

The Sedona Conference WG1 Drafting Team Proposed Uniform Model Rule for the Sealing and Redacting of Information Filed with the Court (October 2020)

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Sedona Sealing Drafting Group

PROPOSED UNIFORM MODEL RULE FOR THE SEALING AND REDACTING OF INFORMATION FILED WITH THE COURT:

Model Rule: Procedures for the Sealing and Redaction of Records in a Civil Case

1.0 Definitions. As used in this Rule:

- (A) **Conditionally Sealed Period.** The time period during which a Record is sealed because it is appended to a Notice of Sealed Record or a motion to seal, and has not been sealed pursuant to court order.
- (B) **Confidential Information.** Confidential Information is information the Filing Party or Producing Party contends is confidential or proprietary in a Notice of Sealed Record or a motion to file under seal, including information that has been designated as confidential or proprietary under a protective order or non-disclosure agreement, or information otherwise entitled to protection from disclosure under statute, rule, order, or other legal authority.¹
- (C) **Court Record.** The Court Record refers to the full collection of pleadings, motions and orders, and exhibits that make up a case file.
- (D) **File.** File means to electronically file (“e-file”) a Record that is submitted by a registered e-filer in a case that is subject to e-filing.
- (E) **Filing Party.** The Filing Party is the party filing a motion that references or appends the Producing Party’s confidential information.
- (F) **Presumptively Protected Information.** A Record may contain Presumptively Protected Information if it includes any of the following:
- (G) Information defined as Personally Identifiable Information (“PII”) in OMB Memorandum M-07-1616 or in any subsequent definition of PII promulgated by GSA or OMB;
 - (1) Information defined as Protected Individually Identifiable Health Information (“PHI”) by HIPAA Privacy Rule and including information protected by comparable federal, state, or local laws, regulations, or rules governing healthcare information privacy;

¹ See E.D. TX LR 5(a)(7)(C).

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- (2) Information otherwise protected from disclosure by federal, state, or local laws, regulations, or rules, governing data privacy;
 - (3) Information not otherwise covered by Fed. R. Civ. P. 5.2, such as passport numbers, taxpayer ID numbers, military ID numbers, drivers' license numbers; other national, state or local government issued identification, license or permit numbers; non-financial customer account numbers; Internet or website user names, login IDs, or passwords; personal email addresses, personal telephone numbers, personal device IP addresses, residence addresses, and personal geolocation data [except to the extent such information is required to be publicly disclosed by rule or order, e.g., residence address on initial pleading, docket form, summons, subpoena, or substantively in a given case];
 - (4) Except where such information is subject to Fed. R. Civ. P. 5.2, or is already publicly available, or where protection from public disclosure has been waived.
- (H) **Proposed Sealed Record(s).** A Proposed Sealed Record is a Record that is temporarily sealed during the Conditionally Sealed Period by virtue of its attachment to a Notice of Sealed Record or motion to seal.
- (I) **Producing Party.** The Producing Party is the person or entity that produced Confidential Information that is at issue under this Rule. The Producing Party may be a non-party or third party to the case.
- (J) **Record.**² Unless the context indicates otherwise, Record means all or a portion of any document, pleading, motion, paper, exhibit, transcript, image, electronic file, or other thing filed or lodged with the court, by electronic means or otherwise.
- (K) **Redacted Record.** A Redacted Record is a Record that, by court order, contains information that is not open to inspection by the public, but the Record itself is not entirely sealed.
- (L) **Sealed Record.** A Sealed Record is a Record that by court order is not, in its entirety, open to inspection by the public.

2.0 Sealing Presumptively Protected Information

² The Drafting Group has considered the proper term for this document, and has looked to the terms used by the varying circuits, which include "record", "judicial record", "document", "judicial document", "item" or "material." This document is to be distinguished from a document that becomes a part of the court file in a case, see 1.0(C), but is instead meant to identify the document sought to be sealed or redacted pursuant to this Rule.

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(A) No prior Court approval required.

A Filing Party who seeks to file Presumptively Protected Information identified in Fed. R. Civ. P. 5.2 shall follow its requirements. For all other Presumptively Protected Information, the Filing Party may³ redact such information without prior court approval where the extent of the redactions is no greater than required to protect the disclosure of such information. Where other content in a Record supports or requires filing under seal, the provisions of Section 3.0 apply, notwithstanding any redactions made under this section.

(B) No requirement to redact received materials.

A Filing Party receiving unredacted Records from a Producing Party in response to discovery requests or by subpoena is not required by this section to apply redactions to the Producing Party's Records before filing. This provision does not supersede any court order (such as a protective order or ESI order), law, regulation, or rule that imposes an affirmative requirement on a receiving party to redact information prior to filing, including Fed. R. Civ. P. 5.2.

(C) No requirement to defend Producing Party's redactions.

A Filing Party receiving redacted Records from a Producing Party in response to discovery requests or by subpoena is not required to defend the appropriateness of redactions made by a Producing Party under this section in order to file them in the form received. This provision does not preclude a receiving party from objecting to or challenging redactions by a Producing Party or entity as otherwise provided. A court may also, *sua sponte*, require that the appropriateness of redactions under this section be demonstrated by the Producing Party..

(D) Redactions to be no more extensive than required.

Redactions to prevent unauthorized public disclosure of information described in Section 1.0(F) should not obscure the type of information being redacted.

(E) Redactions to be textual where feasible.

To apprise viewers of the bases for redactions, where the technology used to redact provides for textual redactions (as opposed to blackbox or whitebox redaction), textual redactions that characterize the redactions should be used (e.g., "PHI/PII Redacted," "Personal Protected Information Redacted"). Where textual redactions have been applied, a Producing Party should not be required to provide a "redaction log" for redacted items.

³ The Working Group is considering whether this is a mandatory requirement (i.e. requiring a "shall") or not. The Group welcomes discussion and input on this issue.

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3.0 All Other Sealing

(A) Court approval required.⁴

A Record must not be filed under seal or redacted without a court order, except in connection with a Notice of Sealed Record or motion to seal, or if the Record contains Presumptively Protected Information under Section 1.0(F), in which case the procedures in Section 2.0 apply. A Record filed under seal in connection with a Notice of Sealed Record or motion to seal will be Conditionally Sealed unless and until an order disposing the motion to seal is entered. Thereafter, the Record remains sealed unless determined otherwise by an order of the court. *See* Section 4.0.

(B) ECF requirement.

- (1) Unless otherwise ordered by the court, any Record to be filed under seal, Notice of Sealed Record, or motion to seal must be filed electronically using the court's CM/ECF System.⁵
- (2) All Records filed under seal must state "FILED UNDER SEAL" at the top of the Record.⁶
- (3) Redacted Records must be filed in redacted form in the public record.
- (4) A Record to be sealed in its entirety must be filed in the public record by a placeholder slip sheet. Each Proposed Sealed Record that is an attachment to a filing must be numbered (e.g., as "Sealed Exhibit Number ____").⁷

⁴ The Committee considered that precedent in each jurisdiction would guide the court's ruling on a motion to seal. *See* Section II. for an overview of relevant caselaw by Federal Circuit. Since this Model Rule is based on procedure only, the Committee refrained from injecting substantive requirements on the parties or the court.

⁵ Some district courts require that documents requested to be filed under seal or redacted be submitted in hard copy ("paper") form. *See*, for example, S.D. Cal. Local Rule 79-5.2.1(b) and its *User's Manual on ECF Filing Under Seal* (<https://www.casd.uscourts.gov/assets/pdf/cmecf/How%20to%20File%20Civil%20Sealed%20Documents.pdf>.) Other courts permit either manual or ECF filing. *See*, for example, N.D. Cal. Local Rule 79-5. While other courts require that such motions be filed only via ECF. *See* C.D. Cal. Local Rule 79-5.2, and S.D.N.Y. ECF Rule 6.3. The Committee elected to require the use of ECF to adopt modern filing requirements and alleviate the burden on courts to manage paper files.

⁶ *See* E.D. TX LR 5(a)(7)(A).

⁷ *See* N.D.N.Y. LR 83.13(6).

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- a. An unredacted copy of each Proposed Sealed Record must be filed concurrently with the Notice of Sealed Record or motion to seal using the CM/ECF System using restricted viewing.⁸
 - b. Paper copies of unredacted Records will not be provided to the court unless required by court order.⁹
- (5) Filing a document under seal does not exempt the filer from the service requirements imposed by federal statutes, rules, or regulations or by any court's local rules. Service on parties of the Sealed Record or Unredacted Record in unsealed or unredacted forms will be accomplished through the CM/ECF system.¹⁰ Service of such Records on non-parties must be made in accordance with Fed. R. Civ. P. 5.¹¹
- (6) If the motion to seal is granted, the Records requested to be sealed are deemed filed as of the date of the order granting the motion to seal, unless otherwise directed by the court.¹² If the motion to seal is denied, the clerk, on order of the court, will delete the temporarily sealed Records, and the moving party must re-file the Records in the public file, or take other action as ordered by the court.
- (7) The motion to seal and its supporting documents, identified below in Section (D), must not be filed under seal unless the motion cannot be drafted in a manner that protects the Confidential Information from disclosure.

⁸ See N.D.N.Y. Local Rule 83.13(6). Other courts require that the moving party provide to the court in paper format, copies of unredacted or clean documents to be sealed. See C.D. CA. Local Rule 79-5.2. The Working Group considered that this adds an extra layer of complexity for the parties and the court. The parties need to prepare a paper submission in the digital age, and the court and clerk need to receive and track that paper, ensuring that it does not become a part of the public file, which can be alleviated through use of ECF.

⁹ The Committee added this requirement to ensure that the vestiges of paper submissions, whether *in camera* or through judge's copies, as well as external media, are unnecessary. See

¹⁰ The Working Group acknowledges that not all courts currently utilize all functionalities available within the CM/ECF system. The CM/ECF system does have the functionality to permit parties to view Sealed and Redacted Records in their entirety, while those Records remain blocked from public view. In the interest of promoting the use of electronic means, The Working Group proposes the use of this functionality.

¹¹ See S.D.Cal. Local Rule 79-5.3.

¹² See N.D. TX Rule 79.3(b)(2). Other courts require records to be resubmitted after a Motion to Seal is granted. See, for example, E.D.N.Y. "Steps for E-filing Sealed Documents – *Civil Case*", at ¶ 2. Further, this provision is intended to lessen the burden on the parties and the clerk with respect to the re-submission of records under seal pursuant to court order. If an order has entered sealing the documents, re-submission should not be required. However, if the order modifies the portions of the records to be sealed, then the applicable order shall specify re-submission as to affected records.

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- (8) Any order disposing of a motion to seal will be publicly filed unless otherwise ordered by the court.

(C) Notice of Sealed Record

- (1) **Filing of Notice of Sealed Record.** If a Filing Party intends to file a motion that references or appends a Producing Party's Confidential Information it must file a Notice of Sealed Record.¹³
- (2) **Content of Notice of Sealed Record.** The Notice of Sealed Record must identify each Proposed Sealed Record or generally identify the Confidential Information that was redacted from each Proposed Sealed Record, in a non-confidential manner, and identify the corresponding Producing Party.
- (3) **Timing of Notice of Sealed Record.** A Notice of Sealed Record must be filed with any motion in which the Proposed Sealed Records are referenced or attached, *i.e.* a motion to compel, a motion for summary judgment, or a motion in limine.
- (4) **Notice to Non-Party Producing Parties.** If Records subject to the Notice of Sealed Record were produced by a Producing Party that is a non-party to the litigation, the party filing the Notice of Sealed Records must provide notice of the filing to the non-party Producing Party on the same date the Notice of Sealed Record is filed. The non-party may intervene for the sole purpose of filing a motion to seal as set forth in Section (D).

(D) Motion to Seal

- (1) **Motion to Seal.** If a Producing Party whose Record(s) are the subject of a Notice of Sealed Record seeks to maintain such Records under Seal, the Producing Party must file a motion to seal. If a motion to seal is not filed within the time frame set forth in Section (D)(5), the Filing Party may publicly file the Record(s).
- (2) **Memorandum.** The motion to seal must include a non-confidential memorandum in support in compliance with Section 3.0(B)(7) that describes:

¹³ The Working Group considered having the only the Filing Party file a Notice of Sealed Record and the Producing Party file a Motion to Seal, but elected to require any Filing Party, regardless of whether the party is also the Producing Party, file a Notice of Sealed Record so as to give notice to the Court and other parties that a Motion to Seal would be forthcoming, and to definitively start the clock for the filing of a timely Motion to Seal.

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(a) each Record(s) to be sealed; (b) the basis for the request; and (c) how each Record(s) to be sealed meets the applicable standards for sealing.

- (3) **Declaration in support.**¹⁴ The motion to seal must include a non-confidential declaration in support setting forth the legal basis for filing each Record(s) under seal, including for each proposed redaction.
- (4) **Proposed Sealed Records.** The Proposed Sealed Record(s) must be appended to the declaration in support and comply with the requirements of Section (B)(1), above.
- (5) **Timing of Motion to Seal.** A Producing Party shall file its Motion to Seal within the time frame set for the filing of any responsive pleading to the motion that references or appends a Producing Party's Confidential Information, unless otherwise ordered by the court.¹⁵ If a responsive pleading is not permitted, the Motion to Seal must be filed within 7 days.
- (6) **Proposed Order.** A proposed order must be served with the motion to seal.

4.0 Disposition of Sealed and Redacted Records

Unless otherwise ordered by the court, a sealed or redacted Record will remain sealed or redacted after final disposition of the case or unless otherwise ordered by the Court. Anyone seeking to unseal or unredact a Record may petition the court by motion. The motion must be served on all parties in the case, and upon any Producing Party, including a non-party or third party.¹⁶

¹⁴ See N.D. Cal., Local Rule 79-5(d)(a). While some Courts require that this declaration also be sealed, *see*, for example, E.D. Cal. Local Rule 79-5.2.2.(a), this proposed Rule endeavors to limit the number of documents that are sealed from public view.

¹⁵ The Working Group discussed the number of days that the Producing Party should have to file a Motion to Seal. The Group considered including as many as 14 days and as little as three days for such filing. Ultimately, the Group opted to use the time of the response brief for the underlying filing as the target date because such date is tied directly to the underlying filing and will ensure that the issue of sealing progresses promptly. The Group welcomes input from the Committee. The intent is to provide a moving party with enough time to prepare a motion to seal, but not bog courts down or cause delay in ruling on underlying motions. We also intend to anticipate all of vehicles that may prompt the need to seal documents or information, including motions, oppositions, and replies.

¹⁶ While the Working Group recognizes that courts may have an interest in unsealing Records on their dockets, the alternatives the Group explored and considered were very burdensome on courts and also difficult for counsel who may have moved on to other employment or retired years after a document was filed under seal, and therefore would not be tracking the action in order to move to unseal years later. The Group welcomes input from the Committee.

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BACKGROUND AND DISCUSSION

I. INTRODUCTION

In July 2019, the WG1 Steering Committee formed a Brainstorming Group on the Need for Guidance and Uniformity in Filing ESI Under Seal. The group was tasked with considering and making recommendations to the Steering Committee regarding the need for Sedona guidance on uniform procedures for filing ESI under seal with a court. The Brainstorming Group prepared a draft outline for a potential new Commentary on this topic. This outline was presented to the WG1 Membership in mid-October 2019 and dialogued at the WG1 Annual Meeting later that month. Member feedback was positive and the steering committee approved forming a new Drafting Team to move forward with the project.

In February 2020, the WG1 Steering Committee formed a Drafting Team to implement the project, and develop Commentary on the Need for Guidance and Uniformity in Filing ESI Under Seal. The Drafting Team is charged with considering various approaches to filing ESI under seal, and to prepare a draft Commentary that proposes a uniform set of procedures for the sealing of civil litigation documents and ESI.

The goal of the drafting team is to draft Commentary that: (1) recommends a consistent process for filing ESI and documents under seal that is supported by existing authority; (2) provides guidance and best practices to practitioners regarding the need for sealing and the steps required for doing so; and (3) explore alternative methods of protecting civil litigation documents and ESI without sealing, so as to minimize the burden on the court.

The drafting team presents to the membership for Commentary, the first part of its analysis, the Draft Proposed Model Rule. The Proposed Model Rule is designed to not only bring uniformity to filing ESI under seal, but is designed to be a fair and efficient method to deal with sealing and redacting of ESI so that the parties can focus on the litigation, while conserving the resources of the Court. The drafting team intends to finalize the Draft Proposed Model Rule after gaining important comment and insight from the membership at this Annual Meeting, and incorporate it into a more comprehensive document, which includes an analysis of the current laws on sealing of ESI, an overview of which is included here, potentially a proposed Notice of Sealed Record form (*see* Draft Proposed Rule 3.0(C)), as well as a practice guide providing a “how to”, containing tips and checklists, for compliance with the final Proposed Model Rule.

II. PRESUMPTIVE RIGHT OF ACCESS TO JUDICIAL RECORDS

“[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Commc’ns, Inc.* [Nixon v. Warner Commc’ns, Inc., 435 U.S. 589, 597 \(1978\).](#) The right to access is based on the public’s “desire

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to keep a watchful eye on the workings of public agencies.” *Id.*, 435 U.S. at 597–98.¹⁷ This right derives from common law and/or the First Amendment. Distinct from these rights is Rule 26(c) of the Federal Rules of Civil Procedure which permits Courts to protect documents and information exchanged during discovery. As discussed in greater detail below, Courts differ in their application of the common law or First Amendment and their definition of whether a particular document to be sealed is indeed a “judicial record.” The procedures to be followed for sealing documents also differ.¹⁸

A. Common Law Right Of Access

The common law public right of access, unlike a Rule 26(c) inquiry by comparison, begins with a presumption in favor of public access. *In re Avandia Marketing, Sales Practices and Products Liability Litigation*, 924 F.3d 662, 670 (3d Cir. 2019). The common law right of access “antedates the Constitution” and it attaches to both judicial proceedings and records, in both criminal and civil cases. *Id.*, at 672. This common law right, however, is not absolute, but rather is 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.” *Nixon*, 435 U.S. at 598–599. Because every court has inherent, supervisory power over its own records and files, even where a right of public access exists, a court may deny access where it determines that the court-filed documents may be used for improper purposes. Examples include the

¹⁷ See also *In re Providence Journal*, 293 F.3d 1, 9 (1st Cir. 2002)(quotation omitted)(“Courts have long recognized ‘that public monitoring of the judicial system fosters the important values of quality, honesty and respect for our legal system.’”); *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995)(quotation omitted)(“The presumption of access is ‘based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice.’”); *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988)(“As with other branches of government, the bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury, and fraud.”); *Columbus–America Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 303 (4th Cir. 2000) (“Publicity of such records, of course, is necessary in the long run so that the public can judge the product of the courts in a given case. It is hardly possible to come to a reasonable conclusion on that score without knowing the facts of the case.”); *S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993) (citation omitted)(“Public access [to judicial records] serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness.”); *Citizens First Nat. Bank of Princeton*, 178 F.3d, 943, 945 (7th Cir. 1999)(“the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding.”); *IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013)(citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978))(“This right of access bolsters public confidence in the judicial system by allowing citizens to evaluate the reasonableness and fairness of judicial proceedings and ‘to keep a watchful eye on the workings of public agencies.’”); *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016), cert. denied, 137 S.Ct. 38 (Oct. 3, 2016) (quoting *United States v. Amodeo (Amodeo II)*, 71 F.3d 1044, 1048 (2d Cir. 1995) (“The presumption of access is ‘based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice.’”); *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir.1985) (“The right is an important aspect of the overriding concern with preserving the integrity of the law enforcement and judicial processes.”); *Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1245 (11th Cir. 2007) (citation and internal citation omitted) (“the common-law right of access to judicial proceedings, an essential component of our system of justice, is instrumental in securing the integrity of the process.”)

¹⁸ The Sealing Drafting Group reviewed Appellate Rules, Local District Court Rules, and ECF rules and found little uniformity regarding procedures for sealing.

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use of records “to gratify private spite or promote public scandal” or to circulate libelous statements or release trade secrets. *Id.*

B. First Amendment Right Of Access

Although the Supreme Court has not specifically extended the First Amendment right of public access to civil proceedings,¹⁹ a number of courts have done so. *See e.g. Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (“A presumption of openness inheres in civil as well as criminal trials.”)²⁰ The constitutional right of access, however, has been found to have a more limited scope in civil context, than it does in the criminal. *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310 (11th Cir. 2001) (citing *Newman v. Graddick*, 696 F.2d 696, 800-801 (11th Cir. 1983)). “Public disclosure of discovery material is subject to the discretion of the trial court and the federal rules that circumscribe discretion.” *Id.*, at 1310, citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984)). Where discovery materials are concerned, the constitutional right of access standard is identical to Rule 26(c) of the Federal Rules of Civil Procedure. *Id.*, citing *McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, 91 (11th Cir. 1989). Accordingly, while, as a First Amendment right the right of access is to be accorded in civil actions the due process protection that other fundamental rights enjoy, “the constitutional right of access, like Rule 26, requires a showing of good cause.” *Nixon*, 435 U.S. at 590; *Publicker*, 733 F.2d at 1070, *accord Globe Newspaper*, 457 U.S. at 606; *Chicago Tribune*, 263 F.3d at 1311. Good cause is established when it is shown that disclosure will work a clearly defined and serious injury to the party seeking closure, and the injury must be shown with specificity. *Id.*, *see also In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1983).

C. Federal Rule 26(c)

Federal Rule of Civil Procedure 26(c) permits a court upon a motion of a party to enter into a protective order to shield a party from “annoyance, embarrassment, undue oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c)(1),(7). “This method replaces the need to litigate the claim to protection document by document, and postpones the necessary showing of “good cause” required for entry of a protective order until the confidential designation is challenged.” *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1307-1308 (11th Cir. 2001) (citing *In re. Alexander Grant*

¹⁹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (“Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.”)

²⁰ *See also Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir.1984) (asserting that “the First Amendment does secure to the public and to the press a right of access to civil proceedings”); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir.1988) (holding that the “rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case”); *Brown & Williamson Tobacco Corp. v. FTCi*, 710 F.2d 1165, 1177 (6th Cir. 1983) (“The Supreme Court’s analysis of the justifications for access to the criminal courtroom apply as well to the civil trial.”); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984) (“we agree with the Sixth Circuit that the policy reasons for granting public access to criminal proceedings apply to civil cases as well.”)

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& Co., 820 F.2d 352, 356 (11th Cir. 1957).) The trial court has complete discretion over the entry of document protective orders. *Seattle Times v. Rhinehart*, 467 U.S. 20, 36, 104 S.Ct. 2199, 2209 (1984) (Rule 26(c) “confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.”)

A protective order is “intended to offer litigants a measure of privacy, while balancing against this privacy interest the public’s right to obtain information concerning judicial proceedings” and “a party wishing to obtain an order of protection over discovery material must demonstrate that ‘good cause’ exists for the order of protection.” Rule 26(c)(7); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994). “Good cause” is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure; the injury must be shown with specificity. *Publicker*, 733 F.2d at 1070. The burden of justifying the confidentiality of each and every document sought to be covered by a protective order, remains on the party seeking the order. *Id.*, at 1122. Federal courts have superimposed a balancing of interests approach for Rule 26’s good cause requirement, requiring courts to balance the party’s interest in obtaining access against the other party’s interest in keeping the information confidential. *Chicago Tribune*, 263 F. 3d at 1313, citing *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985).

While a protective order entered under Fed. R. Civ. P. 26 generally governs the exchange of confidential information during discovery, it does not typically protect confidential information from being filed in the public record. *Shane Group, Inc v. Blue Cross Blue Shield of MI*, 825 F.3d 299, 305 (6th Cir. 2016) (“[T]here 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 court records, on the other . . . Secrecy is fine at the discovery stage, before the material enters the judicial record . . . At the adjudication stage, however, very different considerations apply.”).

D. Overview Of Circuit Case Law

FIRST CIRCUIT

In the First Circuit there are “two related but distinct presumptions of public access to judicial proceedings and records,” under both the common-law right and the First and Fourteenth Amendments. *United States v. Kravetz*, 706 F.3d 47, 52 (1st Cir. 2013). Under the common law analysis²¹, “judicial records” are those “materials on which a court relies in determining the litigants’ substantive rights.” *In re Providence Journal*, 293 F.3d 1, 9–10 (1st Cir. 2002), quoting *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986). “[R]elevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies.” *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir.1987). Such materials are distinguished from those that “relate[] merely to the judge’s role in

²¹ While the two rights of access [common law versus First Amendment] are not coterminous, courts have employed much the same type of screening in evaluating their applicability to particular norms.” *In re Providence Journal*, 293 F.3d at 10 (internal citation omitted).

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management of the trial.” *In re Boston Herald, Inc.*, 321 F.3d 174, 189 (1st Cir.2003) (quoting *Standard Fin. Mgmt. Corp.*, 830 F.2d at 408). Materials filed with the court relating only “to the judge’s role in management of the trial’ and ‘play no role in the adjudication process” are excluded from the common law presumption of access. *Kravetz*, 706 F.3d at 54 (quoting *In re Boston Herald, Inc.*, 321 F.3d at 189; *Standard Fin. Mgmt. Corp.*, 830 F.2d at 408). Thus, the First Circuit classifies civil discovery motions and the materials filed with them as falling within this category, holding that the common law right to public access does not apply to such materials. *Kravetz*, 706 F.3d at 56 (citing *Anderson*, 805 F.2d at 11-13). In these situations, the First Circuit applies the Rule 26(c) “good cause” standard. *Anderson*, 805 F.2d at 7.

In the First Circuit, “only the most compelling reasons can justify non-disclosure of judicial records that come within the common-law right of access.” *Standard Fin. Mgmt. Corp.*, 830 F.2d at 410 (quoting *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir.1983)); see also, e.g., [*Panase v. Shah*, 201 Fed. Appx. 3, 3 \(1st Cir.2006\)](#) (“Sealing is disfavored as contrary to the presumption of public access to judicial records of civil proceedings. It is justified only for compelling reasons and with careful balancing of competing interests.”) (citations omitted). Compelling reasons generally include the privacy rights of parties. *Standard Fin. Mgmt. Corp.*, 830 F.2d at 411 (“[P]rivacy rights of participants and third parties are among those interests which, in appropriate cases, can limit the presumptive right of access to judicial records.”); *Kravetz*, 706 F.3d at 62 (quoting *In re Boston Herald*, 321 F.3d at 190 (Medical information is, as intimated above, “universally presumed to be private, not public.”)).

In determining “if a constitutional right of access applies, the First Circuit applies the Supreme Court’s *Press-Enterprise II* “experience and logic” test which asks (1) whether the document is one which has historically been accessible to the press and the public; and (2) whether public access plays a significant positive role in the functioning of the particular process the record concerns. *Kravetz*, 706 F.3d at 53-54, quoting *Press Enter. Co. v. Superior Court of Calif. For Riverside Cty.*, 478 U.S. 1, (1986).

Before sealing a judicial document, the First Circuit mandates that the court issue “particularized findings,” [*Kravetz*, 706 F.3d at 61](#), and that where some portions of a document may be sealed, “redaction remains a viable tool for separating this information from that which is necessary to the public’s appreciation of [the court’s order].” [*Id.* at 63](#).

SECOND CIRCUIT

The Second Circuit recognizes both the common law right of access as well a qualified First Amendment right. [*Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 \(2d Cir. 2004\)](#). Like the First Circuit, not all court documents are deemed “judicial documents” and “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[]” under the common law. *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) (“*Amodeo P*”); *U.S. Const. Amend. 1. Trump v. Deutsche Bank AG*, 940 F.3d 146 (2d Cir. 2019) (rejecting the Third Circuit’s determination that any document physically on file with a court is a “judicial record” and aligning more with the First Circuit). A “judicial document” or “judicial record”

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(a term used interchangeably) is a filed item that is “relevant to the performance of the judicial function and useful in the judicial process.” *Lugosch*, 435 F.3d at 119. The presumption of the right of access is “at its zenith” where documents “directly affect an adjudication, or are used to determine litigants’ substantive legal rights,” and is at its weakest where a document is neither used by the Court nor “presented to the court to invoke its powers or affect its decisions.” *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 140 n.3 (2d Cir. 2016). Although, a document is judicial not only if the judge actually relied upon it, but also if the “judge should have considered or relied upon[it] but did not.” Such documents “are just as deserving of disclosure as those that actually entered into the judge’s decision.” *Lugosch* 435 F.3d at 123. Documents submitted to the court exist on a “continuum,” spanning those that play a role in “determining litigants’ substantive rights,” which are afforded “strong weight,” to those that play only a “negligible role in performance of Article III duties ... such as those passed between the parties in discovery,” which lie “beyond the presumption’s reach.” *United States v. Amodeo*, 71 F.3d 1044, 1049-50 (2d Cir.1995)(“*Amodeo II*”).

As some practical examples, “documents 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...” *Brown v. Maxwell*, 929 F.3d 41, 47 (2d Cir. 2019). Similarly, documents submitted in support of a motion to dismiss would have a presumption of access since they too require an adjudication. *Shetty v. SG Blocks, Inc.*, No. 20-cv-00550-ARR-SMG, 2020 WL 3183779, at *10 (E.D.N.Y. June 15, 2020), citing *Lugosch*, 435 F.3d at 121. In contrast, there is no presumption of access to “documents that play no role in the performance of Article III functions, such as those passed between the parties in discovery.” *SEC v. TheStreet.com*, 273 F.3d 222, 232 (2d Cir. 2001); *see also Brown v. Maxwell*, 929 F.3d 41, 50 (2d Cir. 2019).

Once the Court determines that the document is in fact a judicial document and the strength of the presumption that attaches to the document in question, the “court must ‘balance competing considerations against it,’” such as “‘the danger of impairing law enforcement or judicial efficiency’ and ‘the privacy interests of those resisting disclosure.’” *Lugosch*, 435 F.3d at 120 (quoting *Amodeo II*, 71 F.3d at 1050). Motions to seal documents must be “carefully and skeptically review[ed] ... to insure that there really is an extraordinary circumstance or compelling need” to seal the documents from public inspection. *Video Software Dealers Ass’n v. Orion Pictures*, 21 F.3d 24, 27 (2d Cir. 1994).

Under the First Amendment, the Second Circuit applies the Supreme Court’s *Press- Enterprise II* “experience and logic” test. *Lugosch*, 435 F.3d at 120. Once the court finds that a qualified First Amendment right of access to certain judicial documents exists, documents may still be sealed, but only if “specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *In re N.Y. Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987). Using such a test, the Second Circuit held that attorney-client privilege can defeat the presumption of right of access to judicial documents submitted in opposition to motions. *Lugosch*, 435 F.3d 110, 125 (2d Cir. 2006). Preserving attorney-client privilege may be a compelling reason which supports sealing orders, precluding a party from exercising their First Amendment right of access. *Id.* The Second Circuit urges district courts to expeditiously determine whether a document submitted to

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the court is a judicial document, so as not to impair the First Amendment rights of a party or the public. *Id.* at 127.²² The Second Circuit recognized the “existence of a qualified First Amendment right of access to docket sheets” because docket sheets alert the public to the entry of a sealing order. *Hartford Courant Co.*, 380 F.3d at 93.

THIRD CIRCUIT

The Third Circuit recognizes a common law and First Amendment right of access. *In re Avandia Mktg., Sales Practices & Prod Liab. Litig.*, 924 F.3d 662, 669 (3d Cir. 2019). Under a common law inquiry, whether the right of access applies to a particular document or record “turns on whether that item is considered to be a ‘judicial record’.” *Id.*, 924 F.3d at 672 (citing to *In re Cendant Corp.*, 260 F.3d 183 at 192 (3d Cir. 2001)). A “judicial record” is a document that “has been filed with the court ... or otherwise somehow incorporated or integrated into a district court’s adjudicatory proceedings.” *Id.*, at 672–73.²³ Once a document becomes a judicial record, a presumption of access attaches. *See id.* at 192–93. The Third Circuit does not distinguish between material filed in connection with a motion for summary judgment and material filed in pretrial motions of a non-discovery nature. *Id.*, 924 F.3d at 672–73; *see also Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 164 (3d Cir. 1993) (“We see no reason to distinguish between material submitted in connection with a motion for summary judgment and material submitted in connection with a motion for preliminary injunction. . .”).

At common law, a party wishing to rebut the strong presumption of public access has the burden “to show that the interest in secrecy outweighs the presumption.” *Bank of Am. Nat. Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343 (3d Cir. 1986). The movant must show “that the material is the kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure.” *In re Avandia*, 924 F.3d at 672 (quoting *Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994)). The Court must then articulate compelling and countervailing interests to be protected, make specific findings on the record concerning the effects of disclosure and provide an opportunity for third parties to be heard. *In re Avandia*, 924 F.3d at 672–73 (citing *In re Cendant Corp.*, 260 F.3d at 194). The Court must conduct a “document-by-document review” of the contents of the materials sought to be sealed. *In re Avandia*, 924 F.3d at 673. “[B]road allegations of harm, bereft of specific examples or articulated reasoning, are insufficient” to overcome the strong presumption of public access. *In re Cendant Corp.*, 260 F.3d at 194.

The Third Circuit has recognized that the right of public access enjoyed under the First Amendment as historically applied to criminal trials also applies to civil proceedings. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984). However, “[t]he First Amendment right of access requires a much

²² “[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)).” *Lugosch*, 435 F.3d at 127.

²³ While filing clearly establishes a document as a judicial record in the Third Circuit, absent a filing a document may still be construed as a judicial record if a court interprets or enforces the terms of the document. *Cendant*, 260 F.3d at 192.

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higher showing than the common law right [of] access before a judicial proceeding can be sealed.” *In re Cendant Corp.*, 260 F.3d at 198 n.13. The Third Circuit follows the “experience and logic” test. *In re Avandia*, 924 F.3d at 673. The First Amendment provisions do not apply to all records, however. The Third Circuit has held that documents obtained during discovery and subject to a protective order pursuant to Fed. R. Civ. P. Rule 26(c) should be not be accessible to the public rejecting the argument that the First Amendment overrides Rule 26(c) considerations. *State of New York v. United States Metal Refining Co.*, 771 F.2d 796, 799-800 (3d Cir.1985)(quoting *Seattle Times*, 467 U.S. 20: “the protective order’s restrictions ...does not offend the First Amendment”).

FOURTH CIRCUIT

In the Fourth Circuit, the right of public access to judicial documents “derives from two independent sources: the First Amendment and the common law,” and accordingly, the Fourth Circuit applies two tests when considering whether any specific document may be filed under seal (or unsealed). *In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 290 (4th Cir. 2013) (*United States v. Appelbaum*). Because the common law and First Amendment invoke different standards for assessing the right of access, the district court must identify which is the source of the right of access before balancing the claimed interests. *Va. Dep’t of State Police v. Washington Post*, 386 F.3d 567, 576 (4th Cir. 2004); *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 266 (4th Cir. 2014); *Under Seal v. Under Seal*, 230 F.3d 1354 (4th Cir. 2000) (remanding in part because district court failed to identify source of public’s right of access).

Under the common law test, when a party asks to seal judicial records, trial courts within the Fourth Circuit “must determine the source of the right of access with respect to each document,” and then “weigh the competing interests at stake.” *In re Application*, 707 F.3d at 290; see also *Va. Dep’t of State Police*, 386 F.3d at 576. The Court must also (1) give the public notice and a reasonable opportunity to challenge the request to seal; (2) “consider less drastic alternatives to sealing;” and (3) if it decides to seal, make specific findings and state the reasons for its decision to seal over the alternatives. *Id.*; *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253-54 (4th Cir. 1988). Under the First Amendment test, the Fourth Circuit follows the “experience and logic” test. *In re U.S. for an Or. Pursuant to 18 U.S.C. Sec. 2703(D)*, 707 F.3d 283, 291 (4th Cir. 2013)

“Judicial records” in the Fourth Circuit are documents filed with the court that “play a role in the adjudicative process, or adjudicate substantive rights.” *In re Application of the United States for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 290 (4th Cir. 2013) (citing *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988)). As examples, motions for summary judgment and the documents attached to those motions are judicial records, even if the attached documents were discovery documents previously covered by a protective order.

Unlike the other Circuits, the Fourth Circuit has not explicitly resolved the question of whether discovery motions and materials attached to discovery motions are judicial records. *In re Application for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d at 290. Some district courts, however, have predicted that the Fourth Circuit will find no public right of access to discovery motions and

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related exhibits, and that consequently, such documents may be sealed. *See, e.g., Kinetic Concepts, Inc. v. Convatec Inc.*, 1:08CV00918, 2010 WL 1418312, at *9 (M.D.N.C. Apr. 2, 2010) (“the Fourth Circuit has used language that suggests that no public right of access attaches [to discovery motions]”).

FIFTH CIRCUIT

The Fifth Circuit has held that in addition to the First Amendment right, there is a right of public access derived from common law that creates a presumption of access, but the right is also not absolute. *Sec. & Exch. Comm’n v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 429 (5th Cir. 1981). The decision is made on a case-by-case basis. *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 450 (5th Cir. 2019) citing *United States v. Sealed Search Warrants*, 868 F.3d 385, 390 (5th Cir. 2017). The decision is left to the sound discretion of the district court as required by *Nixon*, and the Fifth Circuit consistently requires the district court to explain its decisions to seal or unseal a document. *Sealed Search Warrants*, 868 F.3d at 395; *e.g., Van Waeyenberghe*, 990 F.2d at 849; *United States v. Holy Land Found. for Relief and Dev.*, 624 F.3d 685, 690 (5th Cir. 2010).

While there is a common law presumption in favor of public access, the Fifth Circuit does not characterize the public access presumption as “strong” or to require a strong showing of proof. *Vantage Health Plan*, 913 F.3d at 450; *see Belo Broad. Corp. v. Clark*, 654 F.2d 423, 430 (5th Cir. 1981) (holding that the presumption, “however gauged in favor of public access to judicial records” is only one of the interests to be weighed, citing *Nixon*, 435 U.S. at 602). This presumption applies so long as a document is a judicial record. *See Van Waeyenberghe*, 990 F.2d at 849 (holding that once settlement agreement is filed in district court, it becomes a judicial record).

The Fifth Circuit has not generally defined the term “judicial record.” *See Bradley*, 954 F.3d at 225, 227 (holding that sealed minutes are judicial record), citing *In re United States for an Order Pursuant to 18 U.S.C. § 2703(D)*, 707 F.3d 283, 290 (4th Cir. 2013) (stating that it is commonsensical that judicially authored or created documents are judicial records). More recently, however, the Eastern District of Texas, in determining whether to grant the parties’ unopposed motions to seal documents filed in connection with discovery motions, articulated three categories of court materials: (1) materials that relate to dispositive issues in the case; (2) materials that relate to non-dispositive issues in the case, and in particular, materials filed in connection with discovery disputes unrelated to the merits of the case; and (3) materials such as discovery that are exchanged between the parties and not made part of a court filing. *Robroy Indus. – Tex., LLC v. Thomas & Betts Corp.*, No. 2:15-CV-512-WCB, 2016 U.S. Dist. LEXIS 9279, at *4-5 (E.D. Tex. Jan. 27, 2016). Under this framework, the Court found that where materials relate to dispositive issues in a case, the party moving to seal the materials bears the burden to make a “compelling showing of particularized need to prevent disclosure.” *Id.* (citing *Ctr. for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092 (9th Cir. 2016)). Conversely, the “good cause” standard of Federal Rule of Civil Procedure 26(c) applies to materials that relate to non-dispositive issues in the case, which includes materials filed in connection with discovery disputes unrelated to the merits of the case. *Id.* at *6 (citing *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003);

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Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 164-65 (3d Cir. 1993); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986)). Finally, materials that are exchanged between the parties but not filed with the court are not subject to the public interest in open judicial proceedings. *Id.* at *5 (citing *Seattle Times*, 467 U.S. at 33)

The Eastern District of Texas also used this framework in *Script Security Solutions, LLC v. Amazon.com, Inc.*, No. 2:15-CV-1030-WCB, 2016 U.S. Dist. LEXIS 165577, at *8-9 (E.D. Tex. Dec. 1, 2016). In *Script Security Solutions*, the defendant filed a motion to redact confidential information from a hearing transcript to the, finding the defendant did not satisfy either the “compelling showing of particularized need” standard or the less-stringent “good cause” standard. *Id.* While the Eastern District of Texas cited *Center For Auto Safety v. Chrysler Group* to support applying the “compelling reasons” standard to materials that relate to dispositive issues in the case, it did not specifically incorporate the “tangentially related” language from *Center for Auto Safety*. *Center for Auto Safety* expressly rejected a mechanical application of the dispositive and non-dispositive classifications as a means of deciding which standard should apply to determine whether the documents should be sealed. 809 F.3d 1092, 1099 (9th Cir. 2016). However, it seems that the Eastern District of Texas still maintained the more rigid dispositive and non-dispositive motion distinction. *Script Security Solutions*, No. 2:15-CV-1030-WCB, 2016 U.S. Dist. LEXIS 165577, at *8-9. The court in *Script Security Solutions* implied that it would incorporate the Ninth Circuit’s less rigid distinctions when it said it would likely apply the “compelling reasons” test to the motion to redact portions of a hearing transcript. However, this issue has not been fully addressed, as neither case has been heard by the Fifth Circuit Court of Appeals, and thus this issue remains unsettled in the Fifth Circuit. *Id.*

SIXTH CIRCUIT

The Sixth Circuit without not explicitly defining “judicial record”, recognizes that the long-established legal tradition under the common law of the presumptive right of the public to inspect and copy judicial documents and files goes back to the Nineteen Century. *In re Knoxville News—Sentinel Co.*, 723 F.2d 470, 474 (6th Cir 1983)(quoting *Nixon*, 435 U.S. at 597, and collecting cases). But, like other Courts, the Sixth Circuit recognizes that this right is “not absolute.” *Id.* (quoting *Nixon*, 435 U.S. at 598); *Brown & Williamson Tobacco Corp v FTC*, 710 F.2d 1165, 1180-81 (6th Cir 1983) (“Only the most compelling reasons can justify non-disclosure of judicial records”). The Sixth Circuit has also recognized that the right of public access enjoyed under the First Amendment applies to civil proceedings. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d at 1177 (“The Supreme Court’s analysis of the justifications for access to the criminal courtroom apply as well to the civil trial.”).

In the Sixth Circuit, a party seeking to seal records must show that: (1) a compelling interest in sealing the records exists; (2) that the interest in sealing outweighs the public’s interest in accessing the records; and (3) that the request is narrowly tailored. *Kondash v. Kia Motors Am., Inc.*, 767 F. App’x 635, 637 (6th Cir. 2019) (citation omitted). “To do so, the party must ‘analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations.’ ” *Id.* (citation omitted). The party seeking to seal the records bears a “heavy” burden; simply showing that public disclosure of the

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information would, for instance, harm a company's reputation is insufficient. *Id.*; *Shane Grp. Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016). Instead, the moving party must show that it will suffer a “clearly defined and serious injury” if the judicial records are not sealed. *Shane Grp. Inc.*, 825 F.3d at 307.

When sealing court records, the courts within the Sixth Circuit “must set forth specific findings and conclusions ‘which justify nondisclosure to the public.’” *Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 594 (6th Cir. 2016) (citation omitted). District courts must consider “each pleading [to be] filed under seal or with redactions and to make a specific determination as to the necessity of nondisclosure in each instance” and must “bear in mind that the party seeking to file under seal must provide a ‘compelling reason’ to do so and demonstrate that the seal is ‘narrowly tailored to serve that reason.’” *In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 940 (quoting *Shane Grp.*, 825 F.3d at 305). If a district court “permits a pleading to be filed under seal or with redactions, it shall be incumbent upon the court to adequately explain ‘why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary.’” *Id.* (quoting *Shane Grp., Inc.*, 825 F.3d at 306).

As it did at common law, the court in *Rudd Equip. Co.* found under the First Amendment that specific, compelling reasons for nondisclosure of judicial documents must be expressly stated on the record. 834 F.3d at 495 (citing *Tri-City Wholesale Distribs., Inc. v. Wine Grp., Inc.*, 565 Fed.Appx. 477, 490 (6th Cir. 2012) (Gwin, J., concurring and dissenting in part) (“The First Amendment access right extends to court dockets, records, pleadings, and exhibits, and establishes a presumption of public access that can only be overcome by specific, on-the-record findings that the public's interest in access to information is overcome by specific and compelling showings of harm.”)). A party to an action cannot waive the public's First Amendment right to free access. *Id.*

SEVENTH CIRCUIT

The Seventh Circuit recognizes both a common law and First Amendment right to inspect public records. *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1068–69 (7th Cir. 2018), cert. denied, 140 S. Ct. 384 (2019). Unlike other Circuits, however, it has not explicitly defined “judicial record.”

Under common law, there is a strong presumption in favor of public access, but that can be counterbalanced by other considerations. [*United States v. Edwards*, 672 F.2d 1289, 1294 \(7th Cir.1982\)](#). Courts also balance the First Amendment right of access, balancing the interests of the public against injury to the party attempting to seal judicial records, reconciling harm with newsworthiness. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993). Although the Seventh Circuit has not explicitly adopted the “experience and logic” test, it has positively cited *Press-Enterprise II* to hold that a settlement agreement is a judicial record accessible to the public. *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002). While the First Amendment right of access is not absolute, the Seventh Circuit, like many other circuits, recognizes it carries a strong presumption favoring access that can be rebutted by a “compelling interest in secrecy.” *Jessup*, 277 F.3d at 928 (citing [*Citizens First National Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 \(7th Cir.1999\)](#); [*Doe v. Blue Cross & Blue Shield United of*](#)

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Wisconsin, 112 F.3d 869, 872 (7th Cir.1997); Miller v. Indiana Hospital, 16 F.3d 549, 551 (3d Cir.1994)). “The interest in secrecy is weighed against the competing interests case by case.” *Id.* (citing Central National Bank v. United States Dep’t of Treasury, 912 F.2d 897, 900 (7th Cir.1990)).

The Seventh Circuit has “emphasized that upon entering orders which inhibit the flow of information between the courts and the public, district courts should articulate on the record their reasons for doing so.” *In re Associated Press*, 162 F.3d 503, 510 (7th Cir. 1998) (quoting *Grove Fresh*, 24 F.3d at 898).

EIGHTH CIRCUIT

The Eighth Circuit recognizes a common law right to access records but has “not decided whether there is a First Amendment right of public access to the court file in civil proceedings.” *IDT Corp. v. eBay*, 709 F.3d 1220, 1222, 1224 (8th Cir. 2013). As other circuits have acknowledged, this common law right of access is not absolute; it “requires a weighing of competing interests.” *Webster Groves Sc. Distr. v. Pulitzer Publ’g Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990). A district court must balance “the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access against the salutary interests served by maintaining confidentiality of the information sought to be sealed.” *IDT Corp.*, 709 F.3d at 1223. The weight afforded to the presumption of access is determined by role of the material at issue. *Id.*, at 1223-1224. While the Eighth Circuit has not explicitly defined the term “judicial record”, “documents that are relevant to and integrally involved in the resolution of the merits of the case” are generally deemed judicial records.” *Sorin Group USA, Inc. v. St. Jude Med. S.C., Inc.*, No. 14-CV-04023 (JRT/HB), 2019 WL 2107282, at *3 (D. Minn. May 14, 2019) (quoting *Krueger v. Ameriprise Fin., Inc.*, 11-CV-2781 (SRN/JSM), 2019 WL 1257948 at *8-9 (D.Minn. Oct. 14, 2014)(collecting cases))

To determine if a party has overcome the public access presumption attached to judicial records, courts are guided by a six-factor test: (1) the need to public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings. *Sorin Group*, 2019 WL 21072782, at*3 (quoting *Doe v. Exxon Mobile Corp.*, 570 F.Supp. 2d 49, 52 (D.D.C. 2008); see also *U.S. v. Hubbard*, 650 F.2d 293, 318 (D.C. Cir. 1980). The presumption of access is high when the judicial record may be used by the public “to evaluate the reasonableness and fairness of the judicial proceedings.” *Sorin Group*, 2019 WL 21072782, at*4.

NINTH CIRCUIT

In the Ninth Circuit, a strong presumption of access attaches to court records. *Courthouse News*, 947 F.3d at 589 (“We have long presumed a First Amendment ‘right of access to court proceedings and documents’”); see also *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1098, 1101 (9th Cir. 2016); *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) (“Following the Supreme Court’s lead, ‘we start with a strong presumption of access to court records.’”). The

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presumption of access to judicial proceedings “flows from an ‘unbroken, uncontradicted history rooted in the common law that ‘justice must satisfy the appearance of justice.’” *Id.*, (quoting *Richmond Newspapers*, 448 U.S. at 573-74)). A “judicial document” is any item filed with a court that is “relevant to the judicial function and useful in the judicial process.” *Courthouse News Service v. Planet*, 947 F.3d 581, 592 (9th Cir.2020) (citing *Judicial Document*, *Black's Law Dictionary* (10th ed. 2014)).

Documents obtained in discovery are treated differently, however: despite its “strong preference for public access”, “the right to inspect and copy judicial records is not absolute” and the Ninth Circuit has “carved out an exception” for sealed materials attached to a discovery motion unrelated to the merits of a case. *Center for Auto Safety*, 809 F.3d at 1097 (quoting *Nixon*, 435 U.S. at 598). Under this exception, a party need only to satisfy the less exacting “good cause” standard, from Fed. R. Civ. P. 26(c)(1). *Id.* (citing to *Seattle Times*, 467 U.S. at 33, and *Anderson v. Cryovac*, 805 F.2d at 13 (1st Cir. 1986)).

A party seeking to seal a judicial record bears the burden of overcoming this strong presumption by meeting the “compelling reasons” standard, which “stringent standard” permits sealing only when a court finds a compelling reason and articulates the factual basis for the ruling, without relying on hypothesis or conjecture. *Center for Auto Safety*, 809 F.3d at 1096-97 (quoting *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006)). What constitutes a “compelling reason” is “best left to the sound discretion of the trial court.” *Id.* (quoting *Nixon*, 435 U.S. at 599).

When deciding what test to apply to a motion to *unseal* a particular court filing – the presumptive “compelling reasons” standard or the ‘good cause’ exception – the Ninth Circuit has “sometimes deployed the terms ‘dispositive’ and ‘non-dispositive’, referring to the type of motion, though the Court recognizes the “special role” that protective orders play, and it would not make sense to render a district court’s protective order useless simply because a party attached a sealed discovery document to a non-dispositive motion. *The Center for Auto Safety*, 809 F.3d at 1097-1098. In such circumstances, the “good cause” exception would apply. *Id.* Compare, in *Foltz*, the Ninth Circuit applied the “compelling reasons” test as to whether documents attached to a motion for summary judgment should be sealed. 331 F.3d at 1135-36; *see also Kamakana*, 447 F.3d at 1178-80.

TENTH CIRCUIT

Aligning with the majority of circuits, the Tenth Circuit considers the interest of the public in judicial proceedings as “presumptively paramount.” *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir.1980) (citing *Nixon*, 435 U.S. at 602, 98 S.Ct. 1306, 1314, 55 L.Ed.2d 570 (1978)). To overcome this presumption, a party must demonstrate that disclosure “will work a clearly defined and serious injury.” *Harte v. Burns*, No. 13-2586-JWL, 2020 WL 1888823, at *2 (D. Kan. Apr. 16, 2020); *United States v. Walker*, 761 Fed. Appx. 822, 834 (10th Cir. 2019); *Eugene S. v. Horizon Blue Cross Blue Shield of N.J.*, 663 F.3d 1124, 1135–36 (10th Cir. 2011). “[T]he parties must articulate a real and substantial interest that justifies depriving the public of access to the records that inform our decision-making process.” *Colony Ins. Co.*, 698 F.3d at 1242 (quoting *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011)). The Tenth Circuit, however, has repeatedly declined to address whether a First

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Amendment right of access exists for civil trials. *Parson v. Farley*, 352 F. Supp. 3d at 1152, n. 5 (N.D. Okla. 2018), *aff'd*, No. 16-CV-423-JED- JFJ, 2018 WL 6333562 at *(N.D. Okla. Nov. 27, 2018); *United States v. McVeigh*, 119 F.3d 806, 814 (10th Cir. 1997); *United States v. Roberts*, 88 F.3d 872, 882–83 (10th Cir.1996).

Although the Tenth Circuit has not clearly defined what constitutes a “judicial document,” the court has positively cited the Second Circuit's *Lugosch* decision finding that merely filing a document with the court is insufficient, rather, a judicial document must be “relevant to the performance of the judicial function and useful in the judicial process.” *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1242 (10th Cir. 2012), (quoting *Lugosch*, 435 F.3d at 121). While pretrial documents and discovery materials that the parties intended to keep confidential may be sealed, agreement alone is insufficient to support a seal. *Grundberg v. Upjohn Co.*, 140 F.R.D. 459, 466 (D. Utah 1991); *Sacchi v. IHC Health Servs., Inc.*, 918 F.3d 1155, 1160 (10th Cir. 2019).

ELEVENTH CIRCUIT

In the Eleventh Circuit, “the mere filing of a document does not transform it into a judicial record.” *Commr., Alabama Dept. of Corrections v. Adv. Loc. Media, LLC*, 918 F.3d 1161, 1167 (11th Cir. 2019). Judicial documents are those that are “integral to the ‘judicial resolution of the merits’ in any action taken by that court.” *Id.*; *F.T.C. v. AbbVie Prod. LLC*, 713 F.3d 54, 64 (11th Cir. 2013); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001). “Material filed in connection with any substantive pretrial motion, unrelated to discovery, is subject to the common law right of access.” [*Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1245 \(11th Cir. 2007\)](#). But, where a document is filed on the public docket, the type of filing to which it is attached is a factor for the Court to consider in deciding whether the document constitutes a judicial record. [*Advance Loc. Media*, 918 F.3d at 1166–68](#).

Documents filed in connection with discovery motions are not considered judicial documents and are not subject to the common law right of access. *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1313 (11th Cir. 2001); [*In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 \(11th Cir. 1987\)](#). However, discovery materials filed in connection with pretrial motions that require judicial resolution of the merits are subject to the common-law right. *Chicago Tribune Co.*, 263 F.3d at 1312. The court distinguishes between material filed with discovery motions and material filed in connection with more substantive procedures. *Id.* The party seeking to seal must demonstrate a compelling interest in nondisclosure to withstand heightened scrutiny. *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir.1985); *Brown v. Adv. Eng'g, Inc.*, 960 F.2d 1013, 1015–16 (11th Cir.1992). This rule only applies when sealing an entire civil casefile, making it appear to the public that the controversy never occurred. *Wilson*, 759 F.2d at 1571; *Brown*, 960 F.2d at 1015–16. In all other situations, courts in the Eleventh Circuit balance the competing interests of the parties when determining if sealing is appropriate. *Newman v. Graddick*, 696 F.2d 796, 803 (11th Cir.1983).

Eleventh Circuit uses a “good cause” standard under the First Amendment to determine whether those documents should remain under seal. *Chicago Tribune Co.*, 263 F.3d at 1307. Determining whether

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good cause supports unsealing requires balancing the asserted right of access against the parties' interest in keeping information confidential. *Advance Loc. Media*, 918 F.3d at 1169. The broad First Amendment right to access is limited in the Eleventh Circuit by situations where confidentiality outweighs the public's interest in the litigation. *Theriot v. Nw. Mut. Life Ins. Co.*, 382 F. Supp. 3d 1255, 1258 (M.D. Ala. 2019). standard is relevant in civil cases where the parties agree to "umbrella protective orders" at the outset of litigation to ensure that certain information remains confidential and subject to the protection afforded by Fed. R. Civ. Pro. 26(c)(7). *Chicago Tribune Co.*, 263 F.3d at 1307. This

D.C. CIRCUIT

In the D.C. Circuit, "not all documents filed with courts are judicial records." *SEC v. Am. Int'l Grp.*, 712 F.3d 1, 3 (D.C.Cir.2013). What makes a document a "judicial record" is "the role it plays in the adjudicatory process." *Id.*; *United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997). "The reason for this rule is intuitive: the concept of a judicial record assumes a judicial decision, and with no such decision, there is nothing judicial about the record." *Am. Int'l Grp.*, 712 F.3d at 3.

Courts in the D.C. Circuit consider six factors relating to the generalized interests for and against public disclosure, which "can be weighed without examining the contents of the documents at issue." *U.S. v. Hubbard*, 650 F.2d 293, 317 (D.C. Cir. 1980). Those factors include: (1) the need for public access to the documents at issue; (2) previous public access to the documents; (3) the fact of an objection to public access and the identity of those objecting to public access; (4) the strength of the generalized property and privacy interests asserted; (5) the possibility of prejudice; and (6) the purposes for which the documents were introduced. *Id.* at 317–322. The proponent of a motion to seal must demonstrate that these six factors, in totality, overcome the " 'strong presumption in favor of public access to judicial proceedings,' " which is "the starting point in considering a motion to seal court records." *Nat'l Children's Center*, 98 F.3d at 1409 (quoting *Johnson v. Greater Se. Cnty. Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C.Cir.1991)). The common law right of access do not apply to documents "whose contents were not specifically referred to or examined upon during the course of those proceedings and whose only relevance to the proceedings derived from the defendants' contention that many of them were not relevant to the proceedings..." *Hubbard*, 650 F.2d at 316.

The First Amendment "guarantees the press and the public access to aspects of court proceedings, including documents, 'if such access has historically been available, and serves an important function of monitoring prosecutorial or judicial misconduct[.]' " *Am. Int'l Grp.*, 712 F.3d at 5. The D.C. Circuit applies the *Press-Enterprise II* test to determine if the sealed records have "historically been available, and serves an important function of monitoring prosecutorial or judicial misconduct." *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) (citing *Press-Enterprise II*, 478 U.S. at 8, 106 S.Ct. at 2740; *Globe Newspaper Co.*, 457 U.S. at 605–06,

102 S.Ct. at 2619; *Oregonian Pub. Co.*, 920 F.2d at 1465; *Haller*, 837 F.2d at 86; *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir.1986)).

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APPENDIX 1: OVERVIEW OF JUDICIAL RECORD DEFINITION BY CIRCUIT

	Judicial Record Defined?
First Circuit	Yes: “materials on which a court relies in determining the litigants’ substantive rights” <i>In re Providence Journal</i> , 293 F.3d 1, 9–10 (1st Cir. 2002)
Second Circuit	Yes: item that is “relevant to the performance of the judicial function and useful in the judicial process.” <i>Lugosch v. Pyramid Co. of Onondaga</i> , 435 F.3d 110, 119 (2d Cir.2006).
Third Circuit	Yes: a document that “has been filed with the court ... or otherwise somehow incorporated or integrated into a district court’s adjudicatory proceedings.” <i>In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.</i> , 924 F.3d 662, 672–73 (3d Cir. 2019)
Fourth Circuit	Yes: documents filed with the court that “play a role in the adjudicative process, or adjudicate substantive rights.” <i>In re Application of the United States for an Order Pursuant to 18 U.S.C. Section 2703(D)</i> , 707 F.3d 283, 290 (4th Cir.2013)
Fifth Circuit	Not specifically but does cite to D.C. Circuit law that “no clear rules can be articulated as to when judicial records should be closed to the public” <i>Belo Broad. Corp. v. Clark</i> , 654 F.2d 423, 429 (5th Cir. 1981), citing United States v. Mitchell , 551 F.2d 1252 , 1260 (D.C.Cir. 1976) . See also <i>Robroy Indus. – Tex., LLC v. Thomas & Betts Corp.</i> , No. 2:15-CV-512-WCB, 2016 U.S. Dist. LEXIS 9279, at *4-5 (E.D. Tex. Jan. 27, 2016).
Sixth Circuit	Likely yes. <i>Rudd Equip. Co.</i> , 834 F.3d at 495 (citing <i>Tri-Cty. Wholesale Distribs., Inc. v. Wine Grp., Inc.</i> , 565 Fed.Appx. 477, 490 (6th Cir. 2012) (Gwin, J., concurring and dissenting in part) (The public access “[] right extends to court dockets, records, pleadings, and exhibits, and establishes a presumption of public access that can only be overcome by specific, on-the-record findings that the public's interest in access to information is overcome by specific and compelling showings of harm.”)
Seventh Circuit	No.
Eighth Circuit	No.

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Ninth Circuit	Yes: any item filed with a court that is “relevant to the judicial function and useful in the judicial process.” <i>Courthouse News Service v. Planet</i> , No. 16-55977 (9th Cir. 2020)
Tenth Circuit	No, but it has cited favorable to the Second Circuit's <i>Lugosch</i> decision which found that a judicial document must be “relevant to the performance of the judicial function and useful in the judicial process.” See <i>Colony Ins. Co. v. Burke</i> , 698 F.3d 1222, 1242 (10th Cir. 2012).
Eleventh Circuit	Yes: those that are “integral to the ‘judicial resolution of the merits’ in any action taken by that court.” <i>Commr., Alabama Dept. of Corrections v. Adv. Loc. Media, LLC</i> , 918 F.3d 1161, 1167 (11th Cir. 2019), citing <i>AbbVie Prods., LLC</i> , 713 F.3d at 64 (quoting <i>Chicago Tribune Co.</i> , 263 F.3d at 1312).
D.C. Circuit	Yes: what makes a document a “judicial record” is the role it plays in the adjudicatory process.” <i>United States v. El-Sayegh</i> , 131 F.3d 158, 163 (D.C. Cir. 1997). It must be specifically mentioned during the proceedings. <i>U.S. v. Hubbard</i> , 650 F.2d 293, 316 (D.C. Cir. 1980)

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APPENDIX 2: CIRCUIT ANALYSIS OF WHETHER PUBLIC RIGHT
OF ACCESS EXISTS FOR NON-DISPOSITIVE MOTIONS

	Non-Dispositive-related Motions and Exhibits Included in Right of Access?
First Circuit	No. <i>See U.S. v. Kravetz</i> , 706 F.3d 47, 54 (1st Cir. 2013) (no public right of access to discovery motions and related materials); <i>Anderson v. Cryovac, Inc.</i> , 805 F.2d 1, 13 (1st Cir. 1986) (a request to compel or protect the disclosure of information in the discovery process is not a request for a disposition of substantive rights)
Second Circuit	Unlikely. <i>Brown v. Maxwell</i> , 929 F.3d 41, 50 (2d Cir. 2019) (“The presumption of public access in filings submitted in connection with discovery disputes or motions in limine is generally somewhat lower than the presumption applied to material introduced at trial, or in connection with dispositive motions such as motions for dismissal or summary judgment.”)
Third Circuit	Yes. <i>In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.</i> , 924 F.3d 662, 672–73 (3d Cir. 2019).
Fourth Circuit	Unclear. <i>In re Application for an Order Pursuant to 18 U.S.C. Section 2703(D)</i> , 707 F.3d 283, 290 (4th Cir. 2013).
Fifth Circuit	Unlikely. <i>Robroy Indus. – Tex., LLC v. Thomas & Betts Corp.</i> , No. 2:15-CV-512-WCB, 2016 U.S. Dist. LEXIS 9279, at *4-5 (E.D. Tex. Jan. 27, 2016).
Sixth Circuit	Likely. A party attempting to seal records must advance arguments that allow the court to “set forth specific findings and conclusions ‘which justify nondisclosure to the public’.” <i>Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.</i> , 834 F.3d 589, 594 (6th Cir. 2016)
Seventh Circuit	Depends. <i>Smith v. City of Chicago</i> , No. 04 C 2710, 2005 WL 3215572, at *3 (N.D. Ill. Oct. 31, 2005); <i>Matter of Cont'l Illinois Sec. Litig.</i> , 732 F.2d 1302, 1309 (7th Cir. 1984)
Eighth Circuit	No. <i>IDT Corp. v. eBay</i> , 709 F.3d 1220, 1223 (8th Cir. 2013)

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Ninth Circuit	Possibly. Will turn on whether the motion is “more than tangentially related to the merits of the case” <i>Ctr. for Auto Safety v. Chrysler Grp., LLC</i> , 809 F.3d 1092, 1098, 1101 (9th Cir. 2016)
Tenth Circuit	Likely at common law. <i>Parson v. Farley</i> , 352 F. Supp. 3d 1141, 1153 (N.D. Okla. 2018), <i>aff’d</i> , 16-CV-423-JED-JFJ, 2018 WL 6333562 (N.D. Okla. Nov. 27, 2018) (finding Motion to Dismiss and exhibit as “judicial documents.”) Unlikely under the First Amendment. a ‘litigant has no First Amendment right of access to information made available only for purposes of trying his suit’ and that ‘pretrial depositions and interrogatories are not public components of a civil trial.’ ” <i>Grundberg</i> , 140 F.R.D. at 466 (quoting <i>Seattle Times v. Rhinehart</i> , 467 U.S. 20, 32-33 (1984)).
Eleventh Circuit	Depends. <i>Romero v. Drummond Co., Inc.</i>, 480 F.3d 1234, 1245 (11th Cir. 2007) (presumption applies to “material filed in connection with pretrial motions that require judicial resolution of the merits” but not documents “filed in connection with motions to compel discovery”).
D.C. Circuit	No. <i>SEC v. Am. Int’l Grp.</i>, 712 F.3d 1, 3-4 (DC Cir. 2013) (presumption applies only to record that “plays a role in the adjudicatory process,” not to documents where the court “ma[kes] no decisions about them or that otherwise relie[s] on them”).