RECORD NUMBER: 12-2209(L), 12-2210

United States Court of Appeals

for the

Fourth Circuit

COMPANY DOE,

Plaintiff-Appellee,

– v. –

**PUBLIC CITIZEN;
CONSUMER FEDERATION OF AMERICA;
and CONSUMERS UNION,**

Parties-in-Interest-Appellants,

and

INEZ TENENBAUM, in her official capacity as Chairwoman of the Consumer Product Safety Commission, and CONSUMER PRODUCT SAFETY COMMISSION,

Defendants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT GREENBELT**

BRIEF OF *AMICI CURIAE* MEDIA ORGANIZATIONS IN SUPPORT OF PARTIES-IN-INTEREST-APPELLANTS SEEKING REVERSAL

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Under Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, and Circuit Rule 26.1, undersigned counsel for *amici curiae* (collectively, "Media Amici") certify that, to the best of our knowledge and belief:

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Media Amici know of no publicly held corporation that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit-sharing agreement, insurance, or indemnity agreement.

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Undersigned counsel for the Media Amici hereby certify that no party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person, other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. It also owns many Internet sites and has interests in cable systems serving over 2.3 million subscribers.

Bloomberg L.P. operates Bloomberg News, with more than 2200 journalists in 145 bureaus around the world. Bloomberg News publishes more than 6000 news stories each day and also operates as a wire service, syndicating to over 450 newspapers worldwide. Bloomberg News also operates eleven 24-hour cable and satellite television news channels; a 24-hour business news radio station syndicating reports to more than 840 radio stations; the book publisher Bloomberg Press; Bloomberg Magazines, which publishes twelve different monthly magazines, including *Bloomberg Businessweek*; and Bloomberg.com, which is read by the investing public more than 300 million times each month.

Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, WSJ.com, a news website with more than one million paid subscribers, *Barron's*, a weekly business and finance magazine and, through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-

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NPR.org offers hourly newscasts, special features and ten years of archived audio and information.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Tribune Company operates broadcasting, publishing and interactive businesses, engaging in the coverage and dissemination of news and entertainment programming. Tribune publishes eight daily newspapers – Chicago Tribune, Hartford Courant, Los Angeles Times, Orlando Sentinel (Central Florida), The (Baltimore) Sun, The Daily Press (Hampton Roads, Virginia), The Morning Call (Allentown, Pa.) and South Florida Sun-Sentinel. Tribune also owns 23 television stations, a radio station, a 24-hour regional cable news network and "Superstation" WGN America.

WP Company LLC (d/b/a The Washington Post) publishes one of the nation's most prominent daily newspapers, as well as a website, www.washingtonpost.com, that is read by an average of more than 20 million unique visitors per month.

By motion filed December 20, 2012, the Media Amici have sought leave to file this brief. The Appellants have consented. Defendants in the district court action take no position. Appellee Company Doe opposes participation by the Media Amici. The motion of Media Amici is pending.

SUMMARY

This appeal concerns one of the most fundamental rights in our democracy – access by the public and press to court proceedings and judicial records. "Democracies die behind closed doors." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002). For that reason, under established First Amendment and common law principles, "[t]he public's right of access to judicial records and documents may be abrogated only in unusual circumstances." *Stone v. University of Maryland*, 855 F.2d 178, 182 (4th Cir. 1988). Media Amici submit that the secret proceedings sanctioned by the district court here – the wholesale sealing of virtually every document (and even the docket sheet) in a case of utmost public importance involving the conduct of federal government officials in administering a controversial new consumer information program – simply cannot be squared with First Amendment and common law principles of open access to court records.

Media Amici are leading news organizations, and a professional association of journalists and editors, who regularly gather and report news about federal court proceedings in this Circuit. Media Amici report virtually every day on litigation involving potentially harmful allegations against corporations, ranging from insider trading and securities fraud proceedings to product liability suits alleging defective

or unsafe products.[1] Regardless of the ultimate disposition, whether a company wins, loses or settles, the court records, filings and decisions are made freely available to the press. Because the decision below is so far out of step with prevailing First Amendment and common law access principles, Media Amici submit this brief to inform the Court of their grave concerns and to urge reversal.

The plaintiff in the district court litigation, known only as "Company Doe," filed a lawsuit to enjoin the Consumer Product Safety Commission ("CPSC") from posting on its newly-created online database of product safety complaints a report by a local government agency that linked one of Company Doe's products to potential consumer harm. The CPSC product safety database has been the subject of public debate and news coverage since it was created by congressional mandate in 2011. The Company Doe case is the first lawsuit to challenge the accuracy of material sought to be posted on the database by the CPSC – which underscores the significant public interest in news reporting about the facts of this case. Yet, when

[1] *See, e.g.*, Gina Holland, Radiation Suit to Proceed Against Cellphone Makers, Associated Press, Oct. 31, 2005, *available at* http://usatoday30.usatoday.com/money/industries/telecom/2005-10-31-cellphones_x.htm?POE=NEWISVA; Brent Kendall, *Supreme Court to Consider Product Liability Claims on Generic Drugs*, Wall Street Journal, Nov. 30, 2012, *available at* http://online.wsj.com/article/BT-CO-20121130-710754.html; Brady Dennis, *Government Asks Judge to Approve Landmark Settlement Over Banks' Foreclosure Practices*, Washington Post, Mar. 12, 2012, *available at* http://articles.washingtonpost.com/2012-03-12/business/35447773_1_foreclosure-practices-principal-reductions-mortgage-modifications.

it filed its complaint, in October 2011, Company Doe also filed a motion to proceed pseudonymously and to litigate the entire case under seal. Despite the prompt submission of objections to the sealing motion by the Appellant consumer groups ("Consumer Groups"), as well as opposition to sealing by the CPSC, the district court did not formally rule on the sealing motion for nine months. During that time, the court nonetheless conducted proceedings on the merits in secret, sealing all documents filed with the court in their entirety (except for Company Doe's pro forma sealing motion) and even sealing all the docket sheet entries (other than the docket entry for Doe's sealing motion) – with the result that Media Amici, other news organizations and the public had no way to monitor events in the case.

In July 2012, without releasing it to the public, the district court issued a written decision granting summary judgment to Doe Company and enjoining the CPSC from publishing the challenged product report, on the ground that the report was "materially inaccurate." *Company Doe v. Tenenbaum*, No. 11 Civ. 2958-AW, slip op. [hereinafter "Op."] at 69 (D.Md. Oct. 12, 2012). In its written decision, the district court also granted Doe Company's motion to seal the case and to proceed using a pseudonym, ruling that the public has little, if any, "interest in the subject matter of this suit" because the court had found the challenged product safety report to be materially inaccurate and that, in any event, Doe Company had a

greater countervailing interest "in preserving its reputational and fiscal health." Op. at 69-70. Three months later, in October 2012, the district court ultimately unsealed its summary judgment decision in heavily redacted form, removing virtually all factual information and application of the law to the facts, with the result that it is impossible for the Media Amici to meaningfully report or analyze the basis for the court's reasoning and conclusions. Virtually all other documents in the case, including the summary judgment motion and opposition papers and all the pleadings, remain under seal and unavailable to the press and public.[2]

Media Amici believe the district court's wholesale sealing is plainly erroneous and, if allowed to stand, would set a dangerous precedent wholly at odds with the constitutional right of public and press access that has been repeatedly reaffirmed by the Supreme Court and this Court. First, the district court dramatically undervalued the public interest in access, apparently believing that, since the court has ruled the challenged product safety report to be inaccurate, the public has no legitimate interest in knowing anything about the facts of the case or in judging for itself whether the district court correctly analyzed those facts. Such

[2] Other than the heavily redacted summary judgment decision and Company Doe's sealing motion, the only other documents that have been unsealed by the district court are: (1) a Memorandum Opinion and corresponding Order granting Company Doe's proposed redactions to the summary judgment decision ("Mem. Op."); and (2) an Order clarifying the district court's grant of intervention to the Consumer Groups. *See* No. 11 Civ. 2958-AW, Dkt. Entry Nos. 67, 68, 73 (D. Md.).

a paternalistic approach runs directly contrary to this Court's repeated admonition that, under our form of popular sovereignty, public access to court records is "necessary" precisely "so that the public can judge the product of the courts in a given case." *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004) [hereinafter "*VDSP*"] (citation omitted); *Washington Post Co. v. Hughes*, 923 F.2d 324, 331(4th Cir. 1991) ("[R]eady resort to suppression is for societies other than our own."). Moreover, because this case involves not only public oversight of judicial proceedings, but also the actions of a government agency – the CPSC – "the presence of the government in the instant case suggests an even greater presumption in favor of a public record." *Under Seal v. Under Seal*, 27 F.3d 564, 1994 WL 283977 at *4 (4th Cir. 1994).[3]

Second, in maintaining the case under seal, the district court erroneously overvalued the private interest asserted by Company Doe – protecting its corporate reputation. This Court – consistent with every other Circuit – has squarely held that "simply showing that the [sealed] information would harm [a] company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records." *Under Seal*, 1994 WL

[3] Media Amici cite this unpublished disposition, which is available in a publicly accessible electronic database, because of its value to the determination of a material issue in this case and the absence of a published circuit opinion that would serve as well. *See* Fed. R. App. P. 32.1; 4th Cir. R. 32.1.

283977, at * 3 (citation omitted). The same private interest is present in countless cases, whenever a company contests allegations that could affect its reputation. This happens every day in all kinds of cases the news media cover, ranging from product liability and consumer fraud cases to environmental protection, financial regulation and even breach of contract cases. If the press had to wait until a court determined the accuracy of every potentially damaging allegation before being allowed to report on it, the news media would be unable to report on most cases until they were resolved. In effect, if embraced by this Court, the district court's decision would reverse the presumption of openness and undermine the rights of access for the public and the press.

In addition to these manifest substantive errors, the district court decision suffers from dangerous procedural faults as well. Without individual determinations of the need for sealing particular documents, a wildly overbroad sealing of virtually the entire case persisted for a year – the entire pendency of the case – while requests to unseal were left languishing. Throughout that time, the press and public were left without access to any information about the case. This appeal thus provides an opportunity – and indeed demonstrates the need – for this Court to reiterate the procedural requirements that district courts must follow to avoid the unconstitutional suppression of access to our public courts.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY ELEVATED A CONSTITUTIONALLY INSUFFICIENT PRIVATE INTEREST IN CORPORATE REPUTATION OVER THE PROFOUND PUBLIC INTEREST IN OPENNESS

A. The District Court Undervalued the Public Interest in Access to the Courts

The district court's sealing decision cannot be reconciled with the core principles underlying the right of access to judicial records, which are rooted in the First Amendment and in the longstanding Anglo-American tradition that "both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980). Not just trials, but any documents filed in court and any summary judgment proceedings are presumptively open to the public and the press. *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). Under the common law standard, only "if countervailing interests heavily outweigh the public interest in access" may any materials be sealed. *Id*. The First Amendment standard, which inarguably applies to the summary judgment papers and decision in this case, is even higher: "[T]he denial of access must be necessitated by a compelling government interest and narrowly tailored to serve that interest." *Id.* The grounds articulated by the district court here for its sweeping denial of public access fall far short under either of these stringent standards.

The right of access to judicial proceedings is a necessary corollary to the right to discuss government affairs, and the Supreme Court has long recognized the essential role that the press plays in gathering information for the public. Indeed, the First Amendment "specifically selected the press … to play an important role in the discussion of public affairs." *Mills v. State of Alabama*, 384 U.S. 214, 218-19 (1966). *See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) ("[T]he First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of government."). The Supreme Court has explained:

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975). *See also Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 602-03 (1953) ("A vigorous and dauntless press is a chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society.");

Mills, 384 U.S. at 219 ("[T]he press serves and was designed to serve as a … constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.").

Underlying both the commitment to freedom of the press and the necessity of access to the courts is the same principle: "The protection of the public requires not merely discussion, but information." *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964) (citation omitted). *See also Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring) ("Implicit in this structural role is … the antecedent assumption that valuable public debate – as well as other civic behavior – must be informed."). Guaranteeing access to the courts thus "give[s] meaning to [the] explicit guarantees" of freedom of speech and press found in the text of the First Amendment, *id.* at 575 (Plurality Op.), by "ensur[ing] that this constitutionally protected 'discussion of government affairs' is an informed one." *Globe*, 457 U.S. at 604 (citation omitted). That is why the Court has affirmed that the press has standing to assert the public's – and its own – right of access to judicial records. *Id.* at 609 n.25.

By ensuring public access to the courts and enabling public discussion of the functioning of the judiciary, the news media help "the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government." *Globe*, 457 U.S. at 606. As many courts, including this

Court, have recognized, "[w]ithout access to the proceedings, the public cannot analyze and critique the reasoning of the court." *See Brown & Williamson Tobacco Corp. v. Federal Trade Comm'm*, 710 F.2d 1165, 1178 (6th Cir. 1983) ("*B&W*"). *Accord VDSP*, 386 F.3d at 575. Thus, "[o]penness … enhances both the basic fairness of [a] trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984).

The district court's wholesale sealing here has the opposite effect – it gravely undermines public confidence in the judicial system. The Supreme Court has observed that "[p]eople 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." *Richmond Newspapers*, 448 U.S. at 572. *See also B&W*, 710 F.2d at 1178 ("The remedies or penalties imposed by the court will be more readily accepted, or corrected if erroneous, if the public has an opportunity to review the facts presented to the court.").

In light of the constitutional interests at stake, the district court's blithe dismissal of the public interest in access to the records of this case is distressing. The court's approach devalues the fundamental importance of judicial access in general and, even more, vastly underestimates the importance of public access in this case.

The court begins from a premise that runs completely counter to basic First Amendment values. The court suggests that public interest in "the subject matter of this suit" is minimal because the product safety report at issue in the litigation was, in the court's view, materially inaccurate.[4] Op. at 69. In every lawsuit, courts adjudicate the truth and falsity of allegations, but courts do not, and should not, condition access to court documents on the court's ultimate determination of the merits. Allegations that turn out to be false – from criminal charges to civil claims – are regularly aired in public.

The district court's approach seems to be implicitly grounded in a belief that the public would be unable to distinguish between a false accusation and litigation to establish the falsity of that accusation. This apparent mistrust of the people is antithetical to the principles of self-government that underlie the First Amendment. The First Amendment reflects a "belie[f] in the power of reason as applied through public discussion," not the selective withholding of information from the populace. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). As Judge Learned Hand said, the First Amendment "presupposes that the right conclusions are more likely to be gathered out of a multitude of tongues, than

[4] The idea that particular content must be found to be true to benefit from First Amendment protection has been roundly rejected by the Supreme Court: "The constitutional protection [of speech] does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered." *Sullivan*, 376 U.S. at 271.

through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943). The public and the press have a clear and legitimate interest in any information or accusation that has been at the center of judicial decision-making, whether it turns out to be true or not, and in knowing how the court determined it to be true or not.

Indeed, the public interest in access is at its height in cases like this one, where the "subject matter of this suit" was not a dispute between private parties but, as the district court acknowledged, the "first legal challenge" to a new government program. Op. at 69. "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." *Federal Trade Comm'n v. Standard Fin. Management Corp.*, 830 F.2d 404, 410 (1st Cir.1987); *accord Under Seal*, 1994 WL 283977 at *3 ("Where the government is involved in the litigation, there is an undeniable public interest in the records of the proceeding."); *E.E.O.C. v. National Children's Center, Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996). ("The fact that the EEOC, a party to the lawsuit and a public agency, objected to sealing the record is not only relevant, but strengthens the already strong case for access.") "Whatever differences may exist

about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills*, 384 U.S. at 218.

The CPSC database could not be more plainly a matter of legitimate public concern. The database generated considerable controversy at its inception, which was covered extensively in the news media.[5] Numerous aspects of the database – including whether it should exist at all – were debated among congressmen, industry representatives, consumer groups and the members of the CPSC itself. One of the chief concerns expressed was that the database would be "replete with bogus reports and misleading information."[6] This "first legal challenge" to the database appears to have turned on that very issue. Op. at 69. But, with almost the entire record sealed and the district court's opinion redacted so heavily, neither the

[5] *See*, *e.g.*, Jayne O'Donnell, *New Product-Safety Complaint Database Under Attack*, USA Today, Apr. 11, 2011, *available at* http://usatoday30.usatoday.com/money/industries/retail/2011-04-08-consumer-product-safety-commission-challenges.htm; Timothy Noah, *Who's Afraid of the CPSC?: The hysteria over a new government database for consumer complaints*, Slate, Mar. 8, 2011, http://www.slate.com/articles/ business/the_customer/2011/03/whos_afraid_of_the_cpsc.html; Melanie Trottman, *NAM: Database on Unsafe Products Is Inaccurate*, Wall Street Journal, Mar. 9, 2011, http://blogs.wsj.com/washwire/2011/03/09/nam-database-on-unsafe-products-is-inaccurate/; Andrew Martin, *Partisan Rift Mires Product Safety Database Plan*, New York Times, Nov. 23, 2010, *available at* http://www.nytimes.com/2010/11/24/business/24consumer.html.

[6] Jennifer C. Kerr, *Public Database for Safety Complaints Goes Live*, The Associated Press, Mar. 11, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/03/11/AR2011031102631.html.

citizenry nor the press can assess the strengths and weaknesses of the arguments on each side, or assess the court's reasoning in resolving the dispute.

The heightened public interest in access to court proceedings – like this one – involving government affairs was strongly recognized by the Sixth Circuit in the *Brown & Williamson* case. Cigarette companies submitted certain reports on the tar content of their cigarettes to the Federal Trade Commission ("FTC") pursuant to a statute that provided that information submitted to the FTC during agency investigations would be kept confidential. *B&W*, 710 F.2d at 1180. In subsequent litigation between one of the manufacturers and the FTC, those reports were held under seal by the district court. The Sixth Circuit vacated the sealing order, declining to "carve out an exception to the right of access [to judicial records] in order to protect the secrecy of an administrative record." *Id.* On the contrary, the court concluded, "[t]he public has an interest in knowing how the government agency has responded to allegations of error in the [cigarette] testing program. The public has an interest in ascertaining what evidence and records the District Court and this Court have relied upon in reaching our decisions." *Id.* at 1180-81. *See also Hughes*, 923 F.2d at 330 ("The Supreme Court has recognized … that a 'citizen's desire to keep a watchful eye on the workings of public agencies' … will justify writs compelling access to judicial documents.") (quoting, in part, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-98 (1978)).

Here, the public interest is just as weighty. With virtually the entire case sealed and the district court decision redacted to the point of incoherence,[7] the public has no way to know precisely how the CPSC has responded to manufacturer complaints about the accuracy of a product report that was to be submitted to the database, or to assess the district court's ruling on the legality of the agency's process. The public unquestionably has an interest in this information, regardless of whether the last version of the report was deemed accurate or not, and the news media stand ready to provide it. Despite these strong, legitimate interests, the legal fate of a hotly contested government program was decided behind closed doors in a secret trial. That is precisely what the First Amendment right to judicial access is designed to prevent.

B. The District Court Overvalued the Private Interest in Sealing the Case

At the same time that the district court minimized the interest of the public and the press in judicial access, it gave undue weight to Company Doe's interest in preventing access.

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[7] *See, e.g.*, Ryan McCartney, *The Invisible Case Against the Consumer Product Safety Commission: An Anonymous Company's Secret Challenge to the Agency's New Database of Safety Complaints*, Slate, Dec. 18, 2012 ("The opinion itself … is so heavily redacted that it reads like Mad Libs."), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/12/the_invisible_case_against_the_consumer_product_safety_commission.html.

The interest the district court recognized as paramount in deciding to maintain the seal was Company Doe's "concrete interest in preserving its reputational and fiscal health." Op. at 70. If the district court's approach in this case were embraced by other courts, it would encourage every company that opposes the inclusion of a report in the CPSC database to challenge it anonymously and in secret proceedings. Because the same logic would apply to all manner of cases, it would also vastly broaden the denial of access to court documents, crippling the press's ability to report on ongoing litigation any time a corporate litigant wanted to avoid negative publicity. In product liability cases, securities litigation, employment cases and countless other types of disputes adjudicated by our courts, companies contest allegations that could harm their reputations. Open proceedings allow the media to bring news of these cases to the public. Members of the public are well accustomed to learning that a company is being sued (or that its product is alleged to be harmful) and that it denies the allegations. No extraordinary stigma attaches to that news. Companies involved in litigation might very often prefer the allegations against them to be kept under seal, but our open system of government, which counts on the press to inform the broader public, prevents that.

The Media Amici recognize that courts do, at times, seal portions of a record to accommodate the confidentiality interests of litigants, but courts carefully

distinguish between mere non-confidential information that could affect a company's reputation and information that is confidential by law, such as trade secrets. *See, e.g.*, *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1074 (3d Cir. 1984) (courts "traditionally" protect only "confidential commercial information … , e.g., trade secrets"); *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 10 (1st Cir. 1998) (if "adverse publicity" were the only concern, sealing would not be proper, but sealing may protect against disclosure of attorney-client communications). As this Court has declared, "'[s]imply showing that the information would harm the company's reputation is *not* sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records,'" let alone the even stronger First Amendment interests at stake. *Under Seal*, 1994 WL 283977, at *3 (quoting *B&W*, 710 F.2d at 1179) (emphasis added).

Accordingly, courts consistently reject appeals to secrecy that, like the argument advanced by Company Doe here, are premised on nothing more than a "desire to preserve corporate reputation," *Littlejohn v. BIC Corp.*, 851 F.2d 673, 685 (3d Cir. 1988); a company's "commercial self-interest," *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996); or a "company's public image." *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663 (3d Cir. 1991). As one district judge underscored, "[i]t is not the duty of federal courts to accommodate the public relations interests of litigants." *In re*

Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 101 F.R.D. 34, 40 (C.D. Cal. 1984).

The interest the district court elevated here was not any concern to protect confidential information or confidential relationships. Rather, Company Doe worried that the mere "disclosure of [its] name in a suit against the [CPSC]" would have the potential to "link[] one of Plaintiff's products to unfounded safety concerns." Memorandum of Points and Authorities in Support of Motion to Seal Case and Proceed Under a Pseudonym, Oct. 17, 2011(Dkt. No. 2-1) at 2. In other words, Company Doe wanted to preserve its anonymity and block any public information about this case merely to prevent whatever reputational harm inevitably comes from involvement in almost any litigation. As courts have long recognized, "[e]very lawsuit has the potential for creating some adverse or otherwise unwanted publicity for the parties involved. It is simply one of the costs attendant to the filing of an action." *Vassiliades v. Israely*, 714 F.Supp. 604, 606 (D.Conn. 1989). When litigants "call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials." *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).[8]

[8] Even if Company Doe's interests were the type that courts are inclined to protect, courts typically require a much more specific and rigorous showing than the bare statement here that revealing the existence of the litigation would be no different from including the contested report in the CPSC database. In *Joy v. North*, the Second Circuit held that "a naked conclusory statement" that publication of a

* * *

The district court's approach would permit companies to prevent any potential harmful allegations from reaching the public unless and until there has been an actual adjudication against them. But news outlets routinely report on the charges and countercharges in litigation before there has been any court ruling, and, in our system of self-government, they need to do so. Indeed, the importance of reporting on allegations made in court is so universally recognized that the courts and legislatures of 47 states have established a privilege to protect fair and accurate reports of judicial proceedings from claims for defamation, whether the allegations reported are ultimately proved true or false. *See Salzano v. North Jersey Media Group Inc.*, 201 N.J. 500, 514 n.2 (2010) (collecting cases and statutes). There is no need for a court to determine first, as the district court insisted on doing here, whether the allegations in suit are well founded before allowing the press and public to know that a company is involved in litigation and what the litigation is about.[9] The courts cannot be regulators of what news is fit for

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report would "injure" an entity in its industry and community fell "woefully short of the kind of showing which raises even an arguable issue as to whether it may be kept under seal." 692 F.2d 880, 894 (2d Cir. 1982).

[9] The district court here has shielded even the name of the company. It is difficult to imagine what precise harm could come to a company if all that were known were that someone submitted a report to the CPSC about the company but the company is contesting it in court. Now that the court has ruled that the report is materially inaccurate, it is even harder to conceive of any harm that would accrue.

public consumption. The Framers of the First Amendment "did not trust any government to separate the true from the false for us." *Kleindienst v. Mandel*, 408 U.S. 753, 773 (1972) (citation omitted). With the assistance of the press, members of the public can – and must be allowed to – weigh allegations and evidence for themselves.

II. THIS COURT SHOULD REITERATE CRUCIAL PROCEDURAL SAFEGUARDS FOR PUBLIC ACCESS

The district court could have avoided excessive secrecy if it had followed procedures this Court has established to prevent unnecessary sealing. This case provides an opportunity – and illustrates the need – to reinforce the fundamental steps district courts should take when they are asked to block access to judicial records: courts should resolve such motions quickly; courts should make document-by-document determinations of the need for sealing that the public and this Court can review; and, except in the most exceptional circumstances, docket sheets should always be available to the public and the press.

A. Sealing Motions Must Be Resolved Quickly

This case was filed in October 2011. The Consumer Groups filed their objections to the seal within weeks. The litigation then proceeded for *a year* in virtual secrecy, as various motions were briefed and argued, both over sealing and on the merits. Throughout that time, the only entry on the public docket was Company Doe's motion to seal. In July 2012 the court granted Company Doe's

motion for summary judgment and granted its motion to seal, but even that fact was not revealed until the redacted version of the opinion was issued in October 2012. It was impossible for the press to report on what was happening in the case until then.

This Court has recognized that the crucial value of "openness" is "threatened whenever immediate access to ongoing proceedings is denied, even if some provision is made for later public disclosure." *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) . Indeed, the Supreme Court has stated that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Courts have therefore made it crystal clear that, "once found to be appropriate, access should be *immediate* and *contemporaneous*." *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (emphasis added) (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976)), *superseded by statute on other grounds as stated by Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009). *See also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 127 (2d Cir. 2006) ("Our public access cases and those in other circuits emphasize the importance of immediate access where a right to access is found." (citing cases)).

Contemporaneous access is particularly important for the news media because the very nature of "news" is that it is, in fact, new. Information about something that happened months, weeks or even days ago is much less likely to reach the public: "[t]he newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh*, 24 F.3d at 897. For the press to perform its constitutionally sanctioned function, it needs access to information about public affairs as soon as possible. This case offers an opportunity for the Court to direct district courts to determine sealing and access motions at the earliest opportunity, and not wait, as the district court here did, until the litigation is virtually completed and a decision has been reached on the merits before unsealing anything.

B. Courts Must Make Individual Determinations on the Record of the Need for Sealing and the Proper Extent of any Sealing

The district court summarily sealed virtually every document in this case in its entirety. As a result, the press could not even report on the filings of the Consumer Groups, though those documents could not possibly include any information about Company Doe. (The Consumer Groups do not even know Company Doe's real name.) That absurd result highlights the need for individualized document-by-document determinations.

This Court has found wholesale sealing "particularly troubling" because "it would be an unusual case in which alternatives could not be used to preserve public access to at least a portion of the record." *Stone*, 855 F.2d at 182; *accord VDSP*, 386 F.3d at 576. Although the district court ordered Company Doe to "propose redactions to all the records, documents and/or evidence in this case … no greater than necessary to protect the rights Plaintiff sought to vindicate by coming to court," Op. at 70, virtually no documents other than the redacted version of the opinion have been released to the public. The court's failure to provide any specific findings as to why each individual document is being withheld – beyond a general statement that "concerned citizens can glean" enough from the redacted summary judgment opinion (Mem. Op. at 7) – leaves the press and the public almost entirely in the dark.

Media Amici hope the Court will take this opportunity to remind district courts in the Circuit that, when a party requests broad sealing of multiple documents, the party should present its arguments as to why *each* document (or part of a document) warrants sealing, and the court should give the public and press the opportunity to respond and then "should make its *own* redactions, supported by *specific findings*, after a careful review of *all claims for and against access*" for each document. *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995) (emphasis added); *see also Press-Enterprise*, 464 U.S. at 510 ("The

presumption of openness may be overcome only by an overriding interest … [which] is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."). Sealing entire case files wholesale, without document-by-document explanations, as the district court has done here, forecloses any meaningful public or judicial review of the court's reasoning. The careful document-by-document analysis that the Constitution and the common law require, on the other hand, very often leads courts to open more documents and information to the public.

C. Sealing the Entire Docket Sheet Should Be Extraordinarily Rare

"Since the first years of the Republic, … records of judicial proceedings in the form of docket books" have been "presumed open." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 94 (2d Cir. 2004) . Indeed, court docket sheets are powerful research and reporting tools for the press. *Id*. ("[D]ocket sheets provide a map of the proceedings in the underlying cases."). In this case, the district court has prevented the press and the public from even knowing about the *existence* of most of the documents it has considered, as the sealed docket sheet identifies only 5 of the 79 documents that have been filed in the lower court proceeding.

Sealed docket sheets inflict a particularly serious First Amendment injury on the press and the public because no one can challenge the sealing of a document or the closing of a proceeding if its very existence is a secret. Such total secrecy

makes the right of access "merely theoretical," *id.* at 93, and denies "the public and the press meaningful access." *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993). Here, for example, news organizations covered the commencement of Company Doe's action against the CPSC as an important story for consumers and businesses,[10] but for a year thereafter the press had no way to learn (and inform the public) of anything about the case, even that the parties were litigating summary judgment motions. And the press had no way to request access to any relevant filings, because absolutely nothing about them – not even a plain-vanilla description such as "Complaint" or "Preliminary Injunction Motion" – was entered on the public docket.

This Court has recognized that sealing court docket sheets violates the First Amendment right of access:

> There are probably many motions and responses thereto that contain no information prejudicial to a defendant, and we can not understand how the docket entry sheet could be prejudicial. However, under the terms of the orders entered in these cases, this information, harmless as it may be, has also been withheld from the public. Such overbreadth violates one of the cardinal rules that closure orders must be tailored as narrowly as possible.

[10] *See, e.g.*, Dina ElBoghdady, *CPSC Database Faces First Legal Challenge*, Wash. Post, Oct. 18, 2011; Jennifer C. Kerr, *CPSC's Public Database Faces First Legal Challenge*, Assoc. Press, Oct. 18, 2011; Ann Carns, *Company Anonymously Challenges Consumer Web Site*, New York Times, Nov. 2, 2011, at http://bucks.blogs.nytimes.com/2011/11/02/company-anonymously-challenges-consumer-web-site/.

In re State-Record Co., 917 F.2d 124, 129 (4th Cir. 1990) (emphasis added). Even in the most compelling circumstances, courts differ as to whether even national security concerns can justify sealing case docket sheets. *Compare Detroit Free Press*, 303 F.3d at 706-08, *with North Jersey Media Group v. Ashcroft*, 308 F.3d 198, 201-02 (3d. Cir. 2002). Here, no interest as weighty as national security is at stake, and the district court has articulated no remotely legitimate reason for keeping the very existence of documents filed in court a secret from the press and the public.

CONCLUSION

For the foregoing reasons, Media Amici support the Consumer Groups' appeal of the district court's substantively and procedurally erroneous sealing order. Media Amici request the opportunity to participate in oral argument.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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