough," id. at 222 n.4. Nor, significantly, did the majority dispute that this Court's cases have expressly found that "relatively little history" may be needed, id. at 213, and that in some cases, there need be no affirmative showing of history, id. at 213-214. The majority concluded, however, that each of this Court's decisions over the past two decades could be distinguished on its facts. Id. However, the sheer number of cases that had to be distinguished is telling by itself, and in any event, the majority's proffered distinctions are unavailing.

The majority was wrong to dismiss Whiteland Woods's conclusion that plaintiffs had a First Amendment right to attend municipal planning commission meetings as mere "dicta" involving "potentially misleading language." 308 F.3d at 214. Indeed, Whiteland Woods (relied upon by Judge Scirica in his dissent here, id. at 222 n.4) expressly addressed the applicability of Richmond Newspapers to the proceedings there at issue - the very claim raised by the plaintiffs - and the

Court characterized its own conclusion as a "holding." 193 F.3d at 180-81 ("We have no hesitation in holding ... [plaintiffs] had a constitutional right of access to the Planning Commission meeting").

The majority dismissed Criden, 675 F.3d at 555, on the ground that it was decided before Press-Enterprise II "formalized" the two-prong Richmond Newspapers test and made clear that the test can only be satisfied by an affirmative showing of historical openness, and not based on the increased modern "importance" of a procedure. 308 F.3d at 213. Yet the majority does not acknowledge that the Supreme Court in Press-Enterprise II specifically noted - without disapproval - that some courts had based a right of access on the modern "importance" of a given procedure, the exact approach taken in Criden. Press-Enterprise II, 478 U.S. at 11 n.3 (citing cases).<sup>4</sup> Criden remains the law in this Circuit, and ought not be overruled sub silentio. And, indeed, this Court's decisions post-dating Press-Enterprise II have continued to cite Criden for the proposition that a right of access may be based on the "current role of the first amendment" and the "societal interests" militating in favor of public scrutiny.

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<sup>4</sup>Indeed, one of the cases cited by the Supreme Court relied heavily on Criden itself. 478 U.S. at 11 n.3 (citing Minneapolis Star and Tribune Co. v. Kammeyer, 341 N.W.2d 550 (Minn. 1983)).

Simone, 14 F.3d at 838 (quoting Criden, 675 F.2d at 555).

The majority's attempt to cut back Simone is equally unconvincing. The majority appeared to acknowledge that Simone based its decision solely on the logic prong after finding no history of "openness or closure," but held, for the first time, that the decision should be limited to the "criminal context," citing Simone's statement that "[g]iven the overwhelming historical support for access in other places of the criminal process, we are reluctant to presume that the opposite rule applies in this case in the absence of a distinct tradition to the contrary." 208 F.3d at 213-214 (emphasis supplied by majority). But contrary to the majority's suggestion, Simone did not rely on the "criminal context" to create a presumption of openness. Instead, having found no evidence to support either "openness or closure" with regard to a post-trial hearing into potential juror misconduct, the Court proceeded to the logic prong, stating that history provided "little guidance." Simone, 14 F.3d at 838.

Finally, the panel offered no explanation for any of the other cases decided by this or any other circuit finding that the history prong can be satisfied with a showing equal to or

less than that provided here. See supra at 9 (citing cases).<sup>5</sup>

As importantly, the majority provided no criteria for its conclusion that the newspapers' showing was not "sufficient," 308 F.3d at 212, relying exclusively on its view that greater evidence existed in other cases. But even assuming that the panel were correct that the type and length of historical evidence presented here raised an issue of first impression, the majority failed to explain why the newspapers' showing was insufficient, leaving future courts and litigants with no criteria to apply. For this reason alone rehearing is warranted.

\* \* \* \*

The American people have an overwhelming interest in knowing how its government is using the awesome power of detention and deportation. If individuals on American soil are going to be detained and potentially deported in secret proceedings, it should not be on the basis of the Justice Department's unilateral say-so. See In re Washington Post Co., 807 F.2d at 391-92 (stressing that judiciary must not "abdicate" its responsibility even in access cases involving

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<sup>5</sup> The majority's reliance on Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1168-71 (3d Cir. 1986), is wholly misplaced. 308 F.3d at 209. That decision did not involve access to proceedings, but rather access to environmental records unrelated to any proceeding, a distinction the Capital Cities Court specifically emphasized. Id. at 1174-75.

national security). The panel's opinion to the contrary is a dangerous precedent, and requires rehearing.<sup>6</sup>

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<sup>6</sup>The importance of openness is also reflected in the fact that due process (which applies to citizens and aliens alike) also requires a public hearing where an individual's liberty is at stake. See Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903) (due process applies to non-citizens); Kwock Jan Fat v. White, 253 U.S. 454, 464 (1920) (deportation must be "administered, not arbitrarily or secretly, but fairly and openly"); Levine v. United States, 362 U.S. 610, 616 (1960) ("due process demands ... public proceeding" where liberty is involved); Pechter v. Lyons, 441 F.Supp. 115, 119 (S.D.N.Y. 1977) ("fair play" requires open deportation hearing); Ex Parte Radivoeff, 278 F. 227, 228-29 (D. Montana 1922) (same). See also Fitzgerald v. Hampton, 467 F.2d 755, 766 (D.C. Cir. 1972) ("due process requires" open hearing in discharge case).

**CONCLUSION**

The petition for rehearing should be granted.

Respectfully submitted,

By: \_\_\_\_\_  
Lawrence S. Lustberg

Lawrence S. Lustberg  
Shavar D. Jeffries  
Gibbons, Del Deo, Dolan,  
Griffinger & Vecchione, P.C.

One Riverfront Plaza  
Newark, NJ 07102  
(973) 596-4500

Edward Barocas  
American Civil Liberties Union  
of New Jersey Foundation  
Constitutional 35 Halsey Street, Suite 4B  
Newark, NJ 07102  
(973) 642-2086  
2317

David Cole  
Georgetown University Law Center  
60 New Jersey Avenue, NW  
Washington, DC 20001  
(202) 662-9078

By: \_\_\_\_\_  
Lee Gelernt

Steven R. Shapiro  
Lucas Guttentag  
Lee Gelernt  
American Civil  
Liberties  
Union Foundation  
125 Broad Street  
18th Floor  
New York, NY 10004-2400  
(212) 549-2616

Nancy Chang  
Shayana D. Kadidal  
Center for  
Suite 4B Rights  
666 Broadway, 7th Floor  
New York, NY 10012-  
(212) 614-6420

Attorneys for Plaintiff-Appellee Newspapers

Dated: November 21, 2002

**CERTIFICATE OF COMPLIANCE**

I certify that the attached brief has been prepared in  
monospaced typeface using: WP 9.0; Courier New 12 point font.

\_\_\_\_\_  
Lee Gelernt

Dated: November 21, 2002

**CERTIFICATE OF SERVICE**

I, Chika Watanabe, do hereby certify that on November 21, 2002, I caused two copies of the attached PETITION FOR REHEARING EN BANC to be sent by Federal Express overnight, next business day service to the following:

SHARON SWINGLE  
Department of Justice  
Civil Division, Room 9135  
601 D Street, N.W.  
Washington, DC 20530-0001  
(202) 353-2689  
Attorney for Government

DAVID SCHULZ  
Clifford Chance Rogers & Wells  
200 Park Avenue  
New York, NY 10166  
Counsel for Amici

-----  
Chika Watanabe