

# Confidences Worth Keeping: Rebalancing Legitimate Interests in Litigants' Private Information in an Era of Open-Access Courts

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## ABSTRACT

*The ideal of the public trial in open court continues to guide decisions about public access to courts and their records, even as cases are increasingly decided “on the papers.” This is still the case when those “papers” take the form of electronic documents that can be uploaded, downloaded, copied, and distributed by anyone with an internet connection. A series of opinions from the US Court of Appeals for the Sixth Circuit reinforcing this ideal of public access to court records and unsealing district court filings offers an opening to reconsider core values that must inform our treatment of private information in public litigation. This Article articulates some of those relevant values and proposes an orderly mechanism for minimizing gratuitous exposure of private information while maintaining appropriate public access to the evidence courts use to resolve cases and controversies.*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	906
II.	CORE VALUES.....	909
	A. <i>Public Courts</i> .....	909

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	<i>B. Respect for Private Information</i> .....	915
	<i>C. Collaborative, Litigant-Driven Pretrial Litigation</i> .....	918
	<i>D. Proportionality</i> .....	920
III.	RENEWED STANDARDS FOR SEALING DOCUMENTS.....	921
	<i>A. Reinforcing Old Norms</i> .....	923
	<i>B. Procedural Mechanisms Defaulting Toward Disclosure</i> .....	923
	<i>C. Defaults on Promises of Confidentiality</i> .....	926
IV.	DECOUPLING DISCOVERY AND PUBLIC DISCLOSURE.....	927
	<i>A. Threshold Between Discovery and Merits Adjudication</i> .....	928
	<i>B. True Confidentiality in Discovery</i> .....	931
	<i>C. Litigating the Threshold Between Discovery and Merits Adjudication</i> .....	934
V.	CONCLUSION.....	935

## I. INTRODUCTION

“Throughout our history, the open courtroom has been a fundamental feature of the American judicial system.”<sup>1</sup> But some things are private. Those things might be “secret,” “confidential,” “privileged,” “proprietary,” “embarrassing,” or just “none of our business.” Routine pretrial discovery mechanisms, however, expose massive—and still increasing—quantities of this private information to opposing parties. In theory, shared access to the relevant facts facilitates rational settlements.<sup>2</sup> These settlements benefit litigants and the courts by resolving most disputes without expensive public trials. Indeed, the courts could not accommodate public trials for every case. But when potentially unlimited disclosure of private information over the internet becomes the price of admission to public courts, that price can be too high. Some litigants will sacrifice their substantive rights to protect their private information or will retreat to private arbitration.<sup>3</sup> Others will use privacy-invading mechanisms of public litigation to extract private information for nonlitigation purposes.

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1. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983).

2. *See Krause v. Rhodes*, 671 F.2d 212, 214 (6th Cir. 1982) (“[T]he need for trial frequently disappears once both sides have a full and complete understanding of the facts.” (quoting *Krause v. Rhodes*, 390 F. Supp. 1072, 1073 (N.D. Ohio 1975))).

3. *See* David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1446–47 (2017) (“Potential litigants who cannot afford ADR may simply view the privacy costs as too great and decide not to seek resolution in the courts—or worse, engage in self-help remedies.”); Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 308 (1999); Nancy S. Marder, *From “Practical Obscurity” to Web Disclosure: A New Understanding of Public Information*, 59 SYRACUSE L. REV. 441, 445 (2009) (“Companies have tried to avoid these threats, as well as the actual lawsuits, by inserting mandatory arbitration clauses in contracts that consumers must sign if they want the particular product or service.”).

Courts, counsel, parties, and policy makers must therefore balance the important benefits stemming from public scrutiny of court proceedings against the harm done to private parties when their secrets go public.

A renewed interest in enforcing a presumption of *full* public access to electronic court records—even in cases that began with an expectation of some secrecy<sup>4</sup>—invites a reassessment of the wisdom of allowing litigants to file virtually anything disclosed in discovery as a permanent entry in an increasingly public docket. Certain public aspects of the courts are foundational, but those public aspects are limited by competing interests and the ultimate need to credibly resolve disputes. In that regard, more public access does not necessarily produce better or more credible adjudications, and it is particularly counterproductive to penalize litigants who disclose private information in reliance of court orders purporting to protect them from public disclosure.<sup>5</sup> Courts must also consider the related harm to judicial integrity when courts disclose confidences or allow litigants to disclose confidences that prior court orders treated as secret. Fortunately, courts can keep their word, honor the public nature of their institutions, and protect litigants' privacy while encouraging more efficient use of truly public court resources by applying modern values of proportionality and established standards of relevancy and prejudice to the transition between private discovery and public merits adjudication.

As explained below, legitimate public interest in parties' private information extends—at most—to the private information the court actually considers when adjudicating the merits of a dispute. As such, narrowing factual disputes protects private information *and* conserves public (i.e., court) resources. Stipulations, redactions, substitutions, and other reasonable alternatives already allow parties to distill private information to its legally relevant essence. Adapting the party-centered approach that filters pretrial discovery disputes through formal and informal negotiations to minimize court involvement could similarly narrow factual disputes and minimize court exposure to extraneous private information. Venerable evidentiary rules, along with well-

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4. See, e.g., *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 307 (6th Cir. 2016) (rejecting arguments based on parties' and third-party hospital and insurers' expectations).

5. See *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 478 (6th Cir. 1983) (“[W]e do note that the bank placed significant reliance upon the protective order. Once placed in this position, only ‘extraordinary circumstances’ or ‘compelling need’ warrant the reversal of a protective order.” (quoting *F.D.I.C. v. Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982))); Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181, 2211 (2014) (“[P]rotective orders supposedly grease the wheels of litigation by ensuring secrecy—so long as parties can rely on protective orders being enforced over the long term.”).

practiced discretion when managing discovery and the presentation of evidence, give district courts everything they need to resolve any lingering disputes.

Parties and courts should therefore adopt protective orders and scheduling orders that accommodate full interparty sharing of private information during discovery and more exacting proportionality analyses under Federal Rule of Evidence 403 and Federal Rule of Civil Procedure 26(b)(3) before private information flows into an essentially open-access electronic docket. Some argue that even unfiled discovery should be available to the public or to litigants in other cases,<sup>6</sup> but most courts recognize that “[s]ecrecy is fine at the discovery stage”<sup>7</sup> and simply need to consider how to facilitate the efficient exchange of voluminous and potentially sensitive discovery material before winnowing it down to the essential and relevant core. Courts have sometimes “conflated the standards for entering a protective order under Rule 26 with the vastly more demanding standards for sealing off judicial records from public view.”<sup>8</sup> However, it is possible—and preferable—to apply each standard to its own domain. Doing so requires courts to revisit traditional values that informed our current treatment of private information in public litigation. Courts would then need to allow those values to dictate what kind of documents belong under seal, what kind belong in full public view, and what kind have no business being filed at all.

This Article proceeds in four parts. Part II identifies and explores core values that complement and compete with one another in any public litigation involving private information. Part III explores unintended consequences of increasing public access without adjusting other practices, as revealed through a recent series of opinions in the US Court of Appeals for the Sixth Circuit reasserting courts’ obligations to enforce certain norms of public access to court records. Part IV proposes a solution that guards against unjustifiable judicial seals and disproportionate disclosure of private information, thus keeping public courts appropriately open to public observers and private litigants. Part V briefly concludes.

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6. See, e.g., Benham, *supra* note 5, at 2234–35 (advocating for the adoption of protective orders with “well-crafted sharing provision[s],” particularly in product liability cases and other litigation where materials produced in discovery might be useful to similarly situated litigants in future litigation).

7. See FED. R. CIV. P. 26; e.g., *Shane Group*, 825 F.3d at 305 (quoting *Baxter Int’l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002)).

8. *Shane Group*, 825 F.3d at 307.

## II. CORE VALUES

Balancing privacy interests against public access engages core values, including the right of public access to the courts, the right to preserve private information from public disclosure, the expectation that litigants will resolve most pretrial disputes without imposing on the courts, and the new commitment to keeping broadly defined discovery costs proportional to the legitimate needs of any particular case.<sup>9</sup> Those values sometimes complement one another and sometimes conflict, but any assessment of policies for managing private information in public litigation benefits from first acknowledging those values and how they interact. Before deciding who should have access to what, it is useful to ask: Why?

A. *Public Courts*

Courts are public, at least in certain respects. The public engages with different courts in different ways, but “the open courtroom has been a fundamental feature of the American judicial system” since the colonial era, both as a functional component of adjudication and as an article of civic faith.<sup>10</sup> Public courts serve as “outlets for ‘community concern, hostility, and emotions.’”<sup>11</sup> Public access may offer certain opportunities to “analyze and critique the reasoning of the court[s]” as they resolve the cases that come before them.<sup>12</sup> Likewise, keeping courts open to interested and informed individuals directly or through media may promote “true and accurate fact finding” by inviting critique of false or incomplete evidence.<sup>13</sup> Whether these benefits improve the quality of individual decisions or simply preserve public confidence, the expectation that the public may observe the formal exercise of judicial power is an essential component of the rule of law.

Courts remain public institutions even when the public takes little or no interest in a particular case. The US Supreme Court draws

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9. See Marder, *supra* note 3, at 451 (“[T]here is a need to return to the purposes behind making the information public in the first place and to ask whether placing the information on the Web advances or undermines those purposes.”).

10. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983); see also *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 663 (D.C. Cir. 2017) (“The right of public access is a fundamental element to the rule of law, important to maintaining the integrity and legitimacy of an independent Judicial Branch.”).

11. *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1178 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980)).

12. *Id.*; see also *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) (“The operations of the courts and the judicial conduct of judges are matters of utmost public concern.”).

13. *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1178 (quoting *Richmond Newspapers*, 448 U.S. at 596).

a disproportionate share of attention to politically sensitive cases with national consequences, but those high-profile, highly publicized cases are the exception, even on that court's tiny, idiosyncratic docket.<sup>14</sup> Most cases filed in federal district courts never reach a public trial,<sup>15</sup> much less a publicized and potentially politicized Supreme Court argument. Individual district court proceedings and state trial court hearings retain their essential public quality because anybody *could* observe them, not because anyone does.

Typically, when parties physically appear in court before a judge, the courtroom doors are open to the public. But public accessibility does not guarantee public observation. Most litigation attracts no apparent public interest.<sup>16</sup> Even an interested member of the public must invest significant effort to place herself in the right place at the right time to hear anything of interest. Unless a curious member of the public identifies an interesting case, monitors its progress, travels to the courthouse, and sits through a hearing, the details of that “public” hearing remain unknown to the public. So, while the doors may be open, the people who walk through them are typically those with active matters before the court.

Even an observer who attends a live hearing does not receive unfettered access to the proceedings. Conferences conducted in hushed tones around the bench to keep legal discussions from influencing a jury also exclude the public. Telephonic hearings—often directed at

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14. See Adam Feldman, *The Biggest Supreme Court Cases of the Term*, EMPIRICAL SCOTUS (Apr. 11, 2016), <https://empiricalsctous.com/2016/04/11/biggestcases/> [https://perma.cc/DKT7-NW4V]. The Supreme Court reviews approximately one out of every thousand appellate opinions. See Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, LANDSLIDE, Jan./Feb. 2010, [https://americanbar.org/content/dam/aba/migrated/intelprop/magazine/LandslideJan2010\\_Hofer\\_authcheckdam.pdf](https://americanbar.org/content/dam/aba/migrated/intelprop/magazine/LandslideJan2010_Hofer_authcheckdam.pdf) [https://perma.cc/GY3A-63YY]. Each year, only a small fraction of this small fraction of appellate cases breaks through to reach a broad public audience. See Adam Feldman, *Which Supreme Court Cases Are Generating the Most Interest?*, EMPIRICAL SCOTUS (Jan. 9, 2019), <https://empiricalsctous.com/2019/01/09/most-interest/> [https://perma.cc/C53J-CE9U].

15. See Table 4.10—U.S. District Courts—Civil Judicial Facts and Figures, ADMIN. OFF. U.S. CTS. (Sept. 30, 2017), [https://www.uscourts.gov/sites/default/files/data\\_tables/jff\\_4.10\\_0930.2017.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jff_4.10_0930.2017.pdf) [https://perma.cc/7MR9-9W5W]; CIVIL JUSTICE INITIATIVE, NAT'L CTR. FOR STATE COURTS, *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* 7 (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [https://perma.cc/34H6-Z7S5].

16. See Alberto Bernabe-Riefkohl, *Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech*, 33 LOY. U. CHI. L.J. 323, 323 (2002); Nicole Hong, *Ladies and Gentlemen of the Jury, Please Wake Up!*, WALL ST. J. (Dec. 8, 2017, 11:31 AM), <https://www.wsj.com/articles/ladies-and-gentlemen-of-the-jury-please-wake-up-1512750669> [https://perma.cc/W5Z7-NP3M] (detailing difficulties lawyers have maintaining the interest and attention of jury members). Indeed, as any count of default judgments in small claims courts will demonstrate, a fair portion of civil litigation fails to attract even the attention of the litigants. The Author encourages readers who have not recently attended a civil trial to spend a morning visiting their local court with jurisdiction over car accidents, dog bites, and residential lease disputes.

discovery disputes or other nondispositive matters—are neither broadcast over loudspeakers, nor recorded, nor transcribed for public consumption. Case management discussions in chambers and judicial settlement conferences occur behind closed doors. Observers are not invited to question witnesses. They are not entitled to review bench briefs prepared by the judge’s clerks or notes passed among counsel. They have no claim to the judge’s private impressions of the merits of a case unless those impressions issue in a judicial opinion. Hearings are public, but many details remain private.

Each of these deviations from full public access reflects a decision to prioritize some other value over absolute public access. For example, if unfettered public scrutiny were indispensable for resolving evidentiary disputes, the court could remove the jury during those arguments instead of gathering attorneys for quiet conferences around the bench. Telephonic hearings could use publicly accessible conference lines or speaker phones in open court. Judges could release their clerks’ memoranda in real time or publish early drafts of major decisions. Legislatures could try to compel similar disclosures.<sup>17</sup> For various reasons—efficiency, candor, comfort, or convenience—the courts and other policy makers draw lines that invite the public to witness parts of the proceedings while sometimes keeping the public at a distance.

Analyses of the proper quality and quantity of public access at various phases of litigation often apply the same principles to the live proceedings and the pleadings,<sup>18</sup> but the ephemeral live hearing and the fixed written record leave room for meaningful contrasts, even before accounting for differences between paper and electronic or online records. The public observers of a public hearing must engage in a reciprocally public act by appearing in court. Judges, lawyers, parties, and witnesses may or may not recognize spectators in the courtroom, but they know whether they are alone.<sup>19</sup>

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17. See Justin Walker & Caroline Phelps, *Chilled Chambers: Constitutional Implications of Requiring Federal Judges to Disclose Their Papers Upon Retirement*, 47 U. MEM. L. REV. 1169, 1174–76 (2017) (describing various approaches to disclosure of judicial papers); Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. REV. 1665, 1714–20 (2013) (evaluating congressional authority to impose disclosure requirements on federal judges).

18. See, e.g., *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1177 (“Basic principles have emerged to guide judicial discretion respecting public access to judicial proceedings. These principles apply as well to the determination of whether to permit access to information contained in court documents because court records often provide important, sometimes the only, bases or explanations of a court’s decision.”).

19. The situation is more complicated, perhaps, in the jurisdictions that allow video or audio recording or streaming in the courts. See Mitchell Galloway, Note, *The States Have Spoken: Allow Expanded Media Coverage of the Federal Courts*, 21 VAND. J. ENT. & TECH. L. 377, 806–08 (2019).

Pleadings and other filings are qualitatively different. A docket entry is forever,<sup>20</sup> and the party that files a document with the court or has its private information filed by someone else has no way of knowing if or when the public will arrive to claim access. Some of the same practical and bureaucratic barriers limit casual public access to paper records,<sup>21</sup> but the open-ended possibility of future access distinguishes written filings from live testimony and advocacy.

Electronic judicial records take us a step further from the open courtroom.<sup>22</sup> As electronic records become increasingly accessible,<sup>23</sup> reduced costs of access to these electronic records increase the likelihood that policies calibrated for live testimony or paper records will result in electronic overdisclosure in some cases.<sup>24</sup> Historically, practical barriers separated public electronic filings from public scrutiny in ways that roughly mirrored the obstacles that limited casual access to paper files. For ten cents a page, anyone with a Public Access to Court Electronic Records (PACER) account can locate and collect the public filings of any recent federal case, but the dimes add up.<sup>25</sup> Further, an interested party still must register for PACER and identify an interesting case. Like the “whitepages” telephone directories and library card catalogues typical during its 1980s origins, PACER allows people to search one court at a time using party names and case numbers, but not topics or issues.<sup>26</sup> After finding the case, a PACER user can review docket entries and download the individual filings, paying at each step for the search results and documents reviewed.<sup>27</sup>

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20. See Karen Eltis, *The Judicial System in the Digital Age: Revisiting the Relationship Between Privacy and Accessibility in the Cyber Context*, 56 MCGILL L.J. 289, 316 (2011) (describing litigants’ reasonable “fears of having intimate details exposed not only in dusty court files but online, easily googled by potential employers, landlords, even suitors, and so forth”).

21. See, e.g., *Public Case History*, TENN. ST. CTS., <https://www.tncourts.gov/courts/supreme-court/public-case-history> [<https://perma.cc/5Z2E-UCJ5>] (last visited Mar. 15, 2019).

22. See Justin Hughes, *The Internet and the Persistence of Law*, 44 B.C. L. REV. 359, 371–72 (2003) (describing tensions in “translating real world laws, so that the balance they draw in the real world would be roughly replicated in cyberspace”).

23. See Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307, 314–15 (2004).

24. See Eltis, *supra* note 20, at 302–06 (“[A]ccess’ may no longer serve the rationales of openness and accountability and instead undermines the very entry to justice it was intended to foster.”); Winn, *supra* note 23, at 315 (“In this context, to assert that electronic judicial records should be placed under the same rules as paper records is nothing more than to advocate for the free flow of information at the expense of the many other competing values.”).

25. See PUB. ACCESS TO CT. ELEC. RECORDS, <https://www.pacer.gov> [<https://perma.cc/BC23-3X8L>] (last visited Feb. 26, 2019).

26. See PUB. ACCESS TO CT. ELEC. RECORDS, PACER USER MANUAL FOR CM/ECF COURTS 17–23 (2017), <https://www.pacer.gov/documents/pacermanual.pdf> [<https://perma.cc/K5HB-J4PZ>].

27. See Julie L. Kimbrough & Laura N. Gasaway, *Publication of Government-Funded Research, Open Access, and the Public Interest*, 18 VAND. J. ENT. & TECH. L. 267, 277 (2016);

While PACER's costs and narrow functionality translate some of the inconvenience of attending a live hearing in a secure courthouse to the electronic docket, those barriers are eroding.<sup>28</sup> For instance, the judiciary<sup>29</sup> and the legislature<sup>30</sup> have considered reducing or eliminating PACER fees. More importantly, as costs for data storage decrease and data-science capabilities improve, private companies like Westlaw and Lexis have started to gather and analyze those public filings, searching for valuable insights into the process and the relevant participants in litigation.<sup>31</sup> That comprehensive interest is qualitatively different from the attention paid by the press or other intermediaries between public courts and the broader public, even for the most sensationalized Supreme Court cases.<sup>32</sup> The loss of those barriers further undermines confidence that the old rules for paper records properly balance the real costs and benefits of increasingly accessible electronic records.<sup>33</sup>

Legal research services have long provided access to filings from individual cases, but they are developing ever more detailed analyses in which the underlying filings are simply raw material. These research services download *every* filing<sup>34</sup> to analyze the data for what it

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*Electronic Public Access Fee Schedule*, ADMIN. OFF. U.S. CTS. (Aug. 2, 2017), <https://www.uscourts.gov/services-forms/fees/electronic-public-access-fee-schedule> [<https://perma.cc/25GF-VMQZ>].

28. See Marder, *supra* note 3, at 442 (“When documents that were previously available only by making a trip to the courthouse or an agency are now available online, what was practically obscure is now glaringly public.”).

29. See, e.g., Brief of Retired Federal Judges as Amici Curiae in Support of Neither Party at 4, Nat'l Veterans Legal Servs. Program v. United States, No. 19-1081 (Fed. Cir. Jan. 23, 2019), ECF No. 26 (“The best policy is to make PACER free.”).

30. See Jason Tashea, *Proposed Legislation Would Eliminate Pacer Fees*, AM. BAR ASS'N J. (Sept. 18, 2018, 10:55 AM), [http://www.abajournal.com/news/article/new\\_bill\\_wants\\_to\\_end\\_pacer\\_fees](http://www.abajournal.com/news/article/new_bill_wants_to_end_pacer_fees) [<https://perma.cc/U78E-KCZ4>].

31. See *Thompson Reuters Westlaw Edge: Litigation Analytics Coverage*, THOMPSON REUTERS, [https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/other/final\\_s071146.pdf](https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/other/final_s071146.pdf) [<https://perma.cc/8YYT-M9GY>] (last visited Mar. 15, 2019); *What We Do*, LEX MACHINA, <https://lexmachina.com/what-we-do/> [<https://perma.cc/7JFQ-3C58>] (last visited Mar. 14, 2019).

32. Take a moment and search for news coverage of your favorite (or least favorite) Supreme Court opinion from last term. Great coverage might link to the underlying court of appeals opinion. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/> [<https://perma.cc/C4D2-BM48>] (last visited Mar. 15, 2019). The PACER records currently being harvested by LexMachina and WestLawEdge provide access to every unsealed docket entry in the underlying district court case, not only for the nationally known Supreme Court case, but also for the next obscure case on that district court's docket. See *Thompson Reuters Westlaw Edge: Litigation Analytics Coverage*, *supra* note 31.

33. See Lyria Bennett Moses, *Why Have a Theory of Law and Technological Change?*, 8 MINN. J.L. SCI. & TECH. 589, 594–95 (2007).

34. See *How It Works*, LEX MACHINA, <https://lexmachina.com/what-we-do/how-it-works/> [<https://perma.cc/ZQH9-KMXR>] (last visited Mar. 14, 2019). The most advanced and

says about judges, attorneys, and parties, to sell that insight to subscribers in a modern search and analysis platform.<sup>35</sup> Litigants value the analysis that helps determine whether a motion is worth filing, whether a case is likely to resolve ahead of some privately relevant deadline, or even what lines of argument have been persuasive in a particular court on a particular issue. As law firms, repeat litigants, litigation finance companies, and others continue to explore the substantial economic value of this trove of information in litigation, the filings themselves will become increasingly accessible as well.

A LexMachina or Westlaw Edge search resembles a PACER search in roughly the same way that a Google search resembles a search using your local library's card catalogue.<sup>36</sup> It has almost nothing in common with pre-internet searches for court filings in individual clerks' offices. This mirrors the kind of aggregation that made a "vast difference" for Justice John Paul Stevens when comparing "public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."<sup>37</sup> Instead of requiring massive investments of FBI resources to pull and review data for each FBI rap sheet, modern searches are instant, comprehensive, and impose almost no marginal cost. Although those searches currently require subscriptions to commercial research services, strong arguments in favor of full public access may ultimately succeed not only in "mak[ing] PACER free," but also in facilitating more powerful public searches to meet public expectations.<sup>38</sup>

This nascent practice of aggregating and performing automated analysis of every page filed in every case in an increasing number of courts requires a reassessment of the goals and costs associated with the public access we allow to court documents.<sup>39</sup> Big data analyses of individual courts' and judges' tendencies in resolving certain kinds of disputes<sup>40</sup> offer new and objective ways to "analyze and critique" those

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comprehensive systems are still catching up on historical backlogs, but they report collecting documents from all federal district courts. See *Thompson Reuters Westlaw Edge: Litigation Analytics Coverage*, *supra* note 31.

35. See *What We Do*, *supra* note 31.

36. See Brief of Retired Federal Judges as Amici Curiae in Support of Neither Party, *supra* note 29, at 7 (drawing similar comparisons to card catalogues and modern internet search engines).

37. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989).

38. See Brief of Retired Federal Judges as Amici Curiae in Support of Neither Party, *supra* note 29, at 4, 7.

39. See Ardia, *supra* note 3, at 1452 ("Until recently, we have been able to rely on the obscurity of court records to protect privacy interests, but we can no longer do so.").

40. See *How It Works*, *supra* note 34.

decisions, not only to advance litigants' goals in individual cases, but also to advance the core goals associated with public critique of the courts' exercise of judicial authority.<sup>41</sup> Given the retirement of Justice Anthony Kennedy,<sup>42</sup> the polarization of the major political parties,<sup>43</sup> the increasing attacks on judicial independence,<sup>44</sup> and the recent practice of confirming nominees without honoring blue slip traditions<sup>45</sup> or considering ABA assessments of professional qualifications,<sup>46</sup> this easy access to some objective data may prove valuable for understanding the independence and quality of the federal judiciary. But it will not be free.<sup>47</sup>

### B. Respect for Private Information

The second core value—respect for private information—stands in tension with the value of public courts. However, the two values are not entirely at odds with one another. Some cases may involve little private information, but “[p]rivacy can be a matter of concern to the

41. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1178 (6th Cir. 1983).

42. See Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html> [<https://perma.cc/RBV8-QKDH>]. Increased scrutiny of judicial philosophy by political actors before nominations and increased homogeneity of views within each of the major political parties left Justice Kennedy as the last idiosyncratic median Justice on the Court. See Carl Hulse, *Political Polarization Takes Hold of the Supreme Court*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/us/politics/political-polarization-supreme-court.html> [<https://perma.cc/9X93-AHLT>]. Future appointments seem likely to add to predictable votes in favor of the nominating party's core values. See *id.*

43. See *Political Polarization, 1994-2017*, PEW RES. CTR. (Oct. 20, 2017), <http://www.people-press.org/interactives/political-polarization-1994-2017/> [<https://perma.cc/F2BX-CCBP>].

44. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 12:51 PM), <https://twitter.com/realdonaldtrump/status/1065346909362143232?lang=en> [<https://perma.cc/Z4ZA-ZEK5>].

45. Traditionally, a judicial nomination would not advance through the Senate until the nominee's home-state senators indicated their support by returning a blue slip of paper to the Senate Judiciary Committee Chair. See *The Blue Slip Tradition*, AM. CONST. SOC'Y, <https://www.acslaw.org/wp-content/uploads/2018/10/The-Blue-Slip-Tradition.pdf> [<https://perma.cc/6VA6-CNS4>] (last visited Mar. 30, 2019). For more on the recent erosion of this tradition, see Jordain Carney, *Senate Confirms Trump Court Pick Despite Missing Two 'Blue Slips'*, HILL (Feb. 26, 2019, 6:04 PM), <https://thehill.com/homenews/senate/431717-senate-confirms-trump-court-nominee-despite-missing-two-blue-slips> [<https://perma.cc/JT3N-FVQW>].

46. See *Statement of ABA President Linda A. Klein Re: ABA's Role in Screening Judicial Nominations*, AM. BAR ASS'N (Mar. 31, 2017), [https://www.americanbar.org/news/abanews/abanews-archives/2017/03/statement\\_of\\_abapre1/](https://www.americanbar.org/news/abanews/abanews-archives/2017/03/statement_of_abapre1/) [<https://perma.cc/2NEF-2KRZ>].

47. Cf. MIGUEL DE FIGUEIREDO ET AL., *AGAINST JUDICIAL ACCOUNTABILITY: EVIDENCE FROM THE SIX MONTH LIST 4*, 6 (2018), <https://ssrn.com/abstract=2989777> [<https://perma.cc/5GZ9-QA7F>] (exploring non-financial costs associated with publishing the Civil Justice Reform Act listings of long pending civil action and civil motions).

plaintiff, the defendant, and nonparties in a wide array of lawsuits.”<sup>48</sup> A significant portion of constitutional and statutory law involves protecting private control over property, information, and other penumbras of private agency against governmental intrusion.<sup>49</sup> These protections extend to various discrete categories of information including, for example, private health information,<sup>50</sup> educational records,<sup>51</sup> economically valuable trade secrets,<sup>52</sup> confidential business information, and information that could undermine national security (a confidential public good). The Federal Rules of Civil Procedure extend lesser protections to other information that would simply embarrass a litigant or third party.<sup>53</sup> Different types of information receive different protections in different situations, but every public trial and every public filing comes with a cost that can be measured by the private information it discloses.

Public trials require some element of public disclosure, but pretrial discovery does not.<sup>54</sup> The pretrial discovery process was designed and expanded to foster private resolution of conflicts, with “no intention of . . . undermin[ing] privacy” or “promoting public access to information.”<sup>55</sup> The parties’ default rights to privacy prior to adjudication are maximal, and those rights only need to be balanced against default rules of public adjudication once the private information becomes necessary for that adjudication.

Entire bodies of law deal with repeated patterns of conflict between beneficial privacy and public adjudication.<sup>56</sup> State interests in law enforcement or general security provide obvious examples of protected privacy interests. Grand juries proceed in secret to protect the witnesses, the investigation, and the accused. National security concerns permit closing courtrooms and sealing judicial records.<sup>57</sup>

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48. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 464 (1991).

49. See, e.g., U.S. CONST. amends. III, IV, V, XIV; Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-6 (2018).

50. See § 1320d-6; 45 C.F.R. § 164.512 (2016).

51. See Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2018); 34 C.F.R. § 99.1 (2000); *United States v. Miami Univ.*, 294 F.3d 797, 802–03 (6th Cir. 2002).

52. See Federal Defend Trade Secrets Act of 2016, 18 U.S.C. § 1836 (2018).

53. See FED. R. CIV. P. 11(c)–(d), 26(c)(1).

54. See *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016) (“Secrecy is fine at the discovery stage. . . .”); *Romero v. Drummond Co.*, 480 F.3d 1234, 1245 (11th Cir. 2007) (“The right of access does not apply to discovery. . . .”).

55. Miller, *supra* note 48, at 466 (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring)).

56. See ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE 5–16 (2010).

57. See *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983).

Other protected privacy interests cluster around deeply personal information.<sup>58</sup> Those protections are standardized and clearly defined, for example, for personal medical information protected under the Health Insurance Portability and Accountability Act (HIPAA).<sup>59</sup> Similar protections cover educational records through the Family Educational Rights and Privacy Act (FERPA).<sup>60</sup> They also reach financial details and personal identifiers that might facilitate identity theft or similar abuse.<sup>61</sup> More general policies against unnecessary exposure of private information inform rules of evidence<sup>62</sup> and discovery,<sup>63</sup> as well as attorneys' professional obligations.<sup>64</sup> These safeguards against unnecessary disclosure give litigants and district courts the responsibility and discretion, both as a matter of efficiency and of fairness, to keep marginally relevant private information away from juries and away from the public.

While a real tension exists between public courts and private information, respect for privacy is also integral to the important values of keeping the courts open to all litigants and securing cooperation from third parties with information relevant to a dispute. Civil litigation is voluntary—to some degree—so some respect for private information is a prerequisite to functional public courts. For institutions defined by individual “Cases” or “Controversies,”<sup>65</sup> rather than abstract curiosity, closing the courts to parties that value private information is a problem. Remember, courts are public because being public helps them fulfill their constitutional role, not because the public is entitled to irrelevant details beyond the margins of the cases or controversies adjudicated.<sup>66</sup> While litigation over judicial seals necessarily focuses on the litigants who go to court and the observers asserting their actual interest in the documents as a public interest,<sup>67</sup> the void left by parties who forfeit legal

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58. See, e.g., FED. R. CIV. P. 5.2.

59. See Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, § 221, 110 Stat. 1936 (1996) (codified as amended in scattered titles of the U.S.C.).

60. See Family Educational Rights and Privacy Act, Pub. L. No. 93-380, § 1232g, 88 Stat. 57 (1974) (codified at 20 U.S.C. § 1232g (2012)).

61. See Winn, *supra* note 23, at 318.

62. See FED. R. EVID. 403, 412.

63. See FED. R. CIV. P. 26(b).

64. See FED. R. CIV. P. 11.

65. U.S. CONST. art. III, § 2.

66. See U.S. CONST. art. III, § 3; *id.* amend. XI; *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 663 (D.C. Cir. 2017); *supra* Part II.A.

67. See *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 304–06 (6th Cir. 2016); Julie E. Zink, *When Trade Secrecy Goes Too Far: Public Health and Safety Should Trump Corporate Profits*, 20 VAND. J. ENT. & TECH. L. 1135, 1169–71 (2018) (focusing on litigation's inadequacies as a mechanism for publicizing trade secrets).

rights or pursue private arbitration to protect peripheral private information also undermines the public nature of the courts.<sup>68</sup>

### C. Collaborative, Litigant-Driven Pretrial Litigation

The third core value that informs confidentiality policies for litigation is the norm of collaborative, litigant-driven pretrial litigation. When discovery procedures function properly, the court sits in the background while the lawyers resolve disagreements over the scope and volume of discovery.<sup>69</sup> Lawyers regularly balance the merits and importance of a discovery request or objection against the costs of bringing that dispute to the court, costs that include billable hours and the risk of frustrating a judge or losing credibility with the court.<sup>70</sup> Some discovery disputes require formal or informal judicial involvement,<sup>71</sup> but most do not.

Occasional public displays of judicial frustration highlight the expectation of cooperation and illustrate the possible consequences of violating that expectation. In one well-publicized example, an order from the US District Court for the Western District of Texas invited counsel to a “kindergarten party” to learn “[h]ow to enter into reasonable agreements” and limit discovery to “reasonable subject matter.”<sup>72</sup> In an email to district judges that leaked “beyond the limited

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68. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1636 (2018) (Ginsburg, J., dissenting); Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System’*, N.Y. TIMES (Nov. 2, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [<https://perma.cc/SRY4-FDYC>].

69. See Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1019 (1998). *But see* *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (“The District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public.”).

70. See Matthew Salzwedel, *The Motion to Compel: Think Tactically & Keep It Simple*, LAWYERIST (Jan. 27, 2017), <https://lawyerist.com/motions-to-compel-keep-it-simple/> [<https://perma.cc/8QBW-DK3C>].

71. See CHIEF JUSTICE JOHN ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5–7 (2015), <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [<https://perma.cc/XE4U-5BYK>]. Some judges invite or require telephonic conferences with the parties and the judge about any discovery disputes before filing a discovery motion. See Michael J. Caputo, *How Come You Never Call? Resolving Deposition Disputes by Telephone*, DUTY ON THE BREACH, <https://www.sbwllp.com/how-come-you-never-call-resolving-deposition-disputes-by-telephone/> [<https://perma.cc/4G99-VZPU>] (last visited Mar. 15, 2019). Unsurprisingly, given the broad discretion extended to magistrate judges and district court judges managing discovery, if a judge develops and communicates a preliminary assessment of the dispute, the parties and the court can often avoid the cost and delay of formal briefing and adjudication. See United States Courts, *Civil Rules 2015–Early and Active Case Management*, YOUTUBE (Dec. 21, 2015), <https://www.youtube.com/watch?v=XqLZeBAFiI0> [<https://perma.cc/QT4A-5CFC>].

72. Order at 1–2, *Morris v. Coker*, No. A-11-MC-712-SS (W.D. Tex. Aug. 26, 2011); see also David Lat, *Benchslap of the Day: Judge Sparks Burns More Attorneys*, ABOVE L. (Aug. 29, 2011,

scope of the intended distribution,” Chief Judge Edith Jones of the US Court of Appeals for the Fifth Circuit observed that the kindergarten party order “cast[] more disrespect on the judiciary than on the now-besmirched reputation of the counsel.”<sup>73</sup>

The email and the original order demonstrate two important points. First, while Chief Judge Jones discouraged the practice of committing that form of judicial frustration to the public record, she did not take issue with the frustration itself. While neither Chief Judge Jones nor anyone else reading the kindergarten party order can say whether either party or both parties earned a “now-besmirched reputation,” any experienced litigator understands that judges may get frustrated with both parties when discovery breaks down.<sup>74</sup> Chief Judge Jones focused her email on the more manageable task of keeping evidence of judicial frustration that might suggest unfair bias out of the public record,<sup>75</sup> but litigants are often more concerned about undocumented frustration and its potential impact on a case or a reputation. Whether those frustrations are reduced to a written order or not, lawyers worry about adversarial relationships between the parties spilling over into an adversarial relationship with the judge.<sup>76</sup> The tone and form of “kindergarten party” orders are exceptional, but judges regularly express the same expectations and similar broad-brush frustration with lawyers who fail to work through routine discovery disputes,<sup>77</sup> and any cost-benefit analysis of a minor dispute over discovery or evidentiary matters should include the risk of losing credibility with the court.

Second, Chief Judge Jones’s understandable concern that her email to the Fifth Circuit district judges spread online beyond the “limited scope of the intended distribution” parallels litigants’ concerns about their private information.<sup>78</sup> The possibility that any document

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5:20 PM), <https://abovethelaw.com/2011/08/benchslap-of-the-day-judge-sparks-burns-more-attorneys/> [<https://perma.cc/M2DV-ZH6V>].

73. John Council, *5th Circuit Chief Judge Takes U.S. District Judge Sam Sparks to Task in an Email*, TEX. LAW. (Sept. 12, 2011, 12:00 AM), <https://www.law.com/texaslawyer/almID/1202514158040&slreturn=1&hbxlogin=1/> [<https://perma.cc/US8Y-CAJ4>]; see also David Lat, *Benchslap of the Day: Judge Sparks Gets a Taste of His Own Medicine*, ABOVE L. (Sept. 13, 2011, 10:19 AM), <https://abovethelaw.com/2011/09/benchslap-of-the-day-judge-sparks-gets-a-taste-of-his-own-medicine/> [<https://perma.cc/DVV9-CYQ2>].

74. Joe Patrice, *Federal Judges Sound Off On Discovery*, ABOVE THE LAW (Jan. 26, 2017, 2:16 PM), <https://abovethelaw.com/2017/01/federal-judges-sound-off-on-discovery/> [<https://perma.cc/9QP9-DWES>].

75. See Council, *supra* note 73; Lat, *supra* note 73.

76. See also Lat, *supra* note 73 (noting that a judge “fighting with counsel . . . is surely not a fair contest” and “suggests bias”).

77. See Patrice, *supra* note 74.

78. Lat, *supra* note 73.

could take on new life and unlimited distribution on the internet is a concern litigants weigh when deciding how to respond in discovery and how to prove their cases in court.<sup>79</sup>

#### D. Proportionality

A fourth core value—proportionality—was critical to the most recent revisions to the Federal Rules of Civil Procedure.<sup>80</sup> “Relevancy alone is no longer sufficient” to compel the collection, review, processing, and production of voluminous records.<sup>81</sup> Instead, a court assessing proportionality will seek “input from both sides” to determine whether the material is worth the effort in light of the magnitude of the underlying conflict, the importance of the material, and the costs and burdens associated with providing it for use in the litigation.<sup>82</sup> As a part of the analysis, the requesting party must “explain the ways in which the underlying information bears on the issues as that party understands them” and the objecting party will articulate the “undue burden or expense” associated with producing the information.<sup>83</sup> This allows the court to determine “whether the burden and expense of the proposed discovery outweigh its likely benefit.”<sup>84</sup> This new—or perhaps not so new<sup>85</sup>—concern for proportionality reflects the increasing quantity, permanence, and accessibility of electronic records.

In theory, proportionality review should cut back on some of the excesses that resulted from the prior standard authorizing “discovery of any matter relevant to the subject matter involved in the action” as long as “the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>86</sup> Applying the prior broad standard to electronic data weaponized discovery and allowed parties to extract all manner of sensitive data from each other and from third parties using subpoenas.<sup>87</sup> Protective orders and mandatory and permissive

79. See *Eltis*, *supra* note 20, at 316.

80. See *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 564–66 (D. Ariz. 2016).

81. *Id.* at 564.

82. *Id.*

83. FED. R. CIV. P. 26 advisory committee’s notes to 2015 amendments.

84. FED. R. CIV. P. 26(b)(1). The court will also “consider[] the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to the relevant information, the parties’ resources, [and] the importance of the discovery in resolving the issues . . . .” *Id.*

85. See Linda Sandstrom Simard, *Seeking Proportional Discovery: The Beginning of the End of Procedural Uniformity in Civil Rules*, 71 VAND. L. REV. 1919, 1928–30 (2018) (describing history of proportionality in the Federal Rules of Civil Procedure).

86. FED. R. CIV. P. 26(b)(1) (pre-2015 amendments).

87. See Miller, *supra* note 48, at 466; William Hopwood, Carl Pacini & George Young, *Fighting Discovery Abuse in Litigation*, 6 J. FORENSIC & INVESTIGATIVE ACCT. 52, 52 (2014).

redactions enabled increasingly intrusive discovery by providing a theoretical backstop against public disclosure. Those protections against full public disclosure allowed courts and litigants to discount the risk of limited disclosure to adversaries in litigation. So while the old rules were not designed to undermine privacy, advances in electronic data storage and changes in business practices fundamentally altered the records to which they applied, often to the dissatisfaction of litigants.<sup>88</sup>

In a broader sense, proportionality reflects the pragmatic constitutional limitations of federal judicial power to the resolution of true “Cases” or “Controversies”<sup>89</sup> and the first Federal Rule of Civil Procedure calling for “the just, speedy, and inexpensive determination of every action and proceeding.”<sup>90</sup> Although the courts exercise public power and deserve public scrutiny, the scope of each extends only as far as is necessary to resolve real disputes between parties. When resolving those disputes, the courts avoid imposing unnecessary costs on the parties, and seek to do justice as quickly and as inexpensively as possible. This requires “the court and the parties”<sup>91</sup> to work within the scope of their authority and ability to narrow the legal and factual disputes to their cores and accept and impose judgment only where agreement is impossible.

### III. RENEWED STANDARDS FOR SEALING DOCUMENTS

Depending on which value predominates, judicial seals are a necessary evil or—more charitably—a pragmatic compromise. It is neither “speedy” nor “inexpensive”<sup>92</sup> to redact everything exchanged in discovery. It is not “just”<sup>93</sup> to deprive one party access to potentially relevant information in the other party’s possession or to force full public disclosure of legitimately private information. So within the bounds of Rule 26, courts regularly permitted and required disclosure of party secrets in discovery with the assurance that parties who received others’ secrets using the power of judicial discovery mechanisms could not disclose them beyond the needs of the litigation. Unfortunately, once litigants had access to each other’s secrets, courts were not always attentive to issues involving their own access to

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88. See Miller, *supra* note 48, at 466 (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring)).

89. U.S. CONST. art. III, § 2.

90. FED. R. CIV. P. 1.

91. *Id.*

92. *Id.*

93. *Id.*

irrelevant but sensitive details in pretrial proceedings when neither the jury nor any other proxy for the public was present to trigger a balancing of the public's need for specific details against the costs and inconvenience of preserving privacy. As a result, particularly as electronic communications caused an exponential increase in discoverable material, many courts approved protective orders under Rule 26 that also allowed parties to protect information from disclosure not only during discovery, but also after filing it in court records.<sup>94</sup> This turned out to be a problem.

The accessibility of documents on electronic dockets diverged from their hard-copy antecedents over time, but a sudden change of practice in the Sixth Circuit threw their differences into sharp contrast. A series of opinions beginning in 2016 with *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan* resulted in a new procedural mechanism for maintaining open judicial records across the Sixth Circuit and offer a helpful case study for balancing the values discussed above.<sup>95</sup> *Shane Group* addressed allegations of price-fixing affecting “millions of Michigan citizens.”<sup>96</sup> Despite the public’s “keen and legitimate interest” in the evidence, the district court “sealed most of the parties’ substantive filings from public view, including nearly 200 exhibits and an expert report upon which the parties based a settlement agreement.”<sup>97</sup> With substantial portions of the evidence and expert opinions either redacted or sealed, class members argued that “their lack of access to the court record impaired their ability to assess the settlement’s fairness.”<sup>98</sup> After the district court prevented unnamed class members and other interested entities from unsealing or accessing the documents needed to evaluate the settlement, the Sixth Circuit revisited the standard and imposed additional procedural hurdles for sealing judicial records.<sup>99</sup>

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94. See, e.g., *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 472–73 (6th Cir. 1983).

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

96. *Id.* at 302.

97. *Id.*; see also *id.* at 306 (“The documents placed under seal in this case include, among other things, the Plaintiffs’ Amended Complaint, the Plaintiffs’ Motion for Class Certification and Blue Cross’s Response, and Blue Cross’s motion to strike the report and testimony of the Plaintiffs’ expert witness, Dr. Jeffrey Leitzinger (for whose services, under the settlement agreement, the class members would pay more than \$2 million). And sealed along with the parties’ filings were 194 exhibits to them—including Leitzinger’s report, whose valuation of the class’s claims by all accounts was the keystone of the settlement agreement.”).

98. *Id.* at 304.

99. See *id.* at 304–06. The concern for overbroad sealing was not unique to the Sixth Circuit and has been expressed previously in other circuits. See, e.g., *Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (“The order that the district judge issued in this case is not quite so broad as ‘seal whatever you want,’ but it is far too broad to demarcate a set of documents clearly entitled without further inquiry to confidential status.”).

*A. Reinforcing Old Norms*

As a substantive matter, *Shane Group* merely reaffirmed a Sixth Circuit standard articulated in 1983 in *Brown & Williamson Tobacco Corp. v. F.T.C.*<sup>100</sup> *Shane Group* reiterated *Brown & Williamson's* “strong presumption in favor of openness” in service of the public’s “interest in ascertaining what evidence and records the District Court and [the Sixth Circuit] have relied upon in reaching [their] decisions.”<sup>101</sup> The court reminded litigants and lower courts that the strong presumption of public access imposed a “heavy” burden on any party seeking to seal judicial records.<sup>102</sup> Just as it had in *In re Knoxville News-Sentinel Co.*,<sup>103</sup> the court warned that “[o]nly the most compelling reasons can justify non-disclosure of judicial records.”<sup>104</sup> *Shane Group* did nothing to modify the two established justifications for limiting public access to live court proceedings: first, to maintain “order and dignity in the courtroom” and, second, to limit “the content of the information to be disclosed to the public” in order to protect “certain privacy rights of participants or third parties, trade secrets, and national security.”<sup>105</sup> Courts typically analyze seals through the second category involving “privacy rights[,] . . . trade secrets, and national security,”<sup>106</sup> but when a court publishes documents to the world that it would not publish to a jury or publishes documents after agreeing to keep them under seal, that may also implicate concerns for order and dignity of the court and the proceedings.

*B. Procedural Mechanisms Defaulting Toward Disclosure*

*Shane Group's* major change to the law of judicial seals in the Sixth Circuit was procedural. Prior to *Shane Group*, an order sealing judicial records might simply rely on a party’s designation of the document as “CONFIDENTIAL” during discovery.<sup>107</sup> *Shane Group* requires more.<sup>108</sup> The Sixth Circuit imposed a granular US Court of Appeals for the Seventh Circuit procedure requiring that the

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100. See *Shane Grp.*, 825 F.3d at 305 (quoting *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983)).

101. *Id.* at 305 (quoting *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179, 1181).

102. *Id.*

103. See *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983).

104. *Shane Grp.*, 825 F.3d at 306 (quoting *In re Knoxville News-Sentinel Co.*, 723 F.2d at 476).

105. *Shane Grp.*, 825 F.3d at 305–06; *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179.

106. *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179.

107. *Shane Grp.*, 825 F.3d at 305.

108. See *id.* at 305–06.

“proponent of sealing”—who might be either the party filing the document, another litigant, or even a subpoenaed third party—“analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations.”<sup>109</sup> The Sixth Circuit imposed a parallel burden on the district court to “set forth findings and conclusions ‘which justify nondisclosure to the public,’”<sup>110</sup> presumably at a similarly granular level. Following *Shane Group*, “[a] court’s failure to set forth those findings and conclusions ‘is itself grounds to vacate an order to seal.’”<sup>111</sup>

The Sixth Circuit reinforced the new requirement in a series of decisions following *Shane Group*.<sup>112</sup> Although *Shane Group* came up as a direct challenge to the seals themselves, it sparked renewed scrutiny of sealed filings across the circuit.<sup>113</sup> After *Shane Group*, the Sixth Circuit demonstrated in *Beauchamp v. Federal Home Loan Mortgage Corp.* that it was still willing to vacate seals on its own motion, just as it had in *Brown & Williamson*.<sup>114</sup> Next, in *Rudd Equipment Co., Inc. v. John Deere Construction & Forestry Co.*,<sup>115</sup> the court held that an order

109. *Id.* at 305–06 (quoting *Baxter Int’l, Inc. v. Abbott Labs.*, 297 F.3d 544, 548 (7th Cir. 2002)).

110. *Id.* at 306 (quoting *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1176).

111. *Beauchamp v. Fed. Home Loan Mortg. Corp.*, 658 F. App’x 202, 207 (6th Cir. 2016) (quoting *Shane Grp.*, 825 F.3d at 306).

112. *See* *Kondash v. Kia Motors Am., Inc.*, 2019 WL 1418168, at \*2–\*4 (6th Cir. 2019) (exploring distinctions between trade secret status and eligibility for seal); *Woods v. U.S.D.E.A.*, 895 F.3d 891, 893 (6th Cir. 2018); *Signature Mgmt. Team, LLC v. Doe*, 876 F.3d 831, 836–37 (6th Cir. 2017) (extending *Shane Group* to develop a new standard for balancing privacy interests of anonymous defendant liable for copyright infringement); *Danley v. Encore Capital Grp.*, 680 F. App’x 394, 399 (6th Cir. 2017) (emphasizing independent obligation of district courts); *Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 593, 592–94 (6th Cir. 2016) (applying collateral order doctrine to vacate seal on interlocutory appeal); *Beauchamp*, 658 F. App’x at 207 (vacating seals *sua sponte*).

113. *See* *Tyson v. Regency Nursing, LLC*, No. 3:17-CV-91, 2018 WL 632063, at \*1 (W.D. Ky. Jan. 30, 2018) (“The public has a strong interest in viewing the evidence that courts base their decisions upon, even if that evidence could be deemed privileged or protected.”); *Knight Capital Partners Corp. v. Henkel Ag & Co., KGaA*, 290 F. Supp. 3d 681, 687 (E.D. Mich. 2017) (“Henkel’s proposal for an automatic sealing provision in the protective order, therefore, is entirely out of the question.”); *Doe v. Sevier Cnty.*, No. 3:17-CV-41, 2017 WL 1048378, at \*3–\*4 (E.D. Tenn. Mar. 15, 2017) (denying motion to seal educational records because proponent failed to analyze exceptions to the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, or propose line-by-line redactions); *Alyn v. S. Land Co., LLC*, No. 3:15-cv-596, 2016 WL 5126735, at \*3 (M.D. Tenn. Sept. 20, 2016) (denying motion to stay pending appeal of denial of motion to seal); *In re Black Diamond Mining Co., LLC*, No. 15-96-ART, 2016 WL 4433356, at \*4–\*5 (E.D. Ky. Aug. 18, 2016) (unsealing previously protected records); *Wausau Underwriters Ins. Co. v. Reliable Transp. Specialists, Inc.*, No. 15-12954, 2016 WL 6638698, at \*2 (E.D. Mich. July 13, 2016) (“Like all plaintiffs, Wausau must accept the disclosure of otherwise private information and the risks that are consequent to having filed a lawsuit. Its motion for a protective order is DENIED”).

114. *See* *Beauchamp*, 658 F. App’x at 207; *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1176.

115. *See* *Rudd*, 834 F.3d at 592.

to seal judicial documents was a collateral order subject to immediate appeal without awaiting final judgment in the district court.<sup>116</sup>

The *Shane Group* line of cases redirected the path of least resistance for any sensitive document in Sixth Circuit litigation. Prior to *Shane Group*, that sensitive document would likely have been produced under a “CONFIDENTIAL” or “ATTORNEY’S EYES ONLY” designation supported by a protective order issued for “good cause.”<sup>117</sup> If either party chose to present that document to the court for any reason, it would be filed under seal using “perfunctory” motions and orders citing the blanket protective order without applying “the vastly more demanding standards for sealing off judicial records from public view.”<sup>118</sup> That unopposed motion to seal would likely have been granted with limited scrutiny.<sup>119</sup> *Shane Group* called attention to this problem of “conflating the standards for entering a protective order under Rule 26 with the vastly more demanding standards for sealing off judicial records from public view,” but responded in a way that deprived the district courts and litigants of some of the protections and discretion afforded by Rule 26.<sup>120</sup> After *Shane Group*, the same perfunctory order might be vacated *sua sponte* at any time—during litigation or even after litigation ended.<sup>121</sup> The perfunctory motion—if presented to a judge familiar with *Shane Group*—would be denied.<sup>122</sup> The “proponent of the seal” would be “free . . . to demonstrate—on a document-by-document, line by line basis—that specific information in the [documents] meets the demanding requirements for a seal.”<sup>123</sup> But “free” is the wrong word to describe the painstaking analysis *Shane Group* compels—particularly in a circuit where years of “perfunctory” orders leave few robust opinions balancing the privacy interests implicated in modern litigation against historical standards for open courts. A proponent of sealing surprised by the filing, overburdened by responding to the substance of the filing, or simply unable to muster nonexistent legal authority to creatively justify the requested seal with line-by-line briefing would lose that secret to the public record. Moreover, because

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116. *Id.*

117. FED. R. CIV. P. 26(c)(1); *see also* *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016).

118. *Shane Grp.*, 825 F.3d at 307; *accord* *United States v. Carell*, No. 3:09-00445, 2011 WL 1114242, at \*3 & n.2 (M.D. Tenn. Mar. 24, 2011).

119. *Compare Carell*, 2011 WL 1114242, at \*1, \*3 & n.2, *with* *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1996).

120. *Shane Grp.*, 825 F.3d at 307.

121. *See id.*; *Beauchamp*, 658 F. App’x at 207.

122. *See, e.g.*, *Gist v. TVA Bd. of Dirs.*, No. 1-14-CV-174-TRM-CHS, 2017 WL 3634017, at \*1 (E.D. Tenn. Aug. 23, 2017).

123. *Shane Grp.*, 825 F.3d at 308.

“[a] court’s obligation to keep its records open for public inspection is not conditioned on an objection from anybody,”<sup>124</sup> even sealed documents in cases finalized long ago may not be safe from *Shane Group*.

### C. Defaults on Promises of Confidentiality

Parties who begin litigation after *Shane Group* walk into that forced disclosure knowingly, but parties who litigated a case or even exchanged discovery in reliance on a protective order guaranteeing sealed filings occupy a different position. Although the technical details of protective orders vary, parties who accept others’ confidential information on the condition that it will only be filed under seal have some obligation to protect that information. A similar duty reaches district courts that sign and file agreed orders contemplating seals and compel production of confidential information on the basis of those protective orders. Unsealing documents, denying motions to seal that would have been granted before *Shane Group*, and even filing confidential documents knowing that they will be published default on commitments parties relied upon when they made that information available to the litigation.

Prior to *Shane Group*, protective orders described the process of placing confidential discovery into the electronic record in different ways. Some orders ignored procedure, specifying only that the designated material would be filed under seal.<sup>125</sup> Others mandated that the party filing the documents would move to have the documents sealed<sup>126</sup> or—more problematically after *Shane Group*—take all necessary steps to have the documents filed under seal. Still others

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124. *Id.* at 307.

125. *See* Protective Order at 5–6, *Danley v. Encore Capital Grp., Inc.*, No. 2:15-cv-11535-GCS-EAS (E.D. Mich. Jan. 20, 2016), ECF No. 37 (“To the extent that any answers to interrogatories, transcripts of depositions, responses to requests for admissions, or any other papers filed or to be filed with the Court reveal or tend to reveal information claimed to be confidential pursuant to the above terms, these papers or any portion thereof must be filed under seal by the filing party with the Clerk of Court. However, no document may be filed under seal without leave of court.”); Agreed Protective Order at 5–6, *Beauchamp v. Fed. Home Loan Mortg. Corp.*, No. 2:13-cv-53-JGW (E.D. Ky. Feb. 19, 2015), ECF No. 72 (“[A]ll CONFIDENTIAL material and all pages of any briefs, memoranda, affidavits, transcripts, exhibits, and other papers containing notes or summaries of material which has been designated as CONFIDENTIAL pursuant to this Protective Order which are presented to the Court shall be sealed . . .”).

126. *See, e.g.*, Stipulated Protective Order Concerning Confidentiality at 8, *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, No. 2:10-cv-14360-DPH-MKM (E.D. Mich. Oct. 5, 2011) (“If any documents or testimony designated or treated under this Order as Confidential Information is included in any pleading, motion, exhibit, or other paper to be filed with the Court, the Party seeking to use such material shall follow the procedures set forth in E.D. Mich. LR 5.3 and 26.4. Nothing in this Order shall restrict any person, including any member of the public, from challenging the filing of any Confidential Information material under seal.”).

indicated that the court “shall” place the documents under seal.<sup>127</sup> Regardless of the particular language used, each of these orders memorialized and committed to a shared expectation that private information shared with adversaries would not be shared with the public. These expectations were not uncommon, even if they were inconsistent with established law.<sup>128</sup>

The particular phrasing of a protective order may determine whether a party who files an adversary’s confidential information after *Shane Group* or the court that denies a motion to seal it has complied with a pre-*Shane Group* protective order. Compliance may be impossible, for example, where the protective order compels a litigant to “take all steps necessary” to place material under seal or indicates that a court “shall” or “will” place the material under seal. That simply cannot happen for many “CONFIDENTIAL” documents after *Shane Group*. It may be ineffectual, as when a party must move to seal documents but has no incentive to draft a meritorious *Shane Group*-compliant argument, even when one exists. Either way, the result for the party that produced confidential information is unexpected and unfairly prejudicial. Either the private information becomes public, the producing party bears the costs of arguing, “line-by-line,”<sup>129</sup> to seal the documents, or both—the producing party attempts and fails to place valuable personal or commercial information under seals that *Shane Group* does not permit.

#### IV. DECOUPLING DISCOVERY AND PUBLIC DISCLOSURE

Although treating the electronic docket like an open courtroom is problematic, treating it like the entire physical courthouse may actually help reduce the overdisclosure of private information. To the

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127. See, e.g., *Signature Mgmt. Team LLC v. Doe*, No. 4:13-cv-14005 (E.D. Mich. Mar. 13, 2014) (“Any Confidential or Highly Confidential Information including deposition transcripts, as well as briefs and other papers containing or otherwise disclosing such information, which is filed with or otherwise submitted to any court shall be filed under seal. This Order shall be deemed to permit the filing under seal of the deposition transcript, brief, or other paper containing the Confidential or Highly Confidential Information.”).

128. See, e.g., *United States v. Carell*, No. 3:09-00445, 2011 WL 1114242, at \*3 (M.D. Tenn. Mar. 24, 2011) (“The parties in cases often draft proposed joint Protective Orders that violate the requirements of *Procter & Gamble* and *Brown & Williamson*, and it appears that many attorneys are unfamiliar with the principles set forth in these two cases.); see also *id.* at \*3 n.2.

129. *Shane Grp.*, 825 F.3d at 308 (“In any event, the parties or the third parties themselves remain free on remand to demonstrate—on a document-by-document, line-by-line basis—that specific information in the court record meets the demanding requirements for a seal.”). The “line-by-line” language demands some combination of precise redactions and comprehensive justifications. Either is time consuming and potentially prohibitively expensive, particularly when applied to documents prepared and originally filed in reliance on a pre-*Shane Group* protective order that promised to place those documents under seal.

extent that the electronic material tracks evidence and arguments that would take place in full public view, that material should remain available in its electronic form. But the same concerns that justify in-camera review of privileged or otherwise inadmissible documents and judicial determinations of admissibility beyond bare assertions of relevance invite a broader range of default procedures and remedies than *Shane Group* implements. The full range of values addressed above suggests that disputes over discovery and admissibility of evidence should usually take place out of public view and that some private information that cannot be sealed after *Shane Group* should not be allowed in merits briefing at all.

#### A. Threshold Between Discovery and Merits Adjudication

The language and logic of *Shane Group* properly focuses on “the adjudication stage” when “material enters the judicial record” and cautions against “conflat[ing]” the standards for protective orders with those for sealing judicial records.<sup>130</sup> Those thresholds are distinct, though somewhat underdeveloped in the Sixth Circuit’s pre-*Shane Group* precedent.<sup>131</sup> Distinctions between merits adjudication and

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130. *Id.* at 307 (“Here again we see the standards for protective orders and sealing conflated: that a mere protective order restricts access to discovery materials is not reason enough, as shown above, to seal from public view materials that the parties have chosen to place *in the court record.*”).

131. A cursory review of the other circuits illustrates the variety and nuance of standards for balancing public scrutiny and litigants’ privacy. *See, e.g.*, *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 450 (5th Cir. 2019) (“[I]n this circuit the decision to seal or unseal records is to be analyzed on a case-by-case basis . . . and the individualized decision is best left to the sound discretion of the district court.” (citations omitted)); *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 665 (D.C. Cir. 2017) (describing a “six-factor test to balance the interests presented by a given case”); *Suture Express, Inc. v. Owens & Minor Distrib., Inc.*, 851 F.3d 1029, 1047 (10th Cir. 2017) (permitting sealing of a joint appendix because it “contain[ed] confidential documents, financial information, and contracts, the confidential nature of which outweighs the public’s right of access”); *N. Jersey Media Grp. Inc. v. United States*, 836 F.3d 421, 435 (3d Cir. 2016) (“[T]here is a presumptive right to public access to all material filed in connection with *nondiscovery* pretrial motions, whether these motions are case dispositive or not, but no such right as to discovery motions and their supporting documents.” (citing *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 165 (3d Cir. 1993))); *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016) (“[P]ublic access will turn on whether the motion is more than tangentially related to the merits of a case.”); *United States v. Kravetz*, 706 F.3d 47, 54 (1st Cir. 2013) (distinguishing between “materials on which a court relies in determining the litigants’ substantive rights” and those that “relate[] merely to the judge’s role in management of the trial” and therefore “play no role in the adjudication process” when considering whether a common law right of access applies (quoting *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987)); *Goesel v. Boley Int’l. (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013) (“Documents that affect the disposition of federal litigation are presumptively open to public view . . . to enable interested members of the public, including lawyers, journalists, and government officials, to know who’s using the courts, to understand judicial decisions, and to monitor the judiciary’s performance of its duties. (internal citations omitted)); *IDT Corp. v. eBay*, 709 F.3d 1220, 1224 (8th Cir. 2013) (“Modern cases on the common-law right of access say that

secondary adjudications of discovery or evidentiary matters and the larger distinction between merits adjudication and the broader judicial record should inform decisions to publishing, sealing, or excluding potentially relevant private information.<sup>132</sup> For example, documents filed under seal are literally in the judicial record in a way that documents emailed to chambers or physically delivered for in-camera review are not. Different statutory requirements may add significance to that distinction,<sup>133</sup> but it makes no normative difference in considering whether public access is necessary or proper as a policy matter.

Likewise, courts adjudicate discovery and admissibility disputes, but those largely discretionary discovery and evidentiary management decisions are both secondary to and distinct from merits determinations. Moreover, these secondary adjudications also focus on potentially irrelevant information and information carrying significant risks of embarrassment, harassment, or undue prejudice to a party, including information whose disclosure may improperly impact a jury.<sup>134</sup> As long as the courts that adjudicate the merits of cases and controversies also decide what information is relevant and necessary for deciding those merits, judicial records will include private information that is irrelevant and unnecessary. Forcing public disclosure *because* a court received that information and judged it to be *inadmissible* for whatever reason also would wrongly “conflate[]”<sup>135</sup> the relevant standards as surely as the overly aggressive sealing in *Shane*

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‘the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts.’” (quoting *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995)); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (“The weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court’s purview solely to insure their irrelevance.” (quoting *Amodeo*, 71 F.3d at 1049)); *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001) (“The better rule is that material filed with discovery motions is not subject to the common-law right of access, whereas discovery material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right, and we so hold.”); *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180–81 (4th Cir. 1988) (describing “different levels of protection” and “competing interests [that] must be weighed” when a district court considers sealing judicial records). The Federal Circuit “appl[ies] the law of the regional circuit in which the district court sits” when deciding challenges to judicial seals. *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1220 (Fed. Cir. 2013).

132. See, e.g., *Chicago Tribune*, 263 F.3d at 1312.

133. See, e.g., Tenn. Code Ann. § 10-7-403 (2018); TENN. SUP. CT. R. 34(2)(b)(iii), (c)(iv)–(v) (2017).

134. See FED. R. CIV. P. 26(c)(1).

135. *Shane Grp.*, 825 F.3d at 307.

*Group* did. Rather than publishing, sealing, or perhaps excluding documents based on broad definitions of “the judicial record” or “adjudication,” courts should apply the traditional values that make publication, sealing, or exclusion appropriate for different material in different contexts.

Documents and other materials that a court or jury uses to decide the merits of a dispute go to the core of *Brown & Williamson* and traditional notions of public courts.<sup>136</sup> Absent countervailing concerns for national security, trade secrets, or other core privacy values, material that a court needs or uses to resolve a dispute should be available to public observers interested in critiquing or simply understanding the court’s work.

On the other extreme, irrelevant or unduly prejudicial private information is exponentially more damaging on an open electronic docket than it would be in an open courtroom. A party should be able to move to exclude such material from trial without simultaneously publishing it to the world by placing it into “the judicial record” and asking for an “adjudication” on the evidentiary question. Similarly, a party resisting the production of a certain category of documents in discovery should be able to present the material to the court to help explain why the court should “issue an order to protect [the] party or person from annoyance, embarrassment, oppression, or undue burden or expense” without automatically disclosing the same information to the world and suffering the harms Rule 26(c) prevents.<sup>137</sup>

One implication of a more complete mapping of core values onto electronic dockets is that all exhibits and most briefing on discovery and evidentiary disputes could be sealed without noticeably undermining public interests or judicial efficiency. This is a natural extension of *Shane Group*’s acknowledgement that “[s]ecrecy is fine at the discovery stage”<sup>138</sup> and district judges’ and magistrate judges’ traditional responsibility and discretion to resolve intractable discovery and evidentiary disputes. No core values require discovery or evidentiary

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136. See *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983); *Doe by Doe v. Brentwood Acad. Inc.*, No. M2018-02059-COA-R9-CV, 2018 WL 6600250, at \*4 (Tenn. Ct. App. Dec. 14, 2018) (adopting a modified *Shane Group* approach emphasizing actual use of information by the court). The Tennessee court cites *Shane Group* approvingly, but it takes a more exacting look not only at whether the medical information was confidential—it was—but also at whether the courts relied on the information in a way that would otherwise justify disclosure. The Tennessee court held that “if the information is both confidential and was not relied on by the court to make a judicial decision, then the public’s right to such information is greatly diminished.” *Brentwood Acad. Inc.*, 2018 WL 6600250, at \*4.

137. FED. R. CIV. P. 26(c).

138. *Shane Grp.*, 825 F.3d at 305.

disputes to occur in full public view,<sup>139</sup> nor are judges' chambers open to allow the public to observe in-camera review of privileged or otherwise inadmissible documents. Instead, public orders describing and resolving the disputes would provide enough information for the public and future litigants to understand the law, and the sealed filings would remain available for any appellate review. Any documents important enough to come back to the court during the adjudication of the merits would find their way into the judicial record in a publishable form during substantive briefing or at trial.

### *B. True Confidentiality in Discovery*

While the Sixth Circuit “vacate[d] all of [the district court’s] orders sealing documents” in *Shane Group* and remanded for further proceedings on the merits,<sup>140</sup> nothing prevents a court from vacating the merits decisions relying on improperly sealed documents and remanding for further proceedings with properly filed evidence. The Sixth Circuit was correct that the old practice wrongly conflated standards governing secrecy in discovery and during adjudication, but so does *Shane Group*. If “[s]ecrecy is fine at the discovery stage, before the material enters the judicial record”<sup>141</sup> but “very different considerations apply” at the adjudication stage,<sup>142</sup> the question remains: What should we do with the secrets disclosed in discovery that cannot be protected in the public court filings?

Private documents disclosed in reliance on promises that those documents would not be published should remain private until the proponent of public disclosure can satisfy the proportionality standards of Rule 26(b)(1). It is unfair to penalize a litigant for complying with discovery obligations deemed proportional when confidentiality was available by depriving them of the opportunity to argue that public disclosure imposes an undue burden. And nothing prevents a court from specifying that parties may reveal sensitive information to each other for purposes of discovery without allowing that information to be revealed to the public or the court.<sup>143</sup> Such an order would be entirely consistent with the broad mandate of Rule 26(c)(1) to avoid

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139. *But see* Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated through Litigation*, 81 CHI.-KENT L. REV. 375, 436 (2006) (advocating broader access to unfiled discovery).

140. *Shane Grp.*, 825 F.3d at 311.

141. *Id.* at 305 (quoting *Baxter Int’l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002)).

142. *Id.* (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)).

143. *See* FED. R. CIV. P. 26(c)(1).

“embarrassment, oppression, or undue burden or expense,” factors that reach well beyond the narrow standards for judicial seals.<sup>144</sup>

*Shane Group* poses particular problems for sensitive commercial information that falls short of a trade secret. This includes relevant information that a party will grudgingly disclose to resolve fact disputes in litigation but would not willingly publish. It also includes irrelevant information that would be too expensive, too difficult, or too confusing to redact or filter from relevant content. The overbroad pre-*Shane Group* sealing orders managed these concerns by encouraging litigants to voluntarily disclose this borderline material under a “confidential” designation and allowing courts to compel production under similar circumstances. Unfortunately, as *Shane Group* demonstrates, that approach invited overuse of judicial seals by eliminating any adversarial assessment of whether private information was secret enough to deserve a seal. The easy availability of a judicial seal similarly prevented courts and litigants from considering whether private information was relevant enough to be proffered as evidence or even produced in discovery.

The *Shane Group* approach *exposes* the secrets and *leaves* the documents in the record, but the opposite approach—*protecting* the secrets and *striking* the unsealable documents—is equally consistent with the public nature of the courts and is more consistent with the other values addressed above. Faced with a judgment based on documents that cannot be placed in the public record, a court might instead vacate the judgment and remand for proceedings relying on public evidence. Allowing litigants to exchange confidential documents that presumptively cannot be filed in the public court records still gives litigants tools for collaborating and managing pretrial litigation efficiently and with minimal costs.<sup>145</sup> It respects litigants and third parties’ privacy interests that extend beyond the authority of courts to seal their own records.<sup>146</sup> Finally, and perhaps most importantly, it creates an extra opportunity to engage in a proportionality analysis and further narrow the scope of litigation just before the adjudication stage.

Vacating seals enforces the high common law standard for judicial seals; however, it fails to consider whether the district court

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144. *Id.*

145. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.432 (FED. JUDICIAL CTR. 2004) (“When the volume of potentially protected materials is large, an umbrella order will expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication.”).

146. See *Eltis*, *supra* note 20, at 315 (“[I]t may be that safeguarding privacy can become a way towards ensuring access to justice and willingness to participate in light of the challenges of the Internet age.”).

would have been willing to receive those documents or compel their production without the option of placing them under seal. Having determined that private information cannot remain in the public adjudicative record under seal, it fails to consider whether those documents belong in the adjudicative record at all. Certainly many of the sealed documents were necessary and appropriate for the adjudication, but when a protective order avoided “annoyance, embarrassment, oppression, or undue burden or expense” by ensuring that certain documents could *only* be filed under seal, there is no guarantee that the parties or the district court would have agreed to share or use cumulative or marginally relevant documents whose publication would embarrass, oppress, or impose undue burdens or expenses on the litigants or third parties.<sup>147</sup>

*Shane Group’s* warning against conflating standards is well taken, but conflating the standards in the opposite direction to eviscerate Rule 26 and other rules safeguarding private information is also inappropriate. The argument for applying the relevant standard at each stage in litigation is equally persuasive when considering how to preserve the Rule 26 standard for protective orders—a standard that gives litigants and district courts broad latitude to manage discovery and the presentation of evidence. Rule 26(c) reaches beyond trade secrets to protect “other confidential research, development, or commercial information.”<sup>148</sup> It reaches beyond national security to protect litigants and third parties from “embarrassment,” “annoyance,” and “expense” disproportionate to the needs of the litigation.<sup>149</sup> It allows courts and litigants to prescribe other methods for disclosing information,<sup>150</sup> place the contents of discovery under seal,<sup>151</sup> or outright “forbid[] the disclosure or discovery.”<sup>152</sup> Those tools are sufficient to protect private information from disclosure that would oppress or embarrass but not threaten national security. If applied thoughtfully, those same tools can increase the likelihood of a “just, speedy, and inexpensive determination”<sup>153</sup> in appropriate cases.

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147. See *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1316 (11th Cir. 2001) (Black, J., concurring) (“I write separately to express my concern about third parties—who have no cause of action before the court—using the discovery process as a means to unearth documents to which they otherwise would have no right to inspect and copy.”).

148. FED. R. CIV. P. 26(c)(1)(G).

149. FED. R. CIV. P. 26(e).

150. FED. R. CIV. P. 26(c)(1)(C).

151. See FED. R. CIV. P. 26(c)(1)(F).

152. FED. R. CIV. P. 26(c)(1)(A).

153. FED. R. CIV. P. 1.

*C. Litigating the Threshold Between Discovery and Merits  
Adjudication*

One option for retaining the relatively expansive exchange of information in discovery without oversealing judicial records is to delay final proportionality analyses until a party intends to place discovery material into the public record. This allows initial proportionality analyses to focus only on the costs of gathering, reviewing, and disclosing information to the parties involved in the litigation, costs that will be lower than those associated with broader disclosure and more easily managed through the court's authority over parties. The result would be disclosure and expenditures tailored to the actual risks and needs of confidential discovery.

This second stage of proportionality analyses would precede dispositive motions and other fact-intensive merits briefing and would focus only on material deemed relevant by one party and private by another. Just as parties now exchange proposed exhibits ahead of trial, they could exchange exhibits shortly before filing summary judgment briefing. This would allow the parties—and when necessary, the court—to consider the costs and other risks of using specific confidential documents and provide opportunities and incentives to explore reasonable alternatives, including redaction, stipulations, or substitutions. It would not only protect private information, it would also streamline summary judgment by eliminating the incentive and the ability to “dump it all in and let the courts sort it out.”<sup>154</sup>

Mirroring the contemporary approach to discovery and evidentiary disputes, courts could expect litigants to work through most of those issues without direct court involvement. Drawing on modern proportionality analyses and traditional evidentiary analyses, the proponent of filing would bear the burden of showing relevance and need,<sup>155</sup> and the party with the privacy concerns would have the burden of showing harm from disclosure as well as the opportunity to offer options for altering the documents or satisfying the other party's evidentiary needs in other ways. Of course, where *Shane Group* could be satisfied, the parties might move to seal trade secrets or other qualifying private information—preferably early in the litigation to educate the court and the parties on the issues and define the limits of

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154. This approach directly conflicts with the current approach, facilitated by pre-*Shane Group* practices of “dump[ing] it all in and let[ting] the courts sort it out.” Ardia, *supra* note 3, at 1443.

155. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (highlighting the virtue of “means which avoid public documentation or other exposure of private information”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

the information necessary for adjudication but still inappropriate for public disclosure. Where the privacy concerns involve information coincidentally attached to relevant information, those documents could be redacted or replaced with cleaner sources of the relevant information with costs borne by either party. Where redactions would be confusing or cost prohibitive, other documents are unavailable, and the facts are essentially uncontested, the parties might agree to stipulate as to those facts.

Some disputes would still reach the courts, just as some discovery and evidentiary disputes do now, but courts are already well equipped to balance Rule 26 concerns and related rules of evidence before allowing secret discovery documents to pass the threshold into public merits adjudication. Magistrate judges and district court judges already have the expertise and discretion needed to encourage or dictate reasonable compromises and discourage gamesmanship. Done well, this might also narrow and simplify factual disputes ahead of trial and improve the chances of rational settlements reflecting the merits of the dispute rather than tangential risks and leverage involved with highly sensitive, marginally relevant private information in public litigation.

#### V. CONCLUSION

“[T]he open courtroom has been”—and remains—“a fundamental feature of the American judicial system,”<sup>156</sup> but “the just, speedy, and inexpensive determination of every action and proceeding”<sup>157</sup> requires courts to respect private information. *Shane Group* and similar cases highlight the perils of casual secrecy that undermine public confidence in the court, but we must also preserve the rights and confidences of the parties that submit their controversies and their secrets to the courts for justice. The electronic docket is as much the modern heir to in-camera review and bench conferences as it is an extension of the open courtroom. Judges responsible for keeping the public entries open to the public are equally charged with maintaining “order and dignity”<sup>158</sup> in those records to protect the parties and the integrity of the proceedings. Courts and litigants should work together with the same rules and norms that currently screen irrelevant or prejudicial information from jury trials to similarly focus public access and private decision making on the facts and evidence

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156. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983).

157. FED. R. CIV. P. 1.

158. *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179; *see also* *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305–06 (6th Cir. 2016).

essential to the merits of the cases and controversies that courts exist to address.