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[SEALED DOCUMENT]: AN EMPIRICAL STUDY OF SEALING ORDERS IN THE FEDERAL COURTS

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American courts have long embraced the principle that judicial records should be presumptively public. Public access reveals threats to public health and safety. It makes law legible to those who must conform their conduct to it. And it permits citizens to watch power, both public and private. Open courts are, as the Fifth Circuit recently put it, "Law 101."

Standards for sealing are accordingly strict: A litigant who seeks to conceal judicial records must demonstrate a compelling interest in secrecy, and the trial court must make specific, on-the-record, document-by-document findings explaining why sealing is justified. Failure to do so, longstanding appeals court precedent holds, constitutes an abuse of discretion.

But do trial judges actually subject motions to seal to the searching scrutiny the law demands? Over the past half-century, this question has been the subject of speculation in scores of scholarly articles, congressional hearings, and judicial opinions. Yet, to this point, an answer has proven elusive.

This Article offers overdue clarity—and our results are staggering. Using docket data from over 2 million federal civil cases, and combining state-of-the-art machine learning techniques with careful hand-coding, we find that at least 90% of motions to seal are granted. Further, although judges, when granting sealing motions, are duty-bound to supply specific on-the-record findings, most don't. Most do not so much as cite the

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governing standard, and, when a standard is offered, it's very frequently wrong.

These findings are a lightning bolt, with sweeping implications for the open courts principle, public health and safety, judicial hierarchy, and the Advisory Committee on Civil Rules' current deliberations. In a litigation system already defined by the vanishing trial, courts and policymakers must confront the implications of a vanishing record.

INTRODUCTION

In the late afternoon of October 23, 2000, nine-year-old Gus Barber was shot and killed on a family hunting trip in Madison County, Montana.[1] Gus's mother, Barb, was lifting the safety to unload her Remington Model 700 rifle when the gun suddenly discharged, striking Gus in the abdomen and "cut[ting] him in half."[2]

In the months that followed, Barb was repeatedly asked whether she had inadvertently touched the trigger. Her response was the same—and adamant. "Absolutely not." "I pulled the safety off and it fired. The gun went off. My finger was nowhere near the trigger, I had an open hand."[3]

What the Barbers didn't then know was that this was not the first time a Model 700—America's most popular rifle—had spontaneously fired and struck a child. It wasn't even the first time a Model 700 had done so in Montana. Twelve years earlier, in Butte, just 85 miles away, thirteen-year-old Brock Aleksich was holding a Model 700 when it suddenly discharged and shot his brother, Brent, in both legs, causing "severe and permanent physical injuries."[4]

The Barbers didn't know about the Aleksich family's ordeal because, for years, that record had been sealed by order of the U.S. District Court for the District of Montana.[5] Included in the sealed documents in the Aleksich file was evidence that Remington knew about the

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[1] Interview with Rich Barber (Feb. 4, 2026); Kathleen O'Toole, *Remington Rifle Involved in Growing Number of Accidents*, BOZEMAN DAILY CHRON. (Nov. 4, 2000); Kathleen O'Toole, *Youth Dies in Hunting Accident*, BOZEMAN DAILY CHRON. (Oct. 24, 2000).

[2] Barber Interview, *supra* note 1; Order Partially Granting Barber's Motion to Unseal at 4, Aleksich v. Remington Arms Co., No. cv-91-05-BU-RFC (D. Mont. Sep. 4, 2012) [hereinafter Aleksich unseal order].

[3] Richard and Barbara Barber Interview, CBS (Feb. 6, 2001).

[4] Complaint at 4, Aleksich v. Remington Arms Co., No. 2:91-cv-00005-RFC (D. Mont. Jan. 11, 1991); *see also id.* at 7, 11 (alleging that the rifle possessed a "propensity to unexpectedly discharge" and that Remington "knew, or should have known, of the defect"); *see also* Barber Interview, *supra* note 1.

[5] The record was denominated "Sealed v. Sealed." Barber Interview, *supra* note 1. *Public Justice Asks Montana Court to Unseal Long-Secret Court Documents About Dangerous Remington Rifle*, PUBLIC JUSTICE (Apr. 30, 2012) [hereinafter Public Justice Release]; Aleksich unseal order, *supra* note 2.

defect that caused Gus's death and Brent Aleksich's injuries. It had known about it for decades.[6]

Reflecting on the sealing order that had concealed evidence of the deadly defect, Gus's father told us: "Had there not been secrecy, Gus might be alive." He might be alive, "without a shadow of a doubt."[7]

The Remington litigation, and many cases like it, raise longstanding questions about the degree to which the workings of American courts are open to public view.

A cornerstone of American law, rooted in a mix of constitutional provisions, procedural rules, and common-law tradition, holds that judicial records—and particularly those used to make merits determinations—ought to be accessible.[8] Part of the reason that we insist on transparency is that, without access to judicial records, we cannot evaluate *litigants* or the risks they impose on society. Sealing obscures both party and lawyer conduct, "masking impropriety, obscuring incompetence, and concealing corruption."[9] Patterns of wrongdoing remain hidden. Regulators and consumers cannot learn from past failures. And future litigants are condemned to reinvent the wheel.[10]

Nor, without access to judicial records, can we evaluate *courts*. We can't see how judges reason, how legal rules evolve, or whether litigants receive equitable treatment.[11] When all this is obscured, people's trust in courts—and obedience to their mandates—naturally

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[6] Public Justice Release, *supra* note 5; Arthur Bryant, *Rich Barber and the Campaign to Bring Remington to Justice*, CORP. CRIME REP. (Jan. 19, 2016); Scott Cohn, *Deaths, Injuries and Lawsuits Raise Questions about Popular Gun's Safety*, CNBC (Oct. 20, 2010).

[7] Barber Interview, *supra* note 1.

[8] *See, e.g.,* FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987) (holding that the presumption of access may be overcome only by "the most compelling reasons"); *see also infra* notes 54–55 and accompanying text.

[9] Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1180 (6th Cir. 1983).

[10] As the Federal Judicial Center has recognized: "The public resolution of court cases and controversies affords accountability . . . and provides notice of the legal consequences of behaviors and choices." ROBERT TIMOTHY REAGAN, SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE 1 (Fed. Judicial Ctr. 2010).

[11] In the words of the Seventh Circuit: "[T]he public cannot monitor judicial performance adequately if the records of judicial proceedings are secret." Jessup v. Luther, 277 F.3d 926, 928 (7th Cir. 2002).

ebbs.[12] As Chief Justice Burger wrote nearly a half-century ago: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[13] Courts are supposed to be cautious in the sealing of judicial records because sealing orders erode the very features that make courts instruments of public justice.[14]

Given the high stakes, the law of sealing is famously strict, at least on paper. In most Circuits, a trial court can grant a party's motion to seal only if the party can demonstrate a compelling interest in favor of secrecy.[15] And, when adjudicating sealing motions, district courts must show their work. A district court abuses its discretion if it grants a motion to seal without clearly articulating the basis for its decision.[16]

Even so, many have long suspected that trial judges pay only lip service to these commands. Examples of judges sealing even important public safety information are legion. In West Virginia's first state suit against Purdue, for example, the court sealed evidence about OxyContin's risks, even as overdose deaths skyrocketed.[17] In the Propecia litigation, the court permitted the parties to file clinical-trial data and internal correspondence under seal, obscuring information that Merck downplayed the drug's negative effects.[18] In roof-crush litigation against GM, courts repeatedly granted requests to seal crash-test results showing that modest roof-strength improvements would

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[12] *See* Hon. Jennifer Walker Elrod, Hon. Don Willett & Brian M. Miller, *Walking in the Light: On the Overuse of Sealing in Court Records*, 100 ADVOC. 27, 27 (2022).

[13] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 558–81 (1980) (plurality opinion).

[14] *See* Hon. T.S. Ellis III, *Sealing, Judicial Transparency and Judicial Independence*, 53 VILL. L. REV. 939, 940 (2008) ("Secret proceedings, including unwarranted or excessive sealing of court records, engender suspicion, mistrust and a lack of confidence in the judicial process . . . .").

[15] *See, e.g.*, FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987) (holding that the presumption of access may be overcome only by "the most compelling reasons"); *see also infra* notes 53–57 and accompanying text.

[16] *See infra* notes 64–67 and accompanying text.

[17] Benjamin Lesser, Dan Levine, Lisa Girion, & Jaimi Dowdell, *How Judges Added to the Grim Toll of Opioids*, REUTERS (June 25, 2019).

[18] Dan Levine, *U.S. Court Let Merck Hide Secrets About a Popular Drug's Risks*, REUTERS (Sept. 11, 2019).

save lives.[19] In litigation against Bridgestone/Firestone tires, documents revealing a deadly tire tread defect were suppressed, even as accidents piled up.[20] And, most recently, in the Uber sexual assault litigation, a court allowed the sealing of evidence showing that Uber knew certain drivers posed a danger but let them stay on the road.[21]

Recent court cases likewise raise suspicion that sealing practices might be out of whack. In one, a judge sealed documents that were already in widespread circulation, including a "an arrest report from a police department's public website [and] articles from *The New York Times*."[22] In another, the trial court let the parties place 8,000 pages under seal. When the parties' positions were tested on appeal, however, they sought to protect only a single page.[23] In a third, the plaintiff convinced the trial court to greenlight the sealing of its class certification motion and all 90 attachments thereto based on arguments that the appellate court derided as "brief, perfunctory, and patently inadequate."[24]

Yet, while these exemplars have *suggested* something is amiss—they have stopped short of furnishing compelling *proof*. Indeed, up until now, no one has been able to answer critical questions, including: How often do parties ask to seal judicial records? How often do judges say yes? And how often does anyone balk?

This informational void has taken a toll. Without facts to guide policymakers, debate has raged but policy*making* has petered out.[25] Over the past forty years, many have sounded the alarm about creeping

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[19] Jaimi Dowdell & Benjamin Lesser, *These Lawyers Battle Corporate America—And Keep Its Secrets*, REUTERS (Nov. 7, 2019).

[20] Van Etten v. Bridgestone/Firestone, Inc., 117 F. Supp. 2d 1375, 1377–80 (S.D. Ga. 2000); David S. Sanson, *The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency of National Reform*, 53 DUKE L.J. 807, 815 (2003) (citing *Class Action Status Given to Ford and Firestone Suits*, N.Y. TIMES (Nov. 29, 2001)).

[21] *Bonnie Eslinger, Uber* Asks Judge to Look Into Leak of Sealed Records to NYT, LAW360 (Sep. 23, 2025); *see also* Emily Steel, *Flagged for Sexual Misconduct, Many Uber Drivers Stay on the Road*, N.Y. TIMES (Dec. 29, 2025).

[22] June Med. Servs., L.L.C. v. Phillips, 22 F.4th 512, 515 (5th Cir. 2022).

[23] Elrod et al., *supra* note 12, at 28.

[24] Shane Group Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299 (6th Cir. 2016).

[25] Back in 2008, one federal judge wearily observed: "The debate over 'court-ordered' secrecy has festered for several decades." Joseph F. Anderson Jr., *Secrecy in the Courts: At the Tipping Point*, 53 VILL. L. REV. 811, 813 (2008).

court secrecy—and, believing that sealing is "commonplace," have championed efforts to tighten judicial standards.[26] But, for just as long, reformers' cries have been drowned out by reassuring declarations that judges, "acutely aware of their responsibility and duty to protect the public's access to all aspects of judicial proceedings,"[27] review sealing motions "very carefully,"[28] and grant them only "sparingly" after conducting the requisite document-by-document review.[29]

This Article cuts through the persistent haze. Mining data from over 2 million federal civil cases, our findings are startling—and directly refute the notion that sealing practices are operating as designed. Indeed, our findings—which uncover a system where sealing is widespread and rubber-stamped—have sweeping implications for the open courts principle, the regulation of public health, the ongoing deliberations of the Advisory Committee on Civil Rules, and trial courts' obedience to higher law.

The remainder of this Article proceeds in five Parts. Part I summarizes the law governing sealing. We explain how orders to seal (which conceal "judicial records") are both similar to and different from discovery-focused protective orders governed by Federal Rule of Civil Procedure 26(c). We trace the well-established presumption of public access that attaches to judicial records and describe the standard for granting an order to seal, including the variation across Circuits.

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[26] Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357, 357–58 (2006); *see also* David S. Ardia, *Sealed Justice: Federal Courts' Inconsistent Record-Sealing Rules and their Impact on Judicial Transparency*, 6 J. FREE SPEECH 211, 215 (2025) ("Sealing has become disturbingly routine in the federal courts, often carried out with little meaningful judicial oversight."); Sanson, *supra* note 20, at 827 (lamenting that "especially in federal court, it has become far too easy for judges to robotically seal a document when both parties are asking the court to do so").

[27] *Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts: Hearing Before the H. Subcomm. on Courts, Intellectual Property, and the Internet of the Comm. on the Judiciary*, 116th Cong. 43 (2019) [hereinafter 2019 H. Hearing] (statement of Hon. Richard W. Story, U.S. Dist. Judge, N. Dist. of Ga. on behalf of the Jud. Conf. of the U.S.).

[28] *Id*. at 92 (statement of Jodi M. Schebel, Co-Managing Partner, Bowman and Brooke, LLP).

[29] Lawyers for Civil Justice Comment to the Advisory Comm. on Civil Rules, Mar. 24, 2021, at 1 [hereinafter LCJ Comment].

Part II pivots to canvass what is known—and unknown—about contemporary sealing practices. For decades, journalists, politicians, lawyers, judges, and members of the Civil Rules Advisory Committee have made confident (and sometimes conflicting) claims about sealing.[30] But basic facts about how often judges actually seal court records, and what standards they actually apply when doing so, have resisted resolution. As one commentator has observed, up to this point, even "committed researchers have been left to guess" about fundamental questions, including how often parties move to seal judicial records and how often judges acquiesce.[31]

Tackling these persistent and consequential questions, Part III offers a first-of-its-kind empirical survey of sealing orders in federal courts. It proceeds in two steps. First, using cutting-edge machine-learning techniques, we analyze information from a decade of federal docket activity involving more than 2 million federal civil cases filed between 2005 and 2011. This analysis reveals that, even though district court judges are supposed to review motions to seal carefully and are said to grant them only "sparingly," in fact, grant rates clock in around 90%.[32] Indeed, over our study period, dozens of experienced federal judges granted every single sealing request they encountered.

Second, we fortify our "very-large-N" docket entry study with a hands-on review of over 600 orders.[33] Here we find that, although, when granting motions to seal, judges are duty-bound to supply specific on-the-record findings,[34] half of orders don't so much as cite the

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[30] *Compare e.g.,* Michelle Conlin, Dan Levine & Lisa Girion, *Why Big Business Can Count on Courts to Keep its Deadly Secrets*, REUTERS (Dec. 19, 2019), *with, e.g.,* Gregory C. Ray, *There Is Ample Sunshine Already*, 92 ILL. BAR J. 139, 144, 145 (2004).

[31] Heather Abraham, Jonathan Manes, & Alex Abdo, *Judicial Secrecy: How to Fix the Over-Sealing of Federal Court Records*, KNIGHT FIRST AMENDMENT INST. AT COLUMBIA UNIV. (Oct. 21, 2021), https://knightcolumbia.org/blog/judicial-secrecy-how-to-fix-the-over-sealing-of-federal-court-records.

[32] For "sparingly," see *supra* note 29.

[33] This hands-on review was necessary to test whether the high grant rate we see is the result of judicial rubber-stamping or salutary litigant screening. For the latter, the idea would be that parties, anticipating searching scrutiny, only file requests when they are confident they can meet the demanding legal standard. For further discussion, see *infra* notes 176 and 193 and accompanying text.

[34] EEOC v. Nat'l Children's Ctr., Inc., 98 F.3d 1406, 1408 (D.C. Cir. 1996) (noting that "it is imperative that a district court articulate its reasons for electing to seal or not to seal a record"); *see also infra* notes 64–67 and accompanying text.

governing standard. Even more troubling: Most orders that bother to cite a standard cite the *wrong standard*, typically invoking Rule 26(c)'s comparatively lax "good cause" standard that governs protective orders, not the actual, more stringent test that governs motions to seal. Worse still, courts are supposed to use a scalpel, not a sledgehammer: if a redaction will do, wholesale sealing is improper. Yet, in most of the orders we reviewed, courts sealed *entire* filings—including, for example, entire motions for summary judgment.

Part IV interrogates our findings. The legal standards governing sealing are strict, yet motions to seal are seemingly granted with only a cursory, casual review. How can this be? We blame the mismatch on a mix of: (1) translational challenges, in that the law, as set forth by appellate courts, is not adequately conveyed to trial courts, in part because local rules that purport to synthesize governing standards are incomplete or even inaccurate; (2) an adversarial breakdown, in that litigants hardly ever oppose sealing motions, leading to a lack of adversarial ventilation; and (3) judicial resistance and abdication.

As to the first, appellate authority is strict, but that authority has not been reliably synthesized into local rules. Indeed, some local rules are totally off base, describing standards that simply do not apply. As to the second, our empirical investigation reveals that three-fourths of identified requests for sealing are *neither* opposed nor (expressly) jointly supported.[35] Rather, the bulk of sealing efforts sit in something of an adversarial no-man's-land: too controversial to draw the support of an adversary but not important *enough*, relative to costs and other litigation imperatives, to draw opposition. The consequence is that motions to seal, unlike most party filings, are not subject to, or clarified by, adversarial ventilation. Third, we find that, partly given the dynamics above, judges appear to treat sealing as a low-stakes administrative matter—one appropriately resolved by reference to party consent, prior action (particularly the past grant of a protective order), or boilerplate assertions of confidentiality. Whether because of docket pressures, principled resistance, or simple ignorance, judges routinely substitute expedience for enforcement. Together, these findings cast sealing as a systemic pathology of modern litigation

[35] Our finding on this point generally meshes with Elizabeth Rowe's. In a recent article, she reports that "a whopping 84.8% of cases in the past 5 years, and 89.7% of cases in the 2023 calendar year received no attention from their adversaries." Elizabeth A. Rowe, *Judicial Secrecy*, 59 U. CAL. DAVIS 227, 284 (2025). For more on Rowe's recent contribution, see *infra* II.B.2.

management and a party-driven adversarial process that chronically lacks any constituency for transparency.

Part V telescopes out to examine the broader implications of a sealing regime that routinely departs from official commands. We start with sealing's stakes by building a three-part account: The open courts principle—and, by extension, scrupulous limits on sealing—does *regulatory* work, by revealing threats to public health and safety. It does *procedural* work by making substantive law legible, including to those who must conform their conduct to it. And it performs *democratic* work by permitting citizens to monitor the exercise of public and private power. Strict limits on sealing are, as the U.S. Court of Appeals for the Fifth Circuit recently put it, both "Law 101" and "Civics 101."[36]

Next, resisting the temptation to treat sealing as categorically good or bad, we instead situate litigation transparency in context, showing how its stakes vary with the stage of litigation, the type of materials sealed, and the nature of the case. We also explain that, in an era of vanishing trials, access to judicial records carries heightened importance, and yet structural incentives push lawyers and judges toward uncritical sealing, producing a systematic overproduction of secrecy relative to the law on the books. Ultimately, Part V closes with a set of principles for evaluating sealing practices—and three targeted, practicable reforms designed to restore openness to the administration of justice.

Sealing might sound esoteric or academic. But it isn't. As the D.C. Circuit recently explained: "The common-law right of public access to judicial records is a fundamental element of the rule of law, important to maintaining the integrity and legitimacy of an independent Judicial Branch."[37] In this Article, we show that, with little discussion, through a nearly imperceptible accretion of judicial discretion, our courts have become less visible—and also less accountable—than previously understood or formally contemplated. After exposing this drift and identifying its causes, we propose targeted reforms to realign sealing practice with the rule-of-law values it is meant to serve.

I. SEALING 101

We begin by situating sealing orders within the lifecycle of litigation and distinguishing them from protective orders. Like sealing orders, protective orders restrict access to litigation material, but they occur at

[36] Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 417 (5th Cir. 2021).

[37] *In re* Leopold, 964 F.3d 1121, 1127 (D.C. Cir. 2020).

a different stage of litigation, have a different historical pedigree, are governed by different legal standards, and raise different normative stakes.[38]

A. From Private Secrecy to Public Silence: The Shift from Protective to Sealing Orders

This Article focuses on sealing orders, not protective orders. Although both govern confidentiality, there is a "stark difference" between the two mechanisms.[39]

Protective orders control the exchange of information between parties during discovery. Authorized by Federal Rule of Civil Procedure 26(c), protective orders allow courts, upon a showing of "good cause," to permit parties to designate material exchanged during discovery as "confidential," which prevents its dissemination to non-parties.[40] Designed to prevent annoyance, embarrassment, oppression, or undue burden,[41] protective orders are often stipulated by agreement between counsel, in part because it's thought that these orders grease the wheels of discovery.[42] What's key is that protective orders apply only to material held *privately* by litigants, when that material has not yet been (or may never be) filed with the court.[43]

A sealing order—which governs and closes "judicial records"—is different. As soon as a document, exchanged during discovery, is filed

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[38] Regrettably, as we will see, many courts fail to grasp these crucial differences and improperly "conflate[]" these mechanisms. *Shane Grp., Inc*., 825 F.3d at 307; *see, e.g., In re* Avandia Mktg., Sales Prac. & Prod. Liab. Litig., 924 F.3d 662, 670, 680 (3d Cir. 2019) (vacating a seal order because the district court erroneously applied the protective order standard).

[39] Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299, 305 (6th Cir. 2016); *see also* June Med. Servs., LLC v. Phillips, 22 F.4th 512, 521 (5th Cir. 2022) ("Different legal standards govern protective orders and sealing orders. . . . That a document qualifies for a protective order under Rule 26(c) for discovery says nothing about whether it should be sealed once it is placed in the *judicial record.*"); Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1254–57 (2020) (offering a useful primer on how protective orders differ from orders to seal). In contrast to the above, the Eleventh Circuit often blurs the two standards. *See infra* note 93 and accompanying text.

[40] FED. R. CIV. P. 26(c).

[41] *Id*.

[42] Roughly 45% of protective orders are stipulated. *See* Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters & Aaron Schaffer-Neitz, *Secrecy by Stipulation*, 74 DUKE L.J. 99, 106 & 112 (2024).

[43] *Id*. at 109–10.

with the court (as an exhibit to a motion for summary judgment, say) it becomes a judicial record.[44] And, when it comes to judicial records, the public has a right to see.[45]

This divergent treatment is deeply rooted in history. In its 1984 decision, *Seattle Times Co. v. Rhinehart,* the Supreme Court explained that the stuff of discovery—"pretrial depositions and interrogatories"—"were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice."[46] Because there is not a deeply-rooted right of access to discovery material, the disclosure (or non-disclosure) of this material can be governed by the comparatively more lenient Rule 26(c).

By contrast, since the earliest days of the Republic, American courts have (per the Supreme Court) "recognize[d] a general right to inspect and copy . . . judicial records and documents."[47] As a historical matter, then, a judge who seeks to conceal a court record is swimming upstream.

Beyond this historical divergence, courts explain that the grant of a sealing order is different from the grant of a protective order because discovery, per Rule 26, is designed to cast a wide net; a party, when

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[44] *See* Cable News Network, Inc. v. Fed. Bureau of Investigation, 984 F.3d 114, 118 (D.C. Cir. 2021) (explaining that a "judicial record" is any document filed to "influence a judge's decisionmaking"); *In re Avandia*, 924 F.3d at 672 ("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.") (cleaned up); *see also* Alfred W. Cortese, Jr., *ATLA's Protective Order Campaign: Undermining Confidence in the Courts*, 19 PROD. SAFETY & LIAB. REP. 465, 469 (1991) (explaining that "even discovery information becomes public when filed or used in a court proceeding"); Elizabeth Chamblee Burch & Alexandra D. Lahav, *Information for the Common Good in Mass Torts*, 70 DEPAUL L. REV. 345, 369 (2021) (similar). In some circuits, it gets a bit more complicated for reasons we will explain in more detail in *infra* notes 96–97 and accompanying text.

[45] In the words of the Seventh Circuit: "The rights of the public kick in when material produced during discovery is filed with the court." Bond v. Utreras, 585 F.3d 1061, 1075 (7th Cir. 2009).

[46] 467 U.S. 20, 33 (1984) (citation omitted); *see* United States v. Kravetz, 706 F.3d 47, 55 (1st Cir. 2013) (collecting cases).

[47] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978); *see* Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1177 (6th Cir. 1983) ("Throughout our history, the open courtroom has been a fundamental feature of the American judicial system."); United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995) ("The common law right of public access to judicial documents is said to predate the Constitution.").

conducting discovery, may gain access to reams of material that are not actually germane to the dispute.[48] By contrast, a party's choice to attach the fruit of discovery to a motion or filing suggests that the material *is* relevant—and is not part of the flotsam and jetsam of litigation. As the canonical Wright and Miller treatise explains:

> One of the reasons for authorizing broad trial court latitude in restricting dissemination of material garnered through discovery is that the scope of discovery is very broad, often including topics having little bearing on the lawsuit. But when some of those materials are relied upon in a judicial decision, or form the basis for it, the justifications for public access . . . increase.[49]

Given these differences, as compared to the good cause standard that governs the entry of a protective order, the standard for entering a sealing order is "vastly more demanding."[50] To obtain a protective order, that is, the movant need only show "good cause" that disclosure of the material would cause annoyance, embarrassment, oppression, or undue burden or expense.[51] By contrast, as we will explain in greater

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[48] *See* Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1097 (9th Cir. 2016) (explaining that "[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action") (quotation marks omitted); Arthur Miller, *Private Lives or Public Access?*, A.B.A. J. (Aug. 1991), at 64, 66 (similar).

[49] RICHARD L. MARCUS, WRIGHT & MILLER: FEDERAL PRACTICE AND PROCEDURE § 2042 (2025 update).

[50] Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299, 307 (6th Cir. 2016); *see also June Med. Servs*., 22 F.4th at 521 ("That a document qualifies for a protective order under Rule 26(c) for discovery says nothing about whether it should be sealed once it is placed in the *judicial record.*"); Agenda Book, Advisory Comm. on Civil Rules (Mar. 28, 2023), at 135, https://www.uscourts.gov/sites/default/files/2023-03_civil_rules_committee_agenda_book_final_0.pdf [hereinafter Mar. 28, 2023 Agenda Book] (explaining that, in all Circuits, sealing standards "differ from the 'good cause' standard for a Rule 26(c) protective order"); Agenda Book, Advisory Comm. on Civil Rules (Oct. 10, 2024), at 353, https://www.uscourts.gov/sites/default/files/2024-10_civil_rules_agenda_book_final_10-6.pdf [hereinafter Oct. 10, 2024 Agenda Book] ("[T]here is relative uniformity among the circuits that filings under seal must meet a higher standard than protective order motions.").

[51] FED. R. CIV. P. 26(c).

detail below, only "compelling reasons can justify non-disclosure of judicial records."[52]

B. The Standards Across Circuits

Above, we explain that motions to seal are supposed to be carefully scrutinized. This Section specifies what that scrutiny entails, first by highlighting areas of broad agreement across Circuits, and then canvassing areas where fault lines have emerged.

1. Points of Consensus

As one court has put it, the law regarding orders to seal is "substantially the same across circuits: parties seeking confidentiality must present a strong justification to overcome the presumption of public access."[53] "Sealing," courts agree, "is disfavored as contrary to the presumption of public access."[54] Reflecting this disfavor, courts are to be "ungenerous with their discretion to seal judicial records."[55] Motions to seal are to be granted only when the movant shows that "disclosure" will inflict "a clearly defined and serious injury."[56] And, when making that showing, the movant bears a "heavy burden" of proof.[57]

Further—and critically—the Circuits generally agree that sealing orders must be both *precise* and *reasoned*.

As to precision, when granting a sealing motion, a trial court's determination must be both "specific" and granular.[58] When depriving the public of the right to access judicial records, a trial court cannot operate on a wholesale basis.[59] It must, instead "undertake a document-by-document, line-by-line" evaluation, to scrupulously

[52] *Shane Grp., Inc*., 825 F.3d at 305 (citation omitted).

[53] *DePuy Synthes Prod*., 990 F.3d at 1369.

[54] Panse v. Shah, 201 F. App'x. 3, 3 (1st Cir. 2006); *see also June Med. Servs*., 22 F.4th at 519–20 ("[W]e heavily disfavor sealing information placed in the judicial record."); United States v. Cabello, 2025 WL 2738463, at *2 (5th Cir. 2025) ("We approach motions to seal with a working presumption that judicial records should not be sealed.") (quotation marks omitted).

[55] *Binh Hoa Le*, 990 F.3d at 418.

[56] Miller v. Ind. Hosp., 16 F.3d 549, 551 (3d Cir. 1994) (quotation marks omitted).

[57] *Id*. (citation omitted).

[58] United States v. Ahsani, 76 F.4th 441, 452 (5th Cir. 2023).

[59] FRANCIS H. HARE, JR., ET AL., CONFIDENTIALITY ORDERS 156 (1988) (explaining that orders to seal "must be narrowly drawn and precise").

"balance[] . . . the public's common law right of access" against the moving party's or parties' countervailing interest in secrecy.[60] And, before sealing an entire document, "the court must consider less drastic alternatives."[61]

Just as a sealing order is supposed to be limited in scope, it is also supposed to be limited in time.[62] As the Third Circuit has summarized: "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."[63]

As to the command that sealing orders must be reasoned, the Circuits agree that trial courts must "state the reasons for sealing on the public record"[64] and must support their determinations with "detailed, clear, and specific findings."[65] Vague or conclusory statements won't cut it.[66] To quote the Sixth Circuit: "[W]hen a court . . . seal[s] off judicial records from public view, it must 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."[67]

Importantly, too, because a sealing order (unlike most court orders) does not just operate within the controversy to deprive one party or another of a litigation advantage, but instead operates outside the

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[60] *June Med. Servs.,* 22 F.4th at 521 (quotation marks omitted); *see also, e.g., In re* Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 924 F.3d 662, 673 (3d Cir. 2019) (similar).

[61] Va. Dep't of State Police v. Washington Post, 386 F.3d 567, 576 (4th Cir. 2004); *see also, e.g., In re* Nat'l Prescription Opiate Litig., 927 F.3d 919, 939 (6th Cir. 2019) (instructing that, before sealing a judicial record, a trial court must explain "why the seal itself is no broader than necessary") (quotation marks omitted).

[62] *See, e.g.,* Ellis, *supra* note 14, at 949 (explaining that "documents should not be placed permanently under seal").

[63] *In re* Cendant Corp., 260 F.3d 183, 196 (3d Cir. 2001).

[64] Ellis, *supra* note 14, at 945 (identifying this as a point of consensus).

[65] United States v. Ahsani, 76 F.4th 441, 452 (5th Cir. 2023); *see also infra* note 158 (offering additional authority).

[66] *E.g.*, F.T.C. v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 412 (1st Cir. 1987) (explaining that sealing of judicial documents "must be based on a particular factual demonstration of potential harm, not on conclusory statements") (quotation marks omitted); *see also* HARE, JR., ET AL., *supra* note 59, at 156 (explaining that trial courts can only seal material if they "make the necessary findings" on the record).

[67] Grae v. Corr. Corp. of Am., 134 F.4th 927, 930 (6th Cir. 2025) (cleaned up); *see also, e.g., Ahsani*, 76 F.4th at 452.

controversy to deprive *non-parties* of *their* rights, a trial court, when assessing a motion to seal, must carefully weigh the interests for and against public access even when the motion is the product of party consent.[68] Put differently, because secrecy is an externality that affects the public's interest—and because the judge is the steward of the public interest—the judge must carefully scrutinize a party's sealing request, even if the request is unopposed.[69] Reflecting the same consideration, once materials have been filed under seal, interested non-parties can intervene and move to unseal them, with the burden, not on the intervenor, but on the party supporting non-disclosure.[70]

Last but not least, appellate courts tend to agree on the *kind* of material that's appropriately sealed. First, appellate courts agree that a trial court "may deny access where it determines that the court-filed documents may be used for improper purposes" including to "gratify private spite or promote public scandal."[71] Second, appellate courts tend to recognize a need for secrecy in certain specific areas. Secrecy is appropriate, courts agree, in those "areas where openness is not the norm."[72] These cases tend to involve: trade secrets,[73] matters of national security,[74] the privacy or welfare of children,[75] medical

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[68] *E.g.,* Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299, 305 (6th Cir. 2016) (delineating judicial obligations "even if neither party objects to the motion to seal"); Sealed Appellant v. Sealed Appellee, 2024 WL 980494, at *2 (5th Cir. 2024) (similar).

[69] As the Eleventh Circuit has instructed, even when no party objects to sealing, "[t]he district court must keep in mind the rights of a third party—the public." Wilson v. Am. Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985).

[70] *See, e.g.*, United States v. Pickard, 733 F.3d 1297, 1304 (10th Cir. 2013) (allocating these burdens); REAGAN, *supra* note 10, at 20 ("Courts routinely permit non-parties to intervene for the purposes of challenging motions to seal.").

[71] Sedona Conference, *Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal*, 23 SEDONA CONF. J. 379, 436 (2022) (quoting *Nixon*, 435 U.S. at 598–99).

[72] Miller v. Indiana Hosp., 16 F.3d 549, 551 (3d Cir. 1994) (citation omitted).

[73] *E.g.,* Brown & Williamson Tobacco Corp. v. F.T.C.*,* 710 F.2d 1165, 1179–80 (6th Cir. 1983); Jessup v. Luther, 277 F.3d 926, 928 (7th Cir. 2002).

[74] *E.g., Brown & Williamson Tobacco Corp*., 710 F.2d at 1179–80; REAGAN, *supra* note 10, at 5–6.

[75] *E.g., Jessup*, 277 F.3d at 928; Webster Groves Sch. Dist. v. Pulitzer Pub. Co., 898 F.2d 1371, 1375 (8th Cir. 1990).

records,[76] and specific personal information (such as social security numbers).[77] Conversely, courts tend to agree that mere reputational harm won't cut it,[78] and also that secrecy is particularly inappropriate in cases that clearly implicate the public interest, either because of the case's procedural posture (e.g., a class action),[79] its content (e.g., a matter of public health),[80] or party identity (e.g., the government).[81] Third, trial courts appropriately greenlight sealing orders when disclosure (of, say, an informant's identity or the existence of a wiretap) would jeopardize an ongoing criminal investigation.[82] Fourth and finally, there are a number of federal laws that govern (and sometimes, compel) the non-disclosure of judicial records.[83] All agree that courts appropriately seal judicial records when those laws are in play—that, as the D.C. Circuit has put it: "the common-law inquiry must yield when Congress has spoken directly to the issue at hand."[84]

2. Areas of Disagreement

But while the above is clear enough, as with most areas of law, there is some inter-Circuit variation.

First, the Circuits subject motions to seal to somewhat different levels of scrutiny. For instance, the Sixth Circuit, on the "strict" end of the

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[76] *E.g.,* F.T.C. v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 411 (1st Cir. 1987); Miller v. Indiana Hosp., 16 F.3d 549, 551 (3d Cir. 1994).

[77] *See* REAGAN, *supra* note 10, at 9–10.

[78] *E.g.,* Wilson v. Am. Motors Corp., 759 F.2d 1568, 1570–71 (11th Cir. 1985).

[79] *E.g.,* Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299, 305 (6th Cir. 2016); *In re* Cendant Corp., 260 F.3d 183, 194–96 (3d Cir. 2001).

[80] *E.g., Brown & Williamson Tobacco Corp.,* 710 F.2d at 1180 (noting special public interest in cigarette contents); June Med. Servs., LLC v. Phillips, 22 F.4th 512, 520 (5th Cir. 2022) (finding abortion regulation to be a matter of public interest).

[81] *E.g., Standard Fin. Mgmt. Corp*., 830 F.2d at 410 ("The appropriateness of making court files accessible is accentuated in cases where the government is a party."). Indeed, per 28 C.F.R. § 50.9, the federal government has "a general overriding affirmative duty to oppose" the closure of judicial records unless it "is plainly essential to the interests of justice."

[82] *E.g., Jessup*, 277 F.3d at 928; Lawmaster v. United States, 993 F.2d 773, 775 (10th Cir. 1993).

[83] *E.g.,* 31 U.S.C. § 3730(b)(2) (concerning the False Claims Act); 15 U.S.C. § 1116(d)(8) (concerning the Trademark Act of 1946); *see also* LCJ Comment, *supra* note 29, at 4–5 (compiling additional statutory authority).

[84] *In re* Leopold to Unseal Certain Elec. Surveillance Applications & Ords., 964 F.3d 1121, 1129 (D.C. Cir. 2020) (quotation marks omitted).

continuum, is clear that "[o]nly the most compelling reasons can justify non-disclosure of judicial records."[85] The Sixth Circuit further holds that the order granting the motion must be narrowly tailored: it can be "no broader than necessary."[86] In the Fifth, the movant's interest in secrecy must also be "compelling," and sealing must be "congruent to the need."[87] Likewise, the Eighth Circuit requires sealing requests to be "narrowly drawn"[88] and instructs that "only the most compelling reasons" can support sealing.[89] Close to that, in the First and Second Circuits "only the most compelling reasons" can justify sealing.[90] The Third, Seventh, Ninth, Tenth, and D.C. Circuits similarly characterize the presumption in favor of access as "strong."[91] And, the Fourth Circuit requires interests in secrecy to "heavily outweigh" the interest in public access.[92] On the opposite end of the continuum—and a clear outlier—the Eleventh Circuit applies something akin to Rule 26(c)'s "good cause" standard for at least certain documents.[93]

Second, some Circuits apply different standards based on the *kind* of filing at issue.[94] Review is particularly rigorous when the movant

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[85] *Shane Grp., Inc*., 825 F.3d at 305.

[86] *Id.* at 306.

[87] Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 420–21 (5th Cir. 2021).

[88] United States v. Gray, 59 F.4th 329, 333 (8th Cir. 2023).

[89] *In re* Neal, 461 F.3d 1048, 1053 (8th Cir. 2006) (quotation marks omitted).

[90] *See* Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982); *In re* Gitto Glob. Corp., 422 F.3d 1, 6 (1st Cir. 2005).

[91] For the Third Circuit, see *In re* Avandia Mktg., Sales Prac. & Prod. Liab. Litig., 924 F.3d 662, 672 (3d Cir. 2019). For the Seventh, see *Jessup*, 277 F.3d at 928. For the Ninth, see Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006). For the Tenth, see Mann v. Boatright, 477 F.3d 1140, 1149 (10th Cir. 2007). For the D.C. Circuit, see EEOC v. Nat'l Children's Ctr., Inc., 98 F.3d 1406, 1409 (D.C. Cir. 1996).

[92] Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 253 (4th Cir. 1988).

[93] *E.g.,* Chi. Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1312–13 (11th Cir. 2001); Romero v. Drummond Co., 480 F.3d 1234, 1246 (11th Cir. 2007). As noted, other Circuits strenuously reject this conflation. *See supra* notes 38–39 and accompanying text. We account for the Eleventh Circuit's outlier status in our empirical assessment. *See infra* note 211 and accompanying text.

[94] *See* Oct. 10, 2024 Agenda Book, *supra* note 50, at 354 ("[S]ome courts regard 'non-merits' or 'discovery' motions as not implicating rights of public access comparable to those involved with 'merits' motions.").

seeks to seal records pertaining to a dispositive motion.[95] Conversely, when it comes to motions concerning discovery (including, for instance, motions to compel, and especially the fruit of discovery attached to a motion to compel), review is often quite lax.[96] Indeed, some courts exclude discovery motions from the sealing inquiry altogether.[97] Other courts apply more of a one-size-fits-all standard, regardless of whether the court records are, or aren't, key to the claim's adjudication.[98]

Third, Circuits vary as to whether—and how—the "law" of sealing is codified. In particular, in some districts, elaborate local rules furnish sealing standards, while other districts lack these provisions.[99] Furthermore, as we discuss in more detail in Part IV.A., some districts'

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[95] *See* TRACY BATEMAN ET AL., FEDERAL PROCEDURE, LAWYER'S EDITION § 20:235 (2025) (explaining that the "the need for public scrutiny is at its zenith when the motion is dispositive"); *accord* HARE, JR., ET AL., *supra* note 59, at 156 ("The more . . . central [documents] are to a court ruling or a decision by a trier of fact, the stronger the presumption of access.").

[96] *E.g.,* Brown v. Maxwell, 929 F.3d 41, 50 (2d Cir. 2019) ("[T]he presumption of public access in filings submitted in connection with discovery disputes . . . is generally somewhat lower than the presumption applied to . . . dispositive motions such as motions for . . . summary judgment.").

[97] *E.g.,* Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1097 (9th Cir. 2016) (explaining that the Ninth circuit has "carved out an exception," to the typical sealing standard for "materials attached to a discovery motion unrelated to the merits of a case"); United States v. Kravetz, 706 F.3d 47, 55–56 (1st Cir. 2013) (asserting "that no right of access attaches to civil discovery motions themselves or materials filed with them"). In 2007, the Sedona Conference endorsed this treatment, stating: "[I]f the documents have been filed in relation to a discovery dispute, the court may seal them under the same 'good cause' standard that would support a particularized protective order under Fed. R. Civ. P. 26(c)." Sedona Conference Working Group, *Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 SEDONA CONF. J. 141, 154 (2007). We account for this divergent treatment in our empirical assessment. *See infra* note 211 and accompanying text.

[98] *E.g.,* Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr., 913 F.3d 443, 451 (5th Cir. 2019) (describing all documents filed with the court as judicial records); Cortese, *supra* note 44, at 469 (conceding that "even discovery information becomes public when filed").

[99] Oct. 10, 2024 Agenda Book, *supra* note 50, at 360; *see also* Ardia, *supra* note 26, at 300–16 (canvassing local rules and reporting that many are deficient); Rowe, *supra* note 35, at 257–60 (similar).

local rules faithfully convey the law of sealing (as set forth by the Circuit court), while others, to put it charitably, don't.[100]

Finally, because the Supreme Court has only ever explicitly recognized a First Amendment right of access to *criminal* proceedings,[101] there is some disagreement concerning whether the First Amendment protects the right to access *civil* court records—or whether the common law supplies the sole source of protection.[102]

C. Sealing Standards Summarized

Despite some Circuit-by-Circuit variation in the formal law of sealing, certain requirements apply across district courts:

- **Judges must conduct a balancing test.** When adjudicating a motion to seal, a judge must weigh the party or parties' interest in secrecy against the public's interest in openness.
- **Interests in secrecy must be strong enough to overcome the presumption of public access.** In most instances, only "compelling" interests will suffice.
- **An order to seal is distinct from a protective order and requires a stronger showing.** The "good cause" standard governs protective orders, but (except in the Eleventh Circuit) a showing of good cause is not sufficient to seal court records.
- **Judges must articulate specific justifications for sealing.** Conclusory statements are insufficient.
- **When sealing judicial records, judges cannot operate on a wholesale basis.** Instead, before granting a motion to seal, the trial judge must conduct a document-by-document analysis.
- **Motions to seal are subject to the same level of scrutiny regardless of whether they are contested, stipulated, or unanswered.** The trial court's duty to carefully balance the

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[100] *See generally* Letter from Heather R. Abraham et al. to Rebecca A. Womeldorf (Sept. 3, 2021), https://www.uscourts.gov/sites/default/files/21-cv-t_suggestion_from_heather_abraham_alex_abdo_and_jonathan_manes_-_new_rule_5.3_0.pdf (offering evidence that local rules governing sealing vary greatly and seemingly inexplicably) [hereinafter Abraham Letter].

[101] *See* Ardia, *supra* note 26, at 227–30.

[102] *See* Courthouse News Serv. v. Quinlan, 32 F.4th 15, 20 n.8 (1st Cir. 2022) (collecting authority); Sedona Conference, *supra* note 71, at 436 (reporting that "many" though not all, courts have "specifically extended the First Amendment right of public access to civil proceedings" and collecting citations).

interests for and against sealing applies regardless of who brings or supports the motion to seal.

Notably, these requirements—which establish a baseline for our quantitative analysis in Part III—set the floor, not the ceiling, for review.

II. JUDICIAL SEALING: A DEBATE IN THE DARK

Part I shows that motions to seal are supposed to be subject to rigorous review. Are those rigorous requirements satisfied? This Part shows that, for decades, observers from all corners of the legal system have offered confident—and conflicting—assessments. In the course of this debate, some have warned that federal judges seal court records too readily,[103] while others have, just as confidently, asserted the opposite—that judges "enforce a strong presumption in favor of disclosure, granting sealing orders sparingly."[104]

Yet these competing accounts have rarely been backed by hard data. As a result, the questions at the heart of this Article—including how often judges seal judicial records and whether sealing determinations hew to governing law—have remained unresolved. As we will see, this stubborn uncertainty has stunted both law- and rulemaking efforts, in part because those who have championed reforms have been unable to overcome natural inertia—and certain parties' insistence that nothing is amiss.

A. Assertions and Debates

Some have long warned that judges too readily allow litigants to seal information, including about dangerous products and public harms.[105]

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[103] *See supra* note 26 and *infra* note 105 and accompanying text (collecting citations).

[104] LCJ Comment, *supra* note 29, at 1.

[105] *E.g.,* Leslie Brueckner & Beth Terrell, *When It Comes to Sealing Court Records, the Presumption of Public Access Requires That You "Just Say No",* PUBLIC JUSTICE (July 6, 2017) (lamenting that "court records . . . are sealed all too often without any showing of any need for secrecy at all"); Abraham Letter, *supra* note 100, at 5 (contending that some courts "routinely permit sealing"); Hon. Gregg Costa, *Federal Appellate Judge: Too Many Sealed Documents*, NAT'L L.J. (Feb. 15, 2016) (charging that trial judges frequently seal judicial records notwithstanding formal commands: "what the law books say is one thing; how the law is enforced is another"); Gustavo Ribeiro, *(Marked Confidential): Negative Externalities of Discovery Secrecy*, 100 DENV. L. REV. 171, 194 (2022) (observing that judges "seem increasingly willing to grant, often in an uncritical fashion, parties' requests to seal"); *see also supra* note 26 (collecting additional citations).

1. Reform Efforts 1.0

The debate first spilled into public view in the late 1980s, after a series of high-profile scandals involving hidden health hazards captured media attention and generated a public response. Starting with Florida's "Sunshine in Litigation" law, roughly a dozen states clamped down on sealing orders, particularly those that concealed dangers to public health.[106]

Around the same time, the Association of Trial Lawyers of America (ATLA), the country's premier plaintiffs' lawyer organization, started advocating the enactment of federal legislation.[107] Backed by ATLA and supported by numerous lawmakers (chiefly, Senator Herb Kohl of Wisconsin), between the late 1980s and 2010s, various Sunshine in Litigation Acts were *repeatedly* introduced and debated in Congress.[108] But, the Acts' opponents—who derided these efforts as "monstrously unfair," "ill-conceived," and an unjustified incursion on "zones of corporate privacy"—ultimately prevailed.[109]

In these battles, reformers struggled on numerous fronts. They labored to parry opponents' assertions that businesses had a right to privacy—and that restrictions on secrecy "threatened the foundations of American free enterprise."[110] They had trouble rebutting the idea that the reforms were self-interested.[111] And, they were weighed down by

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[106] *See* FLA. STAT. § 69.081 (1991). For other state activity, see James E. Rooks, Jr., *Report of the 2000 Forum for State Appellate Court Judges: Open Courts with Sealed Files: Secrecy's Impact on American Justice*, at 25 (Roscoe Pound Institute Forum Report, July 29, 2000); Engstrom et al., *supra* note 42, at 120–21.

[107] ATLA was rebranded the American Association for Justice (AAJ) in 2007. For ATLA's leadership on the issue, see, e.g., Robert N. Weiner, *Plaintiffs' Lawyers Around the Nation Are Pressing for Laws that Would Open Discovery Files in Personal-Injury Cases to Public Scrutiny. Their Motivations are Not Nearly as Pure as Many Suppose*, LEGAL TIMES (Sep. 23, 1991) (declaring: "The plaintiffs' personal injury bar has declared war on confidentiality.").

[108] Engstrom et al., *supra* note 42, at 119–20 (sketching these debates and collecting sources).

[109] Cortese, *supra* note 44, at 472.

[110] Conlin et al., *supra* note 30; Cortese, *supra* note 44, at 472 (insisting that further compelled disclosure would "place the corporate defendant at an even greater disadvantage").

[111] *E.g.,* Evan A. Burkholder, *Confidentiality and the Courts: Protecting the Right to Privacy*, 76 JUDICATURE 311, 311–12 (1993) (charging that reformers' "motivations" are "suspect" as "[t]he true beneficiaries of these proposals are

the claim that companies need court documents to be sealed for legitimate reasons: "to contain costs, prevent negative publicity and safeguard trade secrets and intellectual property."[112]

But the *biggest* obstacle reformers faced—the argument that they could never really overcome—was critics' assertion that no legislation was needed as there was no problem to address. Critics scored points by questioning the notion that the current framework had jeopardized health and safety.[113] Reformers' safety concerns, one critic sniffed, were "really more splash than substance."[114] More broadly, critics succeeded by convincing lawmakers that the system was working well, no revisions required.[115] According to Al Cortese, the hard-boiled corporate lobbyist who quarterbacked the opposition: Even without adjustments, "today's courts provide broad rights of public access to all court records and proceedings."[116] Or, in the words of Professor Arthur Miller, the scholarly face of Cortese's campaign: "Because proponents of reform have not demonstrated that significant modification of the present framework is necessary, the existing pragmatic and discretionary balancing technique should be retained."[117] "Existing rules and procedures," Miller assured lawmakers, were "more than adequate" to protect the public's right of

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plaintiffs' attorneys" who will use the threat of public access "for improper leverage").

[112] Conlin et al., *supra* note 30.

[113] Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 501 (1991) ("[N]o evidence has been presented that the current practice has created significant risks to public health or safety."); Miller, *supra* note 48, at 68 ("There is simply no reason to believe that current court rules and practices create any risks to public health or safety."); Alfred W. Cortese Jr. & Kathleen L. Blaner, *The Constitutional Limits of Public Access*, 3 MD. J. CONTEMP. LEGAL ISSUES 25, 27 (1991) (asserting that "claims linking confidentiality to public health and safety" are "without merit").

[114] Dawn Shawger McCord, *The Secret to Keeping Settlements Secret*, 33 LITIG. 45, 47 (2007).

[115] *E.g.,* Burkholder, *supra* note 111, at 311 (insisting that reformers' "fears . . . are unfounded").

[116] Cortese, *supra* note 44, at 468; *see also id*. at 472 (explaining that reforms were "unnecessary" because "the courts are already fully accessible to the public"). For Cortese's pivotal role in these debates, see Conlin et al., *supra* note 30.

[117] Miller, *supra* note 113, at 490; *see also id*. at 431 (opposing reform efforts because, inter alia, "proponents of the reforms have not demonstrated any clear need for constricting judicial discretion").

access.[118] In the 1980s, 1990s, 2000s, and 2010s, opponents' assurances landed—and stymied efforts at reform.

2. Reform Efforts 2.0

The past seven years have seen a renewed push for reform, which we'll call Reform Effort 2.0. This push is traceable to two perhaps interlocking developments. First, in 2019, Reuters published *Hidden Injustice*, a hard-hitting, multi-part investigative series examining secrecy in federal civil litigation. We detail the journalists' findings in greater detail in Section B below, but one strand of the reporting was to assert that, in recent decades, "big business and its legal lieutenants . . . . succeeded in getting judges to routinely seal court filings"—and that this secrecy has taken a serious toll on public health.[119] Reuters's findings were explosive—such that even Congress took notice. In late 2019, a House Judiciary subcommittee convened a hearing pointedly titled "Ensuring the Public's Right of Access to the Courts," calling witnesses to address judicial transparency.

Second, in 2020, Professor Eugene Volokh, joined by the Reporters Committee for Freedom of the Press and the Electronic Frontier Foundation, took the fight to the Federal Rules Committee, proposing a new Federal Rule of Civil Procedure 5.3.[120] As drafted, Rule 5.3 sought to change the status quo in four ways. First, to goose the roster of possible objectors, it specified that any member of the public was entitled to move to unseal court documents at any time and also mandated that no court could rule on a motion to seal until at least seven days after the motion was posted on the court's website.[121] Second, to combat sealing "creep," it provided that "[a]ll sealed documents will be deemed unsealed 60 days after the final disposition

[118] Miller, *supra* note 48, at 67.

[119] Conlin et al., *supra* note 30.

[120] *See* Minutes, Civil Rules Advisory Committee (Oct. 16, 2020), at 29 [hereinafter Oct. 16, 2020, Minutes]. Motivating the effort was reformers' view that, "[w]hen it comes to sealing, the federal courts are a procedural Wild West," and that the "excessive secrecy" in federal courts "has caused considerable harm." Abraham Letter, *supra* note 100. In making the case, the reformers asserted that "[m]any times . . . judges simply rubber-stamp a request to seal without providing any explanation at all." *Id*. But of course, they could neither prove nor quantify this occurrence.

[121] Letter from Eugene Volokh to Federal Rules Advisory Comm. (Aug. 7, 2020), at 2 [hereinafter Volokh Letter].

of a case, unless the seal is renewed."[122] Third, to try to promote litigant accountability, it established that "[a]ny party seeking sealing must make a good faith effort to seal only as much as necessary to protect any overriding privacy, confidentiality, or security interests."[123] Fourth, it sought to codify existing case law, including, for instance, by formally specifying that "no document filed in court may be sealed in whole or in part merely because the parties have agreed to a motion to seal or to protective order, or have otherwise agreed to confidentiality."[124]

Yet, in a replay of Reform Effort 1.0, the Volokh proposal has faced strong resistance, centered on the idea that the law of sealing is already strict.

In expressing skepticism, many attorneys and judges seem to take for granted that the law on the books (which reflects a strong presumption of access) reflects the law in practice. They speak not only of a tough judicial *standard*, but of the exacting *application* of the standard. Illustrating this conflation, Judicial Conference Secretary James C. Duff explained in 2021: "The federal Judiciary has long applied a strong presumption in favor of public access to documents."[125]

Others merely offer up a generalized faith in judicial discretion and competence. Taking this tack, the defense-side "advocacy organization," the Lawyers for Civil Justice (LCJ), has opposed Volokh's proposal, insisting that it's much ado about nothing.[126] "[T]he current rules," the LCJ insists, "are working."[127] "By most accounts . . . this system functions as it is intended to, primarily due to judges' discretion and their proximity to the facts and issues of a specific case."[128] If the standard is strong and judges are competent, so goes the argument, then sealing practices must be okay.

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[122] *Id*. at 2.

[123] *Id*.

[124] *Id*.

[125] Judiciary Addresses Cybersecurity Breach: Extra Safeguards to Protect Sensitive Court Records, U.S. Courts (Jan. 6, 2021).

[126] For more on the LCJ, see https://www.lfcj.com/about (last visited Feb. 7, 2026).

[127] LCJ Comment, *supra* note 29, at 2–3.

[128] Similarly, Professor Richard Marcus, the Associate Reporter on the Advisory Committee on Civil Rules, has dismissed concerns that judges might be confusing the standards that govern protective orders and orders to seal. Oct. 10, 2024 Agenda Book, *supra* note 50, at 87 ("Courts understand well that the standard for filing under

While testifying before Congress on behalf of the Judicial Conference of the United States, Judge Richard Story of the Northern District of Georgia recently echoed that assessment:

> I want to assure you that every Federal court and every Federal Judge takes very seriously the subject of public access to the courts. Federal judges adhere to a presumption of openness whereby court proceedings are open to the public.[129]

According to Story, judges "are acutely aware of their responsibility and duty to protect the public's access to all aspects of judicial proceedings—including access to court records—and approach motions to seal with the public's interest in mind."[130]

Buoyed by these perspectives, the current inclination of the Rules Committee seems to be to stick with the status quo. "There is no question that inappropriate sealing of court records is an important concern," the Committee has observed.[131] "But it is not clear that the problem is so widespread that an effort to develop a national rule is warranted."[132]

B. Past Empirical Efforts

Meanwhile, several studies have addressed aspects of how sealing works in the federal courts. For understandable reasons, however, this literature has some substantial limitations. As others have recognized: "Unearthing and documenting the problems with sealing practices is extremely labor-intensive because it requires manual review of the dockets of individual cases to attempt to discern how documents came to be sealed and whether proper procedures were followed."[133] Given these methodological challenges, while past studies have helpfully

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seal is more demanding than what is required to issue a protective order."). For Marcus's role, see https://www.uclawsf.edu/people/richard-marcus/.

[129] 2019 H. Hearing, *supra* note 27, at 32 (statement of Hon. Richard W. Story, U.S. Dist. Judge, N. Dist. of Ga. on behalf of the Jud. Conf. of the U.S.).

[130] *Id*. at 9–10.

[131] Advisory Committee on Civil Rules, Oct. 16, 2020 Agenda Book, at 370 [hereinafter Oct. 16, 2020 Agenda Book]; *see also* Mar. 28, 2023 Agenda Book, *supra* note 50, at 137 (discussing a variant of the proposed Rule 5.3 and questioning the need for reform: "If [a proposal] adopts what the courts are already doing, it might be regarded as somewhat 'cosmetic.'").

[132] Oct. 16, 2020 Agenda Book, *supra* note 131, at 370.

[133] Abraham Letter, *supra* note 100, at 8 n.26.

illuminated different *pieces* of the system, they haven't been able to address the pivotal questions we tackle in Part III.

1. Empirical Efforts 1.0

The Federal Judicial Center (FJC) conducted the first major secrecy study in the early 2000s, examining the prevalence of *completely sealed* civil cases.[134] (Even a case in which every document was sealed was not tallied if the researchers surfaced some public information about the matter.) Unsurprisingly, given this methodology, the FJC found these cases were very rare, comprising only 0.2% of federal court filings. Further, of those that satisfied the study's narrow parameters, many (including matters filed pursuant to the False Claims Act) were sealed by statute.[135]

That finding has been cited for the broader proposition that secrecy in federal civil litigation is uncommon—and that, in general, the system isn't as opaque as critics fear.[136] But the study does not bear the weight placed upon it.[137] Given its extraordinarily limited focus, the study says nothing about how frequently litigants seek to seal individual records, how often courts grant those requests, or whether judges apply the appropriate legal standard when granting them.

Other empirical studies examine partially sealed cases, but only in particular contexts. For example, investigative work shows that sealing is increasingly prevalent at the Supreme Court. In particular, in a 2012 report, journalists reported that at least nineteen Supreme Court cases in 2009 involved sealed materials, up from nine in 2005 and four in 1994.[138] The report also underscored how easily sealing

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[134] *See* TIM REAGAN & GEORGE CORT, SEALED CASES IN FEDERAL COURTS 1–3 (Fed. Jud. Ctr. 2009).

[135] *Id*. at 4–7. *See supra* note 83 and accompanying text (explaining that some statutes, including the False Claims Act, compel sealing).

[136] *See* LCJ Comment, *supra* note 29, at 4 (relying on the FJC study to reassure the Rules Committee that no rule regarding sealing is necessary as "[t]he complete sealing of civil cases is, in fact, extremely rare"); Oct. 16, 2020 Minutes, *supra* note 120, at 30 (citing the FJC study while questioning whether sealing is a significant problem in federal courts).

[137] *See* ELIZABETH GOITEIN, THE NEW ERA OF SECRET LAW 53 (Brennan Ctr. 2016) ("The FJC study is the most comprehensive [study] available, but it dramatically understates the degree of secrecy in the courts due to the FJC's methodology.").

[138] Katie Townsend, *Under Seal: Secrets at the Supreme Court*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (2011), https://www.rcfp.org/journals/under-seal-secrets-supreme-cour/.

can persist without any clear public justification, highlighting cases where the sealing order was missing, and others where lower-court rulings were entirely under seal, leaving even the basic grounds for secrecy difficult to reconstruct from the public record.[139] But because that report was descriptive and confined to the Supreme Court's docket, it could not provide systematic evidence about sealing practice in routine federal civil litigation.

Similarly, in 2012, Judge Stephen Smith assessed sealed magistrate and miscellaneous cases filed in 2006 in three districts to determine how frequently courts entered sealed final orders in proceedings involving electronic surveillance and other law enforcement applications.[140] Roughly 40–47% of such cases resulted in sealed final orders, and Judge Smith extrapolated from those rates to estimate that federal courts issued more than 50,000 sealed orders in 2006 alone.[141] Like the effort above, Smith's study is illuminating, but because of its limited geographic scope and restricted substantive reach, it says little about sealing in ordinary civil litigation.[142]

2. Empirical Efforts 2.0

Two other empirical efforts—published in 2019 and 2025, respectively—have pushed the literature forward, while still leaving key questions unanswered.

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[139] *Id*. The same year, Professor Bernand Chao undertook a "small unscientific survey" of sealing in patent litigation in seven patent-heavy federal districts. Bernard Chao, *Not So Confidential: A Call for Restraint in Sealing Court Records*, 2011 PATENTLY-O PATENT L.J. 6, 8. In several major districts, he found that entire briefs were sometimes sealed when, presumably, redactions would have sufficed. *Id*. at 9–10. But because Chao's inquiry was limited in scale and scope, it could not quantify sealing's frequency, estimate grant rates, or assess judicial reasoning.

[140] Stephen Wm. Smith, *Gagged, Sealed & Delivered: Reforming ECPA's Secret Docket*, 6 HARV. L. & POL'Y REV. 313, 319–20 (2012).

[141] *Id.* at 320.

[142] In the same vein, in 2006, the Reporters Committee for Freedom of the Press uncovered the scope of "super-sealed" dockets in the U.S. District Court for the District of Columbia, identifying 469 cases—primarily criminal prosecutions—that were entirely removed from public view over a five-year period. *Disappearing Dockets*, NEWS MEDIA & THE LAW (2006). These cases lacked even a placeholder entry on the docket, and users searching by case number were falsely told that no such case existed. Many of the proceedings that were eventually unsealed involved multi-defendant drug or conspiracy charges, where sealing was justified by concerns about witness or party safety.

First, as noted above, in 2019, Reuters published *Hidden Injustice*, an ambitious, multi-part investigative series examining secrecy in federal civil litigation.[143] The quantitative portion of that project operated at two levels.[144] To measure sealing's prevalence, Reuters initially analyzed Westlaw data covering approximately 3.2 million federal civil cases filed between 2006 and 2016. Using a combination of machine-learning techniques and manual review, journalists examined roughly 90 million docket entries for sealing activity.[145] Ultimately, the journalists found that judges allowed sealing in at least 65% of federal product-liability cases, suggesting that, at least in the product context, secrecy is not isolated but, rather, widespread.[146]

Second, the Reuters researchers paired that big-N analysis with an intensive, qualitative review of the 115 largest federal product-liability MDLs. Here, the journalists found that judges permitted evidence relevant to public health and safety to be filed under seal in approximately half of the 115 MDLs, often without public explanation. The journalists also found that, in nearly one-third of these MDLs, crucial motions—including those involving class certification and summary judgment—were filed *entirely* under seal,[147] notwithstanding the command that trial courts are supposed to "consider less drastic alternatives" (such as redactions) before sealing documents wholesale.[148]

The Reuters project showed that sealing is common in a salient category of federal litigation and illustrated how secrecy can conceal information of profound public importance.[149] But, the report was, of course, focused on product liability cases—and so could not speak to secrecy more generally.

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[143] *Hidden Injustice: How U.S. Courts Cover Up Deadly Secrets*, REUTERS (2019-2020); *see also* 2019 H. Hearing, *supra* note 27, at 60–65 (testimony of Dan Levine & Lisa Girion).

[144] *See Hidden Injustice: How We Did the Data Analysis*, REUTERS (2019).

[145] Telephone Interview with Benjamin Lesser, Thomson Reuters (Jan. 16, 2026).

[146] *Hidden Injustice, supra* note 144.

[147] *Id*.

[148] Va. Dep't of State Police v. Washington Post, 386 F.3d 567, 576 (4th Cir. 2004). For additional discussion of the governing framework, see *supra* note 61.

[149] As noted, despite its focus, *Hidden Injustice* still prompted congressional hearings. *See supra* note 143.

Last but not least, in 2025, Professor Elizabeth Rowe published a study assessing how frequently federal courts encounter motions to seal.[150] Examining federal civil district court dockets from 2019 to 2023, Rowe found that motions to seal were commonly filed and very frequently unopposed.[151] In 2023, for instance, "motions to seal [were] the third most common type of motion filed."[152] Rowe also tested—and debunked—the comforting assumption that third-parties can be counted on to intervene when necessary to discipline party and judicial conduct. Motions to intervene, she found, were rare. "Of the total number of cases where parties intervened to oppose a motion to seal compared to the total number of dockets containing a motion to seal, third parties appeared in less than 0.3% of federal cases in the past year and less than 0.2% in the last five years."[153] And although some nonprofits seek to "improve public access to court documents," Rowe found that they intervened in only a "handful of cases a year."[154]

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The upshot, then, is that despite decades of impassioned debates about transparency—and despite decades of diligent efforts to study the system—core uncertainties persist. Many observers, including legal luminaries, have said that the current rules are effective and that the system works "as it is intended to" work.[155] But until now, no one has known whether that is true. No one has known how often motions to seal are filed. No one has known how often motions to seal are

[150] *See generally* Rowe, *supra* note 35.

[151] To estimate sealing motion prevalence, Rowe ran a simple keyword search of federal civil district court dockets (pulled from PACER via LexMachina) for the term "motion to seal" within specific date ranges. *Id.* at 276 nn.251–53. To determine how frequently these were unopposed, she ran a keyword search for dockets containing the term "motion to seal" AND ("seal unopposed"~5 OR "seal non-opposition"~5), meaning that the quoted terms must appear within five words of each other in the docket text to be returned. *Id*. at 285 n.293. For 2023, she reports that the "motion to seal" search yields 5,746 dockets, and the search within that subset for oppositions yields 587, implying only about 10% show opposition activity. *Id*. at 285 n.292.

[152] *Id*. at 277.

[153] *Id.* at 285.

[154] *Id*. at 286.

[155] LCJ Comment, *supra* note 29, at 2–3. *See also supra* notes 113–118, 128 and accompanying text (offering similar reassurances from judges, members of the Advisory Committee on Civil Rules, and esteemed scholars).

granted. And no one has been able to say whether, when granting motions to seal, judges faithfully apply the law on the books.

III. NEW EMPIRICAL EVIDENCE ON SEALING ORDERS

To this point, the debate over sealing has largely been a weary war of impressions and intuitions, as no one has been able to answer even basic questions concerning court access.[156]

This Part supplies some overdue clarity. We answer key empirical questions at the heart of the debate: How often are judicial records sealed? What kinds of materials are sealed? How often are motions to seal opposed or jointly filed? And when ruling on motions to seal, do federal judges abdicate their responsibilities—or do they engage in the exacting analysis that the law requires?

We tackle these questions in four Sections. Section A describes our methodology. More technically inclined readers can find additional details in our Online Appendix, while readers uninterested in methodological information can skip ahead to our results.

Section B begins by estimating sealing's prevalence. We find that, during the period of study, approximately 3% of all civil cases had at least one sealed document; of cases that included a motion for summary judgment, that figure more than tripled, to 10%. Then, Section C offers a snapshot of sealing in action. Here, we find nearly 90% of motions to seal are granted, and roughly 15% of experienced federal judges never denied a sealing request within our period of study. We also find that motions to seal are rarely opposed, although consent is frequently tacit, rather than voiced.

Section D turns from outcomes to judicial decision-making. Recall that, when granting a motion to seal, trial judges are supposed to show their work. Sealing orders, appellate courts explain, must be justified by specific, on-the-record findings that sealing is necessary.[157] But our analysis of over 600 hand-coded sealing orders uncovers what appears to be widespread disobedience. Judges are, to quote the Sixth Circuit, obligated to "set forth specific reasons explaining [their] decision[s] to

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[156] *Accord* Ellis, *supra* note 14, at 949 (noting that the judicial system would benefit from "[a]n empirical study of existing sealing practices across").

[157] *See* United States v. Ahsani, 76 F.4th 441, 452 (5th Cir. 2023) ("[C]ourts must make detailed, clear, and specific findings when sealing a record to which there is a presumptive right of access.") (citation omitted); *see supra* note 64–67 and accompanying text.

keep judicial records confidential."[158] Yet we find that only half of orders cite any legal standard—and, among those that do, *most cite the incorrect standard*. We further find that a mere 10% make any effort to apply sealing law to the instant controversy, and just 3% contain any particularized finding of fact.

Ultimately, we uncover a sealing regime that departs drastically from the law on the books, with profound implications for public access, judicial legitimacy, and the courts' regulatory role.

A. Methodological Primer

To set the stage, we briefly sketch our empirical strategy, which blends large-N analysis powered by modern data science methods (including, among other things, LLMs and machine learning techniques) with a close reading of district court dockets and orders.[159]

We start with our large-N dataset. All the results reported below are derived, at least in part, from a docket database acquired from Thomson Reuters;[160] to our knowledge, it is the most comprehensive dataset of federal district court dockets in existence.[161] The portion we used in this study contains information on over 2 million federal civil cases filed between 2005 and 2011.[162] For each case filed, we have

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[158] Signature Mgmt. Team, LLC v. Doe, 876 F.3d 831, 836 (6th Cir. 2017). For additional, similar authority, see *supra* notes 64–67 and accompanying text.

[159] More technically interested readers can consult our Online Appendix for further information.

[160] This dataset has been used in several other studies, including by several authors of this study. *E.g.*, Engstrom et al., *supra* note 42, at 137; Jonah B. Gelbach, *Beyond Transsubstantivity*, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 909, 921–22 (2024); Jonah B. Gelbach, *Material Facts in the Debate over* Twombly *and* Iqbal, 68 STAN. L. REV. 369, 393 (2016); Jonah B. Gelbach, *Rethinking Summary Judgment Empirics: The Life of the Parties*, 162 U. PA. L. REV. 1663, 1676 (2014). For additional information about this dataset, see Online Appendix.

[161] Such comprehensive datasets are rare because most court dockets require a fee to access. *See* Jonah B. Gelbach, *Free PACER, in* LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE (David Freeman Engstrom ed., 2023). An additional available source is SCALES, which includes longitudinal docket information for two years of filings (2016 and 2017); for more about SCALES, see David L. Schwartz et al., *The SCALES Project: Making Federal Court Records Free*, 119 NW. U. L. REV. 23 (2024).

[162] Although we have data on cases filed through the end of 2014, we limited our analyses to account for a "right-censoring" problem that arises because our data extends only through December 31, 2014. To understand the problem, consider a case filed on July 1st, 2014. For that case, we would be able to observe only six months of docket activity. By contrast, for a case filed on January 1st, 2010, we have

docket information for all public case activity from January 1, 2005 through December 31, 2014.[163]

That breadth is an asset, but it creates a classic "needle in a haystack" problem since sealing-related activity amounts to a small share of litigation activity overall.[164] To drill down, used a bevy of natural language processing and other artificial intelligence methods, including but not limited to large language models (LLMs). We briefly outline that process here.

First, we collected docket entries containing the string "SEAL*."[165] From this initial pool, we drew and hand-coded a random sample of 2,500 docket entries and reviewed and labeled each entry, specifying, for instance:

> (1) Whether a docket entry recorded a *motion* that requested sealing, whether it recorded *opposition* to such a motion, and/or whether it recorded a judicial *order* granting or denying the sealing request.

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a full five calendar years' worth of data. Suppose that it's true that cases that have sealing requests always have them more than six months and less than five years after case filing. We would never observe a sealing request in our later-filed case and always see those that occur in our earlier-filed case—which could lead us to misleadingly find differences where none exist. To account for this problem, we: (1) include only docket entries that occur within three years of the case being filed, and (2) remove cases filed after 2011. These adjustments limit the dataset but ensure that each case in the dataset has comparable docket information. *See* Engstrom et al., *supra* note 42, at 137 (taking the same tack).

[163] Because our data extends only to December 31, 2014, owing to the right-censoring problem discussed at note 162, our study addresses only cases that were filed from 2005 through 2011. Accordingly, it does not reflect any changes in sealing practices that may have occurred over the past fifteen years.

[164] *See* Engstrom et al., *supra* note 42, at 137–38.

[165] While we suspect that the vast majority of docket entries related to sealing, including motions, oppositions, orders, and sealed documents themselves, include this string, there will inevitably be some error. The lion's share of these errors are likely false positives (e.g., where a party name contained the "SEAL*" string, or an entry is docketed by the clerk with generic information about sealing). Crucially, though, we later filtered out many of these false positives using natural language processing and artificial intelligence methods. More rarely, there may also be false negatives. Such errors would occur if, for example, all of a case's docket entries that discuss sealing are themselves sealed, or if a docket entry discussed a sealing-related order but did not contain "SEAL*" in it. We suspect such errors are uncommon.

(2) Whether the docket entry mentioned a *sealed motion* or some other type of *sealed document* (e.g., an expert's report), or whether it indicated sealing of the entire *case*.[166]

(3) Whether motions to seal were *stipulated* (filed with the express consent of both parties), *contested* (opposed), or what we call *unanswered* (neither expressly stipulated nor actively contested).

(4) For orders, whether the orders were *granted* or *denied*.[167]

(5) If decipherable from the docket entry, *when* in the litigation lifecycle the docket entry was made.[168]

Next, we trained a series of machine learning and LLM-based classifiers on these hand-labeled docket entries.[169] To evaluate performance, we split the hand-coded entries into a training-test split.[170] Models were trained on the training data, while we used the test-set to evaluate model performance. Performance varied by outcome.[171] But for each, the final chosen classifier achieved results on par with, or surpassing, common benchmarks in the empirical legal studies literature.[172]

To complement our large-N analysis, we conducted a careful qualitative review of over 600 sealing orders to examine how (if at all) judges justified their decisions. Among other outcomes, we coded for:[173]

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[166] Some docket entries were clear. For instance, "Sealed Declaration in Support of Motion for Summary Judgement" identifies what is being sealed (a declaration) and the phase of litigation (summary judgment). Others, however, were ambiguous. Some simply read, for instance: "Sealed Document" or "Sealed Event."

[167] We also tracked whether the orders were partially granted. Because such occurrences were quite rare, we omit them from the analysis below.

[168] Additionally, this variable helped us identify entries to exclude from our analysis. In particular, there were a large number of docket entries that appeared to be related to criminal cases because they included, inter alia, presentence reports. We excluded these entries from our analysis.

[169] For most outcomes, a mix of prompting and fine-tuning yielded the highest accuracy. *See* Online Appendix.

[170] Specifically, we implemented an 80/20 training test split. *See id*.

[171] For a full list describing the LLMs and prompts used for each, see *id*.

[172] *See id*.

[173] We coded both full-text and minute orders.

(1) The *stage of litigation* during which the sealing order occurred.

(2) Whether the order mentioned a *legal standard* related to sealing, and if so, which one (e.g., First Amendment, common-law, good cause, local rules, or something else).

(3) Whether the court made any effort to *apply a legal standard* to the facts of the sealing request.

(4) Whether the court *mentioned factual findings* related to its sealing determination.

(5) Whether the court *referenced a protective order* when justifying its order.

(6) Whether the court *adopted the party's proposed order* with little to no modification.

Before moving on, we flag a few limitations. To start, because our dataset captures only three years of docket activity for each case and ends in 2014, we cannot observe certain late-stage filing or any recent shifts in sealing behavior.[174]

Next, some measurement error is also likely present in our data. Our classification models perform well but, like all models, are imperfect. Additional error may have entered during labeling. We minimize these risks and rely on our mixed-methods approach as a check, but some uncertainty unavoidably remains.

Finally, selection effects are an omnipresent concern. As one of us has discussed at length, parties frequently make litigation decisions based upon a host of contingent and strategic factors.[175] Because litigation decisions are so dynamic, it would be inappropriate to see a high grant rate and, based solely on that grant rate, leap to the conclusion that judges are granting motions to seal too liberally or otherwise misapplying governing law. Even if nearly all motions to seal were granted, that would not necessarily prove that judges were rubber-stamping sealing requests. Even a 99% grant rate might just be a sign that litigants recognize that judges rigorously vet filings and adjust accordingly, filing sealing requests only when every *i* is dotted and *t* is crossed. Thus, although we find a 90% grant rate, to us, that is not in

[174] For further discussion of these limits, see *supra* note 162. That said, we have no reason to believe there have been drastic changes in sealing practices in the intervening years.

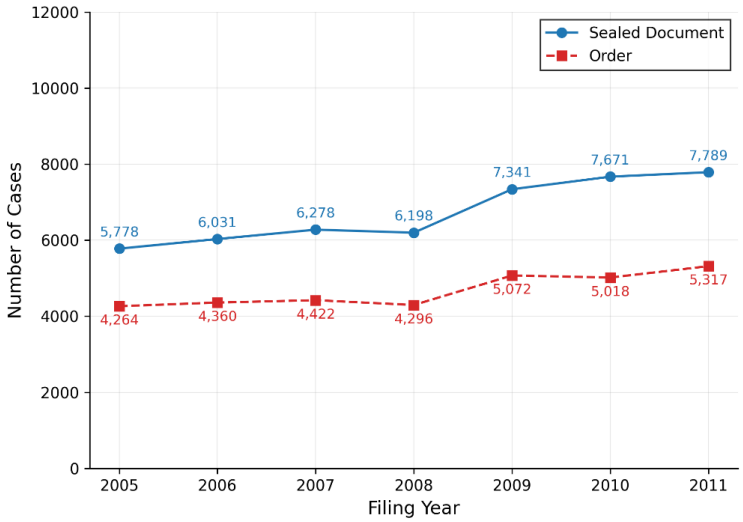
[175] *E.g.*, Gelbach, *supra* note 160, at 389–93.

itself troubling. What *is* troubling is the high grant rate in conjunction with what we find in the text of these orders.[176]

B. Sealing Orders: Time Trends and Prevalence

We start with some descriptive statistics. Figure 1 reports initial estimates, showing the number of cases that had at least some sealing activity.[177] Roughly 5,800 of the cases filed in 2005 contained at least one sealed document; of cases filed in 2011, that number was nearly 7,800, an increase of roughly 35%.

Figure 1: *Number of Civil Cases with at Least One Sealed Document or Sealing Order by Filing Year of Case (2005-2011)*



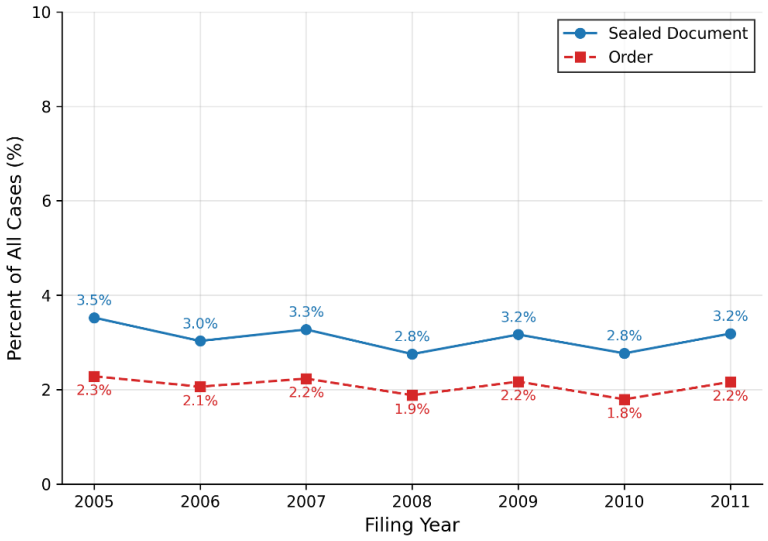
While Figure 1 suggests there is an uptick in sealing, the trend we observe might simply reflect increasing caseloads. To investigate, Figure 2 calculates the same measures as a *percentage* of all civil cases filed in U.S. district courts. We find, indeed, that the growth we observe in Figure 1 is mostly explained by rising caseloads, rather than

[176] For further discussion, see *supra* note 33 and *infra* note 193 and accompanying text.

[177] We consistently find a larger number of cases with at least one sealed document than cases with at least one judicial order concerning sealing because sealing sometimes occurs without a document-specific, docketed ruling. Some of this gap may be due to classification error, but we also observed this trend in our hand-coded case-level analysis. We suspect that documents may be filed under seal pursuant to previously entered protective orders, automatic rule-based restrictions, or summary orders that do not appear as distinct sealing decisions in our coding. It's also possible that sealing sometimes occurs without any order at all.

by a change in the per-case likelihood of sealing activity. Still, the upshot from both Figures is that sealing, while formally "heavily disfavored," in fact, occurred in thousands of cases per year.[178]

Figure 2: *Percentage of Civil Cases with at Least One Sealed Document or Sealing Order by Filing Year of Case (2005-2011)*



Yet, Figures 1 and 2 understate the prevalence of sealing activity, because they capture every lawsuit that's filed—and many lawsuits that enter the federal courts exit very early in the procedural lifecycle.[179] In particular, only about one-third involve the filing of any dispositive motion—and, logically, it is these dispositive motions that are most likely to involve sealing activity.[180] So, the policy-relevant question is: Of cases that *might be expected to* include sealing activity, how many actually do?

To answer that question, Figure 3 zeroes in on cases that reached summary judgment, finding that, of cases that made it to summary judgment, roughly 10% had at least one sealed document.[181]

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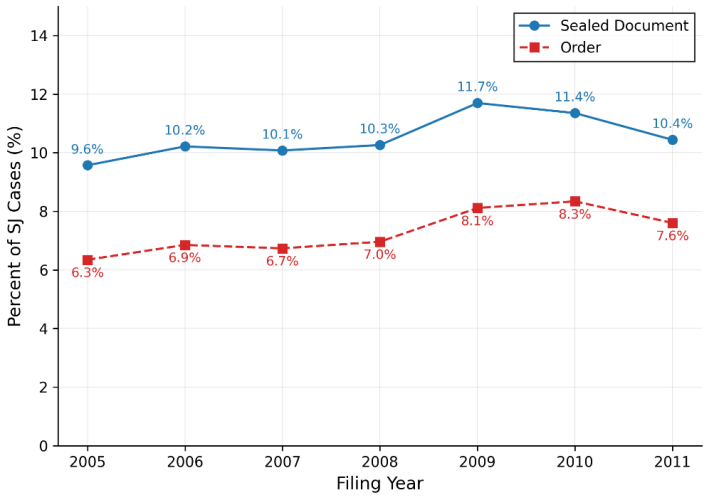
[178] Sealed Appellant v. Sealed Appellee, 2024 WL 980494, at *2 (5th Cir. 2024) (cleaned up).

[179] *See* Charlotte S. Alexander et al., *No Adjudication*, 22 J. EMPIRICAL LEG. STUD. 399 (2025).

[180] *Id.* at 399.

[181] To identify which cases reached summary judgment, we relied on a regular expression implemented in prior work. *See* Jonah B. Gelbach, *Rethinking Summary*

Figure 3: *Percentage of Civil Cases that Reached Summary Judgment with at Least One Sealed Document or Sealing Order by Filing Year of Case (2005-2011)*



A related consideration is *when* documents are sealed. Timing matters because, as Part I explained, many Circuits have established that the value of court access can be assessed on something of a sliding scale. The normative case for transparency is strongest when documents drive merits-based determinations,[182] and, it's weakest if the material merely pertains to subsidiary litigation matters (think: an exhibit to a motion to compel).[183] With that in mind, Figure 4 analyzes when in the litigation lifecycle sealing orders conceal judicial material.[184]

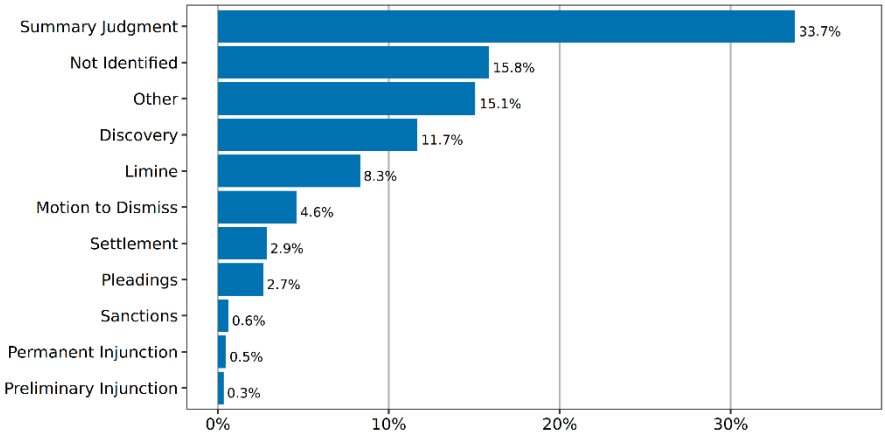
Judgment Empirics: The Life of the Parties, 162 U. PA. L. REV. 1663, 1676–77 (2014).

[182] *See* notes 95–96 and accompanying text.

[183] *See supra* note 97 and accompanying text.

[184] We rely on our hand-coded results for Figure 4 because our stages-of-litigation classifier trained on docket-entry text produced spotty results.

Figure 4: *Percent of Sealing Orders by Stage of Litigation*



Approximately one-third of sealing orders emerged during summary judgment, and roughly another 5% originated in the course of motions to dismiss—precisely those occasions when, per the Second Circuit, "the presumption of access is at its zenith."[185] Only about 12% related to discovery disputes, where the need for public access is less acute.

C. Stipulations, Oppositions, and Decisions

While the above examines the prevalence of sealing, this Section unpacks party and judicial behavior.

Figure 5 examines how non-movants responded to motions to seal. We coded a request "contested" when the non-movant either formally opposed or otherwise visibly registered its opposition to a movant's request.[186] We coded a motion "stipulated" when we found docket evidence that (1) the parties jointly filed the motion to seal or the (2) non-movant expressly supported, or consented to, the filing. Finally, we coded a motion "unanswered" when we could find no response to the movant's filing.[187]

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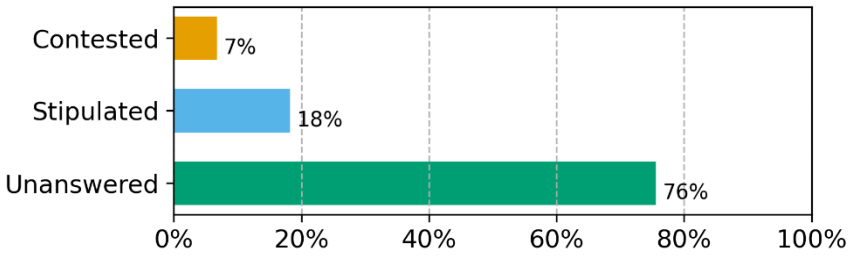
[185] Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 142 (2d Cir. 2016) (citation omitted).

[186] Our measure may overestimate contested sealing and undercount unanswered or stipulated orders. It seems plausible that, sometimes, a party's "response," which we count as "contesting," is, in reality, approval or acquiescence. Even if that's the case, one of our main findings is that sealing orders are rarely contested. Accordingly, this bias, if it exists, lends further credence to that result.

[187] To generate Figure 5, we considered only (i) sealing orders identified by our LLM-based classifier for which (ii) we were able to link the order to a docket entry that another of our LLM-based classifiers identified as a motion to seal. Thus, a *sua*

Figure 5: *Percent of Sealing Orders by Request Type*



We find Figure 5 remarkable: Only about 1 in 14 sealing requests were contested. Another 18% were stipulated. And three-fourths of the time, motions to seal were simply unanswered.[188] Met with what we call "shadow consent," they never generated a discernible response from the other side.[189]

Next up, judges. District court judges "are duty-bound to protect public access to judicial proceedings and records."[190] To begin our assessment of whether judges are fulfilling or abrogating this responsibility, Figure 6 plots our LLM-based estimate of the average

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sponte order to seal would not be included in Figure 5, nor would an order for which were unable to identify a sealing motion that actually did occur. We discuss more details of how we generated Figure 5 in our Online Appendix.

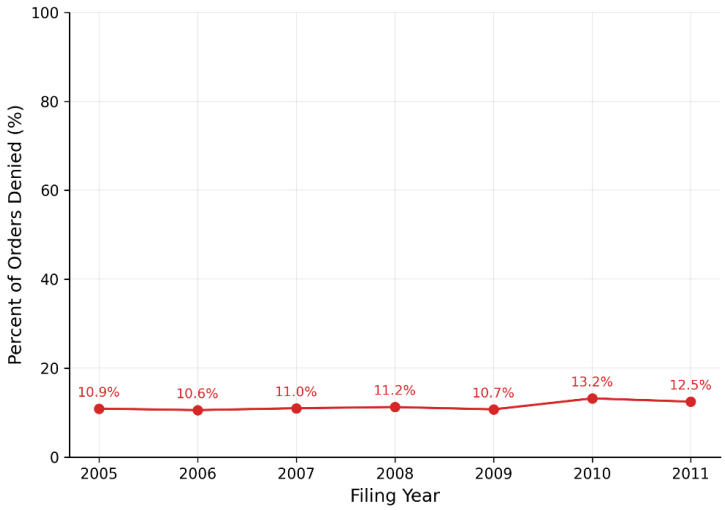
[188] The percentages in Figure 5 add to 101%; this is the result of a small number of orders (amounting to about 0.7% of those reflected in Figure 5) for which we found evidence of *both* a contested motion *and* a stipulated one. That could happen due to classifier error, because multiple other parties responded differently to a movant's request to seal, or because a case has multiple motions to seal. The last of these possibilities would happen naturally if a party's first motion to seal were contested and denied, after which the party worked with contesting parties to narrow the terms of the request, leading to a second, stipulated, motion to seal.

[189] Because we found this result to be surprising, we performed additional data work as a robustness check. This exercise boosted our confidence that the vast majority of sealing requests are "unanswered." In particular, we sampled 91 full-dockets in which our classifier indicated there was an unanswered sealing request. We then reviewed all the entries with "SEAL+" in that case. In total, we tabulated 114 sealing "events" in these cases, where a new set of documents was being sealed. Only 16% had any evidence that the other party consented to a sealing request, and *none* showed any evidence of opposition.

[190] *See* Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 417 (5th Cir. 2021) (explaining that "courts are duty-bound to protect public access to judicial proceedings and records").

denial rate for sealing requests by year of case filing. We find that the denial rate was roughly 11%.[191]

Figure 6: *Percentage of Sealing Motions Denied by Case Filing Year (2005 – 2011)*

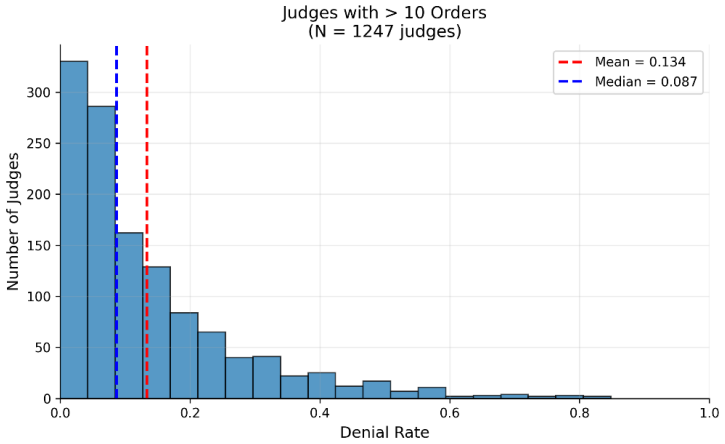


Finally, we examine denial rates at the judge level to see whether Figure 6's overall denial rate masks important inter-judge variation. Figure 7 zeroes in on particular judges—and, to reduce noise, limits this analysis to judges with at least 10 sealing orders. We find that, of these "experienced" federal judges, approximately 12% never denied a *single* sealing request.[192]

[191] As we discuss in Section D, we suspect that Figure 6 overestimates the denial rate—i.e., we suspect that the motion to seal grant rate actually exceeds 90%. *See* Figure 8 (showing a grant rate, within our hand-coded data, of 96%) and *infra* note 199 (explaining this disparity).

[192] Of course, some judges would be expected to have a denial rate of 0 simply because they didn't resolve very many motions. Our Online Appendix use a Monte Carlo-based simulation test and rejects the null hypothesis that this explanation can account for the observed number of judges with a denial rate of 0.

Figure 7: *Distribution of Judge-Level Sealing Order Denial Rate*



To summarize, judges rarely, if ever, denied sealing requests, and the denial rate is highly skewed; many experienced federal judges, apparently, never encountered a motion to seal they wouldn't sign.[193]

D. Assessments of Our Hand-Coded Dataset

To probe the low denial rates seen in Figures 6 and 7, we reviewed more than 600 orders adjudicating motions to seal. Among other things, our aim was to illuminate whether judges were actually applying the law's requirements.[194]

[193] As we caution above, a high grant rate does not necessarily mean that trial courts are abdicating their responsibilities; it is possible that parties, anticipating searching judicial scrutiny, only file requests when they are confident that they can meet the demanding legal standard. For further discussion of this possibility, see *supra* notes 33, 175, and 176 and accompanying text. This is the possibility we consider—and ultimately reject—in Section D.

[194] As detailed below, we find that judges regularly granted motions to seal without providing any meaningful legal analysis. As an additional robustness check, we investigated 40 *motions* linked to orders that did not (1) cite a legal standard, (2) make even a cursory effort to apply law to the facts at hand, or (3) analyze the case's particular facts. The motions provided a smidge more legal content than the bare orders. For example, 58% of these motions cited a legal standard. Almost every time, though, these citations were themselves cursory citations to local rules. In general, the motions, just like the orders, lacked the basic legal and factual justifications legally required.

To create the sample, we randomly selected approximately 600 orders from our dataset.[195] This sample is large enough to render empirically meaningful conclusions.

Digging in, Figure 8 shows some baseline facts about grants and denials in our hand-coded data. We estimate that the overwhelming majority (96%) of sealing orders grant a party's request to seal in full.[196] Another 1.6% grant the request in part. Thus, our estimate based on our hand-coded review is that only 2.4% of orders resolving a sealing request denied the request in full. We recognize that this denial rate is considerably lower than the rate reported in Figure 6. Some of the difference may be due simply to sampling variation (i.e., just by chance, the sample of orders we drew for hand-coding had an unusually low denial rate). However, we believe the difference is too great to be plausibly explained simply on that basis. Instead, we think there is good reason to believe that the already-low denial rate estimate from our LLM-based classification approach systematically overestimates the actual degree of denial.[197]

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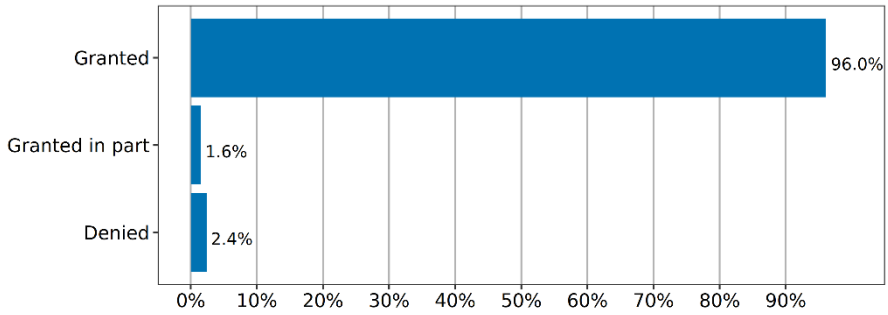
[195] As we started this analysis, we believed that whether motions were contested, stipulated, or unanswered might be associated with other variables of interest. Intending to evaluate this possibility, we chose the orders for hand-coding by randomly selecting approximately 200 orders from three sets of orders: those we had initially categorized as contested, stipulated, and unanswered. After we had finished hand-coding these orders, we determined that our initial approach to categorizing orders into the three groups was unreliable. We have addressed the issues that caused this unreliability, and we are confident that Figure 8 presents a reliable picture of the facts. However, that occurred only after we had already sampled and hand-coded orders; accordingly, we do not believe it would be appropriate to report distinct results for these three categories using our hand-coded data. Still, as we discuss in our Online Appendix, we are able to obtain population-representative estimates by appropriately weighting the hand-coded orders. All the results we report using the hand-coded data therefore use such weighting.

[196] While we initially coded for whether the order granted a motion on a "temporary basis," such orders were rare. Accordingly, we include these orders in the "grant' category.

[197] Our hypothesis here has to do with "false positives" from our LLM classifier of denied orders. We ran our 'Order_Denied' classifier only for docket entries we first identified as orders that resolve sealing requests. As our Online Appendix reports, this initial classifier has estimated precision of 0.85. This means that for every 100 docket entries we *identified* as orders, we estimate that 85 actually are such orders, and 15 are not, i.e., these false positive docket entries are actually something other than orders that resolve sealing requests.

Assume that these false positives are orders responding to some other type of motion (e.g., orders relating to a motion for more time to respond to a sealed motion for summary judgment). Such false positive orders will have text that

Figure 8: *Outcomes of Sealing Motions, Hand-Coded Sample*



We next dug into the orders' actual content in an effort to assess whether they reflected searching analysis.

We first explored whether the orders included, or were accompanied by, an explanation. This is key because, as we discussed in Part I, appellate courts agree that district courts must show their work. In the words of the Sixth Circuit: "A district court must set forth specific reasons explaining its decision to keep judicial records

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indicates denial or granting of motions. Then, false positive docket entries identified by our first-round classifier as sealing-related orders will tend to be classified by our second-round classifier as having denials when there is denial-related text in those entries (which, again, actually involve orders resolving something other than a sealing request). We hypothesize that, compared to motions to seal, other types of motions are more frequently denied. Accordingly, when our first-round 'Order' classifier yields a false positive classification, we expect that our second-round 'Order_Denied' classifier will be significantly more likely to report that the order involves denial than occurs for actual sealing orders.

As an example, suppose that among false positives—docket entries that are not sealing orders but are classified as such—the 'Order_Denied' classifier indicates denial occurs half the time. Then for every 200 docket entries classified as orders resolving sealing requests, 30 (15% of 200) will be orders resolving other types of motions, of which 15 will be classified as denials by our second-round 'Order_Denied' classifier. Now suppose that our second-round classifier has a denial rate of 4.1% for the 170 (85% of 200) "true positive" docket entries that actually do resolve sealing requests. Then 7 of these 170 true positive orders will be denials. That yields a total of 22 orders coded as denials of sealing requests, out of a total of 200 orders coded as orders that resolve sealing requests, which yields a denial rate of 11%—basically what Figure 6 shows. Assume for simplicity that the second-round classifier itself had the same number of false positives and false negatives in classifying the 170 actual sealing orders. In that case, the true denial among the 170 actual sealing orders is 4.1%.

This example shows how false positives in the first-round Order classifier could lead to a substantial overstatement of the denial rate based on our big-data approach.

confidential."[198] Trial courts are obligated to "analyze in detail . . . the propriety of secrecy" and, in so doing, "provid[e] reasons and legal citations" that support the determination.[199] "[A] court's failure to set forth . . . 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—is," the Sixth Circuit has warned, "itself grounds to vacate an order to seal."[200] Or, as the Third Circuit has explained, sealing is only appropriate if the district court makes "specific findings on the record concerning the effects of disclosure . . . broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient."[201]

Against these benchmarks, we initially assessed whether each order cited *any* legal standard—and, in so doing, we erred on the side of inclusion. For instance, even when the invocation of a legal standard was cursory, as in Figure 9, we recorded it in the "yes" column.

Figure 9: *An Example of an Order Granting a Motion to Seal that Cited a Legal Standard*[202]

ORDER GRANTING LEAVE TO FILE DOCUMENT UNDER SEAL

THIS MATTER came before the Court upon parties' Joint Motion for Leave to File Document Under Seal.

THE COURT, having reviewed the pleadings, heard the arguments of the parties, and being fully advised in the premises, finds ~~sufficient cause~~ compelling reasons to grant the parties' request.

IT IS THEREFORE ORDERED that the parties' Settlement Agreement, Waiver and General Release may be submitted to the Court under seal for the Court's approval.

[198] Signature Mgmt. Team, LLC v. Doe, 876 F.3d 831, 836 (6th Cir. 2017). For additional authority, see *supra* notes 64–67 and accompanying text.

[199] Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co., 834 F.3d 589, 594 (6th Cir. 2016) (quotation marks omitted); *see also, e.g.,* Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 419 (5th Cir. 2021) ("Sealings must be explained at a level of detail that will allow for this Court's review. And a court abuses its discretion if it . . . fails to articulate any reasons that would support sealing.") (cleaned up).

[200] Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299, 306 (6th Cir. 2016).

[201] *In re* Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 924 F.3d 662, 673–74 (3d Cir. 2019) (citations omitted).

[202] Order Granting Leave to File Document Under Seal, Jones v. Qwest Commc'ns Int'l, Inc., No. 1:07-cv-02284-RPM-BNB (D. Colo. Apr. 16, 2008).

Even given this lenient standard, as Figure 10 demonstrates, most orders fell short. Based on the orders we hand-coded, we estimate that just under half of sealing orders *cite any legal standard*. Most orders, in other words, were even more cursory than the snippet above. We estimate that even fewer orders (10%) make any effort to apply the law to the facts at hand, and fewer still (3%) contain any particularized finding of fact.

We interpret these results as consistent with the view that judges frequently rubber-stamp parties' requests for sealing. In our view, the results also demonstrate widespread district court disobedience to higher law.

Figure 10: *Reasoning Provided in Sealing Orders, Hand-Coded Sample*

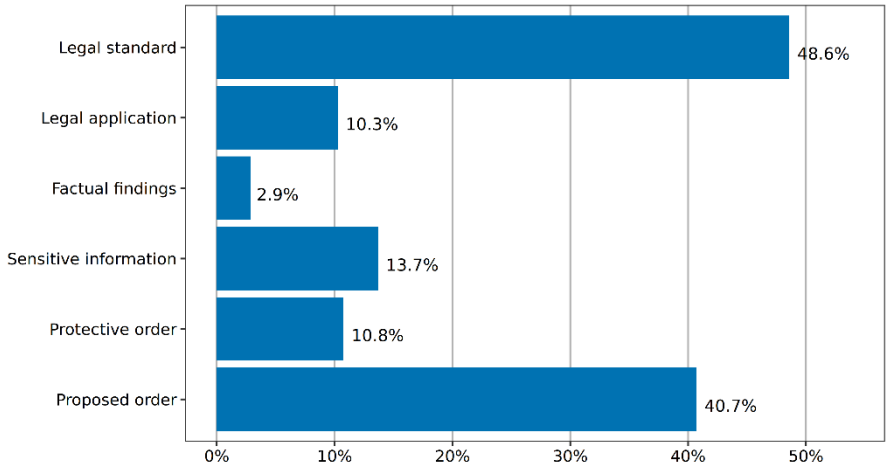
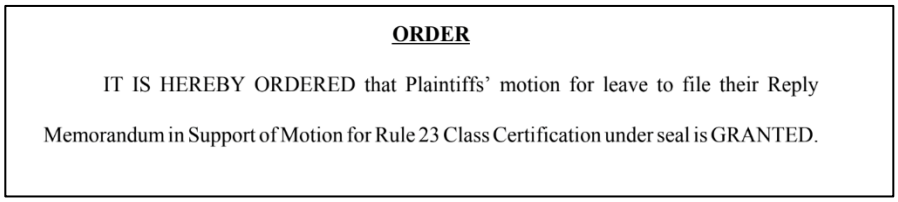


Figure 11 shows how sparse many of the orders we coded were.[203]

[203] In some cases, no order document was available for us to review. Instead, the motions were decided with a "minute" or "text" order: a single sentence entry on the docket informing the parties that the motion was granted. Not surprisingly, these orders also often lacked a rationale for the court's decision.

Figure 11: *Example of Order Granting Motion Without Citing a Legal Standard.*[204]

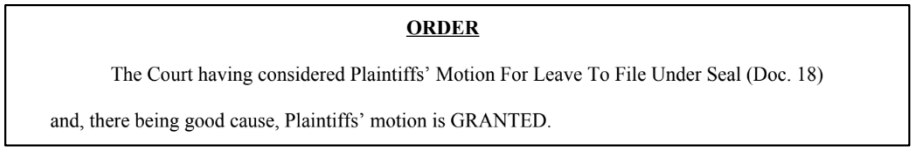


ORDER

IT IS HEREBY ORDERED that Plaintiffs' motion for leave to file their Reply Memorandum in Support of Motion for Rule 23 Class Certification under seal is GRANTED.

Even among orders that supplied a legal standard, many nevertheless failed to furnish meaningful analysis with respect to that standard. The order shown in Figure 12 is representative.

Figure 12: *Example of Order Granting Motion with Legal Standard and No Application.*[205]



ORDER

The Court having considered Plaintiffs' Motion For Leave To File Under Seal (Doc. 18) and, there being good cause, Plaintiffs' motion is GRANTED.

We also found that judges frequently signed off on proposed orders. Figure 13 illustrates. We estimate that, like Figure 13, approximately 40% of orders adopt a party's proposed order with no or minimal modification.[206]

[204] This screenshot contains the entire text of the order. Order Granting Motion to Seal, Harlow et al. v. Sprint Nextel Corp., No. 8-cv-02222-KHV-TJJ (D. Kan. Oct. 8, 2008).

[205] Order Granting Motion to Seal, Sharp v. Wellmark Inc., No. 10-cv-02430-SAC (D. Kan. Oct. 10, 2012).

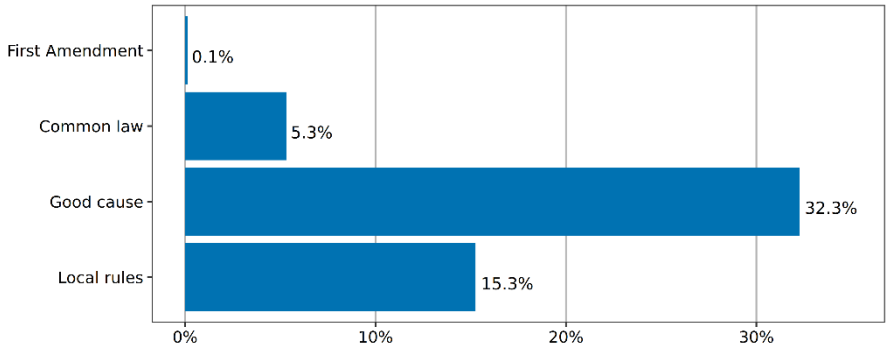
[206] To be sure, there is not necessarily anything wrong with a court's verbatim adoption of a proposed order. These adoptions can save judicial time and effort—and both are scarce and valuable. But when a judge signs off on a party's proposed order, that order *becomes* an opinion—and, to satisfy appellate authority, must contain some explanation.

Figure 13. *Example Snippet from Unmodified Order.*[207]

~~[PROPOSED]~~ ORDER GRANTING MEDIMMUNE, LLC'S MOTION TO SEAL PORTIONS OF ITS SUMMARY JUDGMENT REPLY BRIEFS

Next, we assessed *which* legal standard courts cited in the rare instances that they cited one. As Figure 14 demonstrates, of the roughly half of orders that furnished a legal standard, the standard most frequently cited was "good cause."

Figure 14: *Legal Standard Cited in Sealing Order, Hand-Coded Sample.*[208]



The repeated invocation of "good cause" is surprising because, with limited exceptions, orders to seal are not supposed to be judged pursuant to the good cause standard. As the Fifth Circuit has put it: "That a document qualifies for a protective order under Rule 26(c) for discovery says nothing about whether it should be sealed once it is

[207] Order Granting Motion to Seal, MedImmune, LLC v. PDL Biopharma, Inc., No. 8-cv-05590-JF (N.D. Cal. Dec. 8, 2010). The rest of the order, as submitted by the parties, was unmodified by the judge other than affixing their signature.

[208] By "similar," we mean other qualitative, human-coded reviews of case documents in the context of litigation transparency. *See*, *e.g.*, Endo, *supra* note 39, at 1253 (analyzing "how federal trial courts dealt with 100 proposed stipulated protective orders"); *Hidden Injustice*, *supra* note 144 (offering an intensive, qualitative review of the prevalence and nature of sealing in the 115 largest federal product-liability MDLs).

placed in the judicial record."[209] Furthermore, as recently as 2025, the Associate Reporter on the Advisory Committee on Civil Rules reassured members that "district . . . courts understand well that the standard for filing under seal is more demanding than what is required to issue a protective order."[210] Yet repeatedly, we see the opposite.

Given these anomalies, we dug deeper. In particular, we recognized that, as noted in Part I.B., the Eleventh Circuit has held that good cause suffices—and, in some other Circuits, the good cause standard is good enough when it comes to the sealing of discovery material.[211] Accordingly, we re-ran our analysis excluding (1) cases from the Eleventh Circuit, and (2) filings that involve only fights concerning discovery. Even with those exclusions, however, our findings barely budged. Even when we zeroed in on summary judgment, and even when we zeroed in on Circuits where the law clearly establishes that the protective order's good cause standard does *not* govern, we *still* found that 32% of orders justified sealing based on the good cause standard.

Finally, recall that, under governing law, sealing is supposed to be granular. When sealing, courts are supposed to undertake a "line-by-line" evaluation, to scrupulously "balance[] . . . the public's common law right of access" against the moving party's or parties' countervailing interest in secrecy.[212] Judges are not supposed to seal entire documents if the movant's interest can be protected with a narrower incursion on the public's common-law right of access.[213]

Yet, once again, the law on the books diverges from the law in action. Rather than consistently using the "least restrictive means," more than half of the orders in our sample sealed entire filings, such as the entire brief supporting summary judgment. Fewer than 1% of the orders

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[209] June Med. Servs., LLC v. Phillips, 22 F.4th 512, 521 (5th Cir. 2022); *see also supra* note 50 (collecting additional authority explaining that the Rule 26(c) standard and the standard that governs motions to seal are "vastly" different).

[210] Oct. 10, 2024 Agenda Book, *supra* note 50, at 87. For the role of Richard Marcus, see https://www.uclawsf.edu/people/richard-marcus/.

[211] *See supra* notes 93, 96–97 and accompanying text (concerning Eleventh Circuit authority and discovery material, respectively).

[212] *June Med. Servs.,* 22 F.4th at 521 (quotation marks omitted).

[213] *See, e.g.*, United States v. Garner, 39 F.4th 1023, 1024 (8th Cir. 2022) ("A proper motion to seal should be narrowly drawn . . . ."). For further discussion, see *supra* notes 59–61 and accompanying text.

were denied on the basis that less restrictive alternatives (such as targeted redactions) were available.

To recap, appellate courts have long required trial courts to "make detailed, clear, and specific findings when sealing" judicial records.[214] Yet, when actually *ruling* on motions to seal, only half of district court orders so much as cite a legal standard. And when they do cite a legal standard, orders most frequently cite the wrong one. Sealing practice on the ground, it seems, puts a novel spin on a common refrain in constitutional law: Sealing is strict in theory but generous in fact.

IV. INTERROGATING THE ABOVE DYNAMICS

The foregoing analysis shows that district courts frequently rubber stamp motions to seal even though the standards that govern the sealing of judicial records are quite robust. This Part asks why. What explains this slippage? This inquiry is crucial, as only by understanding what's causing these problems, can we even begin to consider how they might be sensibly addressed.

Ultimately, we attribute the slippage to three forces. First, *translational challenges*: Though appellate doctrine is clear, some local rules are murky, while others are downright inaccurate. This, predictably, sows confusion. Second, *lawyers*: Through what we call "shadow consent" and strategic silence, counsel rarely contest sealing requests, producing a form of quiet complicity. Third, *judges:* Overburdened, deprived of adversarial ventilation, and sometimes (owing to problematic local rules), subject to defective guidance, judges frequently apply the wrong legal standard or apply the right one too laxly. It is these three interlocking challenges that seem to explain much of the modern sealing landscape.

A. Translational Problems: Local Rules Run Amok

Most federal district courts have local rules that address sealing.[215] But as others have shown, these rules—which guide on-the-ground practice—often fail to capture governing law.[216] Indeed, some local rules *contradict* it.[217]

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[214] United States v. Ahsani, 76 F.4th 441, 452 (5th Cir. 2023) (citation omitted). For further authority, see *supra* notes 53–59 and accompanying text.

[215] Ardia, *supra* note 26, at 250 (finding relevant local rules in 82 federal districts).

[216] *See id.* at 300; Abraham Letter, *supra* note 100, at 1–6.

[217] For instance: Every Circuit save the Eleventh treats the standard for sealing as far more demanding than the "good cause" required for protective orders. *See supra*

Consider Chicago. The law, as set down by the Seventh Circuit, specifies that judicial records "can be sealed . . . [w]hen there is a compelling interest in secrecy, as in the case of trade secrets, the identity of informers, and the privacy of children."[218] Further, any sealing order must be circumscribed.[219] Indeed, the "presumption of access" can be rebutted, says the Seventh, only if the movant demonstrates "that suppression is necessary to preserve higher values and when the suppression is narrowly tailored" to promote those higher values.[220] The Seventh Circuit additionally instructs that, before "limit[ing] access," a trial court must be "firmly convinced that disclosure is inappropriate,"[221] and "[a]ny doubts must be resolved in favor of disclosure."[222] Yet inexplicably, these commands are synthesized into a local rule—Northern District of Illinois Local Rule 26.2—that specifies that judicial records may be filed under seal "for good cause shown."[223]

Or take Nebraska. There, Local Rule 7.5(a) provides: "A motion to seal is not required if the document or object is already subject to a protective order."[224] Yet, in Nebraska, per the Eighth Circuit, a motion to seal, unlike a protective order, must be supported by the "most compelling reasons."[225] The District Court for Nebraska has underscored the distinction, admonishing that "a protective order is

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notes 50 and 93 and accompanying text. Yet the local rules in several districts inexplicably cite "good cause." Ardia, *supra* note 26, at 262, 301–02 (highlighting this mismatch).

[218] Jessup v. Luther, 277 F.3d 926, 928 (7th Cir. 2002). Importantly, in the Seventh Circuit, as in some but not all other Circuits (see *supra* note 102), the First Amendment protects public access to judicial records. *See* Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994).

[219] *See* Mitze v. Saul, 968 F.3d 689, 692 (7th Cir. 2020).

[220] *In re* Associated Press, 162 F.3d 503, 506 (7th Cir. 1998) (quotation marks omitted) (discussing the First Amendment right of access).

[221] *Id*. (quotation marks omitted).

[222] *Grove Fresh Distributors*, 24 F.3d at 897.

[223] ILL. L. R. 26.2 (last visited Feb. 9, 2026). Remarkably, although the Seventh Circuit has ruled that the First Amendment protects access to judicial records, the Local Rule says nothing about the Constitution's requirements.

[224] D. NEB. R. 7.5(a)(i) (last visited Feb. 9, 2026).

[225] *In re* Neal, 461 F.3d 1048, 1053 (8th Cir. 2006) (quotation marks omitted).

entirely different than an order to seal . . . and implicates entirely different interests."[226]

We won't belabor the point, although there are numerous other examples.[227] Again and again, the law on the books is strong, but appellate commands have become muted and muffled in the course of transmittal to trial courts.

B. Lawyers: Shadow Consent and Strategic Silence

When evaluating why we see such a mismatch between the law on the books and in action, we next pin blame on litigants and lawyers. In particular, we believe that much of what's wrong when it comes to sealing in U.S. courts is traceable to the fact that roughly 90% of motions to seal are uncontested, and the lion's share of those are the product of what we dub "shadow consent"—not formal acquiescence but tacit agreement.

What fuels this shadow consent? We believe it is an outgrowth of three features of modern litigation, namely: (1) the proliferation of protective orders; (2) incentives created by the contingency fee; and (3) the widespread belief that the lawyer is obligated to serve her client's parochial interest. We explain each in turn.

First, protective orders are common, and the proliferation of protective orders means that, by the time sealing is contested, the parties have long treated certain materials as confidential.[228] Psychologically and strategically, the entry of a protective order sets expectations: Information marked confidential is not to be disclosed.[229] Once those expectations harden, maintaining confidentiality becomes the path of

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[226] Florek v. Creighton Univ., 2025 WL 1149461, at *3 (D. Neb. 2025).

[227] *Compare, e.g.,* Shane Group Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299 (6th Cir. 2016) (articulating a strong standard), *with* W.D. MICH. L. CIV. R. 10.6; S.D. OHIO L. CIV. R. 5.2.1; E.D. TENN. L. R. 26.2 (articulating weak standards).

[228] *See, e.g.*, Dowdell & Lesser, *supra* note 19 (reporting that defendants routinely condition discovery on broad protective orders, resulting in "nearly everything" being stamped confidential—that these orders shape the parties' expectations concerning secrecy). For protective order prevalence, see Engstrom et al., *supra* note 42, at 141–45.

[229] As Judge Costa has put it: "When courts approve . . . protective orders, the cycle of concealment from the public is set in motion." Costa, *supra* note 105. *See* Conlin et al., *supra* note 30 (describing how expansive protective-order regimes "bake" secrecy into litigation); Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181, 2187–90 (2014) (arguing that expansive protective orders influence later sealing decisions).

least resistance. Dislodging it requires a plaintiffs' lawyer (typically, the party less likely affirmatively to prefer secrecy) to turn against a framework she previously accepted—a reversal that is procedurally awkward and strategically costly.

The economics of litigation can compound these incentives. The vast majority of tort and consumer cases are handled on a contingency fee basis.[230] The contingency fee gives the lawyer an incentive to make the most money as possible with as little effort as possible, such that, every hour that the contingency fee lawyer works (to prepare an opposition to a motion to seal, say) is essentially an economic loss.[231] This means that, unless the public disclosure of the information at issue is apt to (1) benefit the current client or (2) benefit a future client, an economically rational plaintiffs' lawyer may choose not to oppose the defendant's sealing request, even if the public would benefit from disclosure. Offering a particularly blunt spin on this idea, plaintiffs' lawyer Bert Bader has explained: "There's only one piece of paper that we're interested in and that's the piece of paper that's got a figure plus a bunch of zeroes behind it."[232] Disclosure for disclosure's sake is hard to financially justify.

Finally, ethical mandates reinforce the incentives above. Many take it for granted that a lawyer's duty is first and foremost to her individual client, even when the client's interest might deviate from the public interest.[233] And clients, might quite reasonably, want to move things

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[230] *See* Nora Freeman Engstrom & Brianne Holland-Stergar, *Competition and Contingency Fees*, 114 GEO. L.J. __ (forthcoming 2026) (discussing contingency fee prevalence).

[231] *See* Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1525 (2009) (describing these financial incentives); Benham, *supra* note 229, at 2190–91 (observing that the contingency fee disincentivizes attorneys from challenging confidentiality provisions because such efforts "do not advance the merits or increase potential recovery").

[232] Steve McGonigle, *Secret Lawsuits Shelter Wealthy, Influential*, DALLAS MORNING NEWS, Nov. 22, 1987, at Al. It's worth noting that many plaintiffs' lawyers would strenuously disagree. *See, e.g.,* Nora Freeman Engstrom & Lisa Qian, *How Tort Law Drives Change* (working paper 2026) (highlighting that many plaintiffs' lawyers work hard to promote transparency).

[233] A rich literature evaluates how lawyers are supposed to balance their obligations to the client versus the public, when these interests conflict. For the view that the answer is obvious, see Miller, *supra* note 113, at 490 (suggesting that, when a conflict arises, "[t]he rules of professional responsibility on this issue are clear—the attorney's duty is to pursue the client's best interests zealously"); Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & POL'Y 53, 56 (2000) ("[T]he plaintiff's attorney's duty of loyalty requires him or her to put the client's interests

along.[234] With bills mounting and time ticking, injured clients might not want to get bogged down opposing an adversary's motion to seal, particularly when doing so risks antagonizing the other side.[235] Reflecting this perspective, Steven Nemeroff, who settled a Zomax suit that concealed information about the drug's risks, explained: "The problem is that they have a gun to your head. The client is concerned about being compensated in full. The lawyer must abide by the concerns and wishes of his client . . . not the fact that [information will remain secret or] other victims may be injured."[236]

C. Judges: Standards Misapplied

Trial judges, too, contribute to the mismatches we uncover in Part III. After all, they are the officials ultimately charged with "[p]roviding public access to judicial records."[237] What explains their widespread abdication of this responsibility? We chalk it up to a mix of four factors. We believe that beleaguered and overburdened judges are abdicating their responsibilities because of some mix of (1) docket pressure, (2) role-based commitments, and the paucity of both (3) adversarial testing and (4) meaningful appellate review. We consider each in turn.

First, animated by the maxim that justice delayed is justice denied, trial judges face relentless pressure to keep cases moving forward.[238]

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ahead of all others."); Philip H. Corboy, *Court Secrecy: The Closed Circle and the Public Interest*, 3 MD. J. CONTEMP. LEGAL ISSUES 1, 18 (1991) ("Plaintiff's counsel is bound to serve the best interests of the client, not necessarily the public at large."). For a more nuanced perspective, see Engstrom & Qian, *supra* note 232.

[234] Oct. 10, 2024 Agenda Book, *supra* note 50, at 89 (summarizing the views of a lawyer who explained to the Committee that "while he often views his adversaries as 'overdesignating' documents for sealing, [he] often [does not] fight over it because of other more pressing matters").

[235] Dowdell & Lesser, *supra* note 19 (reporting, based on interviews with "[d]ozens of plaintiff lawyers" that "they feel compelled to go along with entrenched court secrecy" because "[m]any plaintiffs have suffered catastrophic injuries . . . and literally can't afford to wait for disputes over what can and can't be made public as bills mount").

[236] Benjamin Weiser & Elsa Walsh, *Drug Firm's Strategy: Avoid Trial, Ask Secrecy*, WASH. POST (Oct. 25, 1988), at A1, A12 (alteration in original).

[237] *In re* Leopold to Unseal Certain Elec. Surveillance Applications & Ords., 964 F.3d 1121, 1134 (D.C. Cir. 2020).

[238] *See* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 511, 517 (1994) (explaining that judges are "under great pressure to clear

Under these conditions, even judges who value transparency may slip into what we dub an "efficiency mindset." With limited resources, small staffs, and incessant demands, judges may naturally triage their attention toward matters that present an actual, live controversy, leaving low-salience sealing decisions to pile up.[239] In this environment, secrecy, Gus Barber's father explains, "is the path of least resistance."[240]

Second, some judges' acquiescence may reflect not practical capitulation but principled commitment—meaning that, for some, an embrace of secrecy may stem from a particular conception of the judicial role. On this view, notwithstanding the pesky pronouncements of appellate courts, some trial judges might believe (consistent with the work of Arthur Miller, Richard Marcus, and others) that their primary task is simply to adjudicate disputes between parties.[241] Believing that they work in the *dispute-resolution business*, full stop—and also believing that secrecy is good for that business—

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their calendars" and that many believe that secrecy provisions move cases toward closure).

[239] It is well-documented that high caseloads force federal judges to make tradeoffs between efficiency and accuracy. *See, e.g.*, ALICIA BANNON, BRENNAN CENTER FOR JUSTICE, THE IMPACT OF JUDICIAL VACANCIES ON FEDERAL TRIAL COURTS 8 (2014); Brian Sheppard, *Judging Under Pressure: A Behavioral Examination of the Relationship Between Legal Decisionmaking and Time*, 39 FLA. ST. U. L. REV. 931 (2012) (finding, in a judicial simulation with law students, that fewer resources increased the likelihood of straightforward applications of the law while reducing the conviction that they had reached righteous outcomes); Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1115 (2011) (finding that, when appellate caseloads increase, the affected circuit courts reverse district court rulings less often, applying more deference and less scrutiny to lower court decisions). These same pressures appear to contribute to the rubberstamping of protective orders. *See* Engstrom et al., *supra* note 42, at 123–24.

[240] Barber Interview, *supra* note 1.

[241] According to Miller: "[T]he function of the judicial system is to resolve private disputes, not to generate information for the public." Miller, *supra* note 113, at 441. Likewise, Marcus instructs: "The primary purpose for which courts were created . . . is to decide cases according to the substantive law. The collateral effects of litigation," he warns, "should not be allowed to supplant this primary purpose." Marcus, *supra* note 113, at 470. Miller and Marcus are not alone in espousing this view. *E.g.,* Suzanne B. Conlon, *Confidentiality and the Courts: Preserving Judicial Discretion*, 76 JUDICATURE 304, 306 (1993) ("At the federal level, courts exist for one purpose only—to resolve cases and controversies.").

some judges might view sealing as a valuable tool, to be openly, unselfconsciously embraced.[242]

Third, judges may misapply sealing standards because of an adversarial breakdown. In the United States, after all, judges are accustomed to adversarial ventilation. As Roscoe Pound put it in a now-famous 1906 address: " [I]n America, we take it as a matter of course that a judge should be a mere umpire . . . and that the parties should fight out their own game in their own way without judicial interference."[243] Schooled in this adversarial tradition, judges may flounder when the parties—seeking secrecy—are *unified* in their request.

Indeed, the situation resembles another setting in which courts must protect the interests of unidentified others: review of class settlements under Rule 23(e). In class actions, because settlements bind absent class members, Rule 23(e) requires courts to *independently* evaluate their terms to determine whether they are "fair, reasonable, and adequate."[244]

Yet, many scholars have recognized that actually supplying this Rule 23(e) oversight is challenging because, once a settlement has been inked, the parties, who negotiated, drafted, and now support the settlement, are unified in extolling its virtues.[245] Given the parties' unity, and given the fact that judges are notoriously "ill-equipped to investigate and discover evidence . . . on their own initiative,"[246] settlement review (much like sealing review) tends to be thin and uninformed.[247] The lesson is clear: Part of the reason why judges

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[242] *Accord* Burch & Lahav, *supra* note 44, at 379 (asserting that "disclosure rules fail" because secrecy greases the wheels of dispute resolution, which is what all parties, including judges, prioritize).

[243] Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. AM. BAR ASS'N 395, 405 (1906).

[244] FED. R. CIV. P. 23(e).

[245] *See* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 86–87 (2007) (explaining that, "[b]y the time of the fairness hearing, opposing counsel have joined forces to advocate approval of the proposed settlement").

[246] *Id*.

[247] Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 46–47 (1991); *see also* William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1445 (2006) (explaining that, in the "fairness-hearing process" judges "suffer from

flounder when assessing motions to seal is that, without adversarial ventilation, the provision of rigorous scrutiny is structurally difficult, if not impossible.

Fourth and finally, some of the mismatch may reflect the paucity of appellate review.[248] In theory, vertical stare decisis and appellate oversight should discipline trial-court practice. Yet, when sealing is consensual—and when intervenors only very rarely appear (recall, Elizabeth Rowe found that they appear in less than 0.5% of cases with a motion to seal)—acquiescence stunts not only adversarial testing but also meaningful appellate scrutiny.[249]

V. RETHINKING THE SEALING REGIME

This Article has so far offered the most comprehensive empirical accounting to date of sealing practices in federal courts. Using a decade of federal docket data and combining advanced machine learning with old-fashioned hand-coding, we have shown that U.S. district courts overwhelmingly grant sealing requests, grant them without citing the correct legal standard (or, often, any legal standard at all), and fail to make factual findings to support their determinations. These findings should be a lightning bolt for those judges, rulemakers, practitioners, and policymakers who have, for decades, confidently proclaimed that sealing in practice reflects the laws on the books.[250]

This Part examines the wider implications of a sealing regime that routinely departs from governing law. Particularly in light of ongoing deliberations in the Federal Civil Rules Committee, this Part also asks how we ought to move forward. How much sealing is optimal? How do contemporary litigation dynamics affect normative judgments? And how should we realign incentives to address current deficiencies?

Section A begins by sketching three purposes litigation transparency serves. Access to judicial records, Section A explains, promotes regulatory, procedural, and democratic aims. Section B then asks how these purposes operate across different litigation contexts and stages. Here, we note that there is widespread agreement that the normative case for transparency strengthens as the case "matures"—and moves

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a remarkable informational deficit" and, likely as a consequence, reviews tend to be cursory).

[248] Burch & Lahav, *supra* note 44, at 379 ("[D]isclosure rules fail because protective orders and parties' sealing agreements are rarely appealed . . . .").

[249] For the 0.5% figure, see Rowe, *supra* note 35, at 285.

[250] *See supra* notes 113–118 and accompanying text.

toward merits adjudication.[251] Yet, our findings suggest that judges' sealing decisions are largely invariant; summary judgment motions are sealed at roughly the same rate as other material. This suggests a system that cloaks judicial records reflexively, with little capacity to adapt to specific contexts, raising serious doubts about whether the current regime reflects any coherent or defensible account of optimal transparency. Finally, Section C revisits Part IV's effort to identify the rule-, lawyer-, and judge-centered mechanisms that explain why sealing decisions look the way they do and shows how understanding each of those dynamics can help guide reforms capable of producing durable change.

A. Transparency's Core Purposes: Regulatory, Procedural, Democratic

Why does sealing—and litigation transparency more generally—matter? One answer is institutional. Our findings of pervasive, trial-court deviation from announced legal standards are not merely instances of routine error; they are an affront to judicial hierarchy, the orderly administration of justice, and even rule of law. Similar concerns animated our prior empirical study of protective orders under Rule 26(c), which showed that judges rubber-stamp parties' joint motions for protective orders some 96% of the time,[252] typically without citing the governing legal standard or making a "good cause" determination tailored to case facts.[253] Whatever the context, when trial judges pay mere lip service to, or simply ignore, governing legal tests, the legal system, and the courts that sit at its core, risk loss of legitimacy.[254]

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[251] *See supra* notes 94–98 and *infra* notes 282–284 and accompanying text.

[252] Engstrom et al., *supra* note 42, at 146.

[253] *Id.* at 151–52.

[254] *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 852 (1994) ("[F]ederal courts depend on the perceived legitimacy of their enterprise for their authority. This perception of legitimacy rests, in turn, on the widespread acceptance and appreciation—perhaps even approval—of the courts' work product."). The conventional elaboration of this idea begins with the premise that federal courts lack the "sword and purse" and so depend on widespread acceptance and approval of their work product to ensure compliance with their rulings. *See* THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111–33 (1962) (arguing that courts best maintain their legitimacy by practicing "passive virtues"). In turn, legitimacy depends on court decisions that are temporally stable (hence, stare decisis) and horizontally consistent (in which law

But the case for a more rigorous approach to sealing does not rest only on intra-judicial compliance. Particularly once a case moves from discovery to merits adjudication, sealing rules serve overlapping *regulatory*, *procedural*, and *democratic* functions—shaping behavior outside the courtroom, structuring adjudication within it, and enabling citizen scrutiny of both public and private power.

First, sealing rules, like other litigation-transparency mechanisms, do *regulatory* work by surfacing information about threats to public health and safety, thereby enabling law to warn, teach, and deter. Open judicial records expose defective products, unsafe business practices, environmental hazards, and patterns of misconduct that might otherwise remain buried.[255] That information, in turn, enables consumers and regulators to identify risks and adjust behavior, and sometimes, catalyzes further responsive lawmaking.[256]

Openness also disciplines actors ex ante. The prospect that evidence of wrongdoing may enter the public record shapes litigation conduct and incentivizes compliance with substantive law. Reflexive sealing short-circuits these feedback loops, which allows harms to persist undetected and blunts the law's deterrent effect. In this way, access to judicial records does more than allocate privacy interests among litigants. It promotes law's information-forcing function and facilitates courts' regulatory role.[257]

Second, sealing rules do *procedural* work by making the law legible. Put another way, sealing rules err on the side of transparency so that individuals can observe litigation because *this observation* is what permits future litigants (on both sides of the v.) to know what the law actually and practically requires.[258] Modern civil litigation, after all,

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means the same thing in one place as it does in another), lest court decisions leave the impression that the courts are "unprincipled or incompetent" or that law rests on "politics [or a judge's] personal whim." Caminker, *supra*, at 853.

[255] For examples, see *supra* notes 17–21 and accompanying text.

[256] For how, exactly, information unearthed via litigation is translated into action, see Engstrom & Qian, *supra* note 232.

[257] For more on the information-forcing function of tort law, see *id*. For a rehearsal of these arguments in the context of protective orders, see Engstrom et al., *supra* note 42, at 161–63.

[258] *See* REAGAN, *supra* note 10, at 1 ("The public resolution of court cases and controversies . . . provides notice of the legal consequences of behaviors and choices."); *accord* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 187–88 (2004) (describing this information transmission).

turns on open-textured standards, and the meaning of these abstract standards emerges only through grounded, iterative application. When a court seals the records on which a decision rests, the decision is nominally public but practically meaningless, as an order that this or that conduct is or is not acceptable is only instructive when considered in context. It is the *stuff* of litigation—the exhibits and expert reports—that render a ruling legible to the next set of litigants. On this view, the real value of strict sealing rules—and, indeed, the value of civil procedure more generally—comes *post-judgment*, when others look inside the case in an attempt to gauge their legal entitlements and responsibilities.[259]

Third, strict sealing rules do *democratic* work. They equip citizens with the raw material they need to monitor the exercise of power and simultaneously remind those who wield power that their work is subject to scrutiny. As Oliver Wendell Holmes explained back in 1884:

> It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to mode in which a public duty is performed.[260]

Or, as Jeremy Bentham argued, publicity "keeps the judge himself, while trying, under trial."[261] The aim is not only to expose misconduct—but also prevent it. When decisionmakers of all stripes know that their reasoning can be seen and evaluated, they face stronger pressures to conform their conduct to publicly defensible legal norms, rather than to private convenience or unreviewable intuition.[262]

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[259] Solum, *supra* note 258, at 188 ("This is the real work of procedure—to guide primary conduct after the judgment is rendered.").

[260] *See* Cowley v. Pulsifer, 137 Mass. 392, 394 (1884). For other, similar observations, see *supra* notes 12–14 and accompanying text.

[261] JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (John Stuart Mill ed., 1827), quoted in Judith Resnik, *Uncovering, Disclosing, and Discovering: How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 522 (2006).

[262] As the Supreme Court has observed in the criminal context: "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public

At the same time, judicial transparency promotes individuals' trust in judicial processes. As Judge Jennifer Elrod and co-authors have observed: "[A] foundational source of judicial legitimacy flows from the fact that courts operate in the open—the People ideally will respect the judiciary and its decisions in part because they can see the process of decision-making unfold in front of them."[263] The idea is that, for people to have faith in courts—and, perhaps even, for people to follow judicial mandates—people need to be able to observe courts' operations and activities with their own eyes.[264]

In this light, the problem with overzealous sealing is that it is anti-democratic. When the work of our courts is cloaked in secrecy, it keeps we the people from assessing whether existing legal frameworks—and the work of governmental actors—align with public values or require revision.[265] Overzealous sealing also weakens the feedback loop through which policymakers learn where existing rules under-deter, over-deter, systematically misfire, or otherwise misallocate benefits.[266] The result is a thinner foundation for informed

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opinion is an effective restraint on possible abuse of judicial power." *In re* Oliver, 333 U.S. 257, 271 n.25 (1948). The "presence of interested spectators" keeps those tasked with passing judgment "keenly alive to . . . their responsibility and to the importance of their functions." *Id*. at 271 n.25 (quotation marks omitted).

[263] Elrod et al., *supra* note 12, at 27; *see also* Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1096 (9th Cir. 2016) ("The presumption of access is based on the need for . . . the public to have confidence in the administration of justice.") (quotation marks omitted).

[264] As the Supreme Court has observed in the criminal context: "Openness thus enhances both the basic fairness of the . . . trial and the appearance of fairness so essential to public confidence in the system." Press-Enter. Co. v. Superior Ct. of California, Riverside Cnty., 464 U.S. 501, 508 (1984).

[265] At the same time, democratic-accountability arguments for public access must acknowledge that transparency can distort, not just discipline, decisionmaking. Recent administrative law scholarship on the Freedom of Information Act (FOIA) is instructive. Jon Michaels describes how FOIA's very existence "constrains and disciplines agency leaders." Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 556–57 (2015); *see also* David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 124–27 (2018) (arguing that "the ideological profile of transparency" has become a "substantially *more* libertarian" area of law and advocacy than it used to be).

[266] Here, the democratic purposes of litigation transparency loop back to the regulatory purpose. As Cass Sunstein argues in his work on empirically-informed regulation, effective oversight depends, not just on formal disclosure, but on information that is interpretable and accessible to the intermediaries who generate public knowledge: journalists, watchdog groups, legislators, and regulators. Cass R.

democratic debate—and a public that can have less confidence that the civil justice system is a site of equitable and reasoned decisionmaking.[267]

Taken together, the regulatory, procedural, and democratic justifications for litigation transparency supply a substantial case for more rigorous and less reflexive sealing practices. The harder—and unavoidable—question is whether the existing sealing regime plausibly strikes anything approaching a socially optimal amount of transparency. The next Section casts serious doubt on that proposition.

B. A Sealing System Run Amok

The core purposes of litigation transparency are clear enough. And yet, reasonable people can nonetheless disagree about how much sealing is optimal.

Disagreement might turn on the relative weight to be afforded transparency's distinct aims—from its regulatory role in achieving legal compliance to its democratic function of disciplining judicial actors—as against judicial efficiency and litigants' competing interests in privacy.[268] The calculus is further complicated by incommensurability. It is hard to compare the procedural, "action-guiding" benefits of open courts against the risks posed by the public exposure of private, sensitive, or proprietary information.

Furthermore, in a rapidly digitizing society, one might reasonably call for *more* robust protections for litigation materials—and thus, more sealing—in light of the virality and velocity of information.[269] After all, materials coughed up during discovery or summary judgment briefing that might have remained in "practical obscurity" in a pre-internet age can now be readily shared—and weaponized—at the touch

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Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1353–54 (2011). Without information, these mechanisms cannot function.

[267] *See* Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994) (explaining that "[p]ublic scrutiny over the court system serves," inter alia, to "promote community respect for the rule of law").

[268] For the specific contours of these arguments, see *supra* notes 109–112 and accompanying text.

[269] For a full rehearsal of this argument, see Engstrom et al., *supra* note 42, at 160–61. For seminal, non-law-focused analyses of virality, see KARINE NAHON & JEFF HEMSLEY, GOING VIRAL 14 (2013) (discussing virality's impact on social discourse); JONAH BERGER, CONTAGIOUS: HOW TO BUILD WORD OF MOUTH IN THE DIGITAL AGE 26 (2013) (modeling the psychological and sociological processes of social transmissions).

of a button. Any bottom-line conclusion about optimal transparency in the civil justice system must therefore weigh the potential for lives saved, misconduct deterred, and democratic safeguards fortified, as against the risk of reputational harm, strategic misuse, and the chilling of socially productive activity. As information technologies continue to evolve, that balance may continue to shift.

Yet even recognizing these changes and challenges, there is a strong case to be made that the current sealing regime has drifted far from any defensible equilibrium. To begin, in recent decades, tectonic shifts within the civil justice system and in society more generally have, for the most part, steadily strengthened the importance of each of transparency's core purposes.

The first relevant shift is the vanishing civil trial.[270] Presumptive public access to judicial records dates back centuries, at least to the centuries-old Anglo-American practice of open trials.[271] But the world *of* trials (open or otherwise) no longer exists. Whereas roughly 20% of federal civil cases went to trial in 1938,[272] and about 8% did when the Supreme Court first recognized a common-law right of public access in 1978,[273] trials today account for less than 0.5% of civil case resolutions,[274] and most of these supposed "trials" last less than a single day.[275] Indeed, whereas the trial used to sit at the center of the

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[270] The "vanishing trial" has been extensively documented and exhaustively debated. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and at Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004); Tracey E. Geroge & Albert Y. Yoon, *The Visible Trial: Judicial Assessment as Adjudication*, 94 U. CO. L. REV. 218, 221 (2023) ("More than fourteen-hundred law review articles cited the vanishing trial between 2002 and 2022 with sustained frequency.").

[271] *See supra* Part I.A; *see also* Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 FED. CTS. L. REV. 177, 181–02 (2009) (offering a detailed history of court secrecy, starting in 1066 while declaring, inter alia, that "American courts of the nineteenth century almost never sealed (i.e., concealed) court records").

[272] Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 67 (2019).

[273] Galanter, *supra* note 270, at 464–65.

[274] TABLE C-4, U.S. District Courts–Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2025 (reporting that, during the study period, only 0.4% of civil cases reached trial).

[275] *See* Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2134–35 (2018) (offering the one-day statistic and chalking it up to the fact that, among other oddities, the Federal Judicial Center counts as "trials" things not

civil justice system, it's now an afterthought. Summary judgment has firmly supplanted trial; it, not trial, is at civil litigation's heart.[276]

The implication of this switch is straightforward but profound: In the civil justice system of yesteryear, information would *eventually* come spilling out, even if it remained cloaked at earlier stages of litigation. No more. Now, information needs to come out before trial—or it won't come out at all.[277]

A second potent force likewise points in favor of more stringent sealing rules: In recent decades, more and more policymaking has been funneled through litigation.[278] From PCBs, opioids, and e-cigarettes to climate change, sexual assault, and social media, MDLs and other forms of complex litigation now perform de facto regulatory work in a wide array of policy domains where legislators and regulators once played a more dominant role. Fueled by growing skepticism toward, and judicial constraints on, the administrative state,[279] alongside entrenched partisan paralysis, courts are, more than

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conventionally understood to be trials, such as *Daubert* hearings, meaning that the 0.5% figure exaggerates actual trial activity, perhaps significantly).

[276] Indeed, one back-of-the envelope calculation concludes that a case is six times more likely to be resolved via summary judgment than at trial. Engstrom, *supra* note 272, at 67.

[277] *Accord* In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 924 F.3d 662, 683 (3d Cir. 2019) (Restrepo J., concurring in part) (highlighting the importance of public access to summary judgment material while recognizing: "Because of the modern trend toward resolving civil litigation through motions for summary judgment, in many cases, the summary-judgment stage is . . . the final and most important step of civil litigation.") (quotation marks omitted).

[278] On the growth and prevalence of regulation by litigation, see SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); ANDREW P. MORRISS, BRUCE YANDLE & ANDREW DORCHAK, REGULATION BY LITIGATION 1 (2009); Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1483 (2022). For the classic discussion of "adversarial legalism," see generally ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2d ed. 2019). For historical perspective, see generally AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877 (2017).

[279] *See, e.g.,* Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1601, 1650 (2018); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1153–56 (2012); Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2–8 (2017).

previously, the regulators of first resort.[280] As more governance flows through litigation rather than administrative action or old-fashioned lawmaking, the stakes of transparency rise accordingly—thus upping the ante as to each of transparency's core purposes.

These systemic trends already cast doubt on the adequacy of current sealing practices. But the evidence amassed in Part III delivers an even more decisive critique—and makes an even stronger case that the current sealing regime falls well short of any plausible normative ideal. An acid test for any litigation-transparency regime is adaptability: whether the rules can respond to differences across case types, categories of case materials, and litigation stages. As we explain in Part I, the formal law in many Circuits, already reflects such differentiation.[281] The strongest presumption of access applies to trial and judicial opinions.[282] Substantive motions, such as motions to dismiss or for summary judgment, come next.[283] Then, on the other edge of the continuum are documents that are merely part of "ministerial" processes, such as materials filed with the court only to assist in the adjudication of other discovery skirmishes.[284]

Circuit case law likewise recognizes that the public interest in access varies across substantive case types. Many courts carve out "content-based exceptions to the right of access"[285] in those "areas where

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[280] *See, e.g.,* Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 272 (2019) ("Whether or not an increase in judicial power during periods of polarization is desirable, there seems little question the trend is accelerating.").

[281] Sedona Conference Working Group, *supra* note 97, at 153 ("The strength of the presumption [of public access], and the consequent burden that must be met to overcome it, depends on the relationship of the document to the adjudicative process. The more important the document is to the core judicial function of determining the facts and the law applicable to the case, the stronger the presumption and the higher the burden to overcome it."); *see also supra* note 97 and accompanying text (compiling additional authority).

[282] For trials, see Poliquin v. Garden Way, Inc., 989 F.2d 527, 533 (1st Cir. 1993). For opinions, see Pepsico, Inc. v. Redmond, 46 F.3d 29, 30–31 (7th Cir. 1995) (Easterbrook, J.) (noting that even in "cases involving issues of national security," a "sealed opinion and order" is "barely" imaginable).

[283] *See, e.g.,* Gambale v. Deutsche Bank AG, 377 F.3d 133, 140 (2d Cir. 2004) (stating that, here, "the presumptive right to 'public observation' is at its apogee") (quotation marks omitted); *see also supra* note 182 and accompanying text

[284] *See* Sedona Conference Working Group, *supra* note 97, at 154 and *supra* notes 96–97 and accompanying text.

[285] Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179–80 (6th Cir. 1983); *see supra* notes 72–77 and accompanying text.

openness is not the norm,"[286] such as cases involving trade secrets or national security.[287] In these domains, some courts reason, the private and governmental interests in nondisclosure outweigh the public interest in access.[288] Conversely, many courts have identified categories of litigation in which sealing is especially disfavored because the stakes extend beyond the parties. Cases of heightened public interest generally fall into two clusters: first, mass-tort actions, particularly those involving public health matters, such as tobacco,[289] or reproductive health;[290] and second, cases involving government conduct, including policy activity or public expenditures.[291] In these contexts, public access implicates not just judicial accountability, but also the accountability of other branches of government and public actors.[292]

Against that backdrop, Part III's empirical findings are devastating. Indeed, to consider the insights above against the findings from Part III yields the conclusion that the sealing status quo tracks neither doctrinal nor normative logic.

As to case *type*, we discerned no special scrutiny in tort cases. Our hand-coded sample indicates that trial courts grant 98% of motions to seal in tort cases, as against 95% of these motions in non-tort cases.

And, as to case *stage*, our data are clearer—and more troubling. Consider summary judgment, the stage when everyone agrees that sealing determinations should be carefully scrutinized.[293] Our manual review of sealing requests related to summary judgment shows an extremely low denial rate—just 1.6%. That's even lower than the denial rate generally. Then, consider that 1.6% figure in light of two

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[286] Miller v. Indiana Hosp., 16 F.3d 549, 551 (3d Cir. 1994) (citation omitted).

[287] *See supra* notes 73–74 and accompanying text.

[288] *See id*.

[289] *See supra* note 80 and accompanying text.

[290] *See id*.

[291] Bradley ex rel. AJW v. Ackal, 954 F.3d 216, 233 (5th Cir. 2020) (collecting cases); *see also supra* note 81 and accompanying text.

[292] *See, e.g.,* F.T.C. v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987) ("The appropriateness of making court files accessible 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.").

[293] *See supra* note 283.

facts: (1) our big-N sample found that, of all sealing orders, one-third relate to summary judgment, and (2) our manual review found that only 1 in 10 orders makes an effort to apply the law to case facts, and only about 1 in about 30 contains a particularized factual finding. Put (1) and (2) together, and the conclusion is inescapable: Even at summary judgment, judges are failing to fulfill their obligations.[294] The upshot: It is not just that judges are simply casual with sealing in cases that don't involve summary judgment, or are simply casual with sealing outside the summary judgment context. Rather, judges are not appropriately applying the law of sealing when adjudicating sealing motions *at the summary judgment stage*.

In short, a careful weighing of wider trends in civil litigation and the information economy—when considered against Part III's systematic empirical evidence on sealing practices—torpedoes any notion that the current sealing regime is achieving anything resembling an optimal balance between secrecy and transparency. The next Section addresses the hardest question of all: how a sealing regime that has lost its bearings might be reoriented in a way that is both principled and workable.

C. Sealing Reset: A Three-Pronged Approach

Above, we suggest that greater judicial transparency can sharpen regulatory compliance, clarify legal obligations, and strengthen democratic accountability. We also contend that the costs of sealing accrue, as more and more adjudication is done "on the papers," outside and short of trial. But whether all this outweighs the competing interests served by sealing—privacy, proprietary protection, and administrative efficiency, especially in an era of increased information virality—is a question this Article alone cannot resolve.

Yet, even if reasonable people can disagree about where, exactly, we should land on the continuum between secrecy and transparency, courts' current balance is plainly wrong. Indeed, the status quo is not only sub-optimal; it's indefensible. There is essentially no rhyme or reason to courts' current practices.

Against this landscape, our aim in this final Section is to identify concrete steps toward workable, durable reforms. That exercise

[294] Figure 4 shows that roughly a third of sealing orders emerge *during* summary judgment. Given that 1 in 10 of all orders we reviewed involve any effort to apply law to case facts, the upper bound on the share of summary judgment orders that could feature such an effort is $\frac{1}{10} \div \frac{1}{3} = \frac{3}{10}$. The same logic implies an upper bound of 1 in 10 summary judgment orders that make any particularized finding of fact.

requires a return to Part IV's review of the three mechanisms (translational, owing to inconsistent and inaccurate local rules; lawyer-based, owing to shadow consent; and judge-based, owing to the misapplication of standards) that appear to contribute to the current equilibrium. In order to reorient sealing practices, policymakers need to make changes on all three fronts.

1. A Sealing-Specific Federal Rule

The first and most direct intervention would be for the Advisory Committee to promulgate a sealing-specific federal rule of civil procedure. We envision an analogue to Rule 26(c)'s treatment of protective orders, but with a more stringent standard that reflects the common-law right of public access and sealing's higher stakes. The promulgation of such a rule would serve two main ends.

First, a new rule would clarify and unify the governing standard. This is useful because, as Part I.B.2 showed, sealing doctrine currently varies across Circuits, sometimes meaningfully. The Advisory Committee, operating within the framework of the Rules Enabling Act, is well positioned to bridge these differences and distill the fragmented landscape into a single, coherent standard.

In addition, by preempting the local rules that litter the litigation landscape, a sealing-specific federal rule would also serve a crucial housecleaning function. As Part IV.A. explained, local sealing rules—where they exist—often garble governing standards.[295] A new rule would supplant these provisions and clear out some of the underbrush that is clogging and confusing the system.[296]

To be sure, rulemaking will be difficult. The inter-Circuit variation that creates the need for a rule will complicate efforts to reach a consensus over its content. Further, even an exquisitely crafted rule would be no panacea. As we've shown in prior work, judges routinely flout Rule 26(c), even though its language is clearly specified.[297] Still, a sealing-specific rule would add value by clarifying obligations and cutting through persistent confusion. Recently, the Rules Committee considered sealing practices, conceded that court access is an "important concern," and even acknowledged that court records might

[295] *See supra* Part IV.A.

[296] *See* Oct. 16, 2020 Minutes, *supra* note 120, at 29 ("One effect of a national rule would be to jeopardize all parts of current local rules that are not consistent with, or that duplicate, the national rule.").

[297] *See* Engstrom et al., *supra* note 42, at 106.

sometimes be sealed "erroneously."[298] But, the Rules Committee expressed doubt that the problem was "so widespread that an effort to develop a national rule is warranted."[299] Our evidence suggests otherwise—and ought to fuel renewed rulemaking efforts.

2. Parties—and Third Parties

A second type of intervention is an even heavier lift, but it may be essential to any meaningful reset. Recall the deep structural challenge of sealing rules (and litigation-transparency regimes more generally): In an American legal system with an ironclad commitment to adversarialism, there is no constituency for transparency. Defendants prefer to cloak any suggestion of wrongdoing. Plaintiffs typically acquiesce. Judges tend to go along. And intervenors—thought to represent the public interest—are formally welcomed but rarely show up.[300] All the while, negative externalities—costs and harms borne by those outside the litigation—accrue. A solution would be to deputize and incentivize third parties to play a retail-level, pro-transparency role in litigation.

Here, we need not write on a blank slate. Elsewhere, rulemakers have deliberately enlisted third parties to perform work that the core institutional actors—litigants and judges—are disinclined or unable to perform.[301]

The closest analogue to the sealing context involves class-action settlements. As noted above, the class action settlement context mirrors the sealing context because, in both domains, the court has a watchdog role. (When it comes to class actions, the judge is tasked with ensuring that the proposed settlement, slated to bind absent class members, is "fair, reasonable, and adequate"; in the sealing context, the judge is tasked with ensuring that secrecy, which is slated to deprive the public of valuable information, is justified.) But in both settings, the adversarial process has gone slack. The litigants are poorly positioned to question a class settlement once they have agreed to its terms, just as (for reasons explained in Part IV.B.) litigants are

[298] Oct. 16, 2020 Agenda Book, *supra* note 131, at 370.

[299] *Id*.; *see also id*. at 372 ("Developing a rule would call for considerable further work. The question for the Advisory Committee . . . is whether there is a need to do that work.").

[300] For the paucity of intervention, see *supra* note 153–154 and accompanying text.

[301] One place we see this, for instance, is the False Claim Act's deputization of private whistleblowers to root out fraud against the federal government. *See* David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013).

poorly positioned to spend their time and resources worrying about public disclosure.[302]

Yet, when it comes to class actions, there is a broadly accepted institutional fix. In particular: Recognizing the failure of the adversarial process in the class context, courts routinely welcome third-party objectors into the fold.[303] Their role is to flag potential problems that plague the proposed settlement—such as inadequate relief for the class, excessive attorneys' fees, or unfair distributional terms—that neither side has an incentive to raise. Objectors can submit written objections, present arguments at fairness hearings, and, in some circumstances, appeal approval orders. And here's the kicker: *When they succeed, they frequently and properly earn attorneys' fees*.[304] The possibility of these fees incentivizes their activity.

True, the system is not perfect. Some objectors, for instance, act strategically to extract side payments; others seem ideologically committed to thwarting sound settlements, no matter the cost.[305] Still, there is widespread agreement that objectors *can* improve settlements and reinforce judicial oversight of aggregate litigation.[306] A carefully designed analogue for sealing—perhaps by establishing that anti-

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[302] *See supra* notes 230–236 and 245–247 and accompanying text (discussing these challenges in the sealing and class action contexts, respectively).

[303] *See* WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 13:39 (2025 update) ("Objectors play an important role in bringing potential deficiencies in the settlement to the court's attention, details that may otherwise be overlooked due to the lack of adversarial briefing at settlement.").

[304] Brunet, *supra* note 303, at 429; *see also* FED. R. CIV. P. 23(e)(5) Advisory Committee Note to 2018 Amendment [hereinafter 2018 Advisory Comm. Note] ("Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h)."); MANUAL FOR COMPLEX LITIGATION § 21.643 (4th ed. 2004) [hereinafter MANUAL] ("An objector who wins changes in the settlement that benefit the class may be entitled to attorney fees, either under a fee-shifting statute or under the 'common-fund' theory."); *see, also e.g., In re* Anchor Securities Litig., 1991 WL 53651, *1 (E.D.N.Y. 1991) (awarding fees); *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 273 F. Supp. 2d 563, 565 (D.N.J. 2003) (same).

[305] 2018 Advisory Comm. Note *supra* note 304 ("[S]ome objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process."); MANUAL, *supra* note 304, at § 21.643 (cautioning that some challenges to proposed class settlements "benefit only the objectors and their attorneys").

[306] *See* Brunet, *supra* note 303, at 439–42; *see also supra* note 303 (collecting citations).

sealing interventors are entitled to recover statutorily-specified fees when they succeed—could supply missing adversarial pressure.

Any such mechanism would require careful design. How would the intervenor's success be measured—trial-court relief or appellate affirmance? Would any disclosure suffice, or only disclosure of policy-relevant information? Who would pay, how much, and on what schedule—especially given the absence of a common fund?[307] Each of those design elements would need to be carefully calibrated to stimulate useful intervention activity while minimizing the rent-seeking or obstructionism that can result in a system that attracts "professional objectors" whose pursuit of private gain does not fully align with the system's public-regarding aims.[308] But the basic insight is straightforward: without a committed counterweight, secrecy will persist.

3. Judges

A final set of interventions focuses on judges—the beating heart of the system and perhaps the most challenging reform lever of all. Contemporary sealing practices cannot be understood apart from broader developments in civil procedure that have dramatically expanded trial-court discretion: the advent of "plausibility" pleading,[309] the summary judgment revolution,[310] the emergence of "managerial judging,"[311] and the growth of MDLs and other sites of "ad hoc" procedure.[312] Indeed, large swathes of procedure are now

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[307] For discussion of these and other questions, see generally David Freeman Engstrom, *Bounty Regimes*, *in* RESEARCH HANDBOOK ON CORPORATE CRIMINAL ENFORCEMENT AND FINANCIAL MISDEALING (Jennifer Arlen ed., 2018); David Freeman Engstrom, *Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design*, 15 THEORETICAL INQUIRIES L. 605 (2014).

[308] Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000).

[309] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 565 (2007) (conferring significant discretion on trial judges by instructing them to evaluate the plausibility of allegations); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 663–64 (2009) (extending *Twombly* to all civil litigation).

[310] For a classic account of the *Celotex* trilogy, see Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990). For the growth of summary judgment, see Engstrom, *supra* note 272, at 67 n.293.

[311] The classic discussion of trial judge discretion in pre-litigation matters remains Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

[312] *See* Engstrom, *supra* note 272, at 6–7 (tracing the rise of ad hoc procedure within complex litigation); Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017) (discussing ad hoc procedure more generally).

perhaps best thought of as deliberate conferrals of discretion on judges to manage litigation, from soup to nuts, via hundreds of small-scale, low-visibility decisions—sealing orders among them—that are largely shielded from meaningful appellate review.[313] As the pools of discretion within which trial judges operate have deepened, many have come to view themselves as autonomous problem-solvers rather than as implementers of rigid doctrinal commands.[314] Others hew to a classical conception of the judicial role as neutral, passive arbiters of whatever the adversarial process serves up to them. Others, as noted, see themselves as in the dispute resolution business, full stop.[315] And still others prioritize docket management over institutional concerns about transparency. In that environment, doctrinal exhortation alone will not suffice.

Judicial education offers one promising avenue. Judicial education programs, whether at "baby judge" school or thereafter, could yield both better judicial understanding of the law on the books and a greater appreciation of the social costs of pervasive secrecy. Appellate courts can also play a role. Recall that sealing doctrine follows an unsurprising pattern given the deep structure and incentives of the current regime: a demanding appellate standard is articulated in published opinions, but once at the trial level, it gradually softens—and turns to mush. To address this doctrinal erosion, appellate courts—ideally aided by a new sealing-specific Federal Rule of Civil Procedure and invigorated intervention activity (as discussed above)—could engage in more visible oversight, spot-checking sealing orders, issuing supervisory opinions, and encouraging district courts to operationalize the "compelling reasons" test through structured checklists that reduce reliance on party framing. These measures, focused as much on education as compliance, would usefully complement other interventions by framing rigorous application of sealing doctrine as a core responsibility rather than an optional courtesy to the parties and public.

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[313] *See* David Freeman Engstrom, *Digital Civil Procedure*, 169 U. PA. L. REV. 2243, 2179–80 (2022).

[314] The poster child for this way of thinking was the indominable Jack Weinstein. *See* Jack B. Weinstein, *Limits on Judges' Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV. 1, 1–6 (1994).

[315] *See supra* note 241–242 and accompanying text.

CONCLUSION

American courts profess a strong commitment to transparency. Appellate courts emphatically insist that judicial records are presumptively open, that sealing is disfavored, and that departures from openness must be accompanied by careful, case-specific review. Yet, our analysis of over 2 million case filings—using machine learning alongside hand coding—shows that practice often inverts these official commands.

In addition to demonstrating the existence of a gulf between principle and practice, we also analyze why it persists. Ultimately, we conclude that, although governing law is strong, the infrastructure that *operationalizes* that law is weak. Local rules are confused and incomplete. Adversarial testing is exceptional. And, judges, overstretched and under-resourced, often rubber-stamp sealing requests with minimal effort and limited scrutiny.

The costs are substantial. When judicial records vanish, regulators and the public are robbed of information critical to public health and safety. Future litigants must reinvent the wheel. And, with profound consequences for judicial legitimacy, citizens are deprived of the ability to assess how Article III actors wield power.

Ultimately, we sketch three sets of reforms—to rules, third-party incentives, and judicial engagement—to better align the transparency architecture with both the law on the books and the realities of modern litigation. Implementing these fixes won't be easy. But the alternative is to accept a sealing system that operates by habit rather than principle and that increasingly undermines the regulatory, procedural, and democratic functions that transparency is meant to serve.