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 a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ASSOCIATION OF GLOBAL AUTOMAKERS, INC. AND THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Together, the *Amici Curiae* represent the manufacturer or distributor of virtually every automobile sold in the United States.[1]

The Association of Global Automakers, Inc. ("Global Automakers") is a nonprofit trade association representing international motor vehicle manufacturers, original equipment suppliers, and other automotive-related trade associations. Global Automakers is dedicated to ensuring a responsible, open, and competitive automotive marketplace in the United States. Global Automakers supports public policy initiatives that improve vehicle safety, encourage technological innovation, and promote responsible environmental stewardship. Its members include American Honda Motor Co., Inc.; Aston Martin Lagonda of North America, Inc.; Ferrari North America, Inc.; Hyundai Motor America, Inc.; Isuzu North America Corp.; Kia Motors America, Inc.; Maserati North America, Inc.; McLaren Automotive, Ltd.; Nissan North America, Inc.; Subaru of America, Inc.; Suzuki Motor of America, Inc.; and Toyota Motor North America, Inc.

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[1] Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner is a member of the Alliance of Automobile Manufacturers but neither participated in the preparation of this brief, nor made a monetary contribution thereto. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of *Amici*'s intention to file this brief. The parties have consented to the filing of this brief, each in a separate writing that is being filed concurrently with this brief.

The Alliance of Automobile Manufacturers, Inc. (the "Alliance") is a nonprofit trade association whose aim is to identify and implement constructive public policy solutions to promote sustainable access to mobility, while advancing progress in vehicle safety, responsible energy usage, and environmental protection. The Alliance's members are BMW Group; FCA US, LLC; Ford Motor Company; General Motors Company; Jaguar Land Rover; Mazda North American Operations; Mercedes-Benz USA; Mitsubishi Motors; Porsche Cars North America, Inc.; Toyota; Volkswagen Group of America, Inc.; and Volvo Cars USA.

Amici and their members share the common goal of providing Americans with their choice of safe, innovative, and dependable automobiles. To meet this goal, technological advancement is critical, and so is protecting the incentives for further research. Permitting automakers to shield their trade secrets and other proprietary information from their competitors is essential.

In civil litigation, however, proprietary information is often at risk. In products liability and intellectual property disputes in particular, sensitive information—such as engineering designs, the costs of automobile components, future product plans, the income and profits made on vehicles, and supplier agreements—often become the targets of discovery requests. Prompt disclosure of this information to an appropriately limited audience—often consisting only of opposing counsel, designated experts, and the court—can assist in the fair and timely resolution of the dispute. But broader public dissemination can severely impair an automaker's (or any other innovative company's) competitive standing.

Congress recognized this reality in adopting the Federal Rules of Civil Procedure. Accordingly, Rule 26(c) provides district courts broad discretion to fashion protective orders that limit the disclosure of any "trade secret or other confidential research, development, or commercial information" produced in discovery if "good cause" supports that result. Fed. R. Civ. P. 26(c)(1)(G). This strikes an appropriate balance between the truth-seeking function of the judicial process and innovators' legitimate need to preserve their intellectual property. The Rule creates a mechanism for proprietary information to be shared in litigation to the extent necessary to resolve the dispute, without wider public disclosure that could destroy a company's investments in confidential research and development.

Amici's members rely on protective orders issued pursuant to Rule 26(c) when faced with discovery requests for trade secrets or other proprietary information. Accordingly, *Amici* have a strong interest in ensuring that district courts apply Rule 26(c) with uniformity, in accord with its plain text and purpose, and in preserving district courts' "broad discretion" to fashion appropriate protective relief. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 36 (1984).

SUMMARY OF THE ARGUMENT

Rule 26(c) allows all confidential information produced in discovery to be sealed for "good cause," regardless of whether a party later attaches that information to a court filing. The text of the Rule broadly states that the court "may, for good cause," issue any order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including [an order] requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way." Fed. R. Civ. P. 26(c)(1)(G).

For that protection to be meaningful, "good cause" must protect the information *throughout* the litigation, not just during discovery. In other words, if a district court finds "good cause" to seal a document when it is produced in discovery, it is not appropriate to require a heightened showing to maintain the seal simply because a party—typically the opponent of the party who produced it—has attached the document to a court filing.

The Third, Seventh, and Eleventh Circuits all recognize this. *Infra* at 6–7. As the Eleventh Circuit has explained, the fact that "sealed material is subsequently submitted in connection with a substantive motion does not mean that the confidentiality imposed by Rule 26 is automatically forgone." *Chi. Tribune Co.* v. *Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1313 (11th Cir. 2001) (per curiam). Rather, if the "good cause" that supported the adoption of a protective order during discovery continues to exist when the document is filed with the court, the seal should remain intact. *Id.*

Any contrary outcome "eviscerate[s] Rule 26(c) and its benefits" by allowing litigants to nullify protective orders simply by attaching sealed documents to a motion. Pet. App. 35a (Ikuta, J., dissenting). Yet the First, Sixth, and Ninth Circuits permit precisely this nonsensical result. In those courts, the moment a litigant elects to attach a sealed document obtained in discovery to a motion—regardless of the document's relevance or admissibility at trial—the protective order offers little protection. The document can remain under seal only if its owner can demonstrate that "compelling reasons" support its continued protection—a far more demanding standard than "good cause." *Infra* at 7.

This heightened "compelling reasons" test disregards the plain text and purpose of Rule 26(c), runs counter to this Court's precedents, and is fundamentally unfair to litigants with a legitimate need to protect proprietary information. See Pet. 18–21. This Court should grant certiorari and reverse the judgment below.

This Court's review is also necessary to impose a uniform nationwide standard. *Infra* Part I. The current divide among the Circuits is untenable. Some courts seal confidential documents attached to court filings for "good cause" while others demand "compelling reasons." This conflict over the protection of confidential information encourages forum-shopping: Opportunistic class-action plaintiffs and other litigants will seek out the jurisdictions with weak protections for proprietary information in an effort to coerce settlements from automakers and other innovative companies with proprietary data to protect. Moreover, the disparity in rules triggers an unreasonable competitive imbalance. Innovators in some jurisdictions cannot protect proprietary information unless they satisfy the demanding "compelling reasons" test, while their competitors sued in other jurisdictions can keep their own proprietary data sealed, so long as they meet the traditional "good cause" standard.

This Court's intervention is also necessary because maintaining Rule 26(c) as the controlling test for sealing all documents produced in discovery is exceptionally important to preserving innovation in the auto industry and a host of other sectors. *Infra* Part II. This result is also warranted by the Rule's text and purpose. *Id.* The contrary "compelling reasons" standard dramatically narrows district courts' "broad discretion" to manage the use of proprietary information in litigation, *Seattle Times*, 467 U.S. at 36, once a party makes the unilateral choice to attach a sealed document to a motion. This transfers undue control of this critically important issue to the litigants.

In the First, Sixth, and Ninth Circuits, the recipient of a sealed document via discovery gets to decide what standard its adversary must satisfy to keep the seal in place. If the recipient attaches the document to a court filing, any prior protective order issued for "good cause" is essentially invalidated, and the adversary can maintain the seal only by demonstrating "compelling reasons." *Infra* Part III. This invariably leads to costly discovery disputes and artificial pressures to settle cases, without any corresponding public benefit. *Infra* Part IV. Only this Court can fix this problem.

I. A UNIFORM STANDARD FOR PROTECTING PROPRIETARY INFORMATION IN LITIGATION IS URGENTLY NEEDED.

Now more than ever, the effect of a Rule 26(c) protective order depends upon geography. There is an intractable divide among the courts of appeals on the question whether information discovered pursuant to a protective order can remain sealed, upon a showing of good cause, if it is later attached to a motion.

The Third, Seventh, and Eleventh Circuits hold that Rule 26(c)'s "good cause" standard governs the sealing of all confidential information produced in discovery, regardless of whether a party later files it with the court. See *Leucadia, Inc.* v. *Applied Extrusion Techs., Inc.*, 998 F.2d 157, 166 (3d Cir. 1993); *Citizens First Nat'l Bank of Princeton* v. *Cincinnati*

Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999); *Chi. Tribune*, 263 F.3d at 1313 (11th Cir.). By contrast, in the First and Sixth Circuits, "good cause" only supports the sealing of information during discovery; if any party files the information with the court, its owner must satisfy the heightened "compelling reasons" standard to keep it under seal. See *FTC* v. *Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987); *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983). The Ninth Circuit has now adopted a variation on that test. In that jurisdiction, discovery documents can remain sealed for "good cause" if they are attached to motions with no relation to the merits, but "compelling reasons" are required to maintain the seal over documents attached to any motion that is "more than tangentially related to the merits." Pet. App. 19a.

The uncertainty created by these inconsistent standards is unsustainable for at least two reasons.

First, this disparity in rules encourages forum shopping. Putative class-action plaintiffs and other opportunistic litigants may purposefully file suit in jurisdictions that follow the "compelling reasons" test to boost settlement leverage against defendants with sensitive commercial information to protect. Automakers and other innovators served with complaints in these jurisdictions—even those that appear meritless—will be under pressure to settle rather than take the risk that proprietary information will be unsealed simply because their adversary later attaches it to a motion. It has long been the policy of this Court to discourage this sort of opportunistic behavior among litigants, and to construe the Federal Rules to avoid it. See, *e.g.*, *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965) (discussing the "twin aims" of "discouragement of forum-shopping and avoidance of inequitable administration of the laws"). This counsels in favor of this Court's review.

Second, the disparity in standards creates a competitive imbalance. With different tests operating in different jurisdictions, some companies will be able to seal proprietary data more readily than their competitors. For instance, an automaker that is "at home" within the Eleventh Circuit, see *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 751 (2014), and thus more likely to be sued there, can rely upon that court's faithful application of the federal rules. By contrast, an automaker based within the Ninth Circuit is more likely to face that court's heightened standard for shielding confidential information.

This uneven playing field is fundamentally unfair. It is unreasonable for some innovative companies to labor under the latter while their competitors enjoy the benefits of the former. This Court's intervention is necessary to impose a uniform rule.

II. RULE 26(c)'S "GOOD CAUSE" TEST IS ESSENTIAL TO PROTECTING INNOVATION IN THE MANNER CONGRESS INTENDED.

Applying Rule 26(c)'s "good cause" test to all confidential discovery documents, regardless of how they are used in litigation, is critical to protect automakers' substantial investments in proprietary research and development, and to ensure that American drivers have the benefit of cutting-edge technology.

1. Like all manufacturers, *Amici*'s members must innovate or perish. Automakers invest millions of dollars in developing new technologies that make motor vehicles safer, allow them to operate cleaner and more fuel-efficiently, and enhance the overall driving experience.

Recent technological advancements have dramatically enhanced automobile safety. In fact, passenger vehicle fatalities have decreased by nearly 25 percent over the past decade, even though vehicle miles traveled have substantially increased over the same period. U.S. Dep't of Transp., *Traffic Safety Facts: Research Note* (Mar. 2016), http://www-nrd.nhtsa.dot.gov/Pubs/812246.pdf.

Technology on the horizon offers the potential for even greater leaps forward. For example, emerging "connected car" technology will soon allow automobiles to communicate their position, speed, and other data to nearby vehicles, alerting drivers to impending collisions, blind spots, lane departures, and other important safety information. See, *e.g.*, Global Automakers, *Fact Sheet: Safety Benefits of Connected Vehicles*, https://www.globalautomakers.org/sites/default/files/fullpage/V2V_Fact_Sheet_ID-7156.pdf. The National Highway Traffic Safety Administration (NHTSA) has said this technology could be a "game changer," potentially addressing 80% of vehicle crashes involving non-impaired drivers. *Id.*

Similarly rapid advances are being made in automotive fuel economy through advanced transmission systems, more efficient engines, and electric vehicles. And automakers are aggressively pursuing other unique technologies with the power to reshape the market, such "self-parking" and "self-driving" cars. J. Greenough, *10 Million Self-Driving Cars Will Be On The Road By 2020*, Business Insider, July 29, 2015, http://www.businessinsider.com/report-10-million-self-driving-cars-will-be-on-the-road-by-2020-2015-5-6.

Competition in this space is fierce, and protecting proprietary information is crucial to an automaker's success. What innovations an automaker is pursuing, how the technology will function, its expected price, and the automaker's rollout plans are among the most sensitive and valuable information within a company.

Thus, automakers—like innovators across other industries—steadfastly guard this information against disclosure to competitors. For example, they routinely employ advanced computer security systems to segregate and limit access to confidential electronic data, and adopt detailed procedures for handling confidential physical documents. In addition, they regularly require employees and vendors to abide by strict confidentiality and non-disclosure agreements to ensure this information remains protected.

2. At times, it is necessary for automakers to disclose proprietary information in litigation or to share it with regulators. In each setting, however, Congress has expressly provided for its protection, recognizing that the important governmental needs for access to the information do not warrant broader disclosure to the public and competitors.

In civil litigation, Rule 26(c) grants district courts "broad discretion" to issue protective orders that restrict the dissemination of trade secrets and other proprietary information exchanged in discovery if "good cause" supports that result. *Seattle Times*, 467 U.S. at 36–37; Fed. R. Civ. P. 26(c)(1)(G).

Similarly, when proprietary information is disclosed to federal regulators, Congress routinely requires the agency to shield it from public dissemination. For instance, *Amici*'s members routinely produce safety and other information to NHTSA, the federal agency responsible for ensuring motor vehicle and federal highway safety. Congress has made clear that "[i]nformation obtained" by NHTSA that is "related to a confidential matter"—including a regulated entity's "trade secrets, processes, operations, . . . confidential statistical data, [or] income, profits, losses, or expenditures" may not be disclosed to the public, except in certain limited circumstances. 49 U.S.C. § 30167(a) (cross-referencing 18 U.S.C. § 1905).

Likewise, Congress has declared that emissions information that automakers and other regulated entities disclose to the Environmental Protection Agency (EPA) will not be "made public" if it would "would divulge methods or processes entitled to protection as trade secrets." 42 U.S.C. § 7542(c).

These protections are not limited to agencies that regulate automakers. Drug makers, for instance, may rely upon legitimate designations of confidentiality when they report required information to the Food and Drug Administration, 21 U.S.C. § 356e, as may entities who report data to the Department of Agriculture, 7 U.S.C. § 136h(b), and the Federal Energy Regulatory Commission, 15 U.S.C. § 796(d).

Moreover, Congress broadly protects "trade secrets" and other "commercial or financial information" from disclosure under the Freedom of Information Act (FOIA). 5 U.S.C. § 552(b)(4); *FCC* v. *AT&T Inc.*, 562 U.S. 397, 409 (2011). And federal law even makes it a crime—punishable by up to one year in prison—for a federal employee to divulge a regulated entity's "trade secrets, processes, operations" or other proprietary information. 18 U.S.C. § 1905. In short, Congress consistently has created mechanisms for the *limited* disclosure of proprietary information that is necessary to litigation or regulatory oversight *without* forcing the owner to reveal that information to competitors and the public.

3. Nothing in any statute or Federal Rule of Civil Procedure suggests that Congress intended for courts to cast aside this consistent and longstanding policy of protecting proprietary information and replace it with a far more demanding "compelling reasons" test simply because a litigant has attached a document covered by a protective order to a court filing.

Nor does the common-law right of access to judicial records require such a result. It has long been settled that the common-law right of access to judicial records does *not* apply to information exchanged in discovery because "pretrial depositions and interrogatories are *not public components of a civil trial.* Such proceedings were *not open to the public at common law* and, in general, they are conducted in private as a matter of modern practice." *Seattle Times*, 467 U.S. at 33 (emphases added) (citation omitted). As a consequence, "*restraints placed on discovered, but not yet admitted, information, are not a restriction on a traditionally public source of information." Id.* (emphasis added).

Even assuming a discovery document becomes a judicial record when a party attaches it to a court filing, this Court has made clear that the public's common-law right "to inspect and copy . . . judicial records and documents" is "not absolute." *Nixon* v. *Warner Comm'cns, Inc.*, 435 U.S. 589, 597–98 (1978). In particular, judicial records should not be disclosed if they could be used "*as sources of business information that might harm a litigant's competitive standing*." *Id.* at 598 (emphasis added).

This is precisely the risk that the "compelling reasons" test creates. At least in the Ninth Circuit, entities seeking to protect proprietary information generally cannot meet that "intentionally stringent" standard unless the documents "are being intentionally used for an improper purpose." Pet. App. 36a (Ikuta, J., dissenting). That is not at all faithful to this Court's precedents defining the limits of the public right of access to court records, or Congress's mandates for the protection of proprietary business information.

III. JETTISONING RULE 26(c)'S "GOOD CAUSE" TEST STRIPS COURTS OF THE DISCRETION NECESSARY TO PROTECT PROPRIETARY INFORMATION.

Rule 26(c)'s "good cause" test should apply to *all* confidential documents disclosed in discovery, regardless of whether a party later attaches them to a court filing. Requiring "compelling reasons" to maintain the seal over documents attached to a motion "eviscerates Rule 26(c) and its benefits," and gives litigants who receive sealed documents from their adversaries the power to "render the district court's protective order useless." Pet. App. 34a–35a (Ikuta, J., dissenting).

The protection afforded by Rule 26(c)'s "good cause" test is necessary to balance the Federal Rules' policy favoring liberal discovery against the legitimate needs of litigants and third parties to keep sensitive proprietary information confidential. As this Court has explained, "[l]iberal discovery . . . assist[s] in the preparation and trial, or the settlement, of litigated disputes." *Seattle Times*, 467 U.S. at 34. But the Rules permit liberal discovery for this "*sole purpose*." *Id*. (emphasis added). Discovery carries a "significant potential for abuse" because it gives litigants an "opportunity . . . to obtain . . . information that not only is irrelevant but if publicly released could be damaging to reputation and privacy." *Id*. at 34–35. As a result, a litigant does *not* have an "unrestrained right to disseminate information that has been obtained through pretrial discovery," even if there is a "public interest" in its disclosure. *Id.* at 31. Rather, "[b]ecause of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c)." *Id.* at 34.

Importantly, this Court has repeatedly emphasized that the decision how best to "balance the competing interests" in disclosure and confidentiality is "*best left to the sound discretion of the trial court*," given its familiarity with the "relevant facts and circumstances of the particular case." *Nixon*, 435 U.S. at 599 (emphasis added). Indeed, "[t]he unique character of the discovery process requires that the trial court have *substantial latitude* to fashion protective orders." *Seattle Times*, 467 U.S. at 36 (emphasis added).

The "compelling reasons" test drastically narrows the district court's discretion at the moment a litigant attaches a sealed document to a court filing. Once a litigant takes that unilateral action, the district court's decision that there was "good cause" to issue a protective order no longer applies; the seal is eliminated unless the owner of the document shows that "compelling reasons" support its continued confidential treatment. Pet. App. 19a.

There is no reason to require such a heightened showing. As explained, the public right of access to judicial records does not require it. *Nixon*, 435 U.S. at 597–98; *supra* at 12–13. Nor does any other policy concern.

In the instant case, the divided Ninth Circuit panel suggested that a heightened standard is necessary to preserve the "public's understanding of the judicial process and of significant public events," Pet. App.

12a, and to provide public access to "[d]ocuments" that "play a role in determining litigants' substantive rights," *id.* at 15a. But the mere fact that a litigant chooses to attach a sealed document obtained in discovery to a motion does not make that document "significant" or relevant to the adjudication of "substantive rights." After all, "much of the information that surfaces during pretrial discovery" is irrelevant to the merits. *Seattle Times*, 467 U.S. at 33; see Fed. R. Civ. P. 26(b)(1) (Information "need not be admissible in evidence to be discoverable.").

A litigant may attach any document to a motion that it wishes. The litigant's choice in no way indicates that the district court will find the document relevant to the merits, or even admissible at trial. See Fed. R. Evid. 401 ("Test for Relevant Evidence"); *id.* 403–415 (exclusions and exceptions). Thus, the litigant's choice should not constrain the district court's "broad discretion" to protect proprietary information for "good cause," *Seattle Times*, 467 U.S. at 36, or box the court into a corner in which only "compelling reasons" can provide relief. Only a consistent application of Rule 26(c)'s "good cause" test *throughout* the litigation will ensure that district courts—and not the parties—control the standards that apply to the protection of confidential information.

IV. ABANDONING RULE 26(c)'S "GOOD CAUSE" TEST BREEDS COSTLY DISCOVERY DISPUTES AND UNDUE SETTLEMENT PRESSURE WITHOUT OFFERING ANY PUBLIC BENEFIT.

The "compelling reasons" standard should be rejected for the additional reason that it will undermine the "just, speedy, and inexpensive" resolution of civil litigation, Fed. R. Civ. P. 1, without achieving any material public benefit.

First, permitting litigants to vitiate protective orders simply by attaching sealed documents to their motions increases the incentives for defendants to fight document requests at every turn. It is "axiomatic" that "[a]mong the goals furthered by protective orders is reducing conflict over discovery and facilitating the flow of information through discovery." *Foltz* v. *State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1137 (9th Cir. 2003). "Protective orders . . . promote[] disclosure" because even parties who have an "arguable ground to resist discovery are more likely to turn over their information if they know that the audience is limited." *In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992); see also *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987) (per curiam) (lauding protective orders as able to "expedite the flow of discovery material, promote the prompt resolution of disputes over confidentiality, and facilitate the preservation of material deemed worthy of protection").

By contrast, if a party's opponent has the power to imperil the protective order simply by attaching a sealed document to a court filing, the protective order "cannot be relied upon," and it "'will not foster cooperation.'" *Foltz*, 331 F.3d at 1137 (quoting 8A Charles Alan Wright et al., Federal Practice & Procedure § 2044.1). This poses a very real threat to the efficient resolution of civil litigation. In addition, it will drag courts deeper into the discovery process, an outcome the Rules consistently have attempted to avoid. *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 357 n.24 (1978) (Federal "discovery rules . . . contemplate that discovery will proceed without judicial intervention" wherever possible.); see also Fed. R. Civ. P. 37(a)(1) (requiring parties to confer in "good faith" before a motion to compel discovery is filed); Fed. R.

Civ. P. 26 Advisory Committee's Notes to 2000 Amendment, Subd. (b)(1) ("In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention."). If litigants cannot rely on protective orders and have every reason to fight discovery requests for proprietary data tooth-and-nail, valuable judicial resources will be wasted meting out these disputes.

Second, if litigants cannot rely on protective orders to protect proprietary information, settlement pressures in many cases will become overwhelming. If litigation touches on a valuable proprietary technology developed by one of *Amici*'s members or another innovative company, the cost of public disclosure may easily outweigh the price of settling a meritless action the company otherwise would defend.

This Court has recognized this risk in other contexts: "[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC* v. *Sci.-Atlanta*, 552 U.S. 148, 163 (2008). That risk is particularly great when the disclosure of valuable proprietary information is at stake. The threat of disclosure gives the opposing litigant excessive power to "coerce settlements that have no relation to the prospect of success on the ultimate merits," and "[c]ourts should take care that they do not become instruments of abuse and extortion." *Kiobel* v. *Royal Dutch Petroleum Co.*, 642 F.3d 268, 271 (2d Cir. 2011) (Jacobs, J., concurring with denial of rehearing).

Finally, these harms associated with the "compelling reasons" standard come with no corresponding benefit. As the instant case illustrates, any generic public interest in access to information cannot overcome the specific needs of innovators to protect their proprietary information, especially when regulatory agencies best positioned to protect public health and safety already have access to this information.

As Petitioner describes, this dispute arose from a request by the Center for Auto Safety to intervene in this putative class-action and unseal proprietary documents related to Petitioner's "Totally Integrated Power Module-7" automobile technology, claiming that the public had an interest in reviewing the data for safety reasons. Pet. 6; Pet. App. 5a.

But automakers—like a wide range of other federally regulated entities—routinely share proprietary information related to safety with regulators under a variety of different statutes and programs. For example, the Motor Vehicle Safety Act, as amended by the Transportation Recall Enhancement, Accountability and Documentation (TREAD) Act, 49 U.S.C. § 30101, *et seq.*, requires cars and trucks manufactured in the United States to meet strict federal safety requirements, *id.* § 30111, and requires automakers to provide NHTSA with detailed information concerning any potential safety defects, *id.* §§ 30116–30119. The cornerstone of this regime is the duty to self-report. Manufacturers must report any safety-related defect to NHTSA within five days of determining that it exists, describe the defect in detail, and outline a program for remediation. See *id.* § 30118(c); 49 C.F.R. § 573.6. Failure to comply with these reporting requirements exposes the manufacturer to significant civil penalties, which may total up to $35 million "for a related series of violations." 49 U.S.C. § 30165(a); see also 49 C.F.R. § 578.6.

NHTSA also requires automakers to notify the agency of any claims against the automaker for death, injury, or property damage, and to disclose all customer complaints. 49 C.F.R. § 579.21(b)(1); 67 Fed. Reg. 45,822, 45,824 (July 10, 2002).

Further, NHTSA does not simply rely on automakers' self-reporting. The agency has broad investigatory powers to issue subpoenas, conduct hearings, and take depositions, all in an effort "to obtain information to carry out its functions." 49 C.F.R. § 510.3.

So too, federal law requires automakers to disclose emissions information to the EPA. See, *e.g.*, 42 U.S.C. § 7542(a) ("Every manufacturer of new motor vehicles . . . shall . . . make reports and provide information" to the EPA.). As with information provided to NHTSA, these records may well include proprietary information,[2] which the agency typically is barred from making public, *id.* § 7542(c).

As these carefully crafted reporting and disclosure regimes illustrate, there are well-functioning mechanisms in place to provide auto safety and emissions information to the regulators best positioned to act on it. Therefore, applying Rule 26(c)'s traditional "good cause" test to the sealing of all proprietary information produced in discovery does nothing to undermine the safety of American drivers. To the contrary, it is faithful to Congress's consistent treatment of proprietary information across a range of settings, and ensures protection for a dynamic, competitive marketplace that rewards innovation, to the benefit of all citizens.

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[2] *See, e.g.*, 40 C.F.R. § 86.091-7(a)(2)(i)(A) ("[A] description of the process by which the engine was selected and of the modifications made."); *id.* § 86.091-7(a)(2)(i)(F) ("A record and description of each test performed to diagnose engine or emission control system performance, giving the date and time of the test and the reason for it.").

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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