# WHY ARE JUDGES HIDING JUDICIAL RECORDS FROM THE PUBLIC?

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## INTRODUCTION

Courts are routinely sealing documents in civil cases, sometimes the bulk of a case docket, resulting in public records being hidden from the public.[1] The practice sounds improper on its face and, in most situations, is contrary to the legal doctrine known as the "right of access." The obvious question is "why?" Why are judges hiding judicial records from the public? Why are they allowing it to happen? This secrecy problem has been around for decades, but there has been no legitimate resolution for the issue.[2]

When it comes to sealing judicial materials in civil cases, the law is clear on one thing: The press and public are presumed to have the right to access judicial documents, a presumption which can be overcome only in limited circumstances.[3] This right of access to judicial records stems from the fundamental right of the public to access actual judicial proceedings.[4] This right is not

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[1] While similar issues exist to some extent in criminal cases, the law has been more comprehensively addressed by the Supreme Court in the criminal context. *See* Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982). Although the Supreme Court had the opportunity to provide some clarity on the right of access in civil cases, including access under the First Amendment, in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the Court failed to address the issue beyond the narrow context of discovery protective orders. This article focuses on civil litigation, judicial records filed with the court, and the problems that have arisen in the absence of direction from the Supreme Court.

[2] *See* James E. Rooks Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV. 859, 862 (2004) (noting that "the movement to restrict secrecy began" in the early 1990s and that as of 2004, "[j]udicial understanding of the problem of secrecy has increased, and support of the news media has solidified").

[3] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents."); Newsday LLC v. County of Nassau, 730 F.3d 156, 167 n.15 (2d Cir. 2013) ("Finding that a document is a 'judicial document' triggers a presumption of public access, and requires a court to make specific, rigorous findings before sealing the document or otherwise denying public access.").

[4] Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 418 (5th Cir. 2021); *see also* *Richmond Newspapers*, 448 U.S. at 567 ("That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner." (quoting THE 1677 CONCESSIONS AND AGREEMENTS OF WEST NEW JERSEY, *reprinted in* SOURCES OF OUR LIBERTIES 188 (Richard L. Perry ed., 1959))). It

conditioned on any proprietary interest in a specific document itself or any information contained within it; nor is the right conditioned on some need to use that document as evidence in other litigation.[5] Instead, the basic idea set out by the Supreme Court is that "[f]ree speech carries with it some freedom to listen" along with the right to "receive information and ideas."[6] Following this instruction, courts have reached a rudimentary consensus (discussed herein) that the public enjoys a right of access, even in civil matters.

Nonetheless, courts have vast differences of opinion as to the actual legal source of, and the courts' corresponding ability to limit, that right of access. More disturbingly, courts lack consistency in their protection of this "fundamental" right, regardless of its source. There is a quagmire of inconsistency in the federal courts on the right of access. A thorough understanding of the gravity of the issue requires an understanding of exactly what the right of public access entails, its evolution, and the practical realities of this issue within the modern federal court system. In the absence of some agreement about what right of access truly exists and a consistent enforcement of that right, the "right" is effectively meaningless.

## I. WHAT IS THE RIGHT OF PUBLIC ACCESS AND WHY DOES IT EXIST?

### *A. The Fundamental Right of Access—A Constitutional Right?*

Stated in its most simplistic form, the right of access means that, in the absence of special circumstances, the press and the public usually enjoy the right to obtain access to and copy judicial records.[7] Unfortunately, the simplicity ends there.[8] Although it is

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similarly extends from the well-established idea "that the Constitution protects the right to receive information and ideas." Stanley v. Georgia, 394 U.S. 557, 564 (1969).

[5] *See Nixon*, 435 U.S. at 597.

[6] *Richmond Newspapers*, 448 U.S. at 576 (quoting Kleindienst v. Mandel, 408 U.S. 753, 762 (1972)).

[7] *See* Sloan Filter Co. v. El Paso Reduction Co., 117 F. 504 (D. Colo. 1902) ("[T]he matter of inspecting and taking copies of public records is as old in the law as the records are old."); *see also In re* Reps. Comm. for Freedom of Press, 773 F.2d 1325, 1336 n.8 (D.C. Cir. 1985) (noting that many states have enacted statutes expressing a right of access to records). Interestingly, courts have concluded that the right of access is no

now well-established that the press and public have this "fundamental" right and that some analysis must be undertaken before a court may legally impede that right, that is where the courts' consensus ends.[9]

For example, courts do not even agree about the source of this right in civil cases. While the Supreme Court has held that in criminal cases, the public's right of access stems from the First Amendment,[10] the Court has not taken the opportunity to extend that right as expansively in civil cases.[11] With this gap left by the highest court, some circuit courts have elected to extend constitutional protection to the right of access in both civil and criminal matters under the First Amendment.[12] Even among these courts, however, the heightened protection of access varies based on the type of judicial record involved.[13] For example, the

greater for the press than it is for the public. *See* Co. Doe v. Pub. Citizen, 749 F.3d 246, 263 (4th Cir. 2014) ("In light of the interests served by the public right of access, we have recognized that 'the rights of the news media . . . are coextensive with and do not exceed those rights of members of the public in general.'" (quoting *In re* Greensboro News Co., 727 F.2d 1320, 1322 (4th Cir. 1984))).

[8] Goldstein v. Forbes (*In re* Cendant Corp.), 260 F.3d 183, 196 (3d Cir. 2001) (recognizing the denial of the presumptive right of public access as "an important area where district courts have varied widely in their practice").

[9] *See* Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983) (vacating court order sealing all FTC documents where the district court failed to properly justify its sealing of documents away from the public with appropriate findings or conclusions).

[10] *See, e.g.*, Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 604 (1982) ("The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.").

[11] *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) (declining to recognize First Amendment right of access in the context of the restraints put in place pursuant to a pretrial discovery protective order where documents were only discovered but not yet admitted, reasoning that it was "not the kind of classic prior restraint that requires exacting First Amendment scrutiny").

[12] *See* Lugosch v. Pyramid Co., 435 F.3d 110, 124 (2d Cir. 2006); Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178 (4th Cir. 1988); *Rushford*, 846 F.2d at 253; Publicker Indus. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984); *In re* Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1176.

[13] United States v. Appelbaum, 707 F.3d 283, 290 (4th Cir. 2013) (citation omitted) (explaining how "the common law presumes a right to access all judicial records and documents," but "the First Amendment provides a right of access only to particular judicial records and documents"); *see also* Webster Groves Sch. Dist. v. Pulitzer Pub. Co., 898 F.2d 1371, 1374-75 (8th Cir. 1990) (declining to extend its

Second, Third, Fourth, Sixth and Seventh Circuits have recognized First Amendment protection of access in civil cases under certain circumstances.[14] Even so, two of these circuits are perhaps best described as lukewarm in their adoption of First Amendment protection in civil cases. In *In re Continental Illinois Securities Litigation*,[15] the Seventh Circuit seemed to suggest that there was some First Amendment right of access in civil cases when it discussed its recent adoption of the right of access in criminal case *United States v. Dorfman*.[16] However, the court then proceeded to combine that analysis with a strong presumption of access rooted in common law.[17] The court neither explicitly

holding regarding First Amendment access in *Iowa Freedom* to additional civil proceedings); *Co. Doe*, 746 F.3d at 267 (extending First Amendment access to judicial rulings on summary judgment motions); *In re* Iowa Freedom of Info. Council, 724 F.2d 658, 661 (8th Cir. 1983) (applying First Amendment analysis to right of access in contempt proceeding in a civil case); *see, e.g.*, Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 253 (4th Cir. 1988) (finding First Amendment right of access to summary judgment documents). *But see In re* Marriott Int'l Customer Data Sec. Breach Litig., No. 19-2879, 2022 U.S. Dist. LEXIS 59426, at *4 (D. Md. Mar. 30, 2022) (declining to extend First Amendment access to class certification, which was not a dispositive motion).

[14] *See* Lugosch v. Pyramid Co., 435 F.3d 110, 124 (2d Cir. 2006); Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178 (4th Cir. 1988); *Rushford*, 846 F.2d at 253 ("We believe that the more rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case."); Publicker Indus. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984) (First Amendment right of access to a civil proceeding); *In re* Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984) (derivative suit, finding right of access to special litigation committee report used in support of motion to dismiss, referred to as a "hybrid" summary judgment motion) ("Recently, we recognized that this presumption is of constitutional magnitude." (citing United States v. Dorfman, 690 F.2d 1230, 1233-34 (7th Cir. 1982))); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1176 ("Under the First Amendment and the common law, we conclude that the District Court erred by failing to state findings or conclusions which justify nondisclosure to the public."). *But see* Belo Broad. Corp. v. Clark, 654 F.2d 423, 428 (5th Cir. 1981) (no Constitutional right to the press or public to courtroom exhibits); Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983) (refusing to extend Constitutional right of access to civil materials).

[15] *In re* Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984); *see also* ABS Glob., Inc. v. Inguran, LLC, No. 14-cv-503-wmc, 2017 U.S. Dist. LEXIS 51754, at *5 (W.D. Wis. Apr. 5, 2017) (noting "there is a 'long-recognized presumption in favor of public access to judicial records,' which is 'of a constitutional magnitude'" (quoting *In re* Cont'l Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984))).

[16] *United States v. Dorfman*, 690 F.2d at 1233-34.

[17] Notably, the court expressed its agreement with the Sixth Circuit's "policy reasons for granting public access to criminal proceedings [to] apply to civil cases as

recognized the constitutional right nor applied the usual heightened analysis that is concomitant with the stronger right under the First Amendment. Moreover, subsequent Seventh Circuit decisions consistently refer to a "strong presumption of public disclosure."[18] In a similar manner, the Sixth Circuit only questionably falls within this constitutionally protected access category. It collectively recognized First Amendment and common law protection in *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*,[19] but since then has relied primarily on common law rights, which it fiercely protects.[20]

The Second Circuit is perhaps the leading advocate for First Amendment access, as it has issued a series of decisions that progressively expanded the constitutionally protected right of access for the press and public. In *Westmoreland v. Columbia Broadcasting System, Inc.*, the court recognized access rights under the First Amendment to include the right to attend oral arguments relating to a motion for summary judgment.[21] The court then noted that other circuits had recognized how "a qualified First Amendment right of access extends to" documents submitted in connection with such hearings.[22] Then, ultimately, the Second Circuit extended a "qualified" First Amendment right of access to summary judgment materials, reasoning that in such situations where there may be no public hearing, public access to the judicial documents is "particularly important."[23] Even so, this

well." *In re Cont'l Ill. Sec. Litig.*, 732 F.2d at 1308 (citing *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179).

[18] *See, e.g.*, Baxter Int'l, Inc. v. Abbott Lab'ys, 297 F.3d 544, 548 (7th Cir. 2002).

[19] Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983).

[20] *See, e.g.*, *In re* Knoxville News-Sentinel Co., 723 F.2d 470 (6th Cir. 1983) (declining to acknowledge First Amendment right). *Cf.* Wilson v. Am. Motors Corp., 759 F.2d 1568, 1569 (11th Cir. 1985) (opining that the Sixth Circuit had adopted First Amendment right).

[21] Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984).

[22] *In re* N.Y. Times Co., 828 F.2d 110, 114 (2d Cir. 1987).

[23] *Lugosch*, 435 F.3d at 124 (citation omitted) (quoting *In re N.Y. Times Co.*, 828 F.2d at 114). Notably, while the court did not narrow its decision to this particular fact, it was the press, not a random member of the public, who intervened in this particular instance to seek access to sealed materials. Other courts have also concluded that summary judgment materials are available under the First Amendment and common law rights of access regardless of whether the one seeking access is a member of the press or the public. *See, e.g.*, Brown v. Maxwell, 929 F.3d 41, 47 (2d Cir. 2019) (noting "it is well-settled that 'documents submitted to a court for its consideration in a

circuit continues in most cases to analyze access rights under the common law.

Other circuits have concluded that a right of access derives from the common law alone, following the Supreme Court's holding in *Nixon v. Warner Communications*.[24] In those circuits, the heightened protections associated with First Amendment access are limited to criminal cases.[25] Those circuits that recognize First Amendment protections for certain judicial records also recognize a concomitant common law right of access to all judicial records, consistent with *Nixon*.[26] Absent direction from the Supreme Court or some legislative procedural rule, there is a clear split of authority regarding the source and, in turn, the strength of the right of access. This, in turn, has raised a host of other legal

summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment.'" (citing *Lugosch*, 435 F.3d at 121)).

[24] *Nixon*, 435 U.S. 589 (1978). *See, e.g.*, Secs. & Exch. Comm. v. Van Waeyenberghe, 990 F.2d 845, 849 (5th Cir. 1993) (recognizing "presumption in favor of the public's common law right of access to court records"); *In re Knoxville News Sentinel*, 723 F.2d at 474 ("This long-established legal tradition is the presumptive right of the public to inspect and copy judicial documents and files."); Webster Groves Sch. Dist. v. Pulitzer Pub. Co., 898 F.2d 1371, 1376-77 (8th Cir. 1990); IDT Corp. v. eBay, Inc., 709 F.3d 1220, 1222 (8th Cir. 2013) ("There is a common-law right of access to judicial records."); Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006); Mann v. Boatright, 477 F.3d 1140, 1149 (10th Cir. 2007) ("Courts have long recognized a common-law right of access to judicial records."); Chi. Trib. Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1311 (11th Cir. 2001) ("[T]he common-law right of access includes the right to inspect and copy public records and documents."); FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 n.4 (1st Cir. 1987); Republic of Phil. v. Westinghouse Elec. Corp., 949 F.2d 653, 659-61 (3d Cir. 1991) (emphasizing that the common law right of access is "firmly accepted in this circuit"); *see also* United States v. Wecht, 484 F.3d 194, 208 n.19 (3d Cir. 2007) ("Because we find that a common law right of access attaches . . . we need not engage in the First Amendment analysis.").

[25] *See generally In re Reps. Comm. for Freedom of the Press*, 773 F.2d at 1332-33 (recognizing common law history of access as highlighted by the Supreme Court in *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978), but declining to find a First Amendment right or a general presumption of access).

[26] *Lugosch*, 435 F.3d at 119-20 (recognizing that judicial documents are entitled to a common law presumption of access, the weight of which varies based on the role the document plays and that some of these judicial documents also have a First Amendment protection as well); Miller v. Ind. Hosp., 16 F.3d 549, 551 (3d Cir. 1994) ("The existence of a common law right of access to judicial records is beyond dispute."); Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 253 (4th Cir. 1988) ("Under common law, there is a presumption of access accorded to judicial records."); Smith v. U.S. Dist. Ct., 956 F.2d 647, 649 (7th Cir. 1992).

issues when district courts withhold judicial documents from the public and press. As discussed herein, this disagreement ultimately impacts what the right of access truly is and how it should be enforced. In short, the viability of this "fundamental" right is at risk in those circuits that do not protect it as readily as others.

### *B. The Justifications of Public Access Are Well Founded and Established*

Regardless of the source of the right of access, courts have emphatically defended the reasons why the public access right is essential. Presumably, their unanimity stems from ideas espoused in the Supreme Court's decisions on public access, though expressed in the context of criminal matters.[27] As the First Circuit poetically expressed, "justice is better served by sunshine than by darkness."[28] Indeed, "'[t]he crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'"[29] The Fifth Circuit unequivocally reasoned:

> The public deserves better. The presumption of openness is Law 101: "The public's right of access to judicial records is a fundamental element of the rule of law." Openness is also Civics 101. The Constitution's first three words make clear that ultimate sovereignty is wielded not by government but by the governed. And because "We the People" are not meant to be bystanders, the default expectation is transparency—that what happens in the halls of government happens in

[27] *See* Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 508 (1984) ("The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." (citing Richmond Newspapers v. Virginia, 448 U.S. 555, 569-71 (1980))).

[28] FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 413 (1st Cir. 1987).

[29] Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1178 (6th Cir. 1983) (alteration in original) (quoting *Richmond Newspapers*, 457 U.S. at 567, 571).

> public view. Americans cannot keep a watchful eye, either in capitols or in courthouses, if they are wearing blindfolds.[30]

In short, "American courts are not private tribunals summoned to resolve disputes confidentially at taxpayer expense."[31] This is true even as to "the determination of whether to permit access to information contained in court documents because court records often provide important, sometimes the only, bases or explanations for a court's decision."[32] As recognized by the Eleventh Circuit (quoting Judge Easterbrook of the Seventh Circuit), "'Judges deliberate in private but issue public decisions after public arguments based on public records. . . . Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.'"[33] Similarly, the Second Circuit in *United States v. Amodeo*, emphasized:

> The presumption of access is based on the need for federal courts, although independent . . . to have a measure of accountability and for the public to have confidence in the administration of justice. Federal courts exercise powers under Article III that impact upon virtually all citizens, but judges, once nominated and confirmed, serve for life . . . . [P]ublic monitoring is an essential feature of democratic control. Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.[34]

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[30] Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 418 (5th Cir. 2021) (citations omitted).

[31] *Id.* at 421; *see also* PepsiCo v. Redmond, 46 F.3d 29, 31 (7th Cir. 1995) ("Opinions are not the litigants' property. They belong to the public, which underwrites the judicial system that produces them.").

[32] *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1177.

[33] Perez-Guerrero v. U.S. Att'y Gen., 717 F.3d 1224, 1235 (11th Cir. 2013) (quoting Hicklin Eng'g, L.C. v. Bartell, 439 F.3d 346, 348 (7th Cir. 2006)).

[34] United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995).

The concern is particularly true where one of the litigants is a public or government figure.[35] As the First Circuit has explained, the right of access "is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch."[36]

Courts have also recognized a higher public interest in access to litigation records when the litigation involves matters that are important to a significant portion of the public.[37] For instance, with regard to class actions, the Third Circuit explained in *In re Cendant*:

[35] *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) (citations omitted) ("The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies and in a newspaper publisher's intention to publish information concerning the operation of government.")

[36] FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987); *see also* Secs. & Exch. Comm. v. Biochemics, Inc., 435 F. Supp. 3d 281, 290 (D. Mass. 2020) (reminding that "public access is particularly appropriate where, as here, the government is a party. Therefore, only the most compelling reasons can justify non-disclosure of judicial records, and the burden of proof is on the party seeking confidentiality.").

[37] *In re* Cendant Corp., 260 F.3d 183, 194 (3d Cir. 2001) (noting that in a class action, "the test for overriding the right of access should be applied . . . with particular strictness"). Even so, circuits disagree whether a class certification motion justifies application of the heightened standards of public access under the First Amendment or to a mere emphasis under the less protective common law right of access. *See, e.g.*, *In re* Marriott Int'l Customer Data Sec. Breach Litig., No. 19-2879, 2022 U.S. Dist. LEXIS 59426, at *312-13 (D. Md. Mar. 30, 2022) (declining to provide any right of access to plaintiffs' personal information in sealed class certification materials); Provident v. Teva Pharms. Indus. Ltd., No. 20-4660-KSM, 2023 U.S. Dist. LEXIS 14915, at *14-18 (E.D. Pa. Jan. 30, 2023) (assuming First Amendment right of access applied to class certification materials but allowing narrow redactions as not infringing on public access). *But see* Tropical Sails Corp. v. Yext, Inc., No. 14-7582, 2016 U.S. Dist. LEXIS 49029, at *9 (S.D.N.Y. Apr. 12, 2016) (extending constitutional right of access to class certification materials).

> Protecting the access right in class actions "promotes [class members'] confidence" in the administration of the case. Additionally, the right of access diminishes the possibility that "injustice, incompetence, perjury, [or] fraud" will be perpetrated against those class members who have some stake in the case but are not at the forefront of the litigation. Finally, openness of class actions provides class members with "a more complete understanding of the [class action process] and a better perception of its fairness."[38]

As with class actions, courts have emphasized the right of access in antitrust cases because of the likelihood of anticompetitive conduct having a significant impact on the market as a whole and, accordingly, a significant portion of the public.[39]

### C. *The Right of Public Access Is Not Absolute*

The right of access, however, is not without limitations.[40] All courts agree that certain situations will justify nondisclosure. This is true for both those courts that believe the right of access is rooted in the First Amendment and those that believe it is a common law right.[41] The inconsistency arises when determining

[38] *In re Cendant Corp.*, 260 F.3d at 193 (alteration in original) (quoting Littlejohn v. BIC Corp., 851 F.2d 673, 678 (3d Cir. 1988)); *see generally* Shane v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 309 (6th Cir. 2016) ("Class members cannot participate meaningfully in the process contemplated by Federal Rule of Civil Procedure 23(e) unless they can review the bases of the proposed settlement and the other documents in the court record.").

[39] *Shane*, 825 F.3d at 305 (reasoning that the public's interest is not always just on the outcome of a case, but in some cases, "including 'antitrust' cases," their interest is "on the conduct giving rise to the case" (citing Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983))). It is certainly reasonable for other businesses, courts, litigants, the press, and the public consuming population at large to want information from antitrust cases so that they may be better informed and able to recognize what types of conduct are being challenged in court from an antitrust standpoint. In order to be so informed, they must have access not just to judicial decisions but also the documents and evidence giving rise to those decisions. *See generally,* Baxter Int'l, Inc. v. Abbott Lab'ys, 297 F.3d 544, 546 (7th Cir. 2002) ("Not only the legislature but also students of the judicial system are entitled to know what the heavy financial subsidy of litigation is producing.").

[40] FTC v. AbbVie Prods., LLC, 713 F.3d 54, 62, 66 (11th Cir. 2013).

[41] Even when courts have recognized a First Amendment right of access, there are limits, similar to cases dealing with actual free speech issues. *Cf.* Texas v. Johnson, 491 U.S. 397, 406 (1989) (requiring a "substantial showing of need" to overcome First Amendment speech in a flag burning case). *See also* Gannett Co. v. DePasquale, 443

what special circumstances suffice to overcome the presumptive right of access. Such determinations are often a result of, and are heavily impacted by, the court's views regarding the source of the right of access.

### *D. The Right of Access Is a Matter of Judicial Discretion*

Ultimately, the question of whether the press and public have a right of access to any particular judicial document is a matter of discretion for the court.[42] Of course, those courts that place a higher emphasis on public access emphasize the limitations of such discretion, suggesting, for example, that courts be "ungenerous" with their discretion given that "the working presumption is that judicial records should not be sealed."[43] Other courts have stressed that despite having discretion, courts do have, at a minimum, an affirmative obligation to undertake some assessment of whether the material in question is entitled to public access or closure.[44] As the D.C. Circuit Court of Appeals admonished:

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U.S. 368, 447 (1979) (agreeing that that government interest in nondisclosure was significant when weighed against access right where newspaper covering criminal trial sought access to pretrial proceeding even though parties and court agreed to closure to ensure fair proceeding).

[42] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 599 (1978) ("[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."); *see also* FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410-11 (1st Cir. 1987) ("[I]t falls to the courts to weigh the presumptively paramount right of the public to know against the competing private interests at stake. This balance must be struck, of course, "in light of the relevant facts and circumstances of the particular case." (citing *In re* Knoxville News-Sentinel Co.,723 F.2d 470, 478 (6th Cir. 1983))); *AbbVie Prods.*, 713 F.3d at 61 (reviewing seal decisions for abuse of discretion).

[43] Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 418-19 (5th Cir. 2021).

[44] *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1177 ("Having . . . 'discretion' to deny access to documents does not, however, imply that the District Court operates without standards. In this case, the District Court placed a seal on all of the documents filed by the FTC without discussion. The District Court's decision is not insulated from review merely because the judge has discretion in this domain. The District Court's discretion is circumscribed by a long-established legal tradition."); *see also In re Knoxville News-Sentinel Co.*, 723 F.2d at 473-74 (same).

> To say that discretion exists, . . . is not to say, . . . that what is involved here "is simply a policy determination." Appellants seek to vindicate a precious common law right, one that predates the Constitution itself. While the courts have sanctioned incursions on this right, they have done so only when they have concluded that "justice so requires." To demand any less would demean the common law right.[45]

In the same manner, the Fourth Circuit has "cautioned [its] district courts that the right of public access, whether arising under the First Amendment or the common law, 'may be abrogated only in unusual circumstances.'"[46]

## II. THE RIGHT OF ACCESS (OR EVEN CLOSURE) IS MEANINGLESS ABSENT SOME UNIFORM ENFORCEMENT

Why should it matter what the actual source of the right of access is, so long as one exists? Superficially, it is an appealing argument. In practice, the inconsistencies regarding the right of access and its lack of enforcement have, at times, created the very perception of a fiat against which Judge Easterbrook cautioned in *Hicklin*.[47] Ultimately, the venue of an action (and even the particular judge) may have a significant impact on the public's right of access to judicial records in federal court. The public may have access to judicial records from a case filed in one circuit while identical documents are simultaneously sealed in a substantially similar case simply because the latter happened to be filed in a different circuit. As the Fourth Circuit succinctly summarized:

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[45] United States v. Mitchell, 551 F.2d 1252, 1260 (D.C. Cir. 1976) (citations omitted).

[46] Co. Doe v. Pub. Citizen, 749 F.3d 246, 263 (4th Cir. 2014) (quoting Stone v. Univ. of Md. Medical Sys. Corp., 855 F.2d 178, 182 (4th Cir. 1988)); *see also* Shane v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 306 (6th Cir. 2016) (noting that when evaluating a district court's seal decision on appeal, the abuse of discretion standard is not entitled to the "deference that standard normally brings").

[47] Hicklin Eng'g, L.C. v. Bartell, 439 F.3d 346, 348 (7th Cir. 2006) ("Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat . . . .").

> "The distinction between the rights of access afforded by the common law and the First Amendment is 'significant,' because the common law [and the discovery rule in Fed. R. Civ. P. 26] 'does not afford as much substantive protection to the interests of the press and the public as does the First Amendment.'" Specifically, the common law presumes a right to access *all* judicial records and documents, but this presumption is rebutted if "the public's right of access is outweighed by competing interests." On the other hand, the First Amendment provides a right of access only to *particular* judicial records and documents, and this right yields only in the existence of a "compelling governmental interest . . . [that is] narrowly tailored to serve that interest."[48]

### *A. The Right of Access Is Ambiguous at Best Absent Some Uniformity*

The right of access is riddled with ambiguities. In addition to the absence of consensus about the source of the right already discussed herein, there is further disagreement as to the test that should be used to determine when and how the right applies, how to apply those different tests, and even as to what constitutes a judicial record to which the right of access would apply in the first place. How does one enforce a right of access amidst so many unresolved questions? The following is a brief synopsis of where the courts have and where they lack consensus on these issues.

#### 1. The Different Tests

The differing outcomes on questions of access certainly stem, in significant part, from which test is used to determine whether the right of access can be limited. For example, under the "more stringent First Amendment framework," judicial records may be sealed "only with specific, on-the-record findings that sealing is

[48] United States v. Appelbaum, 707 F.3d 283, 290 (4th Cir. 2013) (alteration in original) (citations omitted); *In re* Cendant Corp., 260 F.3d 183, 194 n.13 (3d Cir. 2001) (recognizing a higher burden for sealing under the First Amendment); Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 124 (2d Cir. 2006) (referencing the "more stringent First Amendment framework"); W. Penn Allegheny Health Sys. v. UPMC, No. 2:12-cv-0692-JFC, 2013 U.S. Dist. LEXIS 196816, at *19 (W.D. Pa. Sep. 16, 2013) (noting that the First Amendment requires a more "rigorous" analysis).

necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim."[49] Stated differently, the First Amendment allows the sealing of judicial records only where there is a compelling interest that outweighs the public's right to the information, and the restraint is limited to protect only that particular information.

Third Circuit courts articulate yet another test for overcoming the First Amendment right of access. In *Publicker Industries v. Cohen*, the court required a showing of a "sufficient threat of irreparable harm,"[50] which was interpreted to mean a "risk of injury to be somewhat probable" or a "reasonably likely" standard of harm could arise from disclosing the information.[51] The Third Circuit viewed this as a higher burden than a "could" or "might" cause harm standard, such as a court would analyze under the common law test.[52]

Courts adopting the common law right of access similarly lack a cohesive test.[53] Some courts require that a party seeking closure of the material establish an "overriding interest" or

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[49] *Lugosch*, 435 F.3d at 122 (citing *In re* N.Y. Times Co., 828 F.2d 110, 116 (2d Cir. 1987)). To further complicate matters, the Third Circuit, which has recognized the First Amendment right of access, as well as the common law right, has not fully set forth the governing standard that must be applied when applying the First Amendment right of access. Indeed, the Third Circuit itself even noted that "the parameters of the First Amendment right of access to civil proceedings are undefined." *W. Penn Allegheny Health Sys.*, 2013 U.S. Dist. LEXIS 196816, at *18; *see also* Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 510 (1984) (failing to make this determination and maintaining that even if the court undertakes a "good cause" analysis, there should be a much more "rigorous level of review" when sealing documents entitled to the First Amendment right of access).

[50] *Publicker Indus.*, 733 F.2d at 1071.

[51] *W. Penn Allegheny Health Sys.*, 2013 U.S. Dist. LEXIS 196816, at *22-23 (citing *Publicker Indus.*, 733 F.2d at 1071).

[52] *Id.*

[53] *See, e.g.*, FTC v. AbbVie Prods., LLC, 713 F.3d 54, 62, 66 (11th Cir. 2013) ("The right to inspect and copy is not absolute, . . . and a judge's exercise of discretion in deciding whether to release judicial records should be informed by a sensitive appreciation of the circumstances that led to the production of the particular document in question . . . .") (quoting Chi. Trib. Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1311 (11th Cir. 2001)); *see also* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978) ("[T]he common-law right of inspection has bowed before the power of a court to ensure that its records are not 'used to gratify private spite or promote public scandal' through the publication of 'the painful and sometimes disgusting details of a divorce case.'").

"compelling reason" for closure.[54] Then, any sealing of materials "must be narrowly tailored to serve" the "compelling reason why [such] documents or portions thereof should be sealed."[55] This particular common law test closely resembles the more stringent First Amendment test used by some courts.

Other courts evaluating the common law right of access, however, require only "good cause" for sealing information, the same language used as the standard for obtaining a simple protective order during the discovery phase of litigation under Rule 26(c) of the Federal Rules of Civil Procedure.[56] Some even

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[54] *See, e.g.*, AmerGen Energy Co. v. United States, 115 Fed. Cl. 132, 137-38 (2014); FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987) ("We agree with the Sixth Circuit that '[o]nly the most compelling reasons can justify non-disclosure of judicial records.'" (citing *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983))); *see also Lugosch*, 435 F.3d at 119 ("[D]ocuments used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons."); Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982) (holding that "only the most compelling reasons can justify the total foreclosure of public and professional scrutiny" when the judicial record is "the basis for the adjudication"); *In re Cendant Corp.*, 260 F.3d at 194 ("[W]e hold that a 'compelling countervailing interests' standard is most appropriate here, with the additional requirement of specific findings."); Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 421 (5th Cir. 2021) (holding that the "presumption of openness . . . can be rebutted only by compelling countervailing interests favoring nondisclosure"); Shane Group, Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016) ("Only the most compelling reasons can justify non-disclosure of judicial records." (quoting *In re Knoxville News-Sentinel Co.*, 723 F.2d at 476)); Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003) (requiring "compelling reasons supported by specific factual findings" to overcome the strong presumption of access given under the common law); San Jose Mercury News, Inc. v. U.S. Dist. Ct., 187 F.3d 1096, 1102 (9th Cir. 1999) (same but requiring "sufficiently important countervailing interests"); *AmerGen Energy Co.*, 115 Fed. Cl. at 137 (requiring "compelling reasons" to prevent "disclosure of information submitted as evidence in dispositive judicial proceedings, whether at trial or in connection with a motion for summary judgment"). One district court in the Fourth Circuit required a "countervailing interest" to overcome the common law public access right. *See* Minter v. Wells Fargo Bank, 258 F.R.D. 118, 121 (D. Md. 2009).

[55] *Shane*, 825 F.3d at 305-06.

[56] *See, e.g.*, *AbbVie Prods., LLC*, 713 F.3d at 62 ("The test for whether a judicial record can be withheld from the public is a balancing test that weighs the competing interests of the parties to determine whether there is good cause to deny the public the right to access the document."); *Chi. Trib. Co.*, 263 F.3d at 1311-12 (finding "the Press's common-law right to the Firestone documents filed in connection with the motion for summary judgment may be resolved by the Rule 26 good cause balancing test"); Romero v. Drummond Co., 480 F.3d 1234, 1246 (11th Cir. 2007) ("The common law right of access may be overcome by a showing of good cause . . . .").

appear to use the two tests interchangeably, while applying a slightly heightened burden for closure under the "good cause" umbrella when dealing with access issues.[57] Further complicating matters, the Ninth Circuit applies the compelling reasons tests to dispositive judicial records, but only a Rule 26(c) "good cause" standard to non-dispositive judicial records.[58] The Eleventh Circuit insists upon now utilizing the general "good cause" standard under the common law right of access but has refused to overturn earlier decisions that previously required the heightened compelling interest standard to justify closure of judicial records.[59]

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Professor Arthur Miller, in an article funded by the Product Liability Advisory Council Foundation, opined that the good cause standard is "strict" because the party seeking closure "must make a particularized factual showing of the harm that would be sustained if the court did not grant" closure. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 433 (1991). The problem with this argument is that it incorrectly assumes that courts are enforcing the particularized showing of harm required under Federal Rule of Civil Procedure 26(c)(7). Perhaps that was true in 1991, but it is no longer the case. *See generally* Jennifer Walker Elrod et al., *Walking in the Light: On the Overuse of Sealing in Court Records*, 100 ADVOC. 27 (2022). To be fair, Professor Miller's particular statement was in the specific context of discovery issues, although the preceding statement indicates he was referring to both protective orders for discovery matters as well as seal requests.

[57] *Standard Fin. Mgmt. Corp.*, 830 F.2d at 410, 412 (alteration in original) (agreeing that "only the most compelling reasons can justify non-disclosure," but then stating that the judges "believe that '[a] finding of good cause [to impound documents] must be based on a particular factual demonstration of potential harm, not on conclusory statements'"); *see also* Shingara v. Skiles, 420 F.3d 301, 306 (3d Cir. 2005) (noting that the "good cause analysis of Rule 26(c) applied 'whether an order of confidentiality is granted at the discovery stage or any other stage of litigation'" (quoting Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994))); Brown v. Auto. Components Holdings, LLC., No. 1:06-cv-1802, 2008 U.S. Dist. LEXIS 47172, at *9 (S.D. Ind. June 17, 2008) (sternly worded order denying joint motion for protective order in part and warning that confidential information "will be unsealed unless supported by good cause"); *but see* Oliner v. Kontrabecki, 745 F.3d 1024, 1026 (9th Cir. 2014) (court required compelling reason to seal information, rejecting "good cause" standard even though no dispositive motions were at issue).

[58] *See* Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1180 (9th Cir. 2006); *see also In re* Midland Nat'l Life Ins. Co. Annuity Sales Pracs. Litig. v. Allianz Life Ins. Co., 686 F.3d 1115, 1119 (9th Cir. 2012) (applying compelling reasons test to a *Daubert* motion because it "may be effectively dispositive of a motion for summary judgment" (citing Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993))).

[59] *See Chi. Trib. Co.*, 263 F.3d at 1311-12 (reversing district court's application of compelling interest test below and requiring only a good cause standard for summary judgment materials; reasoning that this case was factually distinguishable from the narrow circumstances where the entire record was sealed and thus justified "the

#### 2. Inconsistent applications of the tests

Regardless of the particular test a court chooses to apply, the courts ultimately must weigh the competing interests of public access versus the interests supporting nondisclosure.[60] Although public access is certainly deserving of protection, the reality is that not everything produced during litigation is even reliable evidence, much less of such Article III significance that it should be made available to the public.[61] Also, there is still a concern among some that litigants' privacy rights should not be extinguished simply because they go "voluntarily or involuntarily" to court.[62] Thus, courts balance various factors, such as "(1) the role of the material at issue in the exercise of Article III judicial power and (2) the resultant value of such information to those monitoring the federal courts . . . against competing considerations such as the privacy interests of those resisting disclosure."[63] Stated simply, the weight attached to the presumption of access often varies based on what type of judicial

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heightened scrutiny [test for] common-law right of access" in *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013 (11th Cir. 1992)); Wilson v. Am. Motors Corp., 759 F.2d 1568, 1569, 1571 (11th Cir. 1985)); *cf. Oliner*, 745 F.3d at 1026 (requiring heightened burden on party seeking to seal an entire record).

[60] Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 142 (2d Cir. 2016) ("Once the court has determined that the documents are judicial documents and that therefore a common law presumption of access attaches, it must determine the weight of that presumption." (quoting Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119 (2d Cir. 2006))); *see also Chi. Trib. Co.*, 263 F.3d at 1312 ("The common-law right of access standard as it applies to particular documents requires the court to balance the competing interests of the parties.").

[61] United States v. Amodeo, 71 F.3d 1044, 1048-49 (2d Cir. 1995) ("[I]t must be recognized that an abundance of statements and documents generated in federal litigation actually have little or no bearing on the exercise of Article III judicial power. . . . As a result, the temptation to leave no stone unturned in the search for evidence material to a judicial proceeding turns up a vast amount of not only irrelevant but also unreliable material. Unlimited access to every item turned up in the course of litigation would be unthinkable. Reputations would be impaired, personal relationships ruined, and businesses destroyed on the basis of misleading or downright false information."); *see also* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 429-31 (1991).

[62] Miller, *supra* note 57, at 429-31 ("The rule makers who crafted our broad discovery regime . . . never intended that rights of privacy or confidentiality be destroyed in the process.").

[63] *Bernstein*, 814 F.3d at 142 (internal quotation marks and citations omitted); Romero v. Drummond Co., 480 F.3d 1234, 1246 (11th Cir. 2007) (noting that balancing requires consideration of "the nature and character of the information in question").

document is at issue and its role in the litigation. Thus, the weight of the presumption of access to documents that are merely at play in a discovery matter is very low compared to a validly asserted confidentiality interest because such documents have very little to do with the court's Article III functions.[64] On the other end of the spectrum, the weight that presumably applies to documents associated with a dispositive motion, for example, is much greater and requires, in turn, a much greater reason for closure.[65] This is especially true when the document in question is itself the foundation of the court's adjudication.[66] Courts also often require a higher burden for closure when, such as in class actions, "some members of the public are also parties to the case."[67] Unsurprisingly, this is yet another step where courts may still reach inconsistent results.[68]

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[64] *Bernstein*, 814 F.3d at 142; *see also* Brown v. Maxwell, 929 F.3d 41, 49 (2d Cir. 2019) ("Thus, while evidence introduced at trial or in connection with summary judgment enjoys a strong presumption of public access, documents that 'play only a negligible role in the performance of Article III duties' are accorded only a low presumption that 'amounts to little more than a prediction of public access absent a countervailing reason.'" (quoting *Amodeo*, 71 F.3d at 1050)).

[65] *Bernstein*, 814 F.3d at 142; *see also* Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 308 (6th Cir. 2016) (concluding that an increased weight is due on the side of unsealing documents when the documents themselves represent, even if only in part, the conduct giving rise to the case); *Kamakana*, 447 F.3d at 1180 (9th Cir. 2006) (requiring compelling reasons to seal dispositive motion materials but only a good cause standard to non-dispositive motions and related attachments).

[66] Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982) (rejecting closure of special litigation committee's report in a derivative action, reasoning that "[s]ince it is the basis for the adjudication, only the most compelling reasons can justify the total foreclosure of public and professional scrutiny."); *see also* McNamara v. Gannett Co., No. 2:07-cv-479-ID, 2008 WL 4372462, at *2 (M.D. Ala. Sep. 19, 2008) (defendant seeking to file witness declarations in support of summary judgment under seal in Equal Pay Act case because they contained private salary information of third parties). The court found that the public interest outweighed confidentiality interests, particularly where information was "central to resolving the dispute in this case." *Id.*

[66] *Bernstein*, 814 F.3d at 1049; *see, e.g.*, Brown v. Auto. Components Holdings, LLC., No. 1:06-cv-1802, 2008 U.S. Dist. LEXIS 47172, at *10 n.2 (S.D. Ind. June 17, 2008) (noting that even where information, such as salary, personnel and medical records, may be confidential, "such information may well prove pivotal and could not properly be shielded from public view").

[67] *Shane*, 825 F.3d at 305 (noting that in class actions, "the standards for denying public access to the record 'should be applied . . . with particular strictness.'" (quoting *In re* Cendant Corp., 260 F.3d 183, 194 (3d Cir. 2001))).

[68] In *Amodeo*, the court noted how "[c]ourts have given various descriptions of the weight to be given to the presumption of access, ranging from an 'especially strong'

Most courts, at least superficially, maintain that broad, conclusory allegations of harm by a party seeking closure of public records will not suffice.[69] Nonetheless, in actual practice, courts vary wildly in their enforcement of this requirement. For example, many courts assert that the rule of law requires more than mere assertions of "harm to company reputation" to prevent public access to judicial records.[70] Others require substantive and evidentiary submissions demonstrating the risk of competitive or other harm to a business if public access were to be permitted.[71] Yet many motions to seal of this nature are filed and granted based on nothing more than bald, unsupported assertions.

Inevitably, judges are going to differ in how they exercise their discretion when balancing the weight of the right of access against the weight of substantive privacy issues. Even so, there are some commonly accepted principles regarding the amount of weight to be allotted to the interests of access versus closure. Many courts have emphasized that only strong interests—including privilege, trade secrets, or statutorily mandated confidentiality (such as names of minors who are assault victims)—suffice to override public access in civil litigation.[72]

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presumption requiring 'extraordinary circumstances to justify restrictions,' . . . to merely 'one of the interests' that may bow before 'good reasons' to deny the requested access." *Amodeo*, 71 F.3d at 1048 (first quoting *In re* Nat'l Broad. Co., 635 F.2d 945, 952 (2d Cir. 1980); and then quoting Belo Broad. Corp. v. Clark, 654 F.2d 423, 434 (5th Cir. 1981)).

[69] *See, e.g.*, Shingara v. Skiles, 420 F.3d 301, 307 (3d Cir. 2005) (reasoning that "the concern that the disclosure of discovery materials to the media *could* unduly prejudice the public is exactly the type of broad, unsubstantiated allegation of harm that does not support a showing of good cause").

[70] *See, e.g.*, Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983); *see also Joy*, 692 F.2d at 894 ("[A] naked conclusory statement that publication of the Report will injure the bank in the industry and local community falls woefully short of the kind of showing which raises even an arguable issue as to whether it may be kept under seal.").

[71] *See, e.g.*, Preis v. Lexington Ins. Co., No. 06-0360-WS-C, 2007 U.S. Dist. LEXIS 64931 (S.D. Ala. Aug. 30, 2007) (defendant insurance company seeking leave to file summary judgment motion and materials under seal because it referenced material designated confidential pursuant to the protective order). Only one of the exhibits was even stamped "confidential." The court found one exhibit was confidential and could cause competitive disadvantage, and there were no countervailing interests raised. The court unsealed all but the one exhibit. *Id.*

[72] *See Shane*, 825 F.3d at 308 (citing Baxter Int'l, Inc. v. Abbott Lab'ys, 297 F.3d 544, 546-47 (7th Cir. 2002)); *cf.* Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172,

Courts also have emphasized that when weighing a request for closure, "privacy interests are diminished when the party seeking protection is a public person subject to legitimate public scrutiny."[73] On the flip side, courts routinely agree that personal information of a private individual, the disclosure of which could cause obvious injury, should not be disclosed.[74] In the same manner, where innocent third parties' privacy interests are at stake, the balance tips more heavily in favor of closure.[75] Courts also commonly accept the belief that simply maintaining that business information is confidential does not automatically insulate that information with the same protection from disclosure that an actual trade secret would enjoy.[76] In like manner, an

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1182 (9th Cir. 2006) (finding personal information of home addresses and social security numbers satisfied the compelling reason standard for sealing such information); Chi. Trib. Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1313-14 n.13 (11th Cir. 2001) (defining a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (quoting RESTATEMENT (FIRST) OF TORTS § 757 cmt. B (A.L.I. 1939)) (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984))); Webster Groves Sch. Dist. v. Pulitzer Pub. Co., 898 F.2d 1371, 1375 (8th Cir. 1990) (emphasizing how legislatures and courts across the country protect the privacy of juveniles even against the right of access, whether under common law or the First Amendment).

[73] *Shingara*, 420 F.3d at 307; Brown v. Caldwell, No. 20-cv-7907, 2023 U.S. Dist. LEXIS 208314, at *3-4 (D.N.J. Nov. 21, 2023) ("The threshold for sealing is higher where the case involves a public entity or official or a matter of public concern." (citing Pansy v. Borough of Stroudsburg, 23 F.3d 772, 788 (3d Cir. 1994))).

[74] *See, e.g.*, *Caldwell*, U.S. Dist. LEXIS 208314, at *28 ("As for the injury factor, injury to an individual based on disclosure of their personal information is well established. Accordingly, this factor also weighs in favor of sealing. There is good cause to redact these phone numbers in order to protect personal information."); *see also* FED. R. CIV. P. 5.2 (mandating the redaction of such personal information from all public filings).

[75] *Shane*, 825 F.3d at 308; *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 477-78 (6th Cir. 1983) (non-parties' privacy interests were sufficiently compelling to justify protective order permitting the removal of non-party information from the record); *see also* United States v. Amodeo, 71 F.3d 1044, 1050 (2d Cir. 1995); *see, e.g.*, Tavoulareas v. Wash. Post Co., 724 F.2d 1010, 1025 (D.C. Cir. 1984), *vacated*, 737 F.2d 1170 (D.C. Cir. 1984) (giving greater deference to Mobil's privacy argument where it was "essentially a nonparty" which intervened "only to protect the confidentiality of its commercial information" in an underlying libel suit).

[76] *See* Republic of the Phil. v. Westinghouse Elec. Corp., 949 F.2d 653, 663 (3d Cir. 1991); *see also Baxter Int'l*, 297 F.3d at 545 (rejecting parties' reliance on the sole fact that the records were commercial documents; "[t]hat won't do."); Bovie Med. Corp. v. Livneh, No. 8:10-cv-1527-T-24EAJ, 2010 U.S. Dist. LEXIS 114485, at *6 (M.D. Fla. Oct. 19, 2010) ("The fact that the parties have marked their own business records as

assertion of a potential injury to reputation, prejudice, or potential embarrassment is generally insufficient to override public access rights.[77] In *Joy v. North*, for example, the court rejected a request to seal a special litigation committee's report in a derivative action, reasoning:

'confidential' or 'proprietary' is immaterial . . . ."); Minter v. Wells Fargo Bank, 258 F.R.D. 118, 123 (D. Md. 2009) ("[T]rade secrets are more than 'sensitive business information,' they are sophisticated, innovative methods or inventions that are the result of human creativity and ingenuity. Managerial structures and general information regarding business operations — the type of information sought to be protected here - fail to make the grade."); *see also Shane*, 825 F.3d at 307 (rejecting closure based on concerns about "competitively-sensitive financial and negotiating information"); *In re* Bank One Sec. Litig., 222 F.R.D. 582, 589 (N.D. Ill. 2004) (refusing to maintain stale board minutes under seal finding the mere fact that such information is private did not satisfy "the heavy burden on Defendant to show good cause for the maintenance of the seal" when the information is "now stale"); *see Bovie Med. Corp.*, 2010 U.S. Dist. LEXIS 114485, at *6 (finding no good cause and refusing to seal "ordinary business documents" including "income statements, forecasts . . . [and] detailed discussions regarding business decisions"). *But see* Apple Inc. v. Samsung Elecs. Co., 727 F.3d 1214, 1221 (Fed. Cir. 2013) (reversing district court for denying request to maintain seal on pretrial records where parties demonstrated compelling reasons of detailed competitive harm in support of closure of their confidential business information in a patent dispute case). Nonetheless, some courts mistakenly equate "competitively-sensitive information" with trade secrets, giving higher weight to such claims than other courts would in the same situation.

[77] *See, e.g.*, Wilson v. Am. Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985) ("[S]imply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access."); *see also* Co. Doe v. Pub. Citizen, 749 F.3d 246, 269 (4th Cir. 2014) ("A corporation very well may desire that the allegations lodged against it in the course of litigation be kept from public view to protect its corporate image, but the First Amendment right of access does not yield to such an interest."); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1180 (6th Cir. 1983) ("Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records."); Oliner v. Kontrabecki, 745 F.3d 1024 (9th Cir. 2014) (affirming court's refusal to seal at parties' joint request to avoid embarrassment, annoyance and a negative impact on defendant's business); *In re* Neal, 461 F.3d 1048, 1054 (8th Cir. 2006) ("[I]njury or potential injury to reputation is not enough to deny public access to court documents.").

> [A] naked conclusory statement that publication of the Report will injure the bank in the industry and local community falls woefully short of the kind of showing which raises even an arguable issue as to whether it may be kept under seal. The Report is no longer a private document. It is part of a court record. Since it is the basis for the adjudication, only the most compelling reasons can justify the total foreclosure of public and professional scrutiny. The potential harm asserted by the corporate defendants is in disclosure of poor management in the past. This is hardly a trade secret.[78]

As Judge Easterbrook sympathized, "many litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed."[79] Indeed, the potential for embarrassment or damage to a corporation's reputation "are part of the day-to-day operations of the federal courts."[80] In sum, "[l]awsuits and their conduct are of interest to Main Street and Wall Street. Simply because information revealed or used in litigation is arguably detrimental to the financial or business interests of a party does not make that information 'sensitive' or a trade secret" that tilts the balance in favor of closure.[81] There are even those who view misclassifying merely sensitive business information as trade secrets as an "affront to the law of trade secrets." [82]

Ultimately, courts are weighing "the degree of and likelihood of injury if made public, the reliability of the information, . . .

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[78] Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982).

[79] *Baxter Int'l*, 297 F.3d at 547 (7th Cir. 2002); *see also Brown & Williamson Tobacco Corp.*, 710 F.2d at 1180 ("Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know. In such cases, a court should not seal records unless public access would reveal legitimate trade secrets, a recognized exception to the right of public access to judicial records.").

[80] *Co. Doe*, 749 F.3d at 269.

[81] *Minter*, 258 F.R.D. at 124.

[82] R. Mark Halligan, *The Non-Existence of a Trade Secret Asset: 'Confidential' Information*, REUTERS (Mar. 28, 2023, at 09:48 CT), www.reuters.com/legal/legalindustry/non-existence-trade-secret-asset-confidential-information-2023-03-28/ ("There is no middle ground protection for non-trade secret 'confidential' information. Any other characterization of 'confidential' information undermines the protection of trade secret assets and interferes with lawful and fair business competition.").

whether the information concerns public officials or public concerns, and the availability of a less onerous alternative to sealing the documents."[83] Some courts may also consider the reasons why someone is seeking the information, despite the fact that no such reasons are required to establish the right of access.[84]

Courts then vary in how they enforce the required burden on those parties seeking closure of documents away from the public. Some courts simply rubber stamp assertions of confidentiality.[85] To the other extreme, courts addressing requests to seal materials alleged to have commercially sensitive information akin to trade secrets have rejected them for failure to identify the trade secret-like information along with a description of how "its release will result in an unfair commercial disadvantage,"[86] a process which certainly poses a risk of revealing the very information the party seeks to protect from disclosure.[87] Many courts warn that mere conclusory statements will not satisfy the "good cause" burden.[88]

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[83] Romero v. Drummond Co., 480 F.3d 1234, 1246 (11th Cir. 2007) (citing *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 356 (11th Cir. 1987); Shingara v. Skiles, 420 F.3d 301, 305-306 (3d Cir. 2005); United States v. Amodeo, 71 F.3d 1044, 1050–51 (2d Cir. 1995).

[84] FTC v. AbbVie Prods. LLC, 713 F.3d 54, 62 (11th Cir. 2013) ("Our case law lists several relevant factors to consider, including 'whether the records are sought for such illegitimate purposes as to promote public scandal or gain unfair commercial advantage, [and] whether access is likely to promote public understanding of historically significant events.'" (quoting Newman v. Graddick, 696 F.2d 796, 803 (11th Cir. 1983))).

[85] *See* Citizens First Nat'l Bank v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999) (holding that simply rubber-stamping parties' stipulations is not a valid order; it effectively gives "each party carte blanche to decide what portions of the record shall be kept secret.").

[86] *Minter*, 258 F.R.D. at 123.

[87] *See, e.g.*, Apple Inc. v. Samsung Elecs. Co., 727 F.3d 1214, 1221 (Fed. Cir. 2013) (reversing district court's refusal to seal parties' detailed motions to seal or redact pretrial motions when parties had fully demonstrated document by document the confidentiality of the information and the likely competitive harm to the parties if disclosed).

[88] *See* Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1184 (9th Cir. 2006) ("Simply mentioning a general category of privilege, without any further elaboration or any specific linkage with the documents, does not satisfy the burden."); Wall Indus., Inc. v. United States, 5 Cl. Ct. 485, 487 (1984) ("[I]t is axiomatic that nebulous and conclusory allegations of confidentiality and business harm are insufficient to carry the movant's burden."); Forest Prods. Nw., Inc. v. United States, 62 Fed. Cl. 109, 114 (2004) ("A party establishes good cause by specifically demonstrating that 'disclosure will cause a clearly defined and serious injury.'" (quoting Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995))).

Somewhere in the middle of this spectrum are courts that require the party seeking closure to meet the burden of showing how public access "will work a clearly defined and serious injury."[89] Importantly, even where the balance tips in favor of at least partial closure of confidential information, courts have still denied protection due to the failure of the party seeking closure to narrowly tailor its request to only the confidential information.[90]

Moreover, what may now be sufficient cause to maintain information under seal may no longer be sufficient cause in the future. The reasons for sealing may cease to exist or become stale as trade secrets or confidential information become public or no longer useful to the company asserting the need for protection from disclosure.[91]

### 3. What is a judicial record?

It seems reasonable to assume that what constitutes a judicial record would not waiver simply because a party seeks to place it under seal out of the public view. Yet courts struggle to develop a consistent definition of even what qualifies as a judicial

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[89] Shane v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 307; *see also* Baxter Int'l, Inc. v. Abbott Lab'ys, 297 F.3d 544, 547 (7th Cir. 2002).

[90] *In re* Bank One Sec. Litig., 222 F.R.D. 582, 588 (N.D. Ill. 2004).

[91] *Cf.* W. Penn Allegheny Health Sys. v. UPMC, No. 2:12-cv-0692-JFC, 2013 U.S. Dist. LEXIS 196816, at *16 (W.D. Pa. Sep. 16, 2013) (emphasizing that a party seeking continued closure of documents must prove with "*current evidence* . . . how public dissemination of the pertinent materials *now* would cause the competitive harm they claim." (quoting Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 663 (3d Cir. 1991)) (citing Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 167 (3d Cir. 1993))); *see also In re* Cendant Corp., 260 F.3d 183, 196 (3d Cir. 2011) ("Even if a sealing order was proper at the time when it was initially imposed, the sealing order must be lifted at the earliest possible moment when the reasons for sealing no longer obtain."); *In re Bank One Sec. Litig.*, 222 F.R.D. at 588 (noting that decades old documents regarding a company's business strategy are generally not a trade secret, nor competitively sensitive, and should not be sealed in the absence of some additional justification that outweighs the public's right of access); *In re* Agent Orange Prod. Liab. Litig., 101 F.R.D. 559, 575 (E.D.N.Y. 1985) ("An important factor in determining whether disclosure will cause competitive harm is whether the information . . . is current or stale."). *See generally* United States v. Higuera-Guerrero (*In re* Copley Press, Inc.), 518 F.3d 1022, 1025 (9th Cir. 2008) ("Secrecy is a one-way street: Once information is published, it cannot be made secret again."). *But see* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 891-92 (E.D. Pa. 1981) (discussing the problems of deciding when a trade secret has become stale and may be released).

record, at least for purposes of recognizing a public right of access.[92] Perhaps the reason lies with the reality that some courts do not wish to decide issues of public access to documents and use the determination of what qualifies as a judicial record to effectively avoid a decision denying the public access by excluding that particular document from the definition of a judicial record.[93]

The first requirement for a judicial record, of course, is that the item be filed with the court,[94] but the act of filing in and of itself is not enough for most jurisdictions. As the Second Circuit defines it, "[a] 'judicial document' or 'judicial record' is a filed item that is 'relevant to the performance of the judicial function and useful in the judicial process.'"[95] More specifically, the court must consider the "specific contents" of the item in connection with "the nature of the proceeding" itself and "the degree to which access to the [document] would materially assist the public in understanding the issues before the . . . court, and in evaluating the fairness and integrity of the court's proceedings."[96] Stated differently, a right of access exists as to those documents that the

92 *See, e.g.*, *Zenith Radio Corp.*, 529 F. Supp. at 897, 912 n.99 (noting the court's discomfiture by its inability to answer the question of what is a "judicial record" for the right of access to attach but circuitously reasoning that "[t]he right undoubtedly attaches to all materials that are filed with the clerk of court, unless filed under seal pursuant to court order"). *See also* Anne Elizabeth Cohen, *Access to Pretrial Documents Under the First Amendment*, 84 COLUM. L. REV. 1813, 1834 (1984) (opining that limiting the determination of what is a judicial record until after a filed document may be sealed renders "the focus of the inquiry almost inevitably . . . on the necessity of changing the status quo").

93 *See generally In re Cendant Corp.*, 260 F.3d 183; *see, e.g.*, Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 416 (5th Cir. 2021) ("Judicial records are public records. And public records, by definition, presume public access.").

94 *See Zenith*, 529 F. Supp. at 887 n.34 ("[T]he public's common law right of access does not attach to materials not made part of the judicial record.").

95 Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 139-40 (2d Cir. 2016) (quoting Lugosch v. Pyramid Co., 435 F.3d 110, 119 (2d Cir. 2006)); *see also* FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 (1st Cir. 1987) (recognizing that the common law right of access applies to "materials on which a court relies in determining the litigants' substantive rights" (quoting Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986))).

96 *Bernstein*, 814 F.3d at 139-40 (quoting Newsday LLC v. County of Nassau, 730 F.3d 156, 166-67 (2d Cir. 2013)); *see also* Brown v. Maxwell, 929 F.3d 41, 49 (2d Cir. 2019) ("In defining 'judicial records and documents,' we have emphasized that 'the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access.'" (quoting United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995))).

court relies on to decide "substantive rights" versus those that merely pertain to the court's management role in a case.[97] But there is no public right of access when the document in question has no impact on a party's substantive rights in the case, no judicial action is taken with regard to that document, and the public does not need to monitor the lack of judicial action.[98]

Other courts have adopted a slightly broader view of "judicial records" as including those documents filed with the court which "*may* be relied upon in support of any part of the court's adjudicatory function."[99] Only a minority of courts have concluded that the simple act of a party filing a document with the court in a case makes it a judicial document that "gives rise to a presumptive right of public access."[100] The Third Circuit has the broadest interpretation of judicial records, extending access to filed documents that are "somehow incorporated" into a court's adjudication in a case, "whether preliminary or dispositive," along with any "material filed in connection therewith."[101]

When it comes to the First Amendment right of access, the basic considerations of what qualifies as a judicial record are similar, even though the issue is analyzed from two different perspectives:

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[97] United States v. Kravetz, 706 F.3d 47, 54 (1st Cir. 2013).

[98] *See* Rosado v. Bridgeport Roman Cath. Diocesan Corp., 970 A.2d 656, 678 (Conn. 2009) (citing *Cryovac*, 805 F.2d at 13); Smith v. U.S. Dist. Ct., 956 F.2d 647, 650 (7th Cir. 1992); *Standard Fin. Mgmt. Corp.*, 830 F.2d at 408-09 ("Those documents which play no role in the adjudication process, however, such as those used only in discovery, lie beyond reach.").

[99] *Rosado*, 970 A.2d at 678 (emphasis added).

[100] Leucadia, Inc. v. Applied Extrusion Tech., Inc., 998 F.2d 157, 161-62 (2d Cir. 1993). *See also* United States v. Martin, 746 F.2d 964, 968 (3d Cir. 1984) (noting that judicial records include "transcripts, evidence, pleadings, and other materials submitted by litigants" (quoting Stuart Wilder, Comment, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings*, 52 TEMP. L.Q. 311, 337-38 (1979))); San Jose Mercury News, Inc. v. U.S. Dist. Ct., 187 F.3d 1096, 1102 (9th Cir. 1999). Despite these broad definitions of judicial record, subsequent courts have failed to apply this broad a definition of public access to documents filed in connection with discovery motions.

[101] *In re* Cendant Corp., 260 F.3d 183, 192 (quoting *Leucadia*, 998 F.2d at 164); *see, e.g.*, Republic of Philippines v. Westinghouse Elec. Corp. 949 F.2d 653, 659 (3d Cir. 1991).

> The first approach considers "experience and logic": that is, "whether the documents have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question. . . . The second approach considers the extent to which the judicial documents are derived from or are a necessary corollary of the capacity to attend the relevant proceedings."[102]

From a historical perspective, complaints, for instance, have been publicly accessible in most cases.[103] Public access to complaints is logical, the Second Circuit reasoned, because it "allows the public to understand the activity of the federal courts, enhances the court system's accountability and legitimacy, and informs the public of matters of public concern."[104] Indeed, "[o]f all the records that may come before a judge, a complaint is among the most likely to affect judicial proceedings. It is the complaint that invokes the powers of the court, states the causes of action, and prays for relief."[105]

On the other hand, materials that are purely discovery are not considered judicial or public records to which a presumptive right of public access is attached.[106] As one magistrate judge

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[102] Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 141 (2d Cir. 2016) (citation omitted). *See, e.g.*, *In re* Copley Press, Inc., 518 F.3d 1022, 1026 (9th Cir. 2008); *see also* Press-Enter. Co. v. Superior Ct., 478 U.S. 1, 8 (1984) (same regarding press right of access under the First Amendment).

[103] *Bernstein*, 814 F.3d at 141.

[104] *Id.*

[105] *Id.* at 142; *see also* FTC v. AbbVie Prods., LLC, 713 F.3d 54, 62 (11th Cir. 2013) ("A complaint, which initiates judicial proceedings, is the cornerstone of every case, the very architecture of the lawsuit, and access to the complaint is almost always necessary if the public is to understand a court's decision."); *FTC*, 713 F.3d at 62 ("[C]ourts have consistently treated complaints as judicial records for purposes of determining whether the common-law right of access applies." (citing IDT Corp. v. eBay, 709 F.3d 1220, 1222-23 (8th Cir. 2013))).

[106] *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) ("[R]estraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information."). *See, e.g.*, United States v. Gurney, 558 F.2d 1202, 1211 (5th Cir. 1977) (denying newspaper access to documents not yet admitted as evidence in a criminal trial of a former United States Senator); McCarthy v. Barnett Bank of Polk Cnty., 876 F.2d 89, 91 (11th Cir. 1989) ( "[A]n individual has no common law right to discovery material because those materials are not judicial records or public documents."); Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982) ("Discovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or

cogently explained, maintaining the secrecy of documents during discovery is permissible because those documents are not yet judicial records. However, once those documents are presented to the court and may "influence or underpin the judicial decision," the public right of access applies "unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality."[107]

Thus, for most courts, the line is crossed when the filing turns from a discovery issue to an adjudicative one.[108] This logically follows because—as the First Circuit explained:

titillate the public. . . . At the adjudication stage, however, very different considerations apply."); Okla. Hosp. Ass'n v. Okla. Publ'g Co., 748 F.2d 1421, 1425 (10th Cir. 1984) (holding that there is no public right of access to information produced during pretrial discovery); Anderson v. Cryovac, Inc., 805 F.2d 1, 12 (1st Cir. 1983) ("[D]iscovery proceedings are fundamentally different from proceedings to which courts have recognized a public right of access."); Romero v. Drummond Co., 480 F.3d 1234, 1245-46 (11th Cir. 2007) ("Material filed in connection with any substantive pretrial motion, unrelated to discovery, is subject to the common law right of access. . . . A motion that is 'presented to the court to invoke its powers or affect its decisions,' whether or not characterized as dispositive, is subject to the public right of access."); *AbbVie Prods.*, 713 F.3d at 63-64; Est. of Martin Luther King, Jr., Inc. v. CBS, Inc., 184 F. Supp. 2d 1353, 1365 (N.D. Ga. 2002). *See generally* Baxter Int'l, Inc. v. Abbott Laby's, 297 F.3d 544, 545 (7th Cir. 2002) ("Secrecy is fine at the discovery stage, before the material enters the judicial record." (citing Seattle Times Co., 467 U.S. at 20). *But see* Bayer AG v. Barr Lab'ys, Inc., 162 F.R.D. 456, 462 (S.D.N.Y. 1995) (reasoning that when the discovery is a matter of "'great interest to the public and the media,' the First Amendment 'tips the balance'" requiring the party seeking closure to demonstrate "good cause" (quoting *In re* Agent Orange, 104 F.R.D. 559, 570 (E.D.N.Y. 1985))).

107 Containment Techs. Grp. Inc. v. Am. Soc'y of Health Sys. Pharmacists, No. 07-997, 2008 WL 4545310 (S.D. Ind. Oct. 10, 2008) (granting in part and denying in part a motion for protective order). *See generally*, Miller, *supra* note 57 (discussing the need to keep discovery materials confidential and not subject to a presumptive right of public access).

108 Shane v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016) ("The line between these two stages, discovery and adjudicative, is crossed when the parties place material in the court record." (citing *Baxter Int'l*, 297 F.3d at 545)); *see also* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) (reasoning that "an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny"); Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1180 (9th Cir. 2006) (citations omitted) ("Unlike private materials unearthed during discovery, judicial records are public documents almost by definition, and the public is entitled to access by default. This fact sharply tips the balance in favor of production when a document, formerly sealed for good cause under Rule 26(c) becomes part of a judicial record."); Mokhiber v. Davis, 537 A.2d 1100, 1111 (D.C. App. 1988) ("By submitting pleadings and motions to the court

> Once those submissions come to the attention of the district judge, they can fairly be assumed to play a role in the court's deliberations. To hold otherwise would place us in the position of attempting to divine and dissect the exact thought processes of judges as they ponder the entry of consent decrees—a task more suitable to a clairvoyant . . . .[109]

By the time the litigation reaches the summary judgment stage, courts generally agree that such dispositive materials are "judicial records" that are presumptively subject to the public right of access, whether under the common law or First Amendment.[110] They reason that the motion for summary

for decision, one enters the public arena of courtroom proceedings and exposes oneself . . . to the risk . . . of public scrutiny.").

[109] FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 409 (1st Cir. 1987); *id.* at 412-13 ("The presumption that the public has a right to see and copy judicial records attaches to those documents which properly come before the court in the course of an adjudicatory proceeding and which are relevant to the adjudication."); AmerGen Energy Co. v. United States, 115 Fed. Cl. 132, 139-40 (2014) (noting that the court was aware of no court holding otherwise but citing list of "the weight of authority" agreeing on this issue, including *Lugosch v. Pyramid Co.*, 435 F.3d 110, 123, wherein the court reasoned that "if the rationale behind access is to allow the public an opportunity to assess the correctness of the judge's decision . . . documents that the judge *should* have considered or relied upon, but did not, are just as deserving of disclosure as those that actually entered into the judge's decision"); *In re* Coordinated Pretrial Procs. in Petroleum Prods. Antitrust Litig., 101 F.R.D. 34, 43 (C.D. Cal. 1984) ("If the rationale behind access is to allow the public an opportunity to assess the correctness of the judge's decision, . . . documents that the judge *should* have considered or relied upon, but did not, are just as deserving of disclosure as those that actually entered into the judge's decision." (first citing Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 897-901 (E.D. Pa. 1981); and then citing Wilk v. Am. Med. Ass'n, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980))).

[110] *See, e.g.*, *Lugosch*, 435 F.3d, at 121 (2d Cir. 2006) ("[D]ocuments submitted to a court for its consideration in a summary judgment motion are – as a matter of law – judicial documents to which a strong presumption of access attaches under both the common law and the First Amendment."). *Cf.* MANUAL FOR COMPLEX LITIGATION § 11.432 (4th ed. 2004) ("Even if designated as confidential under a protective order, discovery materials will lose confidential status (absent a showing of 'most compelling' reasons) if introduced at trial or filed in connection with a motion for summary judgment. Confidential materials filed solely in connection with pre-trial discovery, however, remain protected as long as the 'good cause' requirement of Rule 26(c) is satisfied." (first citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (1984); then citing Leucadia, Inc. v. Applied Extrusion Tech., Inc., 998 F.2d 157, 161-65 (3d Cir. 1993); and then citing Anderson v. Cryovac, Inc., 805 F.2d 1, 5-7, 10-13 (1st Cir. 1986))).

judgment itself "adjudicates substantive rights and serves as a substitute for a trial," and the public should not be denied access simply because the case is resolved by motion rather than through a full trial.[111] This is true of the judicial opinions on summary judgments as well.[112] Even so, some courts—even at the summary judgment stage—dispute whether a document produced by a defendant in discovery and placed in the record by the plaintiff in support of a plaintiff's motion is a "judicial record" entitled to the same public access as compared to when a party voluntarily places its own documents into evidence in support of a dispositive motion.

For example, in *Joy v. North*, the Second Circuit addressed what it ultimately determined to be the improper sealing of the special litigation committee report and related summary judgment materials in a shareholder derivative suit.[113] The court reasoned:

> An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny. We simply do not understand the argument that derivative actions may be routinely dismissed on the basis of secret documents. We cannot say what the effect on investor confidence would be if special litigation committees were routinely allowed to do their work in the dark of night. We believe, however, that confidence in the administration of justice would be severely weakened. Indeed, any other rule might well create serious constitutional issues.[114]

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[111] Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 252 (4th Cir. 1988).

[112] *See* Co. Doe v. Pub. Citizen, 749 F.3d 246, 267 (4th Cir. 2014) ("The public has an interest in learning not only the evidence and records filed in connection with summary judgment proceedings but also the district court's decision ruling on a summary judgment motion and the grounds supporting its decision. Without access to judicial opinions, public oversight of the courts, including the processes and the outcomes they produce, would be impossible."); *see also* United States v. Mentzos, 462 F.3d 830, 843 n.4 (8th Cir. 2006) (denying motion to file the court's opinion under seal because "decisions of the court are a matter of public record"); Union Oil Co. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000) ("[I]t should go without saying that the judge's opinions and orders belong in the public domain.").

[113] *See generally* Joy v. North, 692 F.2d 880 (2d Cir. 1981).

[114] *Id.* at 893.

There is less clarity regarding those adjudicative motions that fall somewhere between discovery fights and dispositive summary judgment motions. For example, at least one district court in the Fourth Circuit, recognizing that the circuit had not adopted First Amendment rights of access to non-dispositive motions, nonetheless opined that "[t]here is no reason to assume that the First Amendment protection does not apply even more broadly, to non-dispositive motions and materials . . . ."[115] The Fourth Circuit itself has concluded that "judicially authored or created documents are judicial records."[116] Similarly, the Ninth Circuit has held that the right of access is not limited to dispositive motions but rather extends to all motions that are "more than tangentially related to the merits of the case" such as a preliminary injunction.[117] The Second Circuit has held that "pleadings are considered judicial records 'even when the case is pending before judgment or resolved by settlement.'"[118]

Finally, there are cases where courts expansively define "judicial record" to include information they find of particular importance to the public. The Sixth Circuit, for example, in *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, reasoned that:

[115] Minter v. Wells Fargo Bank, 258 F.R.D. 118, 121 (D. Md. 2009) (class action case against a bank regarding allegations of unlawful referral fees and kickbacks, in which the defendant bank sought to seal the deposition of its CEO along with related documents).

[116] United States v. Appelbaum, 707 F.3d 283, 290 (4th Cir. 2013).

[117] Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1101 (9th Cir. 2016).

[118] Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 140 (2d Cir. 2016) (quoting IDT Corp. v. eBay, Inc., 709 F.3d 1220, 1223 (8th Cir. 2013)). *See also id.* at 140 (reasoning that "[e]ven in the settlement context, the inspection of pleadings allows 'the public [to] discern the prevalence of certain types of cases, the nature of the parties to particular kinds of actions, information about the settlement rates in different areas of law, and the types of materials that are likely to be sealed.'" (quoting Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 96 (2d Cir. 2004))).

> The subject of this litigation potentially involves the health of citizens who have an interest in knowing the accurate "tar" and nicotine content of the various brands of cigarettes on the market. The public has an interest in knowing how the government agency has responded to allegations of error in the testing program. The public has an interest in ascertaining what evidence and records the District Court and this Court have relied upon in reaching our decisions.[119]

In *In re Cendant Corp.*, the Third Circuit held that attorney auction bids to become lead counsel in a securities class action should not have been sealed from the public because the auction bids themselves were judicial records and were entitled to "the common law presumption of public access" because such information was of great public interest.[120]

### *B. Practical Problems with the Status Quo*

Under the current system, there are no formal, consistent requirements on parties seeking to seal materials from the public. There is no formal requirement that judges make public their decisions of what and why materials were even sealed. Ultimately, because there is no formal process and, frankly, little repercussion for improper sealing, there is effectively no requirement that the courts or the parties comply with what should be a high burden of sealing materials from the public. The problems stemming from the current system are many, ranging from procedural messiness to more serious and profound problems for the judicial system and the public.

The problem with the lack of uniformity across federal courts is obvious. It is more than a mere possibility that federal courts across the country issue very different access decisions regarding identical documents in cases that are not consolidated before the multidistrict litigation panel but involve claims that are factually similar and legally identical (perhaps with no differences other than the plaintiffs' names). The result of this is that the defendants may have judicial records maintained under seal in

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[119] Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1180-81 (6th Cir. 1983).

[120] *In re* Cendant Corp., 260 F.3d 183, 192 (3d Cir. 2001).

one venue while the same information is publicly available in another. Lawyers may even be threatened with contempt by one district court for thwarting its seal order, even though not appearing before that angered court but litigating in another court where the public access is more strongly enforced. While such differences are superficially harmless, since federal courts frequently differ in their local rules, the effects of different sealing standards can have profound consequences in litigation.

Improper seal decisions can have very real harm on the public. Putting aside the reputational harm done to the judicial system, the very reason why the public right of access exists, there is the risk of actual physical harm being caused to members of the public, at least indirectly, because of improper concealment of judicial records.[121] Examples of such unjustified over-sealing include the lawsuit against the archdiocese of Boston regarding allegations of sexual abuse by some of its priests, as highlighted in the movie *Spotlight*.[122] Similarly, comedian Bill Cosby's deposition testimony regarding his alleged drugging and raping of several women was sealed from the public.[123] The most recent example of potential harm to the public from improper sealing came from a civil lawsuit brought by an alleged victim of sexual abuse against Jeffrey Epstein.[124] Notably, in the Epstein case, the information was ultimately unsealed because the information originally placed under seal was already public.[125] One should question why the information was ever sealed at the outset if the information was publicly available.

Sealing documents in product liability cases is another dangerous practice that could cause real harm to the public. As Reuters reported in 2016, the first state-initiated lawsuit against OxyContin's producer was filed in West Virginia, in which the

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[121] *But see* Miller, *supra* note 57, at 477 (arguing that the number of cases involving such information is "miniscule" and "a rather slim reed" to justify broad public access rights).

[122] SPOTLIGHT, Apple TV (Participant Media 2015).

[123] *See generally* Constand v. Cosby, 112 F. Supp. 3d 308 (E.D. Pa. 2015).

[124] *See* Michael R. Sisak, Rebecca Boone & David B. Caruso, *Unsealed Court Records Offer New Detail on Old Sex Abuse Allegations Against Jeffrey Epstein*, PITT. POST GAZETTE (Jan. 3, 2024, at 12:31 ET), www.post-gazette.com/news/crime-courts/2024/01/03/jeffrey-epstein-court-records-release/stories/202401030086.

[125] *Id.*

judge sealed the very marketing evidence on which he relied in finding that there was sufficient evidence that would support a jury verdict against the manufacturer.[126] When the case settled, that evidence remained under seal for twelve more years while the manufacturer continued to sell the product that was prescribed by uninformed doctors and ingested by patients unaware of the significant health risks, including death.[127] Reuters claimed that its research uncovered judges sealing evidence in over fifty other multidistrict product liability cases, again hiding public records on public health issues from the public.[128]

The current practice is also inefficient, both as a matter of time and money. The simple process of serving filed judicial records on opposing counsel becomes exponentially more difficult when the materials are not all filed in the public record, especially in complex litigation with numerous parties. The time-saving advantages of electronic filings are completely lost. It also creates a logistical nightmare for the court clerk; for every document filed under seal, the clerk must make manual entries into the electronically available docket, noting the existence of the document under seal. If and when those materials become publicly available, that is, when the court eventually addresses the propriety of those materials being closed to the public, the clerk must again make entries to the electronic docket. This refiling results in docket numbers regarding the very same adjudicatory filing being by no means sequentially located or even close to the same time period on the docket.[129] It raises the question of whether the information is truly accessible to the public and press if one cannot reasonably follow the docket entries to locate all materials relevant to one adjudicatory matter without some sort of guide or flowchart.

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[126] Benjamin Lesser et al., *How Judges Added to the Grim Toll of Opioid*s, REUTERS (June 25, 2019, at 13:00 GMT), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges/ [https://perma.cc/7X42-8RJS].

[127] *Id.*

[128] *Id.*

[129] *See* Est. of Martin Luther King, Jr., Inc. v. CBS, Inc., 184 F. Supp. 2d 1353, 1361 (N.D. Ga. 2002). There are additional logistical inefficiencies for sealed records for the administrative side of the courts as well, including storage space and the additional staff time required for handling sealed records.

It is also inevitable that in a more complex case where there are ongoing seal disputes and several rounds of dispositive motions, there ultimately will be some accidental reference to sealed material in court filings. Indeed, the party that has insisted upon closure of materials likely will use the seal strategically to argue that there is no evidence in the record on a particular disputed issue. The opposing party's response, aware that the information is in the record but sealed, must carefully respond so as not to violate the court's seal order. The judge is then faced with which evidence to cite in writing its decision on a dispositive motion—the strongest on-point evidence that is under seal, or the less persuasive evidence that somewhat supports the winning party, but which does not require the reconsideration of existing seal orders. Is such a ruling truly allowing the public access to the court's considerations and the process itself? In situations like these, the delay in addressing objections to the sealing of judicial records can itself constitute a violation of the public right of access.

Requests for closure should be expeditiously resolved.[130] Courts should not sit on such closure issues until the motions and related materials being withheld from the public and at issue are resolved. The right of public access does not turn on the success or failure of the motion at issue.[131] Delay merely serves to expand the procedural mess that occurs in cases, particularly complex ones, when seal decisions are not timely and properly addressed.

Perhaps even more profound is the ethical issue of courts and attorneys routinely breaking (or at the very least, ignoring) the rule of law, further eroding what trust ordinary citizens can place in the legitimacy of the judicial system.[132] If officers of the court

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[130] Co. Doe v. Pub. Citizen, 749 F.3d 246, 272-73 (4th Cir. 2014); *see also* Grove Fresh Distrib., Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994) ("To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." (citing Chi. Council of L. v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975))).

[131] *Co. Doe*, 749 F.3d at 273.

[132] Gregg Costa, *Federal Appellate Judge: Too Many Sealed Documents*, NAT'L L.J. (Feb. 15, 2016), https://www.law.com/nationallawjournal/almID/1202749628845/ [https://perma.cc/DSJ8-4PKB] ("This unjustified sealing of court records happens all too often. . . .The law says it shouldn't be this way. . . . As is often the case, what the law books say is one thing; how the law is enforced is another.").

are not upholding the law on "the little things," there is little reason to trust they will do so with more pressing issues. These "[j]udicial records belong to the American people; they are public, not private, documents. Certainly, some cases involve sensitive information that, if disclosed, could endanger lives or threaten national security. But increasingly, courts are sealing documents in run-of-the-mill cases where the parties simply prefer to keep things under wraps."[133] In this fairly recent case on appeal before the Fifth Circuit, over seventy-three percent of the judicial record was sealed by stipulated consent of the parties.[134] No one, not even the court, questioned whether the sealing was proper.[135] In another case, an antitrust class action settlement, the amended complaint along with all of the class certification materials—including an expert report and exhibits to the settlement agreement—were sealed, denying interested class members (along with the public at large) the ability to evaluate the reasonableness of the settlement and the very nature of the claims being settled.[136] As the Sixth Circuit admonished, such "secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption."[137] Keeping "trade secrets in confidence is one thing, holding entire judicial proceedings in confidence quite another.'"[138] The Eleventh Circuit, which has a lower standard for sealing judicial records, even

[133] Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 417 (5th Cir. 2021); *see, generally,* Brown v. Auto. Components Holdings, LLC., No. 1:06-cv-1802, 2008 U.S. Dist. LEXIS 47172, at *1 (S.D. Ind. June 17, 2008) ("Motions to approve overbroad and otherwise improper protective orders seeking to shield purportedly confidential information from the public record continue to vex this and other courts."); *see, e.g.*, Brown v. Caldwell, No. 20-cv-7907, 2023 U.S. Dist. LEXIS 208314, at *3 (D.N.J. Nov. 21, 2023) (recognizing that despite the public right of access, "an inordinate number of filings have been filed under seal" in the case); *see also* Jennifer Walker Elrod et al., *Walking in the Light: On the Overuse of Sealing in Court Records*, 100 ADVOC. 27 (2022).

[134] *Binh Hoa Le*, 990 F.3d at 417; *see also* Elrod et al., *supra* note 134, at 28 (discussing sealing of over 18,000 pages of 20,000-page record in *Cox Operating, LLC v. Wells Fargo Bank*, a merger dispute case, and 2,000 pages sealed in a contract dispute case in *Al Rushaid Parker Drilling, Ltd. v. National Oilwell Varco, L.P.*).

[135] *Binh Hoa Le*, 990 F.3d at 417.

[136] *See generally* Shane Grp., Inc. v Blue Cross Blue Shield of Mich., 825 F.3d 299 (6th Cir. 2016).

[137] Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983).

[138] *In re* Bank One Sec. Litig., 222 F.R.D. 582, 587 (N.D. Ill 2004) (quoting PepsiCo. v. Redmond, 46 F.3d 29, 31 (7th Cir. 1995)).

applies a higher burden on courts seeking to maintain under seal the entirety of a case's judicial record.[139]

## III. HOW WE GOT HERE AND HOW WE FIX IT

How we got here is easy. Courts routinely rubber-stamp proposed protective orders as the discovery phase of litigation begins—allowing for a more efficient exchange of materials, including those that are sensitive to the producing party.[140] These orders are commonly referred to as the "umbrella protective order;" pursuant to which a party may, without consequence, designate most, if not the entirety, of its production as confidential without any actual determination made by the producing party, much less the court, as to the protection ultimately required for each document.[141] Without question, such protective orders serve a legitimate purpose, allowing for a more efficient discovery process that often may involve the handling of private matters that have no importance to the litigation at hand.[142] This is even the method prescribed by the *Manual for Complex Litigation,*

[139] Perez-Guerrero v. U.S. Atty. Gen., 717 F.3d 1124, 1235 (11th Cir. 2013) ("We have explained that, at least in the context of civil proceedings, the decision to seal the entire record of the case—including the pleadings, docket entries, orders, affidavits, and hearing transcripts—must be 'necessitated by a compelling governmental interest [ ] and [be] narrowly tailored to that interest.'" (alteration in original) (quoting Chi. Trib. Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1311 (11th Cir. 2001))).

[140] Some of this sensitive information would likely be of interest to the public and press, but, nonetheless, litigants do have protectable privacy interests over materials not yet filed with the court. *See In re* Alexander Grant & Co. Litig., 820 F.2d 352, 355 (11th Cir. 1987) (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984)). But, as one judge notes in his standing litigation order that although legitimate in some cases, "the Court's experience is that such orders are used—and-abused—more often than truly necessary." *Id.*; *see* Leigh Martin May, *Standing Order Regarding Civil Litigation*, at 20, U.S. DIST. CT. FOR THE N. DIST. OF GA. (Mar. 8, 2024), https://www.gand.uscourts.gov/sites/gand/files/TCB_Instructions2.pdf [https://perma.cc/H8PQ-QLPY].

[141] Bayer AG and Miles, Inc. v. Barr Lab'ys, Inc., 162 F.R.D. 456, 465 (S.D.N.Y. 1995); *see generally In re Alexander Grant & Co. Litig.*, 820 F.2d at 356 ("Because parties often resist the exchange of confidential information, 'parties regularly agree, and courts often order, that discovery information will remain private.'" (quoting United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986))).

[142] *See In re Alexander Grant & Co. Litig.*, 820 F.2d at 356 ("The realities of today's world have shown that discovery and the exchange of information can become extremely difficult. Busy courts are simply unable to hold hearings every time someone wants to obtain judicial review concerning the nature of a particular document.").

*Second*.[143] But the goal of "[e]fficiency should never be allowed to deny public access to court files or material of record . . . ."[144]

Far too frequently, this protective designation remains attached to the documents throughout the litigation process, resulting in the documents, and any references thereto—including references in dispositive motions—being filed under seal out of public sight.[145] As one circuit judge has noted, the protective order is the "main culprit" for over-sealing documents.[146] The Fifth Circuit explained that this "error—equating the standard for keeping unfiled discovery confidential with the standard for placing filed materials under seal—is a common one and one that over-privileges secrecy and devalues transparency."[147] While closure is acceptable during discovery, nondisclosure ceases to be acceptable once the information "enters the judicial record."[148] Indeed, the burden for nondisclosure of judicial records does not disappear simply because a document may at one time have been filed under seal or have been the subject of a protective order.[149] The problem as described by the Fifth Circuit is how "a steady

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[143] MANUAL FOR COMPLEX LITIGATION (SECOND) § 21.431 (1985).

[144] *In re Alexander Grant & Co. Litig.*, 820 F.2d at 357.

[145] *See generally* Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299 (6th Cir. 2016); *see also* Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 417-18 (5th Cir. 2021) (noting the "growing practice of parties agreeing to private discovery and presuming that whatever satisfies the lenient protective-order standard will necessarily satisfy the stringent sealing-order standard" and courts' accommodation of this common practice due to their busy dockets).

[146] Costa, *supra* note 133, at 2; *see* Brown v. Auto. Components Holdings, LLC., No. 1:06-cv-1802, 2008 U.S. Dist. LEXIS 47172, at *6 (S.D. Ind. June 17, 2008) ("The filing of motions for protective orders seeking to keep purportedly confidential information out of the public eye has seemingly become a reflexive part of federal court practice in this district, and presumably in other districts as well."); *see, e.g.*, Est. of Martin Luther King, Jr., Inc. v. CBS, Inc., 184 F. Supp. 2d 1353, 1360 (N.D. Ga. 2002) ("This case is illustrative of the administrative headache caused by litigants who stipulate to blanket protective orders, arbitrarily file boxes of documents under seal, and then contest their unsealing at the conclusion of the litigation.").

[147] *Binh Hoa Le*, 990 F.3d at 420; *see also Shane*, 825 F.3d at 307 (overturning district court's refusal to unseal documents where "the parties and the district court plainly conflated the standards for entering a protective order under Rule 26 with the vastly more demanding standards for sealing off judicial records from public view").

[148] *Shane*, 825 F.3d at 305 (citing Baxter Int'l, Inc. v. Abbott Lab'ys, 297 F.3d 544, 545 (7th Cir. 2002)).

[149] Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1179 (9th Cir. 2006) ("The presumption of access is not rebutted where . . . documents [are] subject to a protective order . . . . The . . . 'compelling reasons' standard continues to apply.").

flow of unjustified low-profile sealings is capable of far greater damage—a gradual, sub silentio erosion of public access to the judiciary, erosion that occurs with such drop-by-drop gentleness as to be imperceptible."[150]

Understandably, requiring courts to only issue narrow protective orders after reviewing any asserted protection due to each document produced during discovery is not a realistic solution in most cases, particularly those in which terabytes of data must be produced in a relatively short amount of time.[151] Using a blanket protective order, that at least places the burden on the producing party to designate only those documents for which they have a good faith reason to believe contain some sort of confidential information that should not be publicly disclosed, is the best *first* step in litigation. Indeed, some courts have rightly noted how such protective orders are "essential to the functioning of civil discovery."[152] But such orders need to be properly structured to not serve as a permanent means of hiding the information from the public should the materials the orders cover later become part of a judicial record, to which the public and media have a right of access.[153] Indeed, "[t]here is a qualitative difference between a party's sustaining the confidentiality of a single document at the time of its designation and its sustaining the confidentiality of thousands of documents *en masse* long after

[150] *Binh Hoa Le*, 990 F.3d at 421.

[151] *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 356 (11th Cir. 1987) ("The realities of today's world have shown that discovery and the exchange of information can become extremely difficult. Busy courts are simply unable to hold hearings every time someone wants to obtain judicial review concerning the nature of a particular document."); *see also* Brown v. Auto. Components Holdings, LLC., No. 1:06-cv-1802, 2008 U.S. Dist. LEXIS 47172, at *2 ("Given the volume of . . . filings, it is perhaps predictable that a judge might approve a protective order that may have been denied or modified had time permitted more deliberate consideration.").

[152] Bayer AG and Miles, Inc. v. Barr Lab'ys, Inc., 162 F.R.D. 456, 465 (S.D.N.Y. 1995).

[153] *Shane*, 825 F.3d at 305 (admonishing that "there is a stark difference between so-called 'protective orders' entered pursuant to the discovery provisions of Federal Rule of Civil Procedure 26, on the one hand, and orders to seal courts records, on the other"); *see also* Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 946 (7th Cir. 1999) (requiring language in protective orders "that either party and any interested member of the public can challenge the secreting of particular documents").

they have been produced and given a confidential designation."[154] It is this later step in the process where the system is unequivocally dysfunctional.

### *A. The Rule of Access Is Being Ignored*

Despite their lack of unanimity on the details, the circuits do agree that there is at least some public access, and that right is not being enforced consistently. There is no shortage of people to blame for the problem. It is often the case that the parties themselves lack an incentive to protect the public's right of access; in fact, they often have strong incentives to keep their clients' documents confidential.[155] This is true of any party—plaintiff or defendant—which is required to produce business records or similar information during litigation. Often, attorneys with an ongoing attorney-client relationship with a business and its executives have every incentive to allow as little proprietary information as possible to ever be filed openly in court, and they frequently fight its production from the outset of the litigation.[156] That fight does not end just because the litigation ends.[157] Indeed, the Boston Bar Association even advocates for businesses to proactively label their business documents as confidential to "stack the deck against any party later arguing for disclosure" as "the labeling may create a *de facto* presumption in the mind of the decision-maker that the text is indeed protectable."[158]

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[154] Tavoulareas v. Wash. Post Co., 724 F.2d 1010, 1024 (D.C. Cir. 1984), *rev'd on other grounds*, 737 F.2d 1170-72 (D.C. Cir. 1984).

[155] BP Expl. & Prod., Inc. v. Claimant ID 100246928, 920 F.3d 209, 211 (5th Cir. 2019) ("Most litigants have no incentive to protect the public's right of access.").

[156] *See generally* Christopher H. Boehning & Daniel J. Toal, *A Reasonable Route to ESI Confidentiality*, N.Y.L.J. (Oct. 28, 2008), https://www.law.com/article/almID/1202425576310/ [https://perma.cc/HG3S-83TS] ("Of the many burdens litigators must shoulder, among the most irksome may be disputes over what documents are confidential and what agreements and markings are necessary to keep them that way.").

[157] *See, e.g.*, Rooks, *supra* note 3, at 866 (describing how the defense attorneys and insurance companies who responded to the South Carolina federal judges' joint proposal to ban the "outright sealing of any settlement agreements" all opposed it).

[158] Phillip A. O'Connell, Jr. & Tony K. Lu, *Labeling Documents as Protected from Disclosure: Why Bother?*, BOS. BAR ASS'N (Feb. 9, 2023), https://bostonbar.org/journal/labeling-documents-as-protected-from-disclosure-why-bother/ [https://perma.cc/7YCB-P2SW] ("The effort of maintaining a document as confidential, even if upon a later review it is determined to be not protected from

Even in the absence of a true incentive to hide information, business counsel typically have far more voluminous amounts of information (as compared to an individual plaintiff or defendant) to produce during litigation.[159] The time required to truly review each page of every document and find what little information is actually sensitive and could possibly be kept from the public is likely more than clients are willing to pay their counsel, particularly in a document-intensive case.[160]

Opposing counsel, in turn, has every incentive to keep the litigation moving and to avoid annoying the judge with yet another non-merits dispute between the parties that requires the court's intervention and resolution. As long as counsel ultimately receives the documents needed to litigate the case, they consent to the extra hurdle of having to seal materials when they are filed with the court for the judge's adjudication as an acceptable, albeit time-consuming, hassle.[161] The alternative is to require counsel to

disclosure, is worthwhile."). Of course, businesses have a property interest in confidential business information that should be balanced against disclosure when courts are determining access issues. *See* Carpenter v. United States, 484 U.S. 19, 26 (1987). Further, the information actually must be confidential, and the Boston Bar's suggestion presumably serves only to exacerbate the over-designation of materials as "confidential" and increases the burden on the parties and court in litigation. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002 (1984).

[159] *See* Hopson v. City Council of Balt., 232 F.R.D. 228, 245 (D. Md. 2005) ("The plaintiff typically has relatively few electronically-stored records, while the defendant often has an immense volume of it.").

[160] *See generally Hopson*, 232 F.R.D. at 238 ("This case thus highlights an unavoidable clash of important policies. . . . This requires an awareness of the enormous costs that would accompany a requirement that in all civil cases the production of electronically stored information could not be accomplished until after a comprehensive privilege review and particularized assertion of privilege and work product claims."). *Cf.* Taylor Appling, *Sealing Judicial Records or How I Learned to Stop Consenting and Protect Trade Secrets*, FOLEY & LARDNER LLP (May 3, 2021), https://www.foley.com/insights/publications/2021/05/sealing-judicial-records-or-how-i-learned/ [https://perma.cc/34XY-ACF7] ("An employer seeking to protect its trade secrets by filing a lawsuit must be careful that such litigation does not lead to the disclosure of such trade secrets to the public at large.").

[161] *See, e.g.*, Brown v. Auto. Components Holdings, LLC., No. 1:06-cv-1802, 2008 U.S. Dist. LEXIS 47172, at *4 (S.D. Ind. June 17, 2008) (parties filed joint motion to allow the parties to file documents under seal that were designated "confidential" or addressed "other sensitive subject matters" as determined by the parties); *see also Zenith*, 529 F. Supp. at 879 n.18 ("Wholesale designations without repeated objection facilitate the discovery process. If a judge, magistrate, or special master had to rule upon countless invocations of Rule 26(c)(7), the progress of complex cases would be severely impeded.").

prepare his filings weeks before a deadline and to share with opposing counsel the mental impressions and work product regarding which materials he intends to use in support of that pleading prior to actually filing it. Counsel would then have to obtain leave from the court to file documents stamped "confidential" on the public docket, even though the information likely is not entitled to closure. This step just invites further disputes between the parties, more delay in litigation, and greater expense.

Finally, the court itself is motivated to keep its docket moving and to not babysit or referee the parties more than necessary, instead spending time on issues that are "worthy" of attention. When one of the parties takes the time to challenge the other party's insistence that its business records be maintained under seal, the chore of reviewing the potentially voluminous documents for the actual nuggets of confidential information buried within that justify nondisclosure may invariably seem like a waste of time.[162] The judge may simply disregard the rule of access that should be followed in favor of expediency.[163] Alternatively, if uncomfortable with not following the rule of access, the judge may kick the proverbial can down the road, deferring ruling on challenges to the propriety of closure—even as to adjudicative pleadings—until ruling on the motion itself and issuing a contemporaneous order lifting the seal on any documents referenced in the court's decision. Of course, this does not resolve the issue of the other documents that were submitted by the parties for the court's consideration but which are not specifically referenced in the court's order. It makes for a messy docket if the public or press try to locate sealed items of interest.

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[162] Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 879 n.18 (E.D. Pa. 1981) ("Indeed, the judge is a veritable hostage; failure to approve an umbrella protection order is a consignment to years of adjudication of the confidentiality of individual documents.").

[163] *See* Elrod et al., *supra* note 134, at 28 (explaining that, at least with respect to the Fifth Circuit, "[t]he problem is not so much because of a lack of guiding standards but because courts often do not apply the standards."); *see, e.g.*, PepsiCo. v. Redmond, 46 F.3d 29, 31 (7th Cir. 1995) ("The district judge has gone along without an independent discussion of the need for or propriety of restrictions on the public's access.").

This solution also denies the public full transparency of the process.

These common realities have led the supposed gatekeepers of the law to hide public records from the public. And no one can ignore the real possibility that sometimes the parties, or even the judge, may have a less-than-altruistic motivation to keep information from the public.

At least one court, the Fifth Circuit, places the ultimate blame on the federal courts themselves, emphasizing that they are "duty bound" to protect the public's right of access, lamenting that there is no repercussion in federal court when that duty is not met.[164] The court reasoned that it is "'judges, not litigants' [who] must undertake a case-by-case, 'document-by-document,' 'line-by-line' balancing of 'the public's common law right of access against the interests favoring nondisclosure.'"[165] Indeed, only the judge can serve as "the public interest's principal champion."[166]

Perhaps there is some truth to the Fifth Circuit's concerns. As Professor Arthur Miller acknowledged, "[w]here the power lies with judges to prevent or correct abuse and misuse of the system, judges must act."[167] Judges do not always take the right of public access seriously. This is abundantly obvious in situations where a party opposing the sealing of adjudicatory matters establishes that the party seeking closure has not even maintained the information in question in a confidential manner, much less demonstrated why any request to seal such information should be

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164 *See* Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 417 (5th Cir. 2021).

165 *Id.* at 419 (first quoting BP Expl. & Prod., Inc. v. Claimant ID 100246928, 920 F.3d 209, 211 (5th Cir. 2019); and then quoting United States v. Sealed Search Warrants, 868 F.3d 385, 390 (5th Cir. 2017)).

166 *Id.* at 421; *see also* Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999) (citing Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 492 (1991)); *In re* Krynicki, 983 F.2d 74 (7th Cir. 1992) (citation omitted) (highlighting that "[t]he judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it)[, and h]e may not rubber stamp a stipulation to seal the record.").

167 To be clear, although Professor Miller strongly advocated against implementing precise rules on judges on how to decide which documents may be withheld from the public and thereby limiting their discretion (and against a presumptive right of access in general), his statement acknowledges that when judges are given the discretion to decide such issues, they have to do the job. *See* Miller, *supra* note 57, at 458, 487 (arguing against assigning courts "an information clearinghouse function").

sustained—yet the court still keeps the information under seal over those valid objections.[168] It goes without saying that "publicly available information cannot be sealed."[169] Yet the Seventh Circuit, while admonishing judges against any rubber-stamp sealing of records, also was quick to qualify that admonition by stating: "We do not suggest that all determinations of good cause must be made on a document-by-document basis. In a case with thousands of documents, such a requirement might impose an excessive burden on the district judge or magistrate judge."[170] The question thus remains: if the responsibility does not fall on the judges (the final arbiter of justice), then on whom does the responsibility rest? Simply shrugging one's shoulders at the problem is not enough, and strongly-worded appellate decisions chastising lower courts are also not enough when the issue at hand is the routine disregard of the law by courts, along with the officers of those courts, charged with enforcing that law. Online legal advice posts even suggest to business clients that their confidential information is protected and "not open to the public" "[w]henever the judge says it's not."[171] While not an accurate statement of the rule of law, it is an accurate description of the current practice in some courts. As the author of that website accurately notes, when the parties agree, every document in the case can be "shielded from public view."

### *B. How Do We Fix the Problem?*

Even in the absence of true consistency of opinion on the extent of the right of public access, there are practical first steps

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[168] *See, e.g.*, June Medic. Servs., L.L.C. v. Phillips, 22 F.4th 512, 515 (5th Cir. 2022) ("Among the sealed or redacted documents are a transcript of proceedings held in open court, a famous Pennsylvania grand jury report that is available as a book on www.amazon.com and that was adapted as a motion picture, an arrest report from a police department's public website, articles from *The New York Times* and *Rolling Stone*, and an obituary from a public website.").

[169] *See Phillips*, 22 F.4th at 520.

[170] *Citizens First Nat'l Bank*, 178 F.3d at 946. Ultimately, the Seventh Circuit wanted some substantive review of seal requests beyond "the standardless, stipulated, permanent, frozen, overbroad blanket order[,]" though maybe not a line-by-line review of each document. *Id.*

[171] Adam N. Hirsch, *The Civil Courts: When Your 'Confidential Business Information' Isn't So Secret*, FIN. POISE (Dec. 27, 2023), http://www.financialpoise.com/confidential-business-information/.

readily available that can help at least to moderate the abuse of the seal. First and foremost, courts and the officers of those courts could follow the rule of law in their respective circuits. This should not be perceived as a naïve or sarcastic suggestion.

Another legitimate solution is for courts to impose sanctions for abusive or frivolous use of seal requests.[172] While counsel certainly have a duty to protect their clients' confidential and trade secret information, it is well-established that "[i]nformation that is public knowledge or that is generally known in an industry cannot be a trade secret" and therefore should never be the subject of a seal dispute before a court.[173] Nonetheless, courts routinely disregard this very type of seal abuse with virtually no consequence for the offender. For example, in *In re BCBS Antitrust Litigation*, Blue Cross Blue Shield's counsel, in support of a motion for summary judgment, filed under seal excerpts from their client's own book readily available for purchase from Amazon with one quick click, *The Blues - A History of Blue Cross and Blue Shield System*, after repeatedly having been instructed by the court not to abuse the seal process. No sanction or similar action was imposed by the court. Similarly, in *In re Keurig Green Mt. Single-Serve Coffee Antitrust Litigation*, when the court appointed a Special Master to address the outstanding twenty-seven (of an initial thirty-two) seal motions—none requested by the plaintiffs—the court denied plaintiffs' request that the Special Master be given the authority to levy sanctions for frivolous seal requests.[174]

In more complex litigation, appointing a Special Master early in the litigation to address seal issues is recommended and increasingly common.[175] Of course, this increases the cost of the

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[172] *See, e.g.*, May, *supra* note 141, at 13-14 (warning that "the Court is not hesitant to sanction a party and/or counsel for abusing a protective confidentiality order by too readily designating documents . . . as "Confidential").

[173] Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002 (1984) (quoting RESTATEMENT (FIRST) OF TORTS (A.L.I. 1939)).

[174] *In re* Keurig Green Mt. Single-Serve Coffee Antitrust Litig., No. 14-2542, 2023 U.S. Dist. LEXIS 133737 (S.D.N.Y. Aug. 1, 2023).

[175] *See In re* Blue Cross Blue Shield Antitrust Litig., No. 2:13-CV-20000, 2017 U.S. Dist. LEXIS 233764, at *24 (N.D. Ala. Nov. 13, 2017) ("The volume of materials now under seal and which are anticipated to be filed under seal as the case progresses now justifies appointment of this [Special] Seal Master to assist the court in determining which materials should appropriately remain under seal."); Am. Consol. Indus. v.

litigation, making this solution reasonable only in cases where the extra cost can be justified. Courts usually charge these costs either to the party seeking the seal over the objection of the other party or to the party abusing the process.[176] In addition, courts should consider the practice of implementing a brief grace period between the service and the formal filing of dispositive or similar motions (along with supporting briefs and materials) to allow the parties an opportunity to resolve any seal disputes while simultaneously permitting the movant to maintain its work product privilege up and until the time the filing is due. During that pending grace period, the parties either temporarily file materials under seal or merely file a notice that the motion has been served and will be filed with the court within a set number of days. At the expiration of the grace period, the materials are filed publicly (at least to the extent agreed upon by the parties). While not a complete solution to protecting public access against the over-sealing of documents, it does serve to significantly reduce the volume as well as alleviate the problem of a messy docket for the public to follow.[177]

Blasingim, No. 1:19-cv-137, 2024 U.S. Dist. LEXIS 88858, at *4 (N.D. Ohio May 17, 2024); *In re* Keurig Green Mt. Single-Serve Coffee Antitrust Litig., No. 14-MD-2542, 2023 U.S. Dist. LEXIS 133737, at *19 (S.D.N.Y. Aug. 1, 2023) (appointing special master to resolve outstanding sealing issues, noting the court's prior rulings on 12 of 37 outstanding sealing motions, and after a strongly worded order resulted in the withdrawal of only 3 of the outstanding motions); Genentech, Inc. v. Amgen, Inc., No. 1:2018cv00924, 2020 U.S. Dist. LEXIS 182824, at *5 (D. Del. Sep. 2, 2020) (appointing special master to decide whether parties' sealed documents were properly under seal). *See generally* W. Penn Allegheny Health Sys. v. UPMC, No. 2:12-cv-0692-JFC, 2013 U.S. Dist. LEXIS 196816 (W.D. Pa. Sep. 16, 2013) (special master seal decision); Luppino v. Mercedes Benz USA, LLC, No. 2:09-cv-05582, 2013 U.S. Dist. LEXIS 130228 (D.N.J. Sep. 11, 2013) (appointing special master); United States v. Anthem, Inc., No. 1:16-cv-01493, 2016 U.S. Dist. LEXIS 200691 (D.D.C. Dec. 23, 2016) (special master seal decision); *In re* Hewlett-Packard Co. S'holder Derivative Litig., No. 12-cv-6003, 2015 U.S. Dist. LEXIS 166940 (N.D. Cal. Nov. 18, 2015) (same); *see also* Moussouris v. Microsoft Corp., No. 15-cv-1483, 2018 U.S. Dist. LEXIS 78456, at *2 (W.D. Wash. Apr. 25, 2018) (reviewing special master's seal recommendations).

[176] *See generally In re Blue Cross*, 2017 U.S. Dist. LEXIS 233764 (assigning the cost of the Special Master to the defendants who repeatedly sought to maintain documents under seal).

[177] *See, e.g.*, *Am. Consol. Indus.*, 2024 U.S. Dist. LEXIS 79117, at *5-6 (adopting special master's recommendation that parties file their summary judgment motions and supporting materials temporarily under seal for 10 days to allow the parties to confer over what redactions they propose on asserted confidential materials, finding the proposal "significantly mitigate[d] any harm to the public"). *See generally Genentech, Inc.*, 2020 U.S. Dist. LEXIS 182824, at *2-3 (describing how the parties'

In addition, when there are potential public safety issues in product liability cases, judges could allow exemptions from protective orders, perhaps at the post motion to dismiss stage, that permit plaintiffs' counsel to share health and safety records with appropriate governmental agencies. The National Highway Traffic Safety Administration, for example, issued guidance in 2016 allowing for this type of exemption. The Consumer Product Safety Commission followed suit. However, the Food and Drug Administration has not. The mere absence of such administrative agency guidance should not stop judges from adopting such protective order exemptions themselves.

In addition to appropriate exemptions to protective orders, courts should consider appropriate time limitations on protective orders, viewing them as temporary in nature as the case progresses.[178] After the expiration of the specified time period, a proper showing would need to be made by the party seeking to maintain protection on any document produced that might later be filed on the public record, clearing the way for the parties to file documents on the public record without dealing with unnecessary seal issues.

Issuing uniform federal rules on sealing that properly protect the right of access and simultaneously maintain the ability to seal information when adequately justified would remove further abuses of the seal. Several proposals have been submitted to the Federal Rules Committee, but, for now, nothing has changed.[179] A more streamlined, uniform approach—even one that maintains

own "self-critique" of previously sealed materials "undoubtedly saved a great deal of time and expense" but nonetheless left several hundreds of documents left to review the propriety of the requested seal). *Cf.* Moussouris v. Microsoft Corp., No. 15-cv-1483, 2018 U.S. Dist. LEXIS 78456, at *2 (W.D. Wash. Apr. 25, 2018) (lamenting how plaintiff afforded defendant only four hours to review class certification materials for confidentiality issues before filing under seal).

[178] *See, e.g.*, *In re* Agent Orange Prods. Liab. Litig., 99 F.R.D. 645, 650 (E.D.N.Y. 1983) (reexamining earlier protective order and lifting the seal on material produced by the government, recognizing, "it might become desirable to lift the order as discovery progressed and fundamental disputes were resolved").

[179] My research has found proposals submitted by Professor Eugene Volokh of the Reporters Committee for Freedom of the Press and the Electronic Frontier Foundation in 2020 and an alternative proposal submitted by the Knight First Amendment Institute at Columbia University and the Civil Rights & Transparency Clinic at the University at Buffalo School.

discretion at the district court level—would be a significant improvement compared to the status quo.