No. 15-1211

In The

Supreme Court of the United States

FCA US LLC, F/K/A CHRYSLER GROUP LLC,

Petitioner,

v.

THE CENTER FOR AUTO SAFETY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Should the showing required to keep the raw fruits of discovery confidential also be sufficient to justify sealing evidence used in court, despite the public's presumptive First Amendment and common law right to access court records—and despite the fact that every court of appeals has ruled to the contrary?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, 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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Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. Empirical Legal Stud. 111 (2009) 33

Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010) 33

Walter W. Heiser, *Public Access to Confidential Discovery: The California Perspective*, 35 W. St. U. L. Rev. 55 (2007) 31

Arthur Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427 (1991) 32

Minutes, Advisory Committee on Civil Rules (April 1994), *available at* http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/meeting-minutes 18

Minutes, Advisory Committee on Civil Rules (April 1995), *available at* http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/meeting-minutes 18

Minutes, Civil Rules Advisory Committee Meeting (March 2010), *available at* http://www.uscourts gov/rules-policies/records-and-archives-rules-committees/meeting-minutes 29

Report to the Chief Justice on the 2010 Conference on Civil Litigation, *available at* http://www.uscourts.gov/file/reporttothechiefjustice pdf.....32

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Roscoe Pound Institute, *Open Courts with Sealed Files: Secrecy's Impact on American Justice: Report of the 2000 Forum for State Appellate Court Judges*, *available at* http://www.poundinstitute.org/sites/default/files/docs/2000ForumReport.pdf.....33

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Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases, Post-Public Comment Version, 8 Sedona Conf. J. 141 (2007).....24

Andrew John Sutton, *Discovering Discovery Technology! A Model Order and Pilot Program for Implementing Predictive Coding and Other New Technologies in Document Review*, 42 AIPLA Q.J. 459 (2014).....20

Elizabeth G. Thornburg, *Giving the "Haves" A Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. Rev. 229 (1999).....31

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INTRODUCTION

The decision below is utterly unremarkable: Like every other court of appeals to have considered the question, the Ninth Circuit held that the public's right to access court records extends to preliminary injunction motions. In so holding, the Ninth Circuit rejected Chrysler's contention—a contention no court has ever accepted—that the presumption that court records are open to the public should apply only to motions that are literally dispositive. That's it. That's all the court held. The Ninth Circuit did not adopt a whole new standard for the sealing of court records or break with the other circuits. There is nothing novel about this case.

Indeed, Chrysler doesn't really even challenge the decision below. To the contrary, Chrysler *concedes* the sole legal argument it made before the Ninth Circuit and now admits that preliminary injunctions, like most other court records, must be presumed open to the public.

Instead, Chrysler asks this Court to decide an entirely new issue, not considered by the courts below. Chrysler's new argument is that if a district court finds "good cause" under Federal Rule of Civil Procedure 26(c) to issue a protective order prohibiting the parties from disseminating certain information they receive during discovery, this protective order should automatically be sufficient to seal that information if it is ever used as evidence in court.

Not only was that issue never decided by the lower courts, it's not even present in this case. There was no "good cause" protective order entered here. Any ruling this Court might render on the effect of such an order, therefore, would be purely advisory.

Moreover, even if "good cause" protective orders were relevant here, there still would be no reason to grant review. Every court of appeals *agrees* that what constitutes "good cause" to prevent parties from disseminating the raw fruits of discovery does not necessarily suffice to seal evidence used in court.

To be sure, there is some variation in the words the circuits use to describe their law. Most, like the Ninth Circuit, hold that court records can only be sealed for compelling reasons. A few have described the standard as good cause sufficient to overcome the public's right of access to court records. In practice, the upshot is the same: To seal court records in any circuit, there must be an interest in secrecy that outweighs the public's right of access. In every circuit, such interests include the protection of trade secrets and other confidential business information. In no circuit is a protective order—which governs unfiled discovery—automatically sufficient.

The reason is clear: As this Court explained in *Seattle Times v. Rhinehart*, discovery has traditionally been "conducted in private." *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). Therefore, "restraints placed on discovered, *but not yet admitted*, information are not a restriction on a traditionally public

source of information." *Id.* (emphasis added). Court records, on the other hand, are presumptively open to the public. It takes more, therefore, to seal them.

Chrysler and its amici spend much of their briefs wildly speculating about all the terrible things that might befall our justice system if the decision below is allowed to stand. If courts require a higher showing to seal court records than to keep unfiled discovery documents confidential, they argue, discovery disputes will skyrocket, corporations will be forced to settle frivolous lawsuits, and trade secrets will be exposed. They argue as if the decision below is somehow novel.

But it has been the law for decades (if not longer) —in the Ninth Circuit and everywhere else—that the showing required to keep the raw fruits of discovery confidential is lower than that required to abridge the public's right of access to court records. If this rule had disastrous consequences, they would be evident by now.

And yet neither Chrysler nor its amici cites a single shred of evidence to support any of their doomsday predictions.

Chrysler asks this Court to grant certiorari on a question not considered by the lower courts and not even present in this case. It asks this Court to overturn the well-settled law of the courts of appeals, law that is rooted in this Court's case law, and adopt a new rule that every circuit court has rejected. And it asks all this despite the fact that there is no evidence that the

principles unanimously employed by the courts of appeals have any negative effect. This Court should decline its invitation.

STATEMENT OF THE CASE

1. On November 1, 2013, several car owners filed a lawsuit against Petitioner FCA US LLC ("Chrysler"), alleging that the company concealed a dangerous defect in the power system of several models of its vehicles. Ninth Circuit Excerpts of Record ("ER") 14. The plaintiffs claimed that the defect causes "erratic and unsafe behavior from the vehicle's electrical system" that, among other things, can cause the vehicle to stall without warning at high speeds, leading to accidents. ER 88. Concerned that "thousands" of drivers could experience dangerous power system failures before the lawsuit was resolved, the plaintiffs filed a motion for preliminary injunction, requesting that the district court order Chrysler to warn customers immediately. ER 84, 96.

The plaintiffs' motion was heavily redacted. *See* ER 81-101. They 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 [redacted]." ER 96. "In other words," the plaintiffs continued, "the frightening stalling incidents reflected in the accompanying declarations and in driver reports to [the National Highway Traffic Safety Administration] are

[redacted]." ER 96. Almost all of the evidence the plaintiffs submitted in support of their motion was sealed. ER 139. So too was most of the evidence Chrysler relied on in opposition. *See, e.g.*, ER 152-55, 166-68.

The plaintiffs stated that they did not believe the records should be sealed, but they moved to seal them anyway because Chrysler had marked them confidential. *See* ER 135. At the beginning of discovery, the parties had 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 71-80.

On the basis of sealed evidence and heavily redacted briefs, the district court denied the plaintiffs' preliminary injunction motion without issuing a written opinion. ER 249.[1]

2. Respondent The Center for Auto Safety moved to intervene for the limited purpose of unsealing the court records associated with the preliminary injunction motion. ER 294. The Center argued that the common law and the First Amendment protect the public's right to access court records—a right the Ninth Circuit, like most courts of appeals, has repeatedly held

[1] In opposing the motion, Chrysler argued that no warning was necessary because it had already recalled any vehicles that evidenced a defect, and there was no reason to believe that any other vehicles were affected. ER 153. But shortly after the district court denied the preliminary injunction, Chrysler announced a safety recall of additional vehicles—the same vehicles it had previously told the district court were safe. ER 279.

cannot be overcome absent compelling reasons for secrecy. As neither Chrysler nor the district court had provided *any* reason for sealing the records, the Center explained, they must be unsealed.

In opposition, Chrysler argued that although compelling reasons are ordinarily required to seal court records, preliminary injunction motions are exempt from this requirement, solely because they do not necessarily result in a final determination on the merits. ER 251. And even if compelling reasons were required, Chrysler contended, this standard was satisfied here because the records "are trade secrets." Dist. Ct. Docket Entry ("D.E.") 96, at 2. Beyond a declaration filled entirely with conclusory assertions, Chrysler offered absolutely no support for this claim. ER 261-72.[2]

The district court concluded that "[a]s far as [it] could" tell, "given limited briefing," some of the court records "*seem* to include . . . technical information," and therefore they "*could* comprise trade secrets." Pet. 45a-46a (emphasis added). The court did not determine whether the documents actually do contain trade secrets. It did, however, note that many of the records Chrysler asserted contain trade secrets "do not appear" to even contain "significant technical information," let alone a potential "claim to trade secret status." Pet. 46a.

Nevertheless, the court held that all of the court records could remain sealed—including the briefing on

[2] Chrysler conceded that there had been no basis for sealing several of the exhibits. D.E. 96, at 1.

the motion, including even the text of the preliminary injunction the plaintiffs asked the court to issue. Pet. 48a-49a. The court held that the "compelling reasons" standard that ordinarily applies to court records does not apply to nondispositive motions, so preliminary injunction motions may be sealed under a lower "good cause" standard. Pet. 45a. Without any reference to the well-established rule that "stereotyped and conclusory statements" are insufficient even to demonstrate "good cause," the court held that Chrysler had satisfied its burden. Pet. 48a. *Cf. Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981).[3] The court did not appear to consider whether any purported interest in confidentiality outweighed the public's right of access to court records.

3. The Center for Auto Safety appealed. Just before briefing on appeal was complete, Chrysler admitted that there was no basis for sealing several more of the records the district court had held there was "good cause" to seal—records the company had told the court must remain sealed because they contain trade secrets. Ninth Circuit Supplemental Excerpts of Record ("SER") 1-10. These documents make clear that Chrysler's assertion was false.

For example, one now-unsealed document is an email between Chrysler employees "recommend[ing] setting up another touch base on [the power module] shortly." SER 14. "Progress," the email states, "has been slow." *Id.* Chrysler had previously told the district court that this email "discuss[es] trade secrets," and

[3] All internal quotation marks and citations omitted.

that its disclosure "would be harmful to Chrysler" because it "contain[s] detailed information about testing and analysis undertaken by" the company, from which its competitors could benefit. ER 255-56. The email contains no information whatsoever about any testing or analysis Chrysler had undertaken.

Another is an email from Chrysler's attorney to the plaintiffs' counsel stating that in his view, Chrysler's recall of certain 2011 model-year vehicles mooted the preliminary injunction motion. SER 16. Chrysler told the district court that there were "compelling reasons" to seal this email "because of [its] reference to, and discussion of, the properly-sealed exhibits." ER 252-53, 258. But the email doesn't refer to a single exhibit.

4. Before the Ninth Circuit, Chrysler abandoned its argument that there were compelling reasons to seal the court records at issue here. *See generally* Response Br., *The Center for Auto Safety v. Chrysler Group*, No. 15-55084, 2015 WL 2064231 (9th Cir. April 30, 2015). Instead, the company relied solely on its contention that the ordinary presumption of access to court records does not apply to preliminary injunction motions, and so compelling reasons are not necessary. *See id.* at *16, *22.

The Ninth Circuit disagreed. The court emphasized the importance of open courts to the accountability and legitimacy of the judicial system—relying on its own previous case law, the case law of other circuits, and this Court's precedent. *See, e.g.*, Pet. 8a, 18a. These

interests, the court explained, are not necessarily less important simply because preliminary injunction motions are not "literally dispositive." Pet. 11a. To the contrary, preliminary injunctions, the court observed, "are extraordinary and drastic remedies" that have been used to "test the boundaries of equal protection; police the separation of powers . . . ; and even determine life or death." Pet. 17a-18a. Access to such motions and their supporting evidence, therefore, is necessary "'to provide the public with a more complete understanding of the judicial system and a better perception of its fairness.'" Pet. 17a (quoting *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993)). In holding that preliminary injunction motions are subject to the same presumption of access as other court records, the Ninth Circuit joined every other court of appeals to have considered the issue. Pet. 15a-16a.

Importantly, the court made clear that the presumption of access is not absolute. Quoting this Court's decision in *Nixon v. Warner Communications*, the court offered several examples of "compelling reasons" to seal court records, including "when a court record might be used to 'gratify private spite or promote public scandal,' to circulate 'libelous' statements, or 'as sources of business information that might harm a litigant's competitive standing.'" Pet. 9a (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598-99 (1978)).

The Ninth Circuit also reiterated this Court's guidance that "[w]hat constitutes a 'compelling reason'" in any particular case "is 'best left to the sound

discretion of the trial court.'" Pet. 9a (quoting *Nixon*, 435 U.S. at 599). Therefore, the court remanded the case to the district court to determine in the first instance whether there are compelling reasons to seal the court records here. Pet. 22a.

The majority easily refuted the "dissent's doomsday depiction of [its] opinion, in which" refusing to limit the public's right of access to court records to motions that are literally dispositive would somehow "eviscerate" the protective orders that govern the discovery process. Pet. 19a (brackets omitted). The dissent offered no evidence for its conjecture. And, indeed, the majority stated, such speculation "ignores the real world" and the Ninth Circuit's previous case law, and it "conflicts with virtually every other circuit to review this issue." *Id.*

Chrysler's petition for certiorari followed.

REASONS FOR DENYING THE WRIT

I. Chrysler and its Amici Mischaracterize the Facts and the Law.

Chrysler takes substantial liberties with the record to paint a picture that is at best misleading and at worst simply false.

1. As an initial matter, Chrysler's petition is based on a false premise. Chrysler states that in producing documents during discovery, it "relied on the district court's protective order, which had determined

that those documents should not be made public." Pet. 23. But the only "protective order" in this case was a *stipulated* agreement between the parties, entered before the documents were even produced. It was not, as Chrysler suggests, a protective order issued under Rule 26(c) "based on a showing of 'good cause.'" Pet. i. *See Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1176 (9th Cir. 2006) ("Because the parties had simply stipulated to the protective order, a particularized showing of 'good cause' to keep the documents under seal had never been made to the court as required by Federal Rule of Civil Procedure 26(c).").

The district court, in entering the protective order, therefore, did not determine that any particular documents "should not be made public." The documents hadn't even been produced yet. Chrysler couldn't have relied on a determination the district court never made.

More importantly, this means that this case does not actually raise the question Chrysler presents: whether information "kept confidential through a 'good cause' protective order" may remain sealed when filed in court, Pet. 22. There was no such "good cause" protective order here.

2. Chrysler and its amici's description of the decision below bears little resemblance to what the Ninth Circuit actually decided.

To start, Chrysler's assertion that the decision below "changed the ground rules of discovery" is preposterous. Pet. 21. The Ninth Circuit has long held that

"compelling reasons" are required to seal court records —and that this standard is higher than the standard required to seal unfiled discovery documents. *See, e.g.*, *Hagestad v. Tragesser*, 49 F.3d 1430, 1443 (9th Cir. 1995). It has also long held that stipulated protective orders, like the one issued in this case, are insufficient to demonstrate even the "good cause" required by Rule 26(c) to keep unfiled discovery documents confidential, let alone the "compelling reasons" required to seal court records. *See, e.g.*, *Kamakana*, 447 F.3d at 1176. And it has long held that parties cannot seal court records by private agreement. *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1101 (9th Cir. 1999) ("[T]o the extent the Defendants relied on the stipulated protective order . . . , such reliance was unreasonable. The right of access to court documents belongs to the public, and the [parties] were in no position to bargain that right away.").

The decision below did not create a new rule. It merely clarified that preliminary injunction motions are subject to the same rules as other court records.

Chrysler and its amici contend that this commonsense conclusion—the same conclusion reached by *every court of appeals* to have considered the issue—suddenly "subject[s] any party that produces confidential information to risk of public disclosure at the whim of the other party." Pet. 21; *see* Chamber Br. 11; Washington Legal Foundation ("WLF") Br. 7. But of course, information subject to a protective order does not become public "simply because the opposing party chooses to attach [it] to a pleading," Chamber Br. 6. The

court—not the parties—determines whether or not to seal court records. If the interest in secrecy outweighs the public's right of access—if, for example, the information is a trade secret—the information will be sealed. The decision below did nothing to change that.

Chrysler and its amici contend that to seal court records, the Ninth Circuit requires proof that "the party seeking disclosure intends to use the information for an improper purpose . . . such as intentionally using a defendant's confidential business information to place the company at a competitive disadvantage" or "deliberately but unjustifiably to scare away the company's . . . customers." DRI Br. 5; *see* Pet. 8. That's simply not true. To seal court records, a party must demonstrate that their interest in secrecy outweighs the public's right of access. *See* Pet. 8a-9a. They do not need to prove that someone *intends* to misuse the information.

Thus, the Ninth Circuit has permitted the sealing of trade secrets, *McDonnell v. Sw. Airlines Co.*, 292 F. App'x 679, 680 (9th Cir. 2008); "commercially sensitive information," *In re Elec. Arts, Inc.*, 298 F. App'x 568, 569 (9th Cir. 2008); and "identifying information from third-party medical and personnel records," *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1139 (9th Cir. 2003)—all without any proof that someone intended to misuse the information.

Chrysler insinuates—and its amici outright state—that the "compelling reasons" standard is "in most cases" an "insurmountable" obstacle to keeping

trade secrets secret. DRI 4; *see* Pet. 22; Chamber Br. 8-9. That's patently false. The protection of trade secrets (and other commercially sensitive information) is unequivocally a compelling reason for sealing—in the Ninth Circuit and in every other circuit. *See, e.g.*, Pet. 9a; *infra* page 22.

Indeed, the Ninth Circuit, *in this very case*, explicitly stated that preventing disclosure of "business information that might harm a litigant's competitive standing"—i.e. trade secrets and other confidential business information—constitutes a compelling reason for sealing. *See* Pet. 9a; *see also In re Elec. Arts*, 298 F. App'x at 570 (sealing trade secrets); *McDonnell*, 292 F. App'x at 680 (same).

* * *

Chrysler's petition is based on facts that didn't happen and law that doesn't exist. Certiorari should not be granted on such flimsy grounds.

II. The Decision Below is Consistent with this Court's Case Law and Rule 26(c).

A. The Ninth Circuit's Rule is Consistent with this Court's Case Law, Which Distinguishes the Raw Fruits of Discovery from Evidence Used in Court.

Chrysler and its amici's contention that the decision below is in "tension" with this Court's case law is meritless. Pet. 19; WLF Br. 19.

This Court's case law is clear: The public's right to access court records is an "indispensable attribute" of our justice system—firmly rooted in both the First Amendment and the common law, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980). *See, e.g.*, *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 13-14 (1986) (requiring public access to the transcript of a preliminary hearing "unless specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest"); *Nixon*, 435 U.S. at 597 ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.").[4]

Openness is integral, both to the "basic fairness" of the judicial system and to "the appearance of fairness so essential to public confidence in the system." *Press-Enter.*, 478 U.S. at 13. It is, as this Court has explained, "an essential component in our structure of self-government." *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606 (1982).

At the same time, this Court has made clear that the right of access is not absolute. Like all rights, it can

[4] So far, the public right of access has come before this Court solely in the context of criminal cases. But there is no doubt that the right applies in the civil context as well. *See Gannett v. DePasquale*, 443 U.S. 368, 386 n.15 (1979) ("[I]n some civil cases the public interest in access . . . may be as strong as, or stronger than, most criminal cases."). And Chrysler concedes that it applies here. *See* Pet. 16.

be limited to protect countervailing interests—for example, trade secrets. *See Nixon*, 435 U.S. at 598.

The decision below is entirely consistent with these principles. It protects the public's right to access court records, while recognizing that there are sometimes compelling reasons to abrogate that right. *See* Pet. 8a-9a.

The Washington Legal Foundation suggests that the Ninth Circuit's approach to sealing court records is more "stringent" than that suggested by this Court's decision in *Nixon*. WLF Br. 21. But the interests the Ninth Circuit identifies as sufficient to overcome the public right of access are *exactly the same* as the interests this Court identified in *Nixon*. *See* Pet. 8a (quoting *Nixon*, 435 U.S. at 598-99).

Chrysler's contention that the decision below is "in substantial tension" with this Court's opinion in *Seattle Times* is similarly meritless. Pet. 19. *Seattle Times* considered whether the First Amendment prevents courts from issuing protective orders prohibiting parties from disseminating information received in discovery. *See Seattle Times*, 467 U.S. at 37. The Court held such protective orders are permissible *so long as* they are "limited to the context of pretrial civil discovery." *Id.*

Unlike court proceedings, this Court explained, the discovery process has traditionally been "conducted in private." *Seattle Times*, 467 U.S. at 33. Therefore, unlike restraints on court records, "restraints placed on discovered, *but not yet admitted*, information

are not a restriction on a traditionally public source of information." *Id.* (emphasis added).

But restraints on court records *are* a restriction on a traditionally public source of information—and an abrogation of the public's right of access. *Seattle Times* provides no support for Chrysler's contention that *court records* may be sealed without compelling reasons. To the contrary, *Seattle Times* elucidates the core problem with Chrysler's argument—and the reason no court of appeals has ever accepted it. Chrysler's contention that "good cause" to keep unfiled discovery documents confidential should necessarily be sufficient to seal evidence used in a court proceeding entirely ignores the distinction between court records—to which the public has a right of access—and unfiled discovery—to which no such right applies.

B. The Ninth Circuit's Rule is Perfectly Consistent with Rule 26(c).

Chrysler and its amici argue—without citing any authority whatsoever—that Rule 26 governs not just the discovery process, but also evidence filed in court. *See, e.g.*, Pet. 20; Chamber Br. 3. That's wrong. Rule 26(c) authorizes courts "to exercise appropriate control *over the discovery process*." *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (emphasis added). It has nothing to do with court records.

Under Rule 26(c), for "good cause," judges may "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or

expense" stemming from discovery. Fed. R. Civ. P. 26(c). For example, a court may "limit[ ] the scope" of discovery or forbid it entirely; it may "specify[ ] terms," such as "time and place," on which discovery is to take place; or it may require that parties not reveal "trade secret[s] or other confidential research, development, or commercial information" they receive. *Id.*

By its terms, Rule 26 "[g]overn[s] discovery"—not court records. Fed. R. Civ. P. 26 (title). The Civil Rules Advisory Committee—perhaps the foremost authority on the Federal Rules of Civil Procedure—has repeatedly emphasized that discovery protective orders "are distinctively different" from "orders that seal court records." Minutes, Advisory Committee on Civil Rules at 4-5 (April 1994).[5] Protective orders govern solely *unfiled* discovery. *See* Minutes, Advisory Committee on Civil Rules at 10 (April 1995). Once information is used as evidence in court, however, it "become[s] part of the public record, moving free of the scope of [any] discovery protective order." *Id*. "[A]ccess should [then] be governed by the procedures that govern court records, not those that govern discovery materials." April 1994 Minutes at 4; *see also* Minutes, Advisory Committee on Civil Rules at 25 (March 2010) ("The standards for sealing court records are more demanding than the Rule 26(c) standards for entering a protective order.").

[5] All minutes of the Civil Rules Advisory Committee are available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/meeting-minutes.

Every court of appeals to have considered the issue has recognized this distinction. *See infra* page 20-22.

Indeed, under *Seattle Times*, protective orders are permissible precisely *because* they apply solely to unfiled discovery and not to evidence submitted to the court. *See Seattle Times*, 467 U.S. at 37. In determining whether "good cause" exists to issue a discovery protective order, courts consider only the "private interests of the litigants." *Kamakana*, 447 F.3d at 1180. The public right of access to court records is irrelevant. *See id.* And rightly so. The public has no right of access to the raw fruits of discovery.

But when the issue is sealing court records, "the private interests of the litigants are not"—and under this Court's case law, cannot be—"the only weights on the scale." *Kamakana*, 447 F.3d at 1180. For as this Court has made clear, "[u]nlike private materials unearthed during discovery," court records are "public documents almost by definition," and therefore they cannot be sealed without overcoming the presumption that they are open to the public. *See id.* (citing *Nixon*, 435 U.S. at 597).

Chrysler's contention that requiring compelling reasons to seal court records will somehow deprive protective orders of their force is meritless. *Cf.* Pet. 18-21. Most information produced in discovery is never introduced into evidence at all—and therefore may be kept

confidential solely on the basis of a protective order. *See* Andrew John Sutton, *Discovering Discovery Technology! A Model Order and Pilot Program for Implementing Predictive Coding and Other New Technologies in Document Review*, 42 AIPLA Q.J. 459, 460-61 (2014); *Seattle Times*, 467 U.S. at 33 ("Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action."); DRI Br. 11 ("In most cases only a small fraction of discovery documents containing confidential business information actually is filed in court.").

Requiring compelling reasons to seal the small percentage of documents that are used as evidence does not diminish courts' ability to use protective orders to control dissemination of the large swaths of information that are produced in discovery but never used in court.

III. The Decision Below Does Not Conflict with the Other Courts of Appeals.

Chrysler suggests that because there are minor differences in how the circuits describe their sealing law, there's a "deep[]" circuit split this Court must fix. Pet. 11. Nonsense.

Every circuit agrees on the basic principles at issue here: Unlike unfiled discovery, the public has a right to access evidence used in court. Therefore, a higher burden is required to seal court records—the burden of overcoming the presumption of access—than

to keep unfiled discovery confidential. *See, e.g.*, *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, No. 15-1544, 2016 WL 3163073, at *4 (6th Cir. June 7, 2016) (overturning district court for "conflat[ing] the standards for entering a protective order under Rule 26 with the vastly more demanding standards for sealing off judicial records from public view"); *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011) ("parties cannot overcome the presumption against sealing judicial records simply by pointing out that the records are subject to a protective order"); *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1357-58 (Fed. Cir. 2011) ("[w]here a party seeks to limit the disclosure of information actually introduced at trial, an even stronger showing" than Rule 26 good cause is required); *United States v. Wecht*, 484 F.3d 194, 235 & n.22 (3d Cir. 2007) (good cause balancing test for discovery under Rule 26 "does not include the strong presumption that occurs upon a finding of a common law right" and therefore differs from test applicable to court records); *Virginia Dep't of Police v. Wash. Post*, 386 F.3d 567, 576 (4th Cir. 2004) (district court must not "merely allow continued effect to a pretrial discovery protective order" to seal documents submitted in connection with summary judgment motion without conducting new analysis); *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993) ("the ordinary showing of good cause which is adequate to protect discovery material from disclosure cannot alone justify protecting such material after it has been introduced at trial"); *Joy v. North*, 692 F.2d 880, 885, 893 (2d Cir. 1982) ("Private matters which are discoverable may, upon a showing of cause, be put

under seal under Rule 26(c)," but once used by parties in connection with summary judgment motions they "should not remain under seal absent the most compelling reasons.").

1. Although the Petition fails to mention it, the *majority* of the circuits describe the showing necessary to overcome the presumption of access the same way the Ninth Circuit does—"compelling reasons" for (or a "compelling interest" in) secrecy. *See Shane Grp.*, 2016 WL 3163073 at *3; *Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014); *In re Neal*, 461 F.3d 1048, 1053 (8th Cir. 2006); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006); *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002); *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001); *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987).

There are, however, a few courts that have used the phrase "good cause" to describe the required showing. *See* Pet. 12-14. This is a distinction without much difference. As a practical matter, the circuits agree on the interests that can—and cannot—overcome the presumption of access.

Of particular relevance here, every court of appeals holds that the protection of legitimate trade secrets is a sufficient basis for sealing court records. *See, e.g.*, Pet. 9a; *Poliquin*, 989 F.2d at 534; *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983). On the other hand, vague, speculative, or unsubstantiated claims of harm are insufficient to overcome the presumption of access to court records in

any circuit. *See, e.g.*, *In re Cendant*, 260 F.3d at 194; *Romero v. Drummond Co.*, 480 F.3d 1234, 1238-41, 1247 (11th Cir. 2007) ("stereotyped and conclusory statements" are insufficient); *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982) ("[A] court may deny access, but only on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture.").

Chrysler and its amici insist that if this case had arisen in one of the "good cause" circuits, the company would have unquestionably prevailed in its efforts to seal the records at issue here. *See* Pet. 17; WLF Br. 18-19. That's simply not true.

Even the circuits that describe their law as requiring "good cause" still impose a "heavy burden" on parties that wish to seal court records. *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994). They must demonstrate "that the material is the kind of information that courts will protect" and "that disclosure will work a clearly defined and serious injury to the party seeking closure." *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984). "Broad allegations of harm, bereft of specific examples or articulated reason, are insufficient." *In re Cendant*, 260 F.3d at 194.

Chrysler utterly failed to meet this burden. The only evidence it submitted in support of sealing was a declaration that merely restated the definition of competitive harm and asserted it applied here. ER 261-72. It was entirely bereft of the articulated reasoning—let alone factual support—required by every court. *See id.*

And, indeed, it was—at least in part—utterly false. Documents that Chrysler told the district court contained trade secrets obviously did not.

This showing would be insufficient in any circuit. *Cf. In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010) (refusing to seal corporate documents that did not contain trade secrets); *Romero*, 480 F.3d at 1238-41, 1246-47 (reversing sealing of motions and declarations where "the record d[id] not contain any evidence to support" the sealing, and to the extent the documents could be prejudicial, there was no reason why allowing the company's attorneys to comment on them would be "insufficient to counteract any prejudice"); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 662-63 (3d Cir. 1991) (refusing to seal records where defendant failed to present the "specific evidence" needed to make a "particularized showing" that public access would cause the competitive harm).

2. Chrysler attempts to manufacture a circuit split where there is none. The company suggests that in the Third, Seventh, and Eleventh Circuits, the same showing of "good cause" that will keep unfiled discovery information confidential will automatically suffice to seal court records. *See* Pet. 2, 12-14. That's wrong. *Cf. Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases, Post-Public Comment Version*, 8 Sedona Conf. J. 141, 154 (2007) ("While all justifications for restricting public access must constitute 'good cause' to be upheld, the requisite 'good cause' will be dramatically different

depending upon the particular documents and proceedings.").

The rule in these circuits is the same as in those that describe the standard as "compelling reasons": While unfiled discovery may be kept confidential based solely on the private interests of the parties, evidence used in court may not be sealed unless the interest in secrecy outweighs the presumption that court records are open to the public.

The Third Circuit, for example, has made clear that, while discovery "is ordinarily conducted in private," once a discovery document is filed in support of a motion "seeking action by the court," it "stands on a different footing." *Bank of Am. Nat. Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343 (3d Cir. 1986). Accordingly, a discovery protective order is not sufficient to seal court records. *See Littlejohn v. Bic Corp.*, 851 F.2d 673, 680-81 & n.15 (3d Cir. 1988).

Chrysler selectively quotes the Third Circuit's decision in *Leucadia* to give the impression that the case holds that the same showing is required to overcome the public right of access as to issue a protective order governing unfiled discovery. Pet. 12. But *Leucadia* explicitly states that public access to court records "does *not* implicate the standards to be used by the court in entering a pretrial protective order." *Id.* at 162 (emphasis added). Chrysler's contention to the contrary is meritless.

Chrysler's attempt to manufacture a split with the Seventh Circuit also fails. The Seventh Circuit, like the

Ninth Circuit, holds that court records can be sealed only "[w]hen there is a compelling interest in secrecy," *Jessup*, 277 F.3d at 928, and draws a bright line between discovery, which is "conducted in private," and those "portions of discovery that are filed and form the basis of judicial action," which "must eventually be released." *Union Oil of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000). This approach is indistinguishable from that of the Ninth Circuit.

Chrysler's assertion that there's a conflict between the Ninth and Seventh Circuits is particularly mystifying because the Ninth Circuit itself has stated that it "adopted the Seventh Circuit's approach for determining whether the common law right of access should be overridden." *Hagestad*, 49 F.3d at 1434.

Chrysler points to language in an older Seventh Circuit decision, *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, suggesting that court records and pretrial discovery should be treated the same way. Pet. 12-13 (discussing 178 F.3d 943, 945 (7th Cir. 1999)). But when that decision was issued, the Federal Rules required that all discovery materials be filed with the court. Fed. R. Civ. P. 5(d) (1999). And the Seventh Circuit, therefore, endorsed a presumption of public access not just to court records, but to discovery materials as well. *See Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009). The Rules no longer require discovery to be filed with the court, and the Seventh Circuit no longer treats discovery and court records the same way. *See id.*

Under current Seventh Circuit law, as under Ninth Circuit law, there is no presumption of access to the raw fruits of discovery, but sealing court records "requires compelling justification." *See Union Oil*, 220 F.3d at 568.

The Eleventh Circuit also distinguishes between the raw fruits of discovery, which are private, and judicial records, which are presumptively public. *See, e.g.*, *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311-12 (11th Cir. 2001). Like every other court, the Eleventh Circuit only seals court records if the public's "right of access" is outweighed by the "party's interest in keeping the information confidential." *Romero*, 480 F.3d at 1246. For like every other court, the Eleventh Circuit recognizes that "'[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.'" *Perez-Guerrero v. U.S. Atty. Gen.*, 717 F.3d 1224, 1235 (11th Cir. 2013) (quoting *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006)).

In arguing to the contrary, Chrysler makes much of some imprecise language in a 15-year-old decision. That decision, *Chicago Tribune*, stated that when materials designated confidential pursuant to a protective order are submitted to the court in connection with a substantive motion, "the confidentiality imposed by Rule 26 is not *automatically* forgone." *Chicago Tribune*, 263 F.3d at 1313 (emphasis added). This statement merely expresses the unobjectionable conclusion that

rather than simply unsealing everything without any analysis simply because it's been filed, a court should conduct the "common-law right of access balancing test" to determine which records ought to be unsealed. *Id.*

As Chrysler notes, the court did state that this balancing "may be resolved by the Rule 26 good cause balancing test." *Id.* But it's obvious from the context that the court did not mean that what constitutes "good cause" to issue a discovery protective order is the same as what constitutes "good cause" to seal court records. The court simply meant that in both cases determining whether there was the appropriate "good cause" was necessary.

Indeed, the court went to great lengths to develop a "refined approach" to identify which documents count as court records subject to the "strong presumption of public access" and which do not—an effort that would have been entirely superfluous if there were no relevant difference between the two. *Id.* at 1312-13.[6]

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[6] The attempt by the Washington Legal Foundation ("WLF") to manufacture a split with the Fifth Circuit is even more farfetched. Contrary to WLF's claim (Br. at 17-18), the Fifth Circuit, like the Ninth Circuit, has embraced the "strong presumption" that judicial records are open to the public. *United States v. Holy Land Found. for Relief & Development*, 624 F.3d 685, 690 (5th Cir. 2010) ("[T]he power to seal court records must be used sparingly in light of the public's right to access."); *see also In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 230 (5th Cir. 2008) (Jones, J.) (reversing sealing of court records on grounds that the "justification for sealing" was "a weak and unconvincing reason for dispensing with the public nature of our judicial proceedings").

3. Chrysler suggests that the Ninth Circuit is alone in refusing to extend the strong presumption of access that applies to most court records to filings that are only tangentially related to the merits of a case. Pet. 16-18. To the contrary, every circuit holds that tangential filings, such as discovery motions, need not meet the same sealing standard as other court records. *See, e.g., Virginia Dep't of Police*, 386 F.3d at 571, 576; *Leucadia*, 998 F.2d at 164; *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 546 (7th Cir. 2002); *Chicago Tribune*, 263 F.3d at 1312; *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995); *F.T.C.*, 830 F.2d at 408.

* * *

As the Civil Rules Advisory Committee recently determined, "there are few identifiable differences among the circuits" with respect to the tests for sealing court records. March 2010 Minutes at 24. "All recognize that tests for filing 'judicial documents' under seal are far more demanding than the standards for entering protective discovery orders." *Id.*

Chrysler asks this court to grant certiorari to overturn this unanimous rule. In Chrysler's view, so long as information was initially procured through discovery, it may forever be sealed from public view without ever having considered the public's interest in access—regardless of whether that information was used as evidence in a trial or never filed in court at all. *See also* Chamber Br. 7 (arguing that "common-law right of

access does not and should not extend to confidential materials that under Rule 26(c) are entitled to protection"). This Court should deny Chrysler's request that it grant review and implement this unprecedented rule.

IV. The Decision Below Will Not Have Any of the Terrible Consequences Chrysler and its Amici Claim.

Chrysler and its amici protest that if the decision below is allowed to stand, there will be terrible consequences for our justice system—discovery gridlock, forced settlements, the wholesale release of trade secrets. From their briefs, one would never know that the decision below is *not* novel. But as explained above, the Ninth Circuit—and most other courts—have required compelling reasons to seal court records for decades. And for decades, it has been clear that discovery protective orders are insufficient to seal court records—not just in the Ninth Circuit, but everywhere.

We don't need to speculate about what will happen if the decision below is allowed to stand. We already know. We've had decades—centuries, really—of experience with courts prohibiting the sealing of court records absent an interest in secrecy sufficient to overcome the presumption of public access. If terrible things were going to happen, there should be some evidence by now.

And yet neither Chrysler nor its amici cites a single example—let alone any rigorous empirical evidence—that requiring compelling reasons to seal court records has had any negative effects. There is, therefore, no need for this Court to intervene.

1. Chrysler and its amici contend that requiring "compelling reasons" to seal court records, rather than "good cause," will result in "less cooperation in discovery, and more battles over what documents must be turned over." Pet. 23; *see, e.g.*, Chamber Br. 3. But despite the fact that most courts have required compelling reasons to seal court records for years, Chrysler cites—and we have found—no evidence that this requirement has led to increased discovery disputes. *Cf.* Walter W. Heiser, *Public Access to Confidential Discovery: The California Perspective*, 35 W. St. U. L. Rev. 55, 74 (2007) (argument that increased public access leads to increased discovery disputes "lack[s] empirical support").[7] None of the studies that have examined the reasons for discovery disputes identifies sealing standards as a contributing factor. *See, e.g.*, Elizabeth G. Thornburg, *Giving the "Haves" A Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. Rev. 229, 248 & n.126 (1999).

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[7] Empirical research suggests that defendants are more likely "to use discovery disputes to gain an advantage over their opponents" and to benefit from such disputes. *See, e.g.*, Elizabeth G. Thornburg, *Rethinking Work Product*, 77 Va. L. Rev. 1515, 1565-67 & n.232 (1991). These studies shed doubt on Chrysler and its amici's—particularly DRI, "the voice of the defense bar"—professed concern with an increase in discovery disputes.

In fact, during the 2010 Conference on Civil Litigation—sponsored by the Civil Rules Advisory Committee—numerous surveys, empirical studies, and articles were devoted to examining the costs of discovery and the source of discovery disputes, and yet protective orders "drew no comment or attention at all." Report to the Chief Justice on the 2010 Conference on Civil Litigation at 5.[8]

2. Chrysler's amici argue—again, with absolutely no evidence—that a compelling reasons standard for sealing court records may "force[]" businesses to settle meritless claims for fear of revealing confidential information. Chamber Br. 12; *see* Automakers' Br. 5. This argument has no basis in fact. Indeed, the Chamber and the Alliance of Automobile Manufacturers have previously taken precisely the opposite position: In a letter to Congress, they argued that increasing public access to information produced in discovery would *discourage* settlement. S. Rep. No. 112-45, at 29 (stating that limiting the use of protective and sealing orders "would have a chilling effect . . . on discovery *and settlements*" (emphasis added)).[9]

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[8] This report is available at http://www.uscourts.gov/file/reporttothechiefjusticepdf.

[9] Indeed, proponents of increased secrecy typically argue that public access *discourages* settlement. *See, e.g.*, Arthur Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 483 (1991) (arguing that limiting protective orders would mean "more litigants would likely pursue a full adjudication of the merits, rather than agreeing to a settlement" in order to "vindicate their personal or business reputations by

In fact, there is no evidence that the standard for sealing court records has any impact—positive or negative—on the frequency of settlement. To the contrary, the report of a conference attended by nearly one hundred judges stated that none of them "could point to a situation where secrecy was the factor that would have determined whether a case settled or not." Roscoe Pound Institute, *Open Courts with Sealed Files: Secrecy's Impact on American Justice: Report of the 2000 Forum for State Appellate Court Judges* 114.[10]

The idea that "[o]pportunistic class-action plaintiffs . . . seek out the jurisdictions" with more stringent sealing practices "to coerce settlements from . . . innovative companies" is absurd. Automakers' Br. 5. Empirical research on settlements reveals no discernable relationship between a circuit's settlement rate and its sealing standard. *See, e.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 821-24 (2010); Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. Empirical Legal Stud. 111, 141 (2009).

This data is utterly unsurprising given that every circuit—including the Ninth Circuit—holds that confidential business information may be sealed. *See infra* page 22. There is, therefore, no need for companies to

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bringing out the complete story concerning information produced in discovery and publicized out of context").

[10] This report is available at http://www.poundinstitute.org/sites/default/files/docs/2000ForumReport.pdf.

settle to protect such information: It's already protected.

3. Similarly, the assertion that the use of a compelling reasons standard "will inevitably lead to the public disclosure of numerous trade secrets" in the Ninth Circuit or anywhere else is also preposterous. WLF Br. 22. Courts have been using the compelling reasons standard for decades—a standard that, again, explicitly *permits* the sealing of trade secrets—and there is no evidence that it has led to the widespread disclosure of trade secrets.

4. Chrysler and its amici suggest that parties may file frivolous motions—or even frivolous cases—in an effort to release confidential information. But, again, despite decades of courts using the compelling reasons standard, there is simply no evidence that this is a real problem.

Moreover, courts already have the tools to prevent parties from abusing the judicial system in this way. Courts can—and do—dismiss frivolous claims before they even get to discovery, so parties hoping to gain confidential information simply by filing a meritless lawsuit are likely to be out of luck. *See* Fed. R. Civ. P. 16(c) (allowing court to "eliminat[e] frivolous claims or defenses"); *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) (allowing a district court to stay discovery "when it is convinced that the plaintiff will be unable to state a claim for relief").

And Rule 11 allows courts to sanction parties who file frivolous pleadings or litigate in bad faith. Fed. R.

Civ. P. 11; *see Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2168 n.4 (2015) (rejecting concern, in the bankruptcy context, about "frivolous" filings on grounds that the bankruptcy equivalent of Rule 11 "authorizes the court to impose sanctions for bad-faith litigation conduct").

The solution to the filing of meritless pleadings is not to limit the public right of access to meritorious ones. It's to strike the improper pleadings and sanction those who file them. There's absolutely no reason to believe that this solution isn't working perfectly fine.

* * *

The decision below is not exceptional. Courts around the country require compelling reasons to seal court records—including documents obtained in discovery and then filed with the court in connection with preliminary injunction motions. They have for decades. Yet Chrysler and its amici provide not a single shred of evidence that upholding the public right of access has negatively impacted the justice system.

There is absolutely no reason to believe that the decision below—or the Ninth Circuit's sealing practices more generally—will have any effect beyond protecting the public's right of access to court records in accordance with this Court's case law.

V. This Case is Not a Good Vehicle for Review.

Even if this Court were inclined to review the lower courts' sealing practices, this case is an exceedingly poor vehicle through which to do so.

First, the question presented here was not even considered—let alone decided—by the lower courts. Below, Chrysler argued that preliminary injunction motions should be exempt from the sealing standard that applies to other court records because preliminary injunction motions are nondispositive. Chrysler has now abandoned that argument.

Instead, Chrysler now argues that the standard for sealing evidence should be lower if the evidence was initially produced during discovery pursuant to a "good cause" protective order—regardless of the kind of court proceeding at issue. That is, obviously, an entirely different argument.[11]

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *see Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) ("[W]e generally do not address arguments that were

[11] The first time Chrysler even mentioned this argument was in its en banc petition before the Ninth Circuit. In that petition, Chrysler argued that the court should *either* rule that preliminary injunction motions are not subject to the presumption of access *or* that the standard the panel had applied was incorrect. But the court did not order a response to the petition; no judge ordered a vote; Respondent never briefed the argument; and the Ninth Circuit never ruled on it.

not the basis for the decision below."). This is not one of the "exceptional cases" that justifies deviating from this rule. *Id.*

Indeed, the question Chrysler asks this Court to answer—whether a "good cause" protective order issued during the discovery process is sufficient to seal evidence used in court—is not even squarely presented by the facts of this case. There was no "good cause" protective order entered here. Any ruling this Court might make on the effect of such an order would have no impact.

Furthermore, even if this Court were to address sealing standards more generally, its decision is likely to be purely advisory. *See Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion."). Because the Ninth Circuit held that the district court applied the wrong standard, it did not review the district court's conclusion that there is good cause to seal the court records. But it is likely that the Ninth Circuit would reverse on that issue as well.

As explained above, the only justification Chrysler offered for sealing the court records was an entirely conclusory assertion that they contained trade secrets—an assertion that later proved to be at least partially false. That's insufficient under any standard. *See supra* page 24.

Thus, even if this Court were to reverse the Ninth Circuit and hold that good cause is sufficient to seal court records, the outcome of this case is likely to be unchanged. And to the extent the records do contain

genuine trade secrets, those would be protected under any standard.

* * *

Chrysler asks this Court to decide an issue that was not decided by the courts below, is not even squarely presented in this case, and will likely have no impact on its outcome. This Court should decline its invitation.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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