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 U.S. Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether "good cause" is sufficient to maintain under seal discovery documents governed by a protective order issued under Federal Rule of Civil Procedure 26(c), when they are filed with the court.

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INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has appeared in federal court on numerous occasions to support the rights of litigants to prevent disclosure of confidential documents. *See, e.g., Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001); *State Farm Fire and Cas. Co. v. U.S. ex rel. Rigsby*, No. 15-513 (U.S., pet. pending). In particular, WLF devotes considerable resources to protecting intellectual property rights. Because judicially mandated document-releases frequently result in destruction of trade secrets and other intellectual property, WLF opposes such releases in the absence of an overriding public interest in disclosure.

WLF is concerned that the decision below, if allowed to stand, poses a serious threat to property rights. By imposing on parties opposing disclosure a heavy burden of demonstrating "compelling reasons" to maintain the confidentiality of discovery documents, the Ninth Circuit makes it extremely difficult for

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than 10 days prior to the due date, counsel for WLF provided counsel for Respondent with notice of its intent to file. All parties have consented to the filing; letters of consent have been lodged with the Court.

companies to prevent the disclosure of their trade secrets.

WLF is also concerned that the decision below is likely to cause discovery disputes to proliferate and to unduly complicate already cumbersome and costly litigation procedures. Litigants are far more likely to challenge document requests if they come to believe that protective orders will not prevent the public disclosure of confidential information contained in discovery material.

STATEMENT OF THE CASE

The plaintiffs in the underlying lawsuit are several individuals who owned Chrysler vehicles. They filed suit against Petitioner FCA US LLC f/k/a Chrysler Group LLC ("Chrysler"), alleging that a device in their vehicles known as the TIPM-7 was defectively designed. Because documents potentially relevant to the plaintiffs' claims (and thus potentially subject to discovery) contained or reflected "trade secrets or other confidential research and development, financial, commercial, or personal information," the district court entered a Rule 26(c) protective order that prevented the public disclosure of such documents. The protective order required the parties, should they seek to file any such documents with the district court, to submit them under seal.

The plaintiffs later attached several of the Chrysler-sourced confidential documents to their motion for a preliminary injunction. In compliance with the protective order, they filed those documents under seal, as did Chrysler with respect to several

confidential documents attached to its opposition brief. The district court summarily denied the motion, and the parties thereafter settled their lawsuit.

Even before the preliminary injunction motion could be argued, Respondent The Center for Auto Safety ("Center") moved to intervene for the purpose of seeking access to the documents filed under seal. The district court denied the Center's motion, ruling that the documents should not be unsealed "at this time." Pet. App. 37a-50a.

In determining whether Chrysler's documents should be released to the Center, the court applied the "good cause" standard set forth in Rule 26(c).[2] *Id.* at 45a. The court concluded that "there is good cause to keep the documents sealed at this time." *Ibid.* In particular, it cited evidence that the documents contained trade secrets regarding Chrysler's manufacturing and testing processes, and that disclosure of this information "would enable competitors to 'leapfrog' Defendant's hard engineering work and unfairly reap the competitive rewards." *Id.* at 45a-46a. The court also expressed concern that released information "could become a vehicle for improper purposes." *Id.* at 47a. It explained:

> There is some danger that the wide publication of selected, out-of-context materials, in a matter

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[2] Fed.R.Civ.P. 26(c)(1) permits district courts "for good cause" to issue protective orders limiting access to discovery materials. Protective orders are designed "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

> that is only in the early stages of litigation, could unnecessarily harm Defendant and present an unfair picture of the alleged facts to the public.

Ibid.

A divided Ninth Circuit panel vacated the district court's order and remanded. Pet. App. 1a-36a. It concluded that the district court had applied an incorrect legal standard in evaluating the motion to unseal. The appeals court said that, under the common law, there exists a "*strong* presumption in favor of access to court records." *Id.* at 8a (emphasis added). It concluded that when the records at issue have been attached to a motion that "is more than tangentially related to the merits of a case," the common-law right of access applies, *id.* at 19a, and that under those circumstances "a court may seal records only when it finds 'a compelling reason and articulate[s] the basis for its ruling, without relying on hypothesis or conjecture.'" *Id.* at 8a. Concluding that the plaintiffs' preliminary injunction motion was "more than tangentially related to the merits of the case," the appeals court directed the district court on remand "to consider the documents under the compelling reason standard." *Id.* at 22a.

In dissent, Judge Ikuta asserted that the district court acted properly in applying the less-stringent "good cause" standard to the Center's motion to unseal, *id.* at 25a-36a, a standard that requires courts to "balance the protection afforded litigants under Rule 26(c) with the presumption that the public has a right of access to public documents, including judicial records." *Id.* at 25a-26a. She argued that "the

majority's rule upsets th[at] balance" because it "deprives protective orders issued under Rule 26(c) of any force or effect." *Id.* at 34a-35a.

Judge Ikuta noted that the plaintiffs were able to gain access to "86,000 documents from Chrysler (including confidential and trade secret documents) without being put to the cost and delay of fighting discovery battles because Chrysler could confidently rely on the district court's protective order." *Id.* at 35a. She asserted that, as a result of the panel's adoption of "the intentionally stringent 'compelling reasons' standard, ... no future litigant can rely on a protective order and will have to chart its course through discovery cautiously and belligerently, *to the detriment of the legal system*." *Id.* at 36a (emphasis added).

SUMMARY OF ARGUMENT

The decision below, by imposing a heightened evidentiary standard in reviewing efforts to protect the confidentiality of discovery documents, threatens significant disruption of the discovery process and undermines private property rights. Review is warranted to resolve the sharp conflict between that decision and decisions of both this Court and other federal appeals courts.

The Ninth Circuit contended that its heightened review standard was mandated by the common-law right of access to public records, including judicial records. Yet, the Ninth Circuit has never cited any court decisions—other than its own—to support its contention that the common law has mandated heightened scrutiny of confidentiality claims.

Certainly, that contention draws no support from *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)—which contains this Court's most detailed exposition of the common-law right of access—or from the 19th and 20th century case law cited by *Nixon*.

Indeed, that case law indicates that common-law courts generally: (1) imposed the burden of proof on *the party seeking public disclosure*; and (2) did not recognize a right of access until after a judge issued a decision signifying his confirmation of the veracity of the documents in question. Modern-day state court decisions applying a common-law right of access to state court records routinely apply a "good cause" standard—not a heightened standard—to efforts to protect the confidentiality of court records.

Moreover, even if the Ninth Circuit were correct that the common law mandates a heightened standard of review, that standard would apply in federal courts only so long as Congress and this Court (through its rulemaking authority) have not established a different standard. But Congress and this Court have adopted Rule 26(c)'s "good cause" standard, which requires a court to balance (without placing its thumb on the scale) the litigants' privacy interests against the public's interest in disclosure.

The Ninth Circuit asserted that the "good cause" standard should be replaced by its heightened "compelling reasons" standard once the document in question has been attached to a motion that is "more than tangentially related to the merits of the case." Pet. App. 22a. But the court provided no logical or precedential support for that assertion. It may

sometimes be true that the public interest in disclosure increases once a document has been attached to a motion filed with the district court. But that increased public interest can be adequately taken into account in connection with the court's "good cause" determination.

Review is also warranted to resolve the sharply conflicting decisions among federal courts that have addressed the standard-of-review issue. As the Petition well documents, the decision below conflicts with decisions of the numerous other federal courts that have applied a "good cause" standard to motions seeking public access to documents filed under seal. The decision below also is in sharp tension with decisions of this Court, particularly *Nixon* and *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

Finally, review is warranted in light of the negative impact that the decision below will have on the litigation process. The decision permits a litigant to facilitate disclosure of an opponent's confidential documents by attaching them to a substantive motion, without regard to whether most of the information in the documents is related to any contested issue. Once the documents have been filed with the Court, the Ninth Circuit's "compelling reasons" standard makes it extremely difficult for the litigant to maintain confidentiality. Under those circumstances, any rational litigant will be much more likely to contest an initial request for document production, even if the requesting party agrees to a Rule 26(c) protective order. The alternative requires risking the destruction of one's intellectual property. The likely end result: discovery disputes will proliferate, and already cumbersome litigation procedures will become even

more complicated and expensive.

Alternatively, potential litigants will forgo altogether their right to seek judicial resolution of disputes rather than risk the possibility that litigation will force disclosure of confidential information. That result runs counter to the primary purpose of civil litigation (and its accompanying discovery rules): facilitating the resolution of disputes, not generating information for the public.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S HEIGHTENED REVIEW STANDARD FINDS NO SUPPORT IN THE COMMON LAW OR FEDERAL STATUTORY LAW

The Ninth Circuit's recognition of a common-law right of access to judicial records is unexceptionable. As this Court noted in *Nixon*, "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." *Nixon*, 435 U.S. at 597. The Court emphasized, however, that it is "uncontested" that the common-law "right to inspect and copy judicial records is not absolute" and is overcome when outweighed by competing interests, such as litigants' interests in preventing release of confidential business information. *Id.* at 598.

While recognizing that there are limits on the common-law right of access, the Ninth Circuit asserted that the presumption in favor of granting access is "strong" and that a litigant may overcome that

presumption only by demonstrating "compelling reasons" for doing so. Pet. App. 8a. Yet, the Ninth Circuit has never cited any court decisions—other than its own—to support its contention that the common law has mandated heightened scrutiny of confidentiality claims. That failure is readily explainable: there is no common-law tradition of applying heightened scrutiny to litigants' efforts to prevent disclosure of documents submitted to a court in connection with civil or criminal proceedings. Review is warranted to determine whether the Ninth Circuit's significant expansion of the common-law doctrine is warranted.

A. The Common Law Historically Imposed the Burden of Proof on Those Seeking Disclosure, and Even Today Requires No More than "Good Cause" to Justify Nondisclosure

The Ninth Circuit purported to base its "strong" presumption and its "compelling reasons" standard of review on the centuries-old common-law tradition of granting access to public records. But that common-law tradition includes no hint that heightened scrutiny should be applied to efforts to prevent disclosure of court records.

Indeed, far from imposing a "compelling reasons" burden on those resisting disclosure, 19th-century American courts generally imposed the burden of proof on individuals seeking access to court records. They were required to show some particularized interest in the document in question that amounted to more than an interest in determining that courts were properly performing their judicial functions. *See, e.g., In re*

Cincinnati Enquirer, 5 F. Cas. 686, 687-88 (C.C.S.D. Ohio 1879); *In re Caswell*, 29 A. 259 (R.I. 1893); *Burton v. Reynolds*, 68 N.W. 217, 218 (Mich. 1896). For example, in *Burton*, a man "engaged in the business of making abstracts of titles to land" was denied access to the records of a lawsuit over title to property located in Detroit. Although he had a professional interest in the outcome of the suit and land titles generally, the court held that he lacked a right of access in the absence of a showing that he had been hired to create an abstract of the precise parcel at issue in the lawsuit. *Ibid.*

Early common-law courts also generally denied the public access to the parties' pleadings and motions and instead limited the common-law right of access to trial proceedings and orders issued by the judge. According to the Michigan Supreme Court, public access "d[id] not extend to nor include the papers filed in the case necessary to frame the issue to be tried, nor to the entries thereof made by the clerk" because "[s]uch papers are usually filed and the entries made out of court." *Schmedding v. May*, 85 Mich. 1, 5 (1896). The court reasoned that while "it is desirable that the *trial* of causes should take place under the public eye," the right of access did not extend to pleadings and motions that had not been filed during the trial and thus had not been subject to any judicial determination regarding their truthfulness. *Ibid* (emphasis added). *Accord, Nixon v. Dispatch Printing Co.*, 112 N.W. 258, 258-59 (Minn. 1907); *Baten v. Houston Oil Co. of Texas*, 217 S.W. 394, 398 (Tex. Civ. App. 1919).

More recently, state courts have generally imposed the burden of proof on the party resisting

public access to court records. State courts nonetheless generally have judged nondisclosure requests under a "good cause" standard. *See, e.g., Commonwealth v. Pon*, 469 Mass. 296, 312 (2014). *Pon* upheld a request to permanently seal trial records of an individual who had reached a *nolle prosequi* agreement with prosecutors regarding criminal charges of driving under the influence of alcohol and leaving the scene of a motor vehicle accident. The individual admitted to facts sufficient for a finding of guilt, but the judge (with the agreement of prosecutors) dismissed the case following successful completion of a rehabilitation program. The Massachusetts Supreme Judicial Court concluded that the individual had demonstrated "good cause" sufficient to overcome the common-law right of access to court records, noting that disclosure of the criminal proceedings significantly impaired his ability to find employment. *Id.* at 316-17. The court cited numerous other state-court decisions that employed good-cause balancing tests when evaluating whether to seal court records. *Id.* at 314-15.

In sum, the Ninth Circuit's "compelling reasons" standard finds no support in the common law.

B. Rule 26(c)'s "Good Cause" Standard Supersedes More Stringent Judge-Made Standards

Whether and under what circumstances federal courts should grant public access to documents produced in connection with a federal court proceeding is a federal question that is appropriately decided as a matter of federal law. In the absence of direction from

Congress, federal courts act appropriately when they step into the breach and create a federal common-law rule governing uniquely federal issues. *See, e.g., City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (stating that "federal common law is a necessary expedient" that is "resorted to in the absence of an applicable Act of Congress . . . and because the Court is compelled to consider federal questions which cannot be answered from federal statutes alone.") (citations omitted). Thus, in the absence of a congressional rule addressing public access to federal court documents, the Court has held as a matter of federal common law that a limited right of access exists; it based that holding on the existence of a centuries-old common-law tradition of access to public records. *Nixon*, 481 U.S. at 597-98.

But in the post-*Erie* era, federal common law is understood as a rarely-to-be-exercised expedient. The Court has "always recognized that federal common law is subject to the paramount authority of Congress." *City of Milwaukee*, 451 U.S. at 313. "When Congress addresses a question previously governed by a decision rested on federal common law ... the need for such an unusual exercise of lawmaking by federal courts disappears." *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (quoting *City of Milwaukee*, 451 U.S. at 314). The Court does not demand evidence of "a clear and manifest congressional purpose" to establish a governing federal rule before concluding that federal common law is displaced, because "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *Ibid*.

Congress has established a rule governing how federal district courts should evaluate the confidentiality claims of a party required to produce documents in connection with litigation. Rule 26(c)(1) of the Federal Rules of Civil Procedure states that district courts may issue protective orders limiting access to discovery materials "for good cause."[3] Because Congress has established the governing "good cause" standard, the Ninth Circuit exceeded its powers when it sought to establish a heightened "compelling reasons" standard under the federal common law.[4] *See In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1340 (D.C. Cir. 1985) (Scalia, J.) (stating that the Federal Rules of Civil Procedure trump previously existing federal common-law rules governing document disclosure).

The Ninth Circuit recognized that the "good cause" standard should govern requests for access to documents submitted to a district court in connection with a motion that is only "tangentially related to the merits of a case." Pet. App. 19a. It held, however, that a far more stringent "compelling reasons" standard should apply to confidentiality claims asserted with

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[3] The rule explicitly authorizes orders "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).

[4] Congress authorized creation of the Federal Rules of Civil Procedure through its enactment of the Rules Enabling Act, 28 U.S.C. § 2072. Amendments to the Rules do not take effect until after they are approved by the Court and submitted to Congress for its review.

respect to documents attached to a motion that is "more than tangentially related." *Ibid.* Yet the appeals court failed to explain why, as a matter of logic, the "good cause" standard established by Rule 26(c) should not apply in both situations.

The "good cause" standard has been universally understood as requiring courts, without placing a thumb on the scale, to "balance the protection afforded litigants under Rule 26(c) with the presumption that the public has a right of access to public documents, including judicial records." *Id.* at 25a-26a (Ikuta, J., dissenting). By jettisoning the Rule 26(c) standard in connection with a significant number of documents submitted to federal courts in connection with pre-trial motions, the Ninth Circuit is vastly expanding the scope of the common-law right of access to court documents, thereby making it extremely difficult for litigants to prevent public disclosure of those documents.

It may sometimes be true that the public interest in disclosure increases once a document has been attached to a motion filed with the district court. The public has an interest in gleaning information about the federal court decision-making process, *Nixon*, 435 U.S. at. 597-603, and discovery documents attached to merits-related motions might help to illuminate the decision-making process more than would other discovery documents not attached to such motions. But that increased public interest can adequately be taken into account in connection with the district court's balancing process mandated by Rule 26(c)'s "good cause" standard; there is no reason why the courts

should *also* impose a heightened "compelling reasons" standard. Review is warranted to determine whether the Ninth Circuit was justified in invoking federal common law to jettison the Rule 26(c) "good cause" standard authorized by Congress.

II. REVIEW IS WARRANTED TO RESOLVE CONFLICTS BOTH AMONG THE APPEALS COURTS AND BETWEEN THE DECISION BELOW AND THIS COURT'S DECISIONS

A. The Ninth Circuit's "Compelling Reasons" Standard of Review Conflicts with Decisions from Numerous Other Appeals Courts

As the Petition amply demonstrates, the decision below—which requires a showing of "compelling reasons" before a district court may deny public access to discovery documents submitted to the court in connection with motions that are more-than-tangentially related to the merits—directly conflicts with decisions from several other federal appeals courts. Review is warranted to resolve the conflict.

The conflict with the Eleventh Circuit's *Chicago Tribune* decision is the most pronounced. That court held that virtually all requests for public access to discovery documents should be judged under Rule 26(c)'s "good cause" standard, "which balances the asserted right of access against the other party's interest in keeping the information confidential." *Chicago Tribune*, 263 F.3d at 1309. The Eleventh Circuit mandated application of the "good cause"

standard even to discovery documents submitted to the district court in connection with a motion for summary judgment. *Id.* at 1312. It held that the district court erred when it applied a stringent "compelling interest" standard, under which such documents must be released unless the party resisting disclosure can demonstrate that the denial of public access "is necessitated by a compelling government interest, and is narrowly tailored to that interest." *Id.* at 1311-12.[5]

The Eleventh Circuit held that "the confidentiality imposed by Rule 26 is not automatically forgone" simply because the documents in question are attached to a "substantive motion." *Id.* at 1313. Rather, the issue continues to be subject to the Rule 26(c) "good cause" standard, which "requires the court to balance the respective interests of the parties." *Ibid.*

The conflict between the Ninth and Eleventh Circuits could not be sharper. The court below held that the district court abused its discretion when it upheld Chrysler's confidentiality claims under the "good cause" standard, and it remanded the case for reconsideration under its heightened "compelling reasons" standard. In contrast, the Eleventh Circuit in *Chicago Tribune* held that the district court abused its discretion when it invoked a "compelling interest" standard as its basis for rejecting a confidentiality

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[5] The court explained that a heightened review standard is reserved for unusual cases in which "the trial court conceals the record of an entire case, making no distinction between those documents that are sensitive or privileged and those that are not." *Id.* at 1311.

request for documents attached to substantive motions, and it remanded the case for reconsideration under the Rule 26(c) "good cause" standard.

Indeed, the conflict among the federal appeals courts regarding the proper standard of review extends well beyond the case law cited by the Petition. For example, the Fifth Circuit has explicitly rejected the "compelling circumstances" standard adopted by several circuits, concluding that *Nixon* "offers no basis from which one can derive the overpowering presumption of access discovered" by those courts. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 433-34 (5th Cir. 1981). The court added:

> The Supreme Court has not directed lower courts to measure requests for access to evidence only against the "most compelling circumstances." Rather, we read the Court's pronouncements as recognizing that a number of factors may militate against public access. In erecting such stout barriers against those opposing access and in limiting the exercise of the trial court's discretion, our fellow circuits have created standards more appropriate for protection of constitutional than of common law rights.

Id. at 434. *See also, SEC v. Van Waeyenberghe*, 990 F.2d 845, 848 n.4 (5th Cir. 1993) ("While other circuits have held that there is a strong presumption in favor of the public's common law right of access to judicial records, we have refused to assign a particular weight

to the right.").[6]

The Ninth Circuit's standard of review is particularly stringent in that, once a document has been attached to a motion that is related to the merits of the case, the "compelling reasons" standard applies to confidentiality claims—without regard to the degree to which the document (or segregable portions thereof) is actually relevant to the merits. In sharp contrast, the Federal Circuit has held that no special presumption of access exists for documents that were attached as exhibits to substantive motions but were never cited by the parties. *Apple Inc. v. Samsung Electronics Co.*, 727 F.3d 1214, 1228 (Fed. Cir. 2013). It explained that while the common law creates a limited right of access to court documents to assist the public in understanding judicial proceedings, exhibits to motions that "were neither cited nor discussed before the district court [would not] assist the public in understanding the proceedings in this case." *Ibid*.

This case is a particularly good vehicle for resolving the inter-circuit conflict because the choice of standard of review was outcome-determinative. If the less-demanding Rule 26(c) "good cause" standard were applied, we know (based on the district court's

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[6] Similarly, the Eighth Circuit has rejected the "strong presumption" standard adopted by the court below. *United States v. McDougal*, 103 F.3d 651, 657 (8th Cir. 1996) (although finding that *Nixon* recognized "a common law presumption in favor of public access to judicial records," the court stated that it "specifically rejected the *strong* presumption standard adopted by some circuits.") (emphasis in original).

application of that standard, an application with which the Ninth Circuit did not find fault) that Petitioner's nondisclosure claims would prevail. On the other hand, the Ninth Circuit's "compelling reasons" standard is sufficiently stringent that its application is highly likely to require disclosing virtually all documents at issue. Indeed, WLF notes that the Ninth Circuit has almost *never* concluded that a litigant opposing a request for public disclosure of documents has articulated "compelling reasons" for nondisclosure.

B. The Ninth Circuit's Decision Is in Considerable Tension with this Court's *Nixon* and *Seattle Times* Decisions

Review is also warranted because the decision below is in sharp tension with decisions of this Court, particularly *Nixon* and *Seattle Times*. This Court's discussions of the common-law right of access to judicial records has emphasized the limited nature of that right. They are inconsistent with the Ninth Circuit's recognition of a "strong" presumption of access to such records that can be overcome only by demonstrating "compelling reasons" for nondisclosure.

Nixon repeatedly emphasized the limited nature of the public's "right to inspect and copy judicial records." 435 U.S. at 598. Among the common-law rationales cited approvingly by the Court as bases for denying access to such records: release (1) would "promote public scandal," as in the publication of "details of a divorce case"; (2) would cause court files "to serve as reservoirs of libelous statements for press

consumption"; and (3) would serve as "sources of business information that might harm a litigant's business standing." *Ibid.*

The Court did not discuss the common-law right of access in relation to the standards established under Rule 26(c) for obtaining protective orders. It nonetheless described the "normal[ ]" process for determining whether non-litigants have a right of access to judicial records as one that entails "weighing the interests advanced by the parties in light of the public interest and the duty of the court." *Id.* at 602. That formulation is akin to the "good cause" standard prescribed by Rule 26(c), and dissimilar to the Ninth Circuit's "compelling reasons" standard—a standard that is heavily biased in favor of disclosure. None of *Nixon*'s language supports such a bias.

Nixon ultimately denied newspapers' efforts to obtain copies of tapes played at a public trial, concluding that Congress had superseded the common-law right by adopting a statute specifying an alternate procedure for handling access to the tapes in question. *Id.* at 603-06. In light of that disposition, the Court was not required to rule on whether discovery documents—that is, documents provided to opposing counsel pursuant to pretrial discovery procedures and later filed with the district court—are *ever* subject to the common-law right of access. Indeed, the Court stated explicitly that it was *not* deciding that foundational question:

> As we assume for purposes of this case ... that the common-law right of access is applicable, we

> do not reach or intimate any view as to the merits of these various contentions by petitioner [including a contention that] ... exhibit materials subpoenaed from third parties are not "court records" in terms of the common-law right of access.

Id. at 599 n.11. Thus, the Ninth Circuit is applying its extremely stringent nondisclosure standard to a category of court records that this Court has never held are actually subject to the common-law right of access.

The decision below is also in considerable tension with *Seattle Times*. That decision unanimously rejected contentions that a newspaper—the defendant in a libel suit—had a First Amendment right to disseminate allegedly newsworthy documents it had obtained in the course of pre-trial discovery but that were subject to a protective order issued on the basis of a Rule 26(c) "good cause" finding. 467 U.S. at 37. The Court held, "The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders." *Id.* at 36.

The Court explained that the pretrial discovery process has a "significant potential for abuse" that "may seriously implicate privacy interests of litigants." *Id.* at 34-35. It stated that the process provides "an opportunity ... for litigants to obtain—incidentally or purposely—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a *substantial interest* in preventing this sort of abuse of its processes." *Id.* at 35 (emphasis added). The Court

ruled that the interest in preventing the unwarranted release of such information "is sufficient justification for the authorization of protective orders." *Id.* at 36.

It is difficult to reconcile *Seattle Times*'s recognition of a "substantial interest" in protecting privacy interests by limiting public access to discovery documents, with the Ninth Circuit's recognition of a heightened standard of review that makes it exceedingly difficult for litigants to resist requests for public access to discovery documents. Review is warranted to address the considerable tension between the decision below and both *Nixon* and *Seattle Times*.

III. THE NINTH CIRCUIT'S DECISION WILL COMPLICATE ALREADY CUMBERSOME LITIGATION PROCEDURES AND THREATENS TO DESTROY PROPERTY RIGHTS

Review is also warranted in light of the negative impact that the decision will have on the litigation process. In particular, litigants wary of courts' willingness to protect their confidential documents are more likely to resist discovery requests—a sure recipe for the proliferation of discovery disputes. Moreover, the Ninth Circuit's stringent nondisclosure standard will inevitably lead to the public disclosure of numerous trade secrets contained in confidential documents. Such disclosures constitute the destruction of valuable property rights, given that trade secrets lose their value once disclosed.

Judge Ikuta was hardly the first commentator to see a direct correlation between stringent nondisclosure standards and increases in discovery disputes. *See, e.g.*, Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 446 (1991); Kyle J. Mendenhall, *Can You Keep a Secret? The Court's Role in Protecting Trade Secrets and Other Confidential Business Information from Disclosure in Litigation*, 62 DRAKE L. REV. 885, 900 (2014); *Beam Sys., Inc. v. Checkpoint Sys., Inc.*, 1998 WL 364081, at *2 (C.D. Cal. 1997) ("[I]f protective orders were widely believed to be ineffective, ... discovery disputes would proliferate, as parties struggled to withhold confidential information from potentially ruinous disclosure whenever possible.").[7]

Litigants have good reason to fear that the Ninth Circuit's "compelling reasons" standard "deprives protective orders issued under Rule 26(c) of any force or effect." Pet. App. 35a (Ikuta, J., dissenting). That standard permits a litigant to facilitate disclosure of an opponent's confidential documents by attaching them to a substantive motion, without regard to their

[7] Increases in discovery disputes not only are inefficient but also are likely to hamper the ability of litigants to gather information necessary for a fair adjudication of disputes—a result that directly conflicts with the goal of discovery procedures. For example, if contested documents contain confidential information that nonetheless could later be subject to public disclosure under the Ninth Circuit's "compelling reasons" standard, a district judge might well decide to exercise his/her discretion under Rule 26(c)(1)(G) to deny the opposing litigant *any* access to the documents rather than order their production to opposing counsel pursuant to a protective order.

relevance to contested issues. Once the documents are filed with the Court, the Ninth Circuit's "compelling reasons" standard makes it very difficult for the litigant to maintain confidentiality of any portion of the document. Under that standard, it is irrelevant that only minor portions of each attached document are pertinent to the issues raised by the motion, or that neither the briefing nor the court's decision refers to the document. The "compelling reasons" standard will apply to efforts to maintain the confidentiality of all such documents, and effectively will require the party seeking nondisclosure to offer detailed, document-by-document evidentiary showings.[8]

It often can be very difficult to convey to a judge "compelling reasons" why the disclosure of confidential information will cause a company to suffer competitive harm, given that judges rarely possess specialized knowledge of the company's field of business. The inevitable result: the heightened standard of review will lead to the public disclosure (and thus destruction) of trade secrets. Yet the Ninth Circuit established its heightened standard without any apparent recognition that the standard runs headlong into constitutional prohibitions against uncompensated takings of intellectual property. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-12 (1984).

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[8] Indeed, the "compelling reasons" standard provides the plaintiffs' bar with strong incentives to file lawsuits whose primary purpose is to obtain public access to confidential documents, rather than to obtain compensation for an aggrieved client. The decision below thus raises the specter of the discovery tail wagging the dispute-resolution dog.

Alternatively, litigants may choose to forgo altogether their right to seek redress of grievances in federal court rather than place their property rights at risk. Indeed, the parties to a major patent dispute now pending before this Court were so concerned that unrestrained federal court litigation could result in massive public disclosure of both sides' highly sensitive business data that they agreed not to contest each others' damages models at trial—thereby obviating the need to present any of the evidence to the district court, even under seal. *See Apple*, 727 F.3d at 1219. *See also id.* at 1228 (cautioning that "[w]hile protecting the public's interest in access to the courts, we must remain mindful of the parties' right to access those same courts upon terms which will not unduly harm their competitive interest.") Review is warranted to prevent the Ninth Circuit's erosion of private property rights.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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