Case No. 15-55084

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CENTER FOR AUTO SAFETY,
Intervenor-Appellant

v.

CHRYSLER GROUP LLC,
Defendant-Appellee.

Appeal from an Order of the United States District Court for the Central District of California, Case No. 2:13-cv-08080-DDP-VBK

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Center for Auto Safety states that it is a nonprofit corporation that has no parent corporation. As a nonprofit, it does not issue stock, and therefore there is no publicly held corporation that owns 10% or more of its stock.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34, Appellant, the Center for Auto Safety, respectfully requests that the Court hear oral argument of this appeal.

This appeal is from the denial of the Center for Auto Safety's motion to intervene in *Velasco v. Chrysler Group LLC*—a lawsuit currently pending before the U.S. District Court for the Central District of California—for the limited purpose of unsealing court records and the denial of the Center's motion to unseal those records. The Center for Auto Safety, a national nonprofit automobile safety organization, believes that the records—briefs, declarations, and exhibits submitted in connection with the *Velasco* plaintiffs' preliminary injunction motion—may shed light on whether there is a dangerous defect in the power system installed in millions of Chrysler vehicles.

Although this Court has held that "compelling reasons" are normally required to outweigh the public's right of access to court records, *see Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006), the district court held that the records filed in connection with the *Velasco* plaintiffs' preliminary injunction motion could be sealed for "good cause." The court then held that the lower "good cause" standard was met, despite the fact that there was no "particularized showing . . . with respect to [each] individual document" that

unsealing would result in "specific prejudice or harm," *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002) (internal quotation marks omitted).

Oral argument is warranted because this appeal raises a legal issue of first impression in this Court: whether documents filed in conjunction with a motion for preliminary injunction are subject to this Court's general rule that the public right of access to court records may only be overcome by compelling reasons for secrecy, or whether—as the district court held—preliminary injunction motions fall within a narrow exception to this rule that this Court has applied to sealed discovery documents attached to "nondispositive" motions, such as discovery motions. *See Phillips*, 307 F.3d at 1213. In light of the important implications of this case for both the public's right of access to court records and public safety, this Court should allow oral argument on this appeal.

JURISDICTIONAL STATEMENT

The district court has subject matter jurisdiction over the underlying case, *Velasco v. Chrysler Group LLC*, pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). The plaintiffs' Second Amended Complaint alleges that the aggregated claims of the proposed class members exceed $5,000,000, exclusive of interests and costs; and that more than two-thirds of the proposed class members are citizens of a different state than Chrysler. ER 17.

The Court has jurisdiction over the district court's denial of proposed intervenor the Center for Auto Safety's motion to unseal court records because such an order "is appealable either as a final order under 28 U.S.C. § 1291 or as a collateral order." *Oliner v. Kontrabecki*, 745 F.3d 1024, 1025 (9th Cir. 2014) (internal quotation marks omitted). There is appellate jurisdiction over the district court's denial of permissive intervention if (and only if) this Court determines that the district court abused its discretion. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1307-08 (9th Cir. 1997) ("[I]n determining its jurisdiction [over an appeal of the denial of permissive intervention], a reviewing court must—despite the seemingly 'cart-before-the-horse' nature of the inquiry—*first* decide whether the district court abused its discretion in denying the motion.").

The district court's order denying the Center's motions to intervene and to unseal court records was entered on December 30, 2014. ER 13. The Center filed a notice of appeal on January 13, 2015. ER 275. The appeal is therefore timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in holding that the strong presumption of public access to court records does not apply to the preliminary injunction motion filed in this case, and therefore the district court erred in allowing court records filed in connection with the motion to be sealed without compelling reasons.
2. Whether the district court erred by permitting court records to be sealed without requiring a particularized showing with respect to each document that specific prejudice or harm will result from unsealing.
3. Whether the district court erred when it denied the Center for Auto Safety's motion to intervene, even though the Center met the criteria for permissive intervention and there was no evidence that intervention would prejudice any party.

PERTINENT CONSTITUTIONAL PROVISION

Pursuant to Ninth Circuit Rule 28-2.7, the Center states that the only constitutional provision, treaty, statute, ordinance, regulation, or rule pertinent to this appeal is the First Amendment to the United States Constitution. That Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I.

STATEMENT OF THE CASE

This appeal stems from the denial of the Center for Auto Safety's motions to intervene and to unseal court records in *Velasco v. Chrysler Group LLC*, a case currently pending in the Central District of California.[1]

The *Velasco* plaintiffs allege that Chrysler has concealed a dangerous defect in the power system of several of its vehicles that, among other things, causes the vehicles to stall without warning while on the road, which could lead to accidents causing serious injury. ER 15. This allegedly defective power system is installed in millions of cars. ER 96. Concerned that drivers of these cars could experience dangerous power system failures before the lawsuit is resolved, the plaintiffs filed a preliminary injunction motion, requesting that Chrysler be required to warn its customers. ER 87. The district court denied the motion without a written opinion. ER 249. It also granted the parties' requests to seal much of the record related to

[1] Plaintiff Peter Velasco has been terminated from the case, and Defendant Chrysler Group, LLC has submitted a change of name to the district court. *See* ER 296. Nevertheless, the district court case appears to be continuing under the name *Velasco v. Chrysler Group LLC*. Therefore, for ease of reference, the Center refers to the case by that name in this brief. In this Court, the appeal is captioned *The Center for Auto Safety v. Chrysler Group LLC*.

the motion—without even mentioning the public right of access to court records. ER 139, 199, 230.

The Center for Auto Safety, a national nonprofit organization devoted to promoting automobile and highway safety, moved to intervene in the case for the limited purpose of unsealing these court records and, at the same time, moved to unseal them. ER 1. The district court denied both motions. ER 1. This appeal followed. ER 107.

A. The Underlying Litigation

On November 1, 2013, the plaintiffs in *Velasco* filed a putative class action against Chrysler, alleging that the company concealed a dangerous defect in the power system—technically, the Totally Integrated Power Module (or TIPM)—of several models of its vehicles. ER 14. This defect, the plaintiffs contend, "results in erratic and unsafe behavior from the vehicle[s'] electrical system" that, among other things, causes vehicles not to start, or worse, to stall at high speeds. ER 88. As of October 20, 2014, the plaintiffs had been "contacted by over 500 Chrysler customers who . . . reported difficulty starting the[ir] vehicles, stalling while driving, . . . electrical malfunctions while driving (*e.g.*, lights turning off, horn blaring), or a dead battery because their vehicle's fuel pump would not turn off." ER 128. The National Highway Traffic Safety Administration (NHTSA) and the Center for Auto Safety have received hundreds of consumer complaints describing

similar problems, including numerous reports from drivers whose Chrysler vehicles dangerously stalled without warning as they were driving. ER 128, 235.

On August 21, 2014, the Center for Auto Safety petitioned NHTSA "to initiate a safety defect investigation into failures associated with the Totally Integrated Power Module (TIPM) installed in Chrysler SUV's, trucks, and vans beginning in the 2007 model year." ER 239. On September 25, 2014, NHTSA opened a defect petition review to evaluate the Center's request. ER 247. The agency estimated nearly five million vehicles could be affected. ER 247. Although the agency was, by law, required to decide by December 19, 2014 whether to grant the Center's petition, *see* 49 U.S.C. § 30162(d), it has not yet done so.

Despite having previously denied any TIPM-related defect, on August 26, 2014—just days after the Center for Auto Safety petitioned NHTSA to investigate— Chrysler itself decided to conduct a "voluntary safety recall" of its model year 2011 Dodge Durango and Jeep Grand Cherokee vehicles. ER 179. According to the recall documents, a power system defect could cause these vehicles to "stall without warning, ... increas[ing] the risk of a crash." ER 194. Although the Center for Auto Safety's petition to NHTSA was concerned with fourteen Chrysler models, from 2007 to the present—approximately 4.9 million

vehicles—Chrysler recalled only two models from a single year—approximately 188,723 vehicles. ER 188.

Concerned that "thousands upon thousands" of drivers could experience dangerous power system failures before the lawsuit is resolved, the *Velasco* plaintiffs filed a motion for preliminary injunction, requesting that the district court order Chrysler to warn its customers. ER 84, 96. "The risk of serious injury from widespread TIPM failures," the plaintiffs argued, is so high that Chrysler's customers need to be informed immediately so they can take precautions. ER 88. The plaintiffs requested that the court require Chrysler to "notify its customers that: [redacted]." ER 87. "What makes Chrysler's silence particularly dangerous," the plaintiffs explained, "is that—[also redacted]." ER 96. "In other words," the plaintiffs continued, "the frightening stalling incidents reflected in the accompanying declarations and in driver reports to NHTSA are [also redacted]." ER 96. The plaintiffs' motion is replete with redactions. *See* ER 81-101. And, aside from consumer complaints, almost all of the evidence they submitted in support of their motion was sealed. ER 139.

Chrysler opposed the plaintiffs' motion. ER 61. Its recall of 2011 Durangos and Grand Cherokees, the company argued, mooted the plaintiffs' request. ER 156. With respect to other model-years, Chrysler argued that the plaintiffs had "either submit[ted] *no* evidence supporting the notion of a TIPM-7 defect," or "the

evidence [they did] submit is *not* likely to prove a defect in those vehicles. ER 166. Chrysler asserted that the "root cause" of the defect in the recalled vehicles was a "combination of heat factors," which are "very different" from any of its other model-year cars. ER 153. The evidence upon which Chrysler relied for this assertion is redacted. ER 153-55. In fact, most of the evidence Chrysler cited to support its contention that a warning was unnecessary is redacted. *See*, *e.g.*, ER 152-55, 166-68.

In their reply brief, the plaintiffs argued that the defect is not limited to the two 2011 vehicles Chrysler recalled. ER 205, 208-09. Owners of other Chrysler cars, the plaintiffs explained, have reported the same problems. *See* ER 205, 208-09. Moreover, the plaintiffs stated that "[a]ccording to Chrysler, the TIPM defect is a progressive condition"—that is, the power system deteriorates over time. ER 209. If they are correct, as time goes on, it will become increasingly likely that the power systems in these vehicles will fail, leading them to stall without warning, which, of course, might lead to accidents, injuries, or even fatalities. To support their argument, the plaintiffs cited not only consumer complaints and declarations, but, it seems, evidence from Chrysler itself. *See* ER 209. That evidence is redacted. ER 209.

The district court denied the plaintiffs' preliminary injunction motion without issuing a written opinion. ER 249.

On February 27, 2015, Chrysler announced a safety recall of 2012-2013 Jeep Grand Cherokees and Dodge Durangos—despite the fact that just months previously, it had argued to the court that there was no evidence that these vehicles were defective. ER 279. On March 5, 2015, the parties filed a notice of settlement in principle with the district court. ER 278.

B. The Sealed Court Records

At the beginning of discovery, the parties stipulated to a blanket protective order, which provided that any party could mark a document confidential and any party that filed documents marked confidential with the court was required to move to seal those documents. ER 1-2, 72, 74-75. The district court entered the stipulated protective order without making any determination of whether there was good cause to seal any particular document. *See* ER 71-77.

Without any analysis of the public's right of access to court records, the district court granted the parties' applications to file numerous documents related to the motion for preliminary injunction under seal. ER 139, 199, 230. The plaintiffs' motion, the briefs, and the declarations are heavily redacted.[2] *See, e.g.*,

[2] Currently, not even a redacted version of Chrysler's memorandum in opposition to the preliminary injunction motion is publicly available—that motion and all its supporting documents are sealed in their entirety. *See* ER 141. Although Chrysler's counsel represented to the district court that redacted versions of these records were publicly filed, ER 274, and represented to the Center's

(Footnote continued on following page.)

ER 81-101, 142-175, 200-221. And much of the evidence submitted in connection with the motion is sealed in its entirety. *See, e.g.*, ER 106-126. Indeed, as noted above, even the warning the plaintiffs' wanted Chrysler to issue—that is, the relief they sought from the district court—is redacted. ER 82. In their application to seal, the plaintiffs stated that they believed these records should not be sealed, but they moved to seal them anyway because they included information Chrysler had marked confidential. ER 135.

C. The Center for Auto Safety's Motions to Intervene and Unseal and the District Court's Decision

On October 23, 2014, the Center for Auto Safety moved to intervene for the limited purpose of protecting the public right of access to court records and moved to unseal the documents. ER 294. The Center argued that the common law and the First Amendment protect the public's right to access court records—a right that cannot be overcome absent compelling reasons for secrecy. As neither Chrysler

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counsel that he intended redacted versions of these records to be available to the public, Chrysler did not move to unseal the redacted records, and they remain sealed. *See* ER 282-83. Chrysler's counsel did, however, email them to the Center for Auto Safety's counsel. The versions Chrysler's counsel emailed are the versions included in the excerpts of record.

On March 9, 2015, the Center for Auto Safety submitted an application to the district court to unseal these records, which Chrysler did not oppose. ER 282. The court has not yet ruled on that application.

nor the district court had provided *any* reason for sealing the records, the Center explained, they must be unsealed.

Chrysler opposed both the Center's motion to intervene and its motion to unseal.[3] ER 295. The plaintiffs, who had already taken the position that the records should not be sealed, did not oppose the motions.

The district court denied the Center's motions. ER 13. With respect to the motion to unseal, the court first held that although "[o]rdinarily, a party must show compelling reasons to seal a court document," in this case, Chrysler "need only show good cause." ER 5 (internal quotation marks omitted). The court explained that, in its view, motions for preliminary injunction are exempt from the general rule that court records may only be sealed for compelling reasons because they do not result in "a *final* determination on some issue." ER 6. And, the court stated, even if some preliminary injunction motions are subject to the public right of access, the one in this case should not be, because it was neither "a motion to temporarily grant the relief ultimately sought" by the plaintiffs in the "underlying suit," nor "necessary to the resolution of the case." ER 7-8. The court concluded that this was sufficient reason to exempt the motion from the strong presumption that the public has a right to access court records. ER 7-8. On that basis, the court

[3] Chrysler conceded in its opposition that there was no basis for sealing certain of the exhibits, and did not oppose unsealing those. ER 13.

held that Chrysler needed to demonstrate only good cause—not compelling reasons—to seal the court records at issue here. ER 8.

Second, the court held that Chrysler had satisfied this lower standard. ER 8. The court found that "a number of the documents *seem* to include . . . technical information, which *could* comprise trade secrets." ER 8 (emphasis added). The court found that the rest of the documents—mostly communications amongst Chrysler employees or between Chrysler and its contractors—did "not appear to contain significant technical information," but held that these documents could be sealed anyway. ER 10. The court expressed a concern that "there is some danger" that unsealing the records "could unnecessarily harm [Chrysler] and present an unfair picture of the alleged facts to the public." ER 10. Disclosure, the court stated, could "force[] Chrysler to litigate the case in court *and* litigate in the press." ER 11. And the court was "leery of creating an environment that would chill free and open communication among [Chrysler's] engineers, or incentivize the use of closed-door meetings that leave no paper-trail." ER 11.

The court did not explain how unsealing any particular document filed in this case would lead to a specific prejudice or harm. Nor did it balance any harm that might result from disclosure with the public interest in unsealing the records, let alone analyze whether any harm from unsealing was so significant it outweighed the public's right of access. The court also did not discuss whether the

interests it sought to safeguard could be equally protected by redacting, rather than sealing, the records that had been sealed in their entirety. The court simply held that because disclosure "could" cause harm, sealing was warranted. ER 8, 10.

The court also denied the Center's motion to intervene. ER 13. While the court noted that it was undisputed that the Center "meets the[] requirements" for intervention, the court held that because it had denied the motion to unseal, there was "no other reason" for the Center to be permitted to intervene. ER 4.

This appeal followed. ER 275.

SUMMARY OF THE ARGUMENT

Under the common law and the First Amendment, there is a strong presumption that court records are open to the public. *See Courthouse News Serv. v. Planet*, 750 F.3d 776, 787-78 (9th Cir. 2014); *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). A party that seeks to overcome this presumption must demonstrate "compelling reasons" for secrecy. *Kamakana*, 447 F.3d at 1178 (internal quotation marks omitted). Where court records have been sealed without compelling reasons, a nonparty may intervene in the case to vindicate the public's right of access. *See San Jose Mercury News*, 187 F.3d at 1100. The district court, however, held that the preliminary injunction motion filed in *Velasco* was not subject to a strong presumption of access; it therefore held that the court records submitted in connection with that motion could be sealed without

compelling reasons for doing so. It denied the Center for Auto Safety's motion to unseal, without pointing to any specific harm that might occur if the court records in this case are disclosed or any factual basis for concluding secrecy is warranted. Finally, the court denied the Center's motion to intervene, despite acknowledging that the Center met the criteria for permissive intervention. These decisions were wrong and should be reversed.

First, the district court applied the wrong standard in determining whether the court records may be sealed. The court held that good cause was an adequate basis for keeping records sealed. But that standard applies to discovery documents. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003). Ordinarily, court records may only be sealed for compelling reasons. *See Kamakana*, 447 F.3d at 1178. And once a document is filed with the court—even if it was initially produced in discovery—it becomes a court record. *See Foltz*, 331 F.3d at 1136.

The district court's rationale for its departure from this Court's settled law was that, because preliminary injunction motions do not necessarily result in a final determination of any issue, they are exempt from the public right of access. But that rationale is a misunderstanding of this Court's precedent. This Court has held that "when a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public's right of access is rebutted." *Phillips*,

307 F.3d at 1213. But this is a "narrow exception." *In Re Roman Catholic Archbishop*, 661 F.3d at 429. It is designed for attachments to discovery motions, and similar documents, to which the "the public has less of a need for access" because they "are often unrelated, or only tangentially related, to the underlying cause of action." *Kamakana*, 447 F.3d at 1179 (internal quotation marks omitted). Preliminary injunction motions, on the other hand, represent an "extraordinary" exercise of judicial power. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). They can have tremendous consequences for the parties and for the public, before a trial has even occurred, and without the input of a jury. Such consequences may not be imposed on the basis of secret evidence—at least not without compelling reasons for doing so.

Second, even if the lower good cause standard did apply, it was not met in this case. Even under the good cause standard, a party that seeks to seal documents must, "for each particular document it seeks to protect," identify the "specific prejudice or harm [that] will result if" the document is unsealed. *Foltz*, 331 F.3d at 1130. Court records may not be sealed based on "stereotyped and conclusory statements." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981) (internal quotation marks omitted). Rather, "a particular and specific demonstration of fact" is required. *Id.* (internal quotation marks omitted).

Here, the district court held that some of the documents could be sealed solely because they "*seem* to include . . . technical information, which *could* comprise trade secrets." ER 8 (emphasis added). And even documents that "d[id] not appear to contain significant technical information," the court held, could still be sealed, because releasing them might cause a "public scandal." ER 10 (internal quotation marks omitted). But there is no basis in the record for concluding that other car companies would obtain a competitive advantage from the disclosure of the court records in this case, nor is there any evidence whatsoever that a public scandal would result if the documents are unsealed. The court cited no facts, no examples, no reason at all to believe that unsealing the court records in this case would cause any specific harm. Such "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy" even the good cause standard the court erroneously applied, let alone the more demanding compelling reasons standard it should have applied. *See Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992).

Third, the district court erred in denying the Center for Auto Safety's motion for permissive intervention. This Court has made clear that a motion to intervene is the proper vehicle for challenging the sealing of court records. *See San Jose Mercury News*, 187 F.3d at 1100. There was no dispute that the Center met the criteria for permissive intervention. ER 4. And the court made no finding that

intervention would prejudice any party. *See* ER 4. There was, therefore, no reason to deny its motion to intervene. The court's decision should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews both a district court's decision on a motion for permissive intervention and its decision on a motion to unseal court records for abuse of discretion. *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1352 (9th Cir. 2013); *In re Roman Catholic Archbishop*, 661 F.3d at 424. "Where . . . the district court's decision turns on a legal question, however, its underlying legal determination is subject to *de novo* review." *San Jose Mercury News*, 187 F.3d at 1100. Therefore, the district court's decision that the good cause standard, and not the compelling reasons standard, applies to sealing the court records in this case should be reviewed *de novo*. *See Phillips*, 307 F.3d at 1213. So too should its decision that the Center's motion to intervene could be denied solely because the court denied the motion to unseal. *See San Jose Mercury News*, 187 F.3d at 1100.

II. THE DISTRICT COURT ERRED IN HOLDING THAT MOTIONS FOR PRELIMINARY INJUNCTION MAY BE SEALED WITHOUT COMPELLING REASONS FOR SECRECY.

A. Court Records May Not Be Sealed Without Compelling Reasons.

It is well-established that both the common law and the First Amendment provide the public a right to access court records.[4] *See Courthouse News Serv.*, 750 F.3d at 787-78; *Kamakana*, 447 F.3d at 1178.

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[4] The district court did not specify whether the basis for its ruling was the common law or the First Amendment. Both apply here. There is no dispute that the common law provides a public right of access to civil court records. *See* ER 251. Chrysler, however, argued before the district court that the First Amendment does not apply here. *See* ER 259. This is incorrect.

"Though the Supreme Court originally recognized the First Amendment right of access in the context of criminal trials, the federal courts of appeals have widely agreed that" a right of public access under the First Amendment "extends to civil proceedings and associated records and documents." *Courthouse News Serv.*, 750 F.3d at 787-78. To determine whether a particular proceeding is subject to a First Amendment right of access, this Court looks to two factors: (1) "experience"—that is, whether the proceeding has "historically been open to the press and general public"—and (2) "logic"—"whether public access plays a significant positive role in the functioning of the particular process in question." *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1084 (9th Cir. 2014) (internal quotation marks omitted).

Both prongs of this test support the conclusion that there is a First Amendment right to access documents filed in connection with preliminary injunction motions. Preliminary injunction proceedings in this country developed from interlocutory injunctions issued by the English Court of Chancery. *See* Rachel A. Weisshaar, *Hazy Shades of Winter: Resolving the Circuit Split over Preliminary Injunctions*, 65 Vand. L. Rev. 1011, 1018 (2012). Such proceedings were typically held in open court. *See* Jack I.H. Jacob, *The Fabric of English Civil Justice* (1987).

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The historic reasons for public access are well known: The knowledge that the public may review the records upon which judicial decisions are based provides an "effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948). And the ability to exercise that restraint promotes "public confidence in the [judicial] process and [in the] result." *Seattle Times Co. v. U.S. Dist. Court for W. Dist. of Wash.* 845 F.2d 1513, 1517 (9th Cir. 1988). The public right of access to court records thus helps ensure both actual fairness and the appearance of fairness—that is, accountability and legitimacy. These values are fundamental to the functioning of our judicial system. *See Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 606 (1982).

Any analysis of whether court records may be sealed, therefore, begins with "a strong presumption in favor of access." *Kamakana*, 447 F.3d at 1178 (internal quotation marks omitted). This presumption can be overcome only if there are

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More importantly, as explained below, there can be no question that public access "plays a significant positive role in the functioning of the" preliminary injunction process. *Index Newspapers LLC*, 766 F.3d at 1084 (internal quotation marks omitted); *see also In re Copley Press, Inc.*, 518 F.3d 1022, 1026 (9th Cir. 2008) ("[E]ven without an unbroken history of public access, the First Amendment right exists if public scrutiny would benefit the proceedings." (internal quotation marks omitted)).

Both experience and logic, therefore, support the conclusion that the First Amendment provides a right of access to preliminary injunction proceedings and the documents filed therein.

"compelling reasons" for sealing, "supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure." *Id.* (internal quotation marks omitted).[5]

The district court, however, held that Chrysler need not meet this standard here. To seal documents in connection with the preliminary injunction motion in this case, the court held, Chrysler need only show good cause for sealing. That was error.

The good cause standard is the standard for designating discovery materials as confidential. *See Foltz*, 331 F.3d at 1138. While court records have, historically, been open to the public, the documents exchanged between private parties as part of discovery have not. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). Many documents obtained in discovery are "unrelated, or only tangentially related, to the underlying cause of action" and are therefore never used in court. *Id.* The public interest in accessing these documents is, therefore, weaker than its interest in access to documents that are actually filed in court. *See Oliner*, 745 F.3d at 1026. For that reason, a lesser showing is required to keep them secret:

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[5] In addition, if the First Amendment applies, there must not only be a "compelling interest" in sealing, but also a "high probability" that this interest would be harmed if the documents were disclosed and "no alternatives to closure that would adequately protect the compelling interest." *Perry v. Brown*, 667 F.3d 1078, 1088 (9th Cir. 2012) (internal quotation marks omitted).

In contrast to the compelling reasons standard that applies to court records, unfiled discovery documents may be kept confidential upon a "particularized showing" that there is "good cause" to do so. *Foltz*, 331 F.3d at 1138.

Ordinarily, however, once discovery documents are filed with the court, they "lose their status of being raw fruits of discovery" and may not be sealed without compelling reasons. *Foltz*, 331 F.3d at 1136. "Unlike private materials unearthed during discovery, judicial records are public documents almost by definition, and the public is entitled to access by default." *Kamakana*, 447 F.3d at 1180.

There is no question that the documents submitted in connection with the plaintiffs' preliminary injunction motion are court records. The briefs, declarations, and pleadings were never discovery documents. And although many of the exhibits were initially produced to the plaintiffs in discovery, they were filed with the court as evidence of the plaintiffs' contention that there was a danger to the public that warranted judicial intervention. They therefore "los[t] their status of being raw fruits of discovery." *See Foltz*, 331 F.3d at 1136. All of the documents submitted in connection with the preliminary injunction motion are thus court records, subject to public access "by default." *Kamakana*, 447 F.3d at 1180; *Phillips*, 307 F.3d at 1212 (explaining that the public "has a federal common law right of access to all information filed with the court"). They may only be sealed for compelling reasons.

B. There Is No Exception to the Presumption of Access that Applies to Preliminary Injunction Motions.

The court below held that the preliminary injunction motion in this case was exempt from the public right of access that ordinarily applies to court records. But "[t]here can be little dispute that the press and public have" a right of access to "most pretrial documents." *Associated Press v. U.S. Dist. Court for Cent. Dist. of California*, 705 F.2d 1143, 1145 (9th Cir. 1983); *see Foltz*, 331 F.3d at 1134 (explaining that this right extends to civil, as well as criminal, cases). There are few exceptions to this right, and none applies here.

The only court records this Court has permitted to be sealed without compelling reasons are (1) records that "have traditionally been kept secret for important policy reasons," such as "grand jury transcripts and warrant materials in the midst of a pre-indictment investigation"; and (2) "sealed discovery documents attached to a non-dispositive motion." *Kamakana*, 447 F.3d at 1178-79 (alterations and internal quotation marks omitted). There is no argument here that preliminary injunction motions have traditionally been kept secret. Rather, the district court relied on the second exception: The *Velasco* plaintiffs' preliminary injunction motion, the court held, was a nondispositive motion, and therefore the records filed in connection with the motion could be sealed without demonstrating compelling reasons for sealing.

The court erred for two reasons: First, many of the sealed court records are briefs, declarations, and pleadings. These documents were *never* discovery documents, and therefore cannot be sealed under an exception that by its terms applies only to "sealed discovery documents."

Second, and more importantly, the exception for sealed discovery documents attached to nondispositive motions does not apply here at all. The idea that such documents might be subject to a lesser standard than other court records stems from this Court's decision in *Phillips v. General Motors*. 307 F.3d 1206 (9th Cir. 2002). In that case, the Los Angeles Times sought to unseal a document containing confidential settlement information that General Motors had produced to the plaintiffs in discovery under a protective order. *Id.* at 1209. The plaintiffs had never filed the document in connection with a substantive motion; nor had they relied on it as evidence in the case. *See id.* The only reason the document was filed with the court at all was because the plaintiffs had attached it to a discovery-sanctions motion, in which they argued that General Motors had violated a discovery order by including irrelevant information in the document. *Id.* The question on appeal was whether the strong presumption of access to court records applied to that document, even though it was only filed with the court as part of a discovery dispute. *See id.* at 1213.

Phillips held that the presumption did not apply. *See Phillips*, 307 F.3d at 1213. The Court's decision hinged on the fact that the document was filed in connection with a discovery-sanctions motion: It would "make[ ] little sense," the Court explained, "to render the district court's protective order useless simply because the plaintiffs attached a sealed discovery document to a nondispositive sanctions motion filed with the court." *Id*. Discovery documents attached to discovery motions are still, essentially, just discovery documents: The fact that the documents are filed as part of a discovery motion just means that the parties are fighting over discovery. As this Court later explained, the rationale underlying *Phillips* is that "the public has less of a need for access to court records attached only to non-dispositive motions," such as the discovery motion in *Phillips*, "because those documents are often unrelated, or only tangentially related, to the underlying cause of action." *Kamakana*, 447 F.3d at 1179 (internal quotation marks omitted).

This rationale does not apply to preliminary injunction motions. *Cf. Oliner*, 745 F.3d at 1026 (applying the compelling reasons standard to court records where "[t]he rationale underlying the 'good cause' standard for nondispositive orders . . . d[id] not apply"). For one thing, motions for preliminary injunction are not tangential to the underlying cause of action. To the contrary, evaluation of a preliminary injunction motion *requires* an assessment of the likelihood that a party

will succeed on the merits. *See Stormans v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009). Indeed, as a practical matter, rulings on preliminary injunction motions often determine the outcome of a case. *See, e.g.*, *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1102 (9th Cir. 1998) (reversing district court's denial of preliminary injunction and directing district court to enter a permanent injunction based on the conclusion that the plaintiff had "a 100% probability of success on the merits"); *Miller v. Rich*, 845 F.2d 190, 191 (9th Cir. 1988) ("[I]n this case, the denial of the preliminary injunction effectively decided the merits of the case."). Preliminary injunctions are not tangential, but directly relevant to the merits of a case—and often, its resolution.

More importantly, the public's need for access to preliminary injunction motions is as great as, if not greater than, its need for access to other court records. The reason documents that are unrelated, or only tangentially related, to a cause of action are often exempt from the strong presumption of access is because the public is thought to have less of a need for them. That is not the case here. Access to preliminary injunction proceedings are essential to "the public's understanding of the judicial process and of significant public events." *Kamakana*, 447 F.3d at 1179 (internal quotation marks omitted).

A court's ruling on a preliminary injunction motion can have tremendous consequences for the parties—and often for the public. Preliminary injunctions

have been granted to "block the enforcement of legislation, place a candidate on the ballot, forbid strikes, prevent mergers, [and] enforce . . . school desegregation plan[s]"—all without a jury. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525, 525 (1978). And the denial of a preliminary injunction is equally consequential: An execution may be allowed to proceed, *Lopez v. Brewer*, 680 F.3d 1068 (9th Cir. 2012); land may be irreversibly transferred, *Kettle Range Conservation Grp. v. U.S. Bureau of Land Mgmt.*, 150 F.3d 1083, 1085 (9th Cir. 1998); or, if the *Velasco* plaintiffs are correct, people may continue to drive cars they don't realize have a dangerous safety defect. Preliminary injunction decisions affect people's lives. Courts routinely hold that the public has a right to access the court records upon which decisions that affect their lives are based. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180-81 (6th Cir. 1983).

Moreover, the decision on a preliminary injunction motion is rendered before the completion of a case and without a jury. It is thus an "extraordinary" exercise of judicial power. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *see also Burlington N. R. Co. v. Dep't of Revenue of State of Wash.*, 934 F.2d 1064, 1072 (9th Cir. 1991) (holding that delegation of decision on preliminary injunction motion to special master was "an inexcusable abdication of judicial responsibility and a violation of article III of the Constitution"). Such an exercise

of judicial power must be subject to public oversight. *See United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (explaining that "public monitoring" of the courts' exercise of Article III judicial power "is an essential feature of democratic control").

The public right of access does not, as the district court thought, exempt any motion that does not result in a final determination. Rather, the term "nondispositive motion" is simply shorthand for motions that are not "of major importance to the administration of justice," *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984).[6] Preliminary injunction motions do not fit this bill. The public right of access therefore applies with equal force.

C. Most Courts that Have Considered the Issue Have Held that the Public Right of Access Applies to Preliminary Injunction Motions.

For these reasons, the vast majority of courts to have considered the issue have held that preliminary injunctions are subject to the presumptive public right

[6] The use of the term nondispositive to distinguish motions that are tangential to the judicial process from those that are central to the Article III judicial power is not limited to the court secrecy context. For example, the pretrial matters on which magistrate judges are empowered to rule are referred to as "non-dispositive," whereas the motions they lack authority to determine are called "dispositive" motions. *See, e.g., Maisonville v. F2 America, Inc.*, 902 F.2d 746, 747-48 (9th Cir. 1990). The list of "dispositive" motions includes not only summary judgment motions and motions to dismiss, but also motions for preliminary injunction. *See* 28 U.S.C. § 636.

of access. The Third Circuit, for example, has held that there is "no reason to distinguish between material submitted in connection with a motion for summary judgment and material submitted in connection with a motion for preliminary injunction." *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 164 (3d Cir. 1993). A district court's decision on a preliminary injunction motion, that court explained, "is a matter which the public has a right to know about and evaluate." *Id.* (internal quotation marks and alterations omitted); *see also Romero v. Drummond Co.*, 480 F.3d 1234, 1245-46 (11th Cir. 2007) ("Material filed in connection with any substantive pretrial motion, unrelated to discovery, is subject to the common law right of access."); *Methodist Hospitals, Inc. v. Sullivan*, 91 F.3d 1026, 1031 (7th Cir. 1996) (applying presumption of access to temporary restraining order).

Several district courts in this circuit have come to the same conclusion. *See, e.g.*, *United Tactical Sys., LLC v. Real Action Paintball, Inc.*, No. 14-CV-04050-MEJ, 2015 WL 295584, at *2 (N.D. Cal. Jan. 21, 2015); *Gaudin v. Saxon Mortgage Servs., Inc.*, No. 11-CV-01663-JST, 2013 WL 2631074, at *1 (N.D. Cal. June 11, 2013); *Gamez v. Gonzalez*, No. 1:08-CV-01113-LJO, 2013 WL 127648, at *2 (E.D. Cal. Jan. 9, 2013) ("Permitting the motion to be filed under seal would deprive the public of the information it is entitled to, namely the basis for this

Court's decision on the motion for temporary injunction. The Court shall not decide Plaintiff's motion based upon secret evidence.").

D. Public Access to Preliminary Injunction Motions is Essential to the Accountability and Legitimacy of the Judicial System.

Indeed, the values underlying the public right of access apply with particular force to preliminary injunction motions.

First, "[t]he knowledge that" a preliminary injunction proceeding "is subject to contemporaneous review" by the public is an "effective," and, indeed, essential, "restraint on possible abuse of judicial power." *See In re Oliver*, 333 U.S. at 270. Such restraint is particularly important because preliminary injunction decisions are rendered by a judge alone—there is no jury to temper the judge's power. *See Press-Enter. Co. v. Superior Court of California for Riverside Cnty.*, 478 U.S. 1, 12-13 (1986) (explaining that juries have "long [been] recognized as an inestimable safeguard . . . against the compliant, biased, or eccentric judge" and therefore the public right of access is even more important in proceedings where there is no jury (internal quotation marks omitted)). "[S]ecrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Brown & Williamson*, 710 F.2d at 1179. Publicity, on the other hand, "enhances the quality and safeguards the integrity" of the preliminary injunction process. *Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 606 (1982).

Second, allowing the public to access the records upon which preliminary injunction decisions are based will "help to ensure [these] important decision[s] [are] properly reached." *Seattle Times Co.*, 845 F.2d at 1517. "[T]he danger of a mistake" in a preliminary injunction proceeding "is substantial." *Am. Hosp. Supply Corp. v. Hosp. Products Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986). "And a mistake can be costly." *Id.* The denial of a preliminary injunction can result in irreparable harm to the party that requested it. *See id.* But the grant of a preliminary injunction carries the same risk to the party opposing it. *See id.* Public scrutiny means that parties will be less able (and less likely) to mislead the court, and any mistakes that do happen "will be more readily" noticed and "corrected." *Brown & Williamson*, 710 F.2d at 1178; *see id.* ("Public access creates a critical audience and hence encourages truthful exposition of facts."). "Without access to the [court records]," though, the public can neither "critique the reasoning of the court," nor observe the conduct of the litigants. *Id.*; *see Oliner*, 745 F.3d at 1025 ("[C]ourt records often provide important, sometimes the only, bases or explanations for a court's decision." (internal quotation marks omitted)). Preliminary injunction decisions are important. The public should have a right to ensure that they are properly reached.

Third, access to preliminary injunction proceedings enhances the legitimacy of the judicial system. "Public confidence in our judicial system cannot long be

maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *United States v. Holy Land Found. for Relief & Dev.*, 624 F.3d 685, 690 (5th Cir. 2010) (internal quotation marks and brackets omitted). Preliminary injunction decisions are "important judicial decisions" with substantial real-world consequences. They ought not be made behind closed doors.

E. There is No Reason to Treat the Preliminary Injunction Motion in this Case Differently.

The district court held that even if some preliminary injunction motions are subject to the public right of access, the motion in this case should still be exempt, because it was neither "a motion to temporarily grant the relief ultimately sought" by the plaintiffs in the "underlying suit," nor was it "necessary to the resolution of the case." ER 7-8. But, as explained above, the public right of access does not hinge on whether a decision "grant[s] the relief ultimately sought" or is necessary to resolve a case. The public has a right to access *all* court records by default. The nondispositive motion exception is a limited one that applies only to records to which the "the public has less of a need for access." *Kamakana*, 447 F.3d at 1179 (internal quotation marks omitted). The preliminary injunction motion in this case does not qualify.

Here, the district court denied a preliminary injunction that the plaintiffs argued could prevent serious injury from a defect that could be present in millions of cars. It did so without issuing a written opinion and on the basis of sealed evidence. In opposing the plaintiffs' motion, Chrysler argued that there was no evidence of a safety defect beyond 2011 Jeep Grand Cherokees and Dodge Durangos, cars that Chrysler had already recalled. ER 166. The recalled vehicles, Chrysler explained, are "very different" from the rest of the cars it manufactures, such that the defect would not occur. ER 153. But just a couple months after the denial of the preliminary injunction, Chrysler recalled model-year 2012-2013 Grand Cherokees and Durangos for the same problem. ER 279. Apparently, the vehicles Chrysler told the court were safe turned out not to be. Of course, this does not necessarily mean that the district court's decision on the preliminary injunction motion was wrong—the evidence in the record may, in fact, have been inconclusive. But without access to the court records, it is impossible to tell. If the documents remain sealed, the public will never know whether Chrysler misled the court, whether the court made a mistake, or whether, in fact, there was simply insufficient evidence to grant a preliminary injunction. *See Brown & Williamson*, 710 F.2d at 1178 ("Without access to the proceedings, the public cannot analyze and critique the reasoning of the court.").

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). The public should be permitted to access the court records filed with the preliminary injunction motion in this case.

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The public right of access requires that "if the court decides to seal . . . judicial records, it must base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture."[7] *Kamakana*, 447 F.3d at 1179. But the district court "conduct[ed] its analysis under the good cause standard, not the compelling reasons standard." ER 8. It thus applied the wrong standard, and its decision should therefore be reversed.

III. THERE IS NO GOOD CAUSE, LET ALONE COMPELLING REASON, TO SEAL THE COURT RECORDS IN THIS CASE.

Even under the good cause standard the district court erroneously applied, a party that seeks to seal court records must demonstrate that, "for each particular document it seeks to protect, . . . specific prejudice or harm will result if" the document is not sealed. *Foltz*, 331 F.3d at 1130. "Broad allegations of harm,

[7] Redactions of court records are subject to the same scrutiny as records sealed in their entirety. *See Kamakana*, 447 F.3d at 1183-84.

unsubstantiated by specific examples or articulated reasoning, do not satisfy" this standard. *Beckman*, 966 F.2d at 476. Rather, a party must provide "a particular and specific demonstration of fact" that sealing is necessary. *Gulf Oil*, 452 U.S. at 102 n.16 (internal quotation marks omitted).

Initially, the district court sealed the preliminary injunction documents without providing any reason at all. Its initial sealing orders included no analysis, or even mention, of the public right of access. ER 52, 62, 72. Even once the Center for Auto Safety moved to unseal the records, the court permitted them to remain under seal, solely on the basis of conclusory assertions that, if disclosed, the documents "*could*" potentially cause competitive harm or "promote public scandal." ER 8-10 (internal quotation marks omitted and emphasis added). But such "[b]road allegations of harm"—allegations that could apply to almost anything—do not meet the good cause standard. *Beckman*, 966 F.2d at 476. The court provided no "specific examples," no "articulated reasoning" that would demonstrate that unsealing *any* particular document filed in this case would cause any *specific* harm. *Id.* That is not a sufficient basis to seal court records under any standard.

A. There Is No Basis for Concluding that the Court Records Contain Trade Secrets or that Unsealing Them Would Cause Competitive Harm.

The district court found that "a number of the documents *seem* to include [Chrysler's] technical information, which *could* comprise trade secrets." ER 8 (emphasis added). This speculation, unsupported by any factual basis, is insufficient to seal court records, even under the good cause standard.

A trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972) (internal quotation marks omitted). The Supreme Court has "emphasize[d] that the value of a trade secret lies in the competitive advantage it gives its owner over competitors." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 n.15 (1984). Thus, a trade secret is information that if public, would allow a competitor to, for example, improve its product or operate more efficiently. *See id.* Information that a company's product is harmful, on the other hand, does not constitute a trade secret, because any decline in profits caused by the release of that information "stems from a decrease in the value of the [product] to consumers, rather than from the destruction of an edge the [company] had over its competitors." *Id.*; *see also Brown & Williamson*, 710 F.2d at 1179-80 ("[T]he natural desire of parties to shield prejudicial information contained in judicial

records from competitors and the public . . . . cannot be accommodated by courts without seriously undermining the tradition of an open judicial system. Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know. In such cases, a court should not seal records unless public access would reveal legitimate trade secrets.").

The district court sealed several documents that do not appear to meet this definition. For example, the court sealed "photographs[] of returned TIPMs." ER 255. These photographs cannot be trade secrets, because they are not secrets. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475 (1974) ("Trade secrets must be secret."). There can be no argument that pictures of a car part that is available in cars sold to the public contain confidential information—Chrysler's competitors could simply go to a car lot and take pictures of TIPMs; this is not a trade secret. Another document the court sealed was an "analysis of the trends of failure rates for . . . recalled vehicles." ER 255. This, too, is not a trade secret. It is hard to imagine how Chrysler's competitors could gain a competitive advantage—that is, how they could make better or cheaper cars—by knowing the rates at which already-recalled Chrysler cars fail.

The only reason the district court gave for holding that the court records contain trade secrets is that Chrysler said so. The court relied entirely on the fact that Chrysler's Manager of Product Investigations asserted in his declaration that

"some of the court documents could provide [Chrysler's] competitors" with information that might allow them to "manufacture their own products more efficiently, without having to engage in the expensive research and development that [Chrysler] has already done." ER 9. The court did not discuss a single document or make a single factual finding. Nor did it explain *how* other car companies could benefit from the information the court records contain. Indeed, the court did not provide a single reason to believe the court records in this case would cause competitive harm, besides the fact that Chrysler said it would. Court records may not be sealed on this basis—under any standard. *See Beckman*, 966 F.2d at 476 ("[B]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the [good cause] test.")

Moreover, even if the district court had conducted a more rigorous analysis, there was no basis in the record from which it could have concluded that the preliminary injunction documents contain trade secrets or that unsealing them would cause competitive harm. Chrysler argued that some of the court records were trade secrets "by [their] nature,"—that is, because of the kind of information they contain. ER 254. For example, Chrysler contended that "technical or scientific information" was automatically a trade secret. ER 255 (internal quotation marks omitted). It suggested that "spreadsheets" are trade secrets. ER 255 (internal quotation marks omitted). But, of course, not all technical or

scientific information is a trade secret. Information is a trade secret if it gives its owner a competitive advantage over others who do not have access to it. Beyond a conclusory assertion, though, Chrysler provided no reason to believe that the information in the court records bestowed such an advantage.

Chrysler's brief and declaration repeatedly assert that disclosure of the court records would enable other companies "to appropriate, without cost, design, development, and testing concepts and processes on which Chrysler group invested significant time and money to develop." ER 266. But nowhere does Chrysler provide any factual basis for this contention. Nowhere does it explain how Chrysler's competitors might benefit from the information the court records contain. Nowhere does it provide a "*particularized* showing" that "*specific* prejudice or harm will result" from disclosure. *Phillips*, 307 F.3d at 1210-11 (internal quotation marks omitted and emphasis added). Chrysler's bare assertions that disclosing information will lead to competitive harm fall far short of the "specific demonstrations of fact" required to seal court records, even under the good cause standard. *Foltz*, 331 F.3d at 1130-31 (internal quotation marks omitted); *cf. Ohio Valley Environmental Coalition v. Elk Run Coal Co., Inc.*, 291 F.R.D. 114, 121 (S.D.W. Va. 2013) ("A factually unsupported contention that research could potentially be used by a competitor, and the competitor would benefit by not having to incur the expense of conducting the research, is

insufficient to establish actual and severe financial and competitive harm."); *Koval v. Gen. Motors Corp.*, 62 Ohio Misc. 2d 694, 698 (Com. Pl. 1990) ("General Motors has not given specific examples of competitive harm. It simply argues that the information was costly to develop and that if the materials were to fall into the hands of its competitors, it *might* or *could* result in its competitors obtaining information concerning how they how might improve the quality and performance of their products. Such vague conclusions regarding the value of these documents and their possible use by General Motors' competitors are insufficient grounds for a protective order, and fall short of the good cause requirement of the rule.").

B. There Is No Basis for Concluding that Unsealing the Documents Would Lead to Public Scandal.

In its briefing before the district court, Chrysler spent only a few sentences arguing that the court records should remain sealed for any reason other than that they contain trade secrets. The company briefly argued that because the documents represent only some of the company's internal work on the TIPM issue, they "only tell part of the story." ER 259. Releasing them, therefore, Chrysler contended, "would be harmful to Chrysler Group" because the documents were "likely to promote public scandal and to be a vehicle for improper purposes," when the court "has not even determined that Chrysler Group has acted wrongfully." ER 256, 258-59. That's it.

Chrysler did not identify the specific harm that might befall it, what "public scandal" might arise if the documents are released, or for what improper purposes the documents might be used. Nor did it provide any factual basis for these assertions. Indeed, the declaration Chrysler submitted in support of its opposition to the motion to unseal did not even mention these theories. *See* ER 261. Nor did the company explain why, if the problem was that the documents "only tell part of the story," it could not simply make public whatever other documents it believes are necessary to understand the whole story. Chrysler's unelaborated assertion that unsealing the court records will cause public scandal is plainly insufficient to satisfy even the good cause standard. *Foltz*, 331 F.3d at 1130-31.

Nevertheless, the court sealed the records for three reasons: Unsealing the documents, the court believed, "ha[d] great potential to mislead the public," could "force[]" Chrysler "to litigate the case . . . in the press," and might "creat[e] an environment that would chill" speech within the company. ER 11. None of these reasons is supported by the record, and none is a sufficient justification for sealing the court records in this case.

1. First, the district court hypothesized that the public might be misled because the "matter . . . is only in the early stages of litigation," and the court records are "incomplete" and "out-of-context." ER 10. There are several problems with this rationale.

For one thing, the court did not explain *how* the public might be misled—that is, it is not at all clear what the court believed the public might think that is not true. The district court expressed a "concern that disclosure could give a false impression," presumably about the safety of Chrysler's cars (although the court did not specify even that much). ER 12. But the court did not say what this false impression might be. There is no suggestion that the records themselves contain false information or defamatory allegations. Indeed, with the exception of the plaintiffs' briefs, nearly all of the sealed documents were created by Chrysler itself. Moreover, in its opposition to the preliminary injunction motion, Chrysler argued that the records *do not* contain any evidence of a safety defect, beyond the vehicles

Chrysler had already recalled. ER 166. It cannot, therefore, turn around and ask that they be sealed because they *do* contain such evidence.

The court records are not one-sided. Chrysler opposed the plaintiffs' motion (and won). Therefore, both the plaintiffs' and Chrysler's interpretation of the evidence is in the record. The district court offered no reason to believe that the public would be less able than the court itself to evaluate the parties' competing interpretations and come to an accurate assessment. *See Romero*, 480 F.3d at 1247 (holding that district court abused its discretion in sealing records in part because the "court failed to explain why" allowing the defendant's "attorneys to comment about the" documents "was insufficient to counteract any purported prejudice" to the defendant from disclosure).

The district court stated that its "concern" that the public might be misled was "bolstered by the fact that . . . . the [c]ourt itself found" the court records "inconclusive." ER 11. But inconclusive and misleading are different. There is no reason to think that, faced with a set of inconclusive documents, the public would not, like the district court, simply conclude that the documents are inconclusive.

Furthermore, it cannot be the law that a district court may seal records simply because it believes the public will interpret them incorrectly. One reason for the public right of access is to allow the public to oversee how judges interpret

the evidence before them. If judges could seal documents solely because they believed the public might interpret them differently than they did, the public right of access would be eviscerated. Courts may not determine which information the public may access for fear that some may draw the wrong conclusion. *See Kleindienst v. Mandel*, 408 U.S. 753, 773 (1972) ("[T]he forefathers did not trust any government to separate the true from the false for us." (internal quotation marks omitted)).

Of course, if a "specific prejudice or harm," *Foltz*, 331 F.3d at 1130, will result from the public drawing the wrong conclusion in a particular case, there may be reason to seal the documents in that case. But neither Chrysler nor the district court identified any such specific harm in this case.

2. Second, the district court held that, if the court records were disclosed, Chrysler could "be forced to litigate the case in court *and* litigate in the press." ER 11. The court was "particularly" worried about "the disclosure of small snippets of informal corporate communications, which may frequently be incomplete, inaccurate, jocular, or filled with an insider's shorthand or jargon." ER 11. "An offhand remark in an email," the court explained, "can easily become the 'gotcha' quote in headlines and press releases." ER 11. While this may well be true, the court offers no reason to believe that would happen in this case. More

importantly, the court offers no explanation for why this general truism is a sufficient justification for sealing court records.

Courts have consistently held that the possibility that a company will face negative publicity is simply not a valid reason to seal court records. *See, e.g.*, *Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014); *see also id.* (citing cases from several circuits and stating that "every case we have located" has held that "a company's bare allegation of reputational harm" is insufficient to overcome the public right of access); *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 477 (6th Cir. 1983) (citing a District of Columbia district court case for the proposition that the "public interest in disclosure of documents regarding auto safety outweighs defendant's interest in avoiding adverse publicity").

As one judge put it, "[i]t is not the duty of federal courts to accommodate the public relations interests of litigants." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 101 F.R.D. 34, 40 (C.D. Cal. 1984).

3. Finally, the court's speculation that internal corporate speech within Chrysler might be chilled is baseless. The court stated that "as investigations of alleged TIPM-7 failures are ongoing," it was "leery of creating an environment that would chill free and open communication among [Chrysler's] engineers, or incentivize the use of closed-door meetings that leave no paper trail." ER 11. But the court provided no support—factual or logical—for the conclusion that

unsealing the documents would, in fact, chill communication in this case. Chrysler did not even argue that unsealing the court records here would have any impact on Chrysler's internal communications.

And for good reason. Chrysler is already the defendant in at least two lawsuits alleging a safety defect in its power module, the National Highway Traffic Safety Administration is investigating, and there have been several media stories. *See, e.g.*, ER 247; *Garcia v. Chrysler Group LLC*, No. 14-cv-08926-KBF (S.D.N.Y.); Christopher Jensen, *Chrysler Owners Sound Off on a Power Defect*, N.Y. Times, Aug. 22, 2014. at B3; James R. Healey, *Chrysler, Feds Probe Dangerous Stalling*, USA Today, Aug. 22, 2014, http://www.usatoday.com/story/money/cars/2014/08/22/chrysler-nhtsa-stalling-dangerous-investigations-complaints/14462289/. It is difficult to believe that unsealing the documents associated with the plaintiffs' preliminary injunction motion in this case will have any additional impact whatsoever on Chrysler's internal communications. *Cf. Dowling v. Am. Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992) (observing that "automobile and other manufacturers continue to conduct [internal safety] reviews despite" disclosure of the "infamous cost-feasibility memorandum that subjected Ford Motor Company to enormous punitive damages" based on the company's failure to correct a design defect it knew would cost lives).

The court provided no basis for believing that unsealing the court records in this case would have any impact whatsoever on Chrysler's internal operations. Nor did it explain why any such impact was a legally sufficient justification for sealing court records. The idea that allowing the public to access court records might "incentivize" corporations to, essentially, create fewer records is not a specific reason for sealing the records in this case. It is a general policy argument against the public right of access. But it has been long decided in this country that, in general, the value of open courts outweighs the arguments for secrecy. A district court cannot change that law. It can, of course, seal particular records in a particular case. But to do so, even under the good cause standard, there must be "a particularized showing" that "specific prejudice or harm will result" if the records are not sealed. *Foltz*, 331 F.3d 1122. There was no such showing here.

C. The District Court Abused its Discretion by Failing To Balance Any Harm from Unsealing the Court Records with the Public Interest in Disclosure and Failing to Consider Whether the Records that Are Sealed in Their Entirety Should Instead Be Redacted.

Even under the good cause standard, the conclusion that harm will result from unsealing court records is not the end of the road.[8] The court must "then . . .

[8] Under the compelling reasons standard that the district court should have applied, a finding that disclosure will result in harm is also insufficient. The court must determine whether that harm constitutes a compelling reason to overcome the public's right of access to court records. *See Kamakana*, 447 F.3d at 1181.

proceed to balance" that harm with the public interest in disclosure to determine whether sealing is appropriate. *In re Roman Catholic Archbishop*, 661 F.3d at 424. And even if the court determines that the interest in sealing certain information is greater than the public interest in disclosure, the court "must still consider" whether the court records should be redacted rather than sealed in their entirety. *Id.* at 425; *see Methodist Hospitals, Inc. v. Sullivan*, 91 F.3d 1026, 1032 (7th Cir.1996) ("To say that particular *information* is confidential is not to say that the entire document containing that information is confidential."). The court below did neither of these things.

The public has a strong interest in unsealing the documents filed in connection with the plaintiffs' preliminary injunction motion. As explained above, the only way the public can evaluate the district court's denial of a preliminary injunction in this case—a measure the plaintiffs claimed could prevent serious injury—is to see the court records on which the decision was based. The public right of access is particularly important where, as here, the plaintiffs allege that public safety is at stake. *See Brown & Williamson*, 710 F.2d at 1180 (holding that "[t]he public has a strong interest in obtaining the information contained in the court record," where the "litigation potentially involves the health of citizens"); *In re Air Crash at Lexington, Ky.*, No. CIV A 506-CV-316-KSF, 2009 WL 1683629, at *8 (E.D. Ky. June 16, 2009) ("[T]he public interest in a plane crash that resulted

in the deaths of forty-nine people is quite strong, as is the public interest in air safety."). The district court should have balanced this interest with any harm it concluded would result from unsealing the records.

Moreover, it should have considered whether any harm in disclosure could be sufficiently remedied through redaction. *See In re Roman Catholic Archbishop*, 661 F.3d at 424. Its failure to do so was, in and of itself, an abuse of discretion. *See id.* But this failure is also telling: It is difficult to imagine how the court even could have considered redaction. It would be impossible to determine what information to redact based on the conclusory—and largely speculative—assertions of harm on which the district court relied.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING THE CENTER'S MOTION TO INTERVENE SOLELY BECAUSE IT DENIED THE MOTION TO UNSEAL.

The law is clear that "[n]onparties seeking access to a judicial record in a civil case may do so by seeking permissive intervention under [Federal Rule of Civil Procedure] 24(b)(2). *San Jose Mercury News*, 187 F.3d at 1100. There was no basis for denying intervention in this case: There is no dispute that the Center for Auto Safety satisfies the requirements for intervention. ER 4. And although Chrysler argued that intervention might prejudice its rights, the district court did not identify any prejudice that would result from intervention, and, in fact, held that the Center "likely ha[d] the better argument" on that point. ER 4.

The only reason the court denied the Center's motion to intervene was because it denied the motion to unseal. ER 4. Because intervention was sought "for the sole purpose of unsealing" court records, the court theorized, once the motion to unseal was denied, there was no reason for the Center "to be a party." ER 4. But this puts the cart before the horse: The motion to intervene is the procedural vehicle for putting the motion to unseal before the court. *See San Jose Mercury News*, 187 F.3d at 1100. Therefore, a motion to intervene should still be granted, even if the court then goes on to deny a motion to unseal. *Cf. id.* at 1101 (explaining that even if unsealing court records would prejudice a party, intervention should be granted, and the prejudice should be considered in evaluating the motion to unseal).

Moreover, as explained above, the district court abused its discretion in holding that the court records could remain sealed. Therefore, that decision cannot be a valid basis for denying intervention. In *San Jose Mercury News*, this Court reversed a district court's denial of permissive intervention, where the district court's decision was based solely on its erroneous determination that the public right of access did not apply to the document the intervenor sought to unseal. 187 F.3d at 1098. Here, too, the district court's denial of intervention was based solely on its erroneous determination that the Center's motion to unseal should be denied. The court's decision should therefore be reversed. *See id.*

CONCLUSION

The district court's order denying the Center for Auto Safety's motion to intervene and its motion to unseal should be reversed and remanded with directions to grant the Center permissive intervention and to unseal all of the court records filed in connection with the *Velasco* plaintiffs' motion for preliminary injunction.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the Center for Auto Safety states that there are no known related cases pending in this Court.

Respectfully submitted,

Dated: March 31, 2015

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