COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

SEALING FATE: THE PROPOSAL TO RESTRICT JUDICIAL DISCRETION OVER SEALING CONFIDENTIAL INFORMATION WOULD IMPOSE UNWORKABLE STANDARDS ON THE COURTS, CONFLICT WITH STATUTORY PRIVACY RIGHTS, AND STOKE UNPRECEDENTED SATELLITE LITIGATION

March 24, 2021

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") in response to Suggestion 20-CV-T[2], which asks the Committee to adopt a new Federal Rule of Civil Procedure ("FRCP") governing the sealing and unsealing of court records in civil cases.

INTRODUCTION

Data privacy and cybersecurity are the focus of tremendous political and public policy attention today—and for good reason. The "information age" accumulation of proprietary and personal data is raising extremely important questions about the proper collection, storage, and protection of information. As more and more business, personal communications, and healthcare are conducted online,[3] the strong tide of public opinion and policy development favors adding protections for proprietary and personal data, including notable laws in Europe, California, and many other jurisdictions. Meanwhile, federal courts continue to enforce a strong presumption in favor of disclosure, granting sealing orders sparingly. Amidst this debate, Suggestion 20-CV-T urges the Committee to displace established precedent and create a rule governing the sealing of documents in order to establish an even stronger policy preference for forcing litigants (and non-parties) to expose private information to the public—and in doing so, inventing an expansive

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[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] Suggestion 20-CV-T, Letter by PROFESSOR EUGENE VOLOKH (Aug. 7, 2020).

[3] See https://www.pwc.com/us/en/services/consulting/library/consumer-intelligence-series/cybersecurity-protect-me.html.

new role for federal courts as the general public's clearinghouse for accessing private information.

The complexity of this issue is well known to the Committee and the Standing Committee due to prior work on the topic,[4] and is also evidenced by the legislative history of related proposals[5] and the testimony of federal judges and litigants.[6] Almost without exception, serious efforts to devise a new standard for balancing the competing interests regarding sealing have concluded that the current rules are working. For example, in testimony before the House Judiciary Committee, Judge Richard W. Story of the U.S. District Court for the Northern District of Georgia described the present system for sealing documents as an efficient case management tool.[7] When members of the media advocated for stricter requirements on sealing documents by pointing to a Sixth Circuit decision admonishing a judge for improperly sealing documents,[8] the take-away lesson was that federal appellate courts are easily able to address the matter within the current legal framework.[9]

Suggestion 20-CV-T is not only unneeded, but also unworkable. The proposed rule would: (1) require courts to make "particularized findings" before sealing documents; (2) allow "any member of the public" to contest sealing orders "at any time"; and (3) automatically terminate all sealing orders just 60 days after case disposition. These provisions would inevitably consume significant judicial, private, and public resources by inviting new, time-intensive, and recurring ancillary proceedings. Meanwhile, the proposed rule would require judicial reconciliation of numerous conflicts with well-established sources of law, including federal statutes (such as whistle-blower protection laws), the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, federal rules protecting third parties, federal district court local rules, and Supreme Court precedent. By placing enormous additional burdens on a civil justice system that is already overworked and under-resourced, Suggestion 20-CV-T would create the very "inconsistencies and uncertainties in the justice system"[10] that its supporters claim it would reduce.

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[4] *See* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 49 (Dec. 9, 2020) ("Around 15 years ago, the Standing Committee appointed a subcommittee made up of representatives of all Advisory Committees that responded to concerns then that federal courts had 'sealed dockets' in which all materials filed in court were kept under seal. The FJC did a very broad review of some 100,000 matters of various sorts, and found that there were not many sealed files . . .").

[5] *See id*. (discussing the failure of Congress to pass a Sunshine in Litigation Act).

[6] *See generally The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts Hearing Before the H. Comm. on the Judiciary* 117th Cong. 16-18 (2019) (testimony of The Honorable Richard W. Story, Senior Judge, United States District Court for the Northern District of Georgia).

[7] *Id*.

[8] *See generally The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts Hearing Before the H. Comm. on the Judiciary* 117th Cong. 39-40 (2019) (testimony of Daniel R. Levine, Legal Correspondent, Thomas Reuters Corporation).

[9] *See* ROBERT TIMOTHY REGAN, CONFIDENTIAL DISCOVERY: A POCKET GUIDE ON PROTECTIVE ORDERS at 15-16 (Federal Judicial Center) (2012) (discussing the process for appealing protective orders in various circuits); *see also* ROBERT TIMOTHY REGAN, SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE at 18 (Federal Judicial Center) (2010) (discussing the same for orders to seal).

[10] Suggestion 20-CV-T, Letter by PROFESSOR EUGENE VOLOKH (Aug. 7, 2020).

If the Committee undertakes to draft a new national standard, it should set aside Suggestion 20-CV-T and instead fashion a rule that provides pragmatic guidance for courts and parties balancing the legitimate need for litigants to seal proprietary information with the public interest in oversight of the judicial process. Any new rule should reflect the fact that, in many cases, the information held by companies, governments, hospitals, and non-profits includes customer data, financial histories, patient charts, and employment records is not only proprietary but also pertains to individuals. It also should contemplate that, in today's discovery practices, parties commonly exchange information about their data infrastructure, including the design and operation of their computer systems—information that does not go to the merits of any legal dispute but whose disclosure opens serious risks by providing a roadmap to hackers, competitors, and state sponsors around the world who conduct daily cyber espionage and cyber attacks. Any new rule should: (i) clearly distinguish between discovery and court-filed documents; (ii) allow parties to stipulate to protection of discovery information; (iii) apply the presumption of public disclosure only to documents that are important to the determination of case merits; (iv) provide a mechanism to ensure information exchanged during discovery is appropriately protected from cybersecurity threats; and (v) establish a procedure for parties and courts to minimize the amount of potentially confidential information that gets filed with courts in the first place. Such a rule, unlike Suggestion 20-CV-T, could be "worth the candle" given the many difficulties the Committee will have to tackle when drafting a new rule on this topic.

I. A NEW RULE IS UNNECESSARY BECAUSE THE SEALING OF RECORDS IS RARE AND TYPICALLY GOVERNED BY STATUTE

Presently, litigants must provide a compelling reason for a document to be sealed in the federal courts.[11] The current policy was explained by the then-director of the Administrative Office of the Courts in a recent press release addressing a serious cybersecurity breach in the federal courts:

> "The federal Judiciary has long applied a strong presumption in favor of public access to documents," Duff said. "Court rules and orders should presume that every document filed in or by a court will be in the public domain, unless the court orders it to be sealed, and that documents should be sealed only when necessary," Duff said in his January 6 memo to the courts.[12]

Courts ruling on sealing motions enter findings in accordance with Supreme Court and circuit precedent by balancing the public right of access with the various privacy interests.[13] By most accounts from judges and litigants, this system functions as it is intended to, primarily due to judges' discretion and their proximity to the facts and issues of a specific case.[14]

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[11] *The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts Hearing Before the H. Comm. on the Judiciary* 117th Cong. 4 (2019) (written statement of The Honorable Richard W. Story, Senior Judge, United States District Court for the Northern District of Georgia).

[12] Available at Judiciary Addresses Cybersecurity Breach: Extra Safeguards to Protect Sensitive Court Records | United States Courts (uscourts.gov).

[13] In re Nat'l Broadcasting Co., 653 F.2d 609, 613 (D.C. Cir. 1981).

[14] *See id*. ("Because of the difficulties inherent in formulating a broad yet clear rule to govern the variety of situations in which the right of access must be reconciled with legitimate countervailing public or private interests, the decision as to access is one which rests in the sound discretion of the trial court.").

The complete sealing of civil cases is, in fact, extremely rare.[15] The Federal Judicial Center's analysis of sealed cases shows that, in a one-year period, only 576, or 0.2% of the 245,326 civil cases filed were sealed.[16] The majority of sealing orders were entered to protect whistleblowers, government cooperators, and the identity of minors. Specifically, *qui tam* actions accounted for 182 of those cases,[17] 30 cases were *habeas corpus* and prisoner actions that were sealed because the actions involved cooperators or juveniles,[18] and 24 non-habeas cases were sealed to protect the identity of minors.[19] Only 16 cases were found to be sealed in error.[20] The FJC's report also shows that the number of orders protecting or sealing certain documents (rather than the entire case) is also small. According to the FJC, the number of cases involving protective orders never exceeded 10% in the three districts surveyed.[21] Moreover, protective orders were denied 34% of the time,[22] rebutting the narrative that judges are merely rubber stamping motions for protective orders.

Many case sealing orders are required by statute. For example, the False Claims Act states that complaints filed by a private citizen must be filed in camera and remain under seal for at least sixty days.[23] It also provides that any motion to extend that time, together with any supporting evidence, must be filed in camera as well.[24] Similar rules apply for federal funding arising out of State False Claims Act claims.[25] Statutes also require sealing of specific types of documents. The Trademark Act of 1946 requires courts to keep under seal any order to prevent further infringement and all supporting documents, until the person against whom the order would be granted has an opportunity to contest the order.[26] Numerous federal statutes require that information with national security implications remain under seal when submitted to a court, including electronic surveillance authorizations made by the President without a court order, *ex parte* requests by the U.S. government to seal information regarding a party's material support to a foreign terrorist organization, and authorization for the acquisition of foreign intelligence regarding people outside the United States.[27] Arbitration agreements are also required to be sealed when filed with the district court so that a party who wants to request a trial *de novo* can have confidence that the result of the arbitration proceedings "shall not be made known" to the

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[15] *See* GEORGE CORT & TIMOTHY REGAN, SEALED CASES IN FEDERAL COURT 4 (Federal Judicial Center) (2009) (describing the results of an empirical investigation into the sealing of cases in federal courts).
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *See* ELIZABETH C. WIGGINS, MELISSA J. PECHERSKI, AND GEORGE W. CORT, PROTECTIVE ORDER ACTIVITY IN THREE FEDERAL JUDICIAL DISTRICTS: REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 3 (Federal Judicial Center) (1996) (describing an empirical study conducted to track protective order activity in the District of Columbia, District of Michigan, and the Eastern District of Pennsylvania).
[22] *Id*. at 6.
[23] 31 U.S.C.A. § 3730(b)(2).
[24] 31 U.S.C.A. § 3730(b)(3).
[25] 42 U.S.C.A. § 1396h(b)(3).
[26] 15 U.S.C.A. § 1116(d)(8).
[27] 50 U.S.C.A. § 1805b; 18 U.S.C.A. § 2339B; 50 U.S.C.A. § 1802.

judge assigned to the case until the court has entered final judgment.[28] These examples show that most sealing orders in federal courts are governed by statute rather than procedural rules.

II. THERE IS NO RIGHT TO GREATER DISCLOSURE; IN MANY INSTANCES, PRIVACY INTERESTS OUTWEIGH PUBLIC ACCESS

Although critics may proclaim a desire for increased access to litigants' private information, there is no constitutional or common law right to any greater public access to such information than what is available under current rules. A litigant "does not in fact surrender (or 'forfeit') the confidentiality of its information by seeking judicial review."[29] While courts recognize a presumptive right of access to information that facilitates public oversight of judicial performance and the justice system, "an abundance of statements and documents generated in federal litigation actually have little or no bearing on the exercise of Article III judicial power."[30] Many are irrelevant or unreliable, which is why "[t]he universe of documents that can be considered judicial records is not limitless."[31] Federal courts of appeal[32] have found a qualified right to access only as to a subset of judicial records in civil matters.[33] A significant body of caselaw provides a balanced approach[34] that puts the burden on parties seeking protection.[35]

Despite the high bar for confidentiality, there are important areas in which privacy interests clearly outweigh public access, including where judicial records may be used "as sources of business information that might harm a litigant's [or third party's] competitive standing."[36] Courts appropriately use their discretion to deny access to trade secrets and confidential business information in a variety of circumstances[37]—notably including where such information could

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[28] 28 U.S.C.A. § 657(b).
[29] *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 671 (D.C. Cir. 2017).
[30] *U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995).
[31] *Giuffre v. Maxwell*, No. 15 CIV. 7433 (LAP), 2020 WL 133570, at *4 (S.D.N.Y. Jan. 13, 2020), *reconsideration denied*, No. 15 CIV. 7433 (LAP), 2020 WL 917057 (S.D.N.Y. Feb. 26, 2020). *See also Newsday LLC v. County of Nassau*, 730 F.3d 156, 167 n.15 (2d Cir. 2013) (emphasizing that "the category of 'judicial documents' should not be readily expanded").
[32] The U.S. Supreme Court has not explicitly ruled on whether a First Amendment right of access extends to civil proceedings and records. *Courthouse News Serv. v. Planet,* 947 F.3d 581, 590 (9th Cir. 2020).
[33] *See*, *e.g., id.* (finding qualified First Amendment right of access to newly filed, nonconfidential complaint); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119–20 (2d Cir. 2006) (specific documents attached to summary judgment motion in civil RICO action are "judicial documents" subject to qualified First Amendment right of access).
[34] *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes."); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs*., 800 F.2d 339, 344 (3d Cir. 1986) ("Just as the right of access is firmly entrenched, so also is the correlative principle that the right of access, whether grounded on the common law or the First Amendment, is not absolute.").
[35] *See Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007) (the common-law presumption of access can be rebutted "if countervailing interests heavily outweigh the public interests in access."). Where there is a qualified First Amendment right of access, "documents may be sealed if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Lugosch*, 435 F.3d at 119-20. *In re Knoxville News-Sentinel, Co., Inc.*, 723 F.2d 470, 474 (6th Cir. 1983).
[36] *Nixon*, 435 U.S. at 598.
[37] *See*, *e.g.*, *In re Hewlett-Packard Co. S'holder Derivative Litig.*, 716 F. App'x 603, 609 (9th Cir. 2017) (upholding sealing order where documents at issue included trade secrets, privileged attorney-client communications and work product information, and confidential whistleblower information); *Apple Inc. v. Samsung Elecs. Co*., 727 F.3d 1214,

impede U.S. companies' ability to protect trade secrets from international competitors and might implicate Export Controls restrictions. There is also a rapidly growing array of federal, state, and global privacy laws that require confidentiality concerning specific categories of personal information in order to protect individuals' privacy interests.[38] Because much of the information held by public and private organizations reflects data about individual consumers, patients, and tax payers, many institutions, including companies, governments, hospitals, and non-profits, are investing significantly in appropriate technology, staff, procedures, and training to keep up with evolving legal obligations.[39] Some of those laws are already causing tension with civil discovery obligations, even with the courts' current discretion to resolve motions regarding the sealing and unsealing of documents in a way that best balances the public interest in access with competing privacy interests. The suggestion to develop a new, nationwide rule governing sealing orders that would even more strongly favor public disclosure risks eroding the very flexibility and discretion required for courts to navigate legal requirements, while balancing legitimate privacy interests against the need for public access to information concerning the functioning of the judiciary. This is particularly the case where the rights at issue are held by people who are not parties to any case.

III. SUGGESTION 20-CV-T IS UNWORKABLE

A. Requiring Courts to Make "Particularized Findings" Would Burden Courts with A Novel Standard That Is Inconsistent with Supreme Court Precedent

Suggestion 20-CV-T would require courts to detail the basis of all orders to seal with "particularized findings."[40] To comply with that mandate, courts would be forced to make fact-intensive inquiries and complicated determinations about potentially thousands of documents

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1221 (Fed. Cir. 2013) (district court in patent infringement case abused its discretion in refusing to seal confidential business information); *In re Elec. Arts, Inc.,* 298 F. App'x 568, 570 (9th Cir. 2008) (trial court committed clear error in refusing to issue a sealing order protecting a litigant's confidential and commercially sensitive information used as trial exhibit in licensing dispute); *Crane Helicopter Servs., Inc. v. United States*, 56 Fed. Cl. 313, 327 (2003) (trade secrets of nonparty helicopter manufacturer would remain sealed after trial where release of the information might significantly damage manufacturers' competitive advantage).

[38] The United States has not adopted a comprehensive federal approach to data protection, instead taking a sector-specific approach in areas such as securities, health, consumer lending, and children's online privacy. *See* Michael L. Rustad & Thomas H. Koenig, Towards A Global Data Privacy Standard, 71 Fla. L. Rev. 365, 381 (2019) (summarizing U.S. federal legal regime governing data privacy). States are enacting their own laws governing privacy obligations, such as the California Consumer Privacy Protection Act. Cal. Civ. Code §§ 1798.100-.199 (effective Jan. 1, 2020) (creating new privacy rights to give consumers control over their personal information). Multinational companies are subject to individual countries' privacy laws and are likely to be subject to European Union law barring the "processing" or public disclosure of personal information, including names and contact information, without the individual's consent. *See*, *e.g.*, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

[39] *See* Corporate Data Privacy Today: A Look at the Current Readiness, Perception, and Compliance (FTI Consulting, May 2020) (report of survey of over 500 large U.S.-based companies' data privacy activities; 75 percent of respondents changed their data privacy efforts in the preceding 12 months and 97 percent plan to increase their data privacy spending in the next year, most by 50 percent), *available at* https://static2.ftitechnology.com/docs/white-papers/FTI%20Consulting%20White%20Paper%20-%20Corporate%20Data%20Privacy%20Today.pdf (reg. required).

[40] Suggestion 20-CV-T, Letter by PROFESSOR EUGENE VOLOKH (Aug. 7, 2020).

that implicate parties' trade secrets, confidential business information, and other sensitive data. This would require judges to review pre-trial discovery documents, read extensive briefing and affidavits, hold hearings, and write detailed opinions—all of which would divert judicial resources,[41] cost parties considerable expense, and prolong law suits.

The term "particularized findings" would be a brand new standard for the FRCP.[42] No current rule imposes on courts a burden to make specific or particularized findings.[43] Indeed, there are few places in the FRCP that even require courts to make "findings." Rule 52(a)(1) requires a court to enter findings of fact and conclusions of law after a bench trial,[44] and Rule 23(b)(3) states that class certification should occur only if a court finds the standard for class verification is met.[45] These provisions cannot be analogized to orders to seal and protective orders, which are widely understood to be litigation management tools.[46] The term "particularized findings" also does not appear in any of the 94 local rules governing orders to seal.[47] Even the local rule for the Western District of North Carolina cited in support of Suggestion 20-CV-T merely requires the court to "state its reasons with findings supporting its decision."[48]

Moreover, the "particularized findings" standard begs the question: particularized findings of *what*? Suggestion 20-CV-T would establish a four-part test, including whether the rationale for sealing "overcome[s] the common law and First Amendment right of access."[49] This means that, for every sealing order, judges must explicitly elaborate the reasons why the order does not violate an entire body of caselaw and First Amendment jurisprudence. Such a rule would starkly contrast with the Supreme Court's *Nixon v. Warner Communications*[50] holding that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[51] The high burden and

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[41] The Committee regularly weighs the burdens of a proposed rule against its utility. *See* Advisory Cmty. On Civil Rules, April 2020 Minutes 32 (Apr. 1, 2020) (discussing pragmatic considerations, including the burdens imposed by Rule 17(d)); Advisory Cmty. On Civil Rules, Report to the Standing Cmty. 50 (Dec. 9, 2020) (questioning the burden that the proposed rule for sealing documents would impose on courts). The federal judiciary is presently rife with overburdened courts, overloaded dockets, and overworked judges and court staff. *See generally* Peter S. Menell & Ryan Vacca, Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform, 108 CALIF. L. REV. 789 (2020). An empirical study tracking federal caseloads since 1970 found a 145% increase in the number of actions filed, with the majority of the increase attributable to increased civil litigation. *Id*. at 844. During the same period, caseloads per judge increased by 90%, and the average time from the filing of a case to disposition rose from 152 to 272 days. *Id.* at 848, 851.

[42] *See generally* Fed. R. Civ. P.

[43] *See, e.g.,* Fed. R. Civ. P. 9(b) (requiring that "fraud or mistake" be plead with "particularity"); *see also* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 50 (Dec. 9, 2020).

[44] Fed. R. Civ. P. 52(a)(1); *see also* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 50 (Dec. 9, 2020).

[45] Fed. R. Civ. P. 23(3)(b); *see also* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 50 (Dec. 9, 2020).

[46] *See* Statement of the Honorable Judge Richard W. Story, *supra* notes 6-7 (discussing the utility of orders to seal and protective orders as a case management tool).

[47] *See generally* Suggestion 20-CV-T, Letter by PROFESSOR EUGENE VOLOKH at 2 (Aug. 7, 2020) (quoting numerous local rules with no instances of the term "particularized findings").

[48] W.D.N.C. L. Civ. R. 6.1 (f).

[49] *See* Suggestion 20-CV-T, Letter by PROFESSOR EUGENE VOLOKH at 2 (Aug. 7, 2020) (outlining the proposed rule).

[50] 435 U.S. 589 (1978).

[51] Warner Communications, 435 U.S. at 599.

attendant uncertainties of such a rule overwhelm any possible benefit, especially given that the current standard has a proven record of helping judges balance litigants' privacy rights with the public's right to access information related to the functioning of our courts.[52]

B. Allowing "Any Member of The Public" To Challenge Sealing Orders "At Any Time" Would Vastly Expand the Judiciary's Role and Workload

The proposal to allow "any member of the public" to challenge sealing orders and motions to seal "at any time" would invent a bold, new role for the federal judiciary as the "information clearinghouse"[53] for access to confidential information. Suggestion 20-CV-T would effectively nullify Rule 24(b) and corresponding caselaw by doing away with intervention standards for non-parties who wish to challenge court orders on sealing.[54] Instead, any "member of the public"[55] would be allowed into court without any showing of interest in the case or even the contents of the sealed filing. When handling a member of the public's challenge to a sealing motion or its own sealing order, the court's role would change from that of adjudicator and manager of the case to that of referee and reconciler of differing public policy viewpoints. And the proposal would allow such challenges "at any time" without regard to the procedural posture of the case (even during trial or after the case is closed), including unlimited re-litigation of sealing orders that have already been entered with particularized findings under the new four-part test. This would be the first FRCP provision with a time period of "forever,"[56] opening up novel jurisdiction issues and a strong likelihood that the unsealing of records will occur without notice to former litigants and non-parties.

Inevitably, Suggestion 20-CV-T would flood the federal civil docket with a new workload of motions that rarely, if ever, relate to the merits of cases. Each motion would lead to lengthy delays as documents are reviewed, briefs are written and read (with supporting affidavits and other evidence), a hearing is held, and a written opinion with "particularized findings" is drafted and issued from the court. This burden would be particularly heavy in complex civil cases, where confidential documents frequently number in the thousands or even millions.[57] The costs

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[52] *Id*. *See also* Siedle v. Putnam Invs., Inc., 147 F.3d 7, 10 (1st Cir. 1998) ("The trial court enjoys considerable leeway in making decisions of this sort."); San Jose Mercury News v. U.S. Dist. Court, 187 F.3d 1096, 1102 (9th Cir. 1999); United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997).

[53] Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts,* 105 Harv. L. Rev. 427, 487 (1991); *cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989) (rejecting the use of an executive agency as an information clearinghouse).

[54] *See* 8A Fed. Prac. & Pro. § 2044.1.

[55] This term is ambiguous and would need definition if incorporated into the FRCP. For example, would it be limited to U.S. citizens or permanent residents? Would government, corporate, and non-profit entities qualify, and if so, how about foreign-owned or foreign-registered entities and international non-governmental organizations?

[56] *Cf.* Fed. R. Civ. P. 60(c)(1) (limiting time for relief from judgment to "a reasonable time" and for relief due to mistake, newly discovered evidence, or fraud to one year).

[57] *See* Citizens First Nat'l Bank v. Cincinnati Ins. Co., 178 F.3d 943, 946 (7th Cir. 1999) ("We do not suggest that all determinations of good cause must be made on a document-by-document basis. In a case with thousands of documents, such a requirement might impose an excessive burden on the district judge or magistrate judge."); *see also* Am. Nat'l Bank Trust Co. of Chicago v. AXA Client Solutions, LLC, No. 00 C 6786, 2002 WL 1067696, at *6 (N.D. Ill. May 28, 2002) ("In a case involving thousands of documents, such as this one, the court need not make a finding of good cause on a document-by-document basis.").

and delays inherent in such a process (including interruptions during trial) would trammel any hope of securing the "just, speedy, and inexpensive determination" of affected cases.[58]

Evaluating these burdens puts a fine point on how strongly Suggestion 20-CV-T favors one public policy outcome over another. While the proposal would sacrifice much in order to give any member of the public the right to *oppose* a motion or order to seal, it does not permit the public or an individual who would be harmed by disclosure to *move for* or *support* a sealing order. This gaping omission belies the presumption that Suggestion 20-CV-T would always serve the public interest; it would do so only when public disclosure is good, not when it's harmful. If the burdens contemplated by the proposal would be justified when members of the public advocate on *one side* of sealing questions, wouldn't it also be worthwhile to allow the public to advocate on the *other side* as well?

C. The Automatic Unsealing of Protected Documents Would Cause Pointless Re-Litigation

Despite establishing the very high bar of "particularized findings" under its four-part test, Suggestion 20-CV-T nevertheless would automatically terminate all court sealing orders, without judicial review, 60 days after the final disposition of the case.[59] There is no rationale provided as to why this is appropriate—especially for court orders required by statute—or why judges should be denied the discretion to set a different duration to fit the needs of a particular case.[60] No doubt, motions to renew sealing orders would be filed in almost every case because the need for confidentiality is unlikely to change within such a short time[61]—especially because Suggestion 20-CV-T would require such motions to be filed 30 days after final disposition (within 30 days of the expected unsealing date). Not only would the automatic unsealing provision cause a significant increase in post-resolution litigation, with its attendant burdens on judicial time, but it would also create a substantial risk of unlimited public access to documents that have been adjudicated private, sensitive, and confidential. As written, the proposed rule suggests that if a motion to renew sealing is not filed within 30 days of the final disposition, not even the court would have the power to keep the documents under seal.

D. The Proposed Rule Would Overwhelm Court Clerks Offices

Implementing the requirements of Suggestion 20-CV-T, including the sealing and unsealing of pleadings, evidence, and orders and abiding by the various timelines for each, would likely

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[58] *See* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 50 (Dec. 9, 2020) (questioning the burden that the proposed rule for sealing documents would impose on courts).

[59] *Cf.* N.D. Tex. L.R. 79.4 (district court local rule cited by Professor Volokh to support this proposed provision, which states that "all sealed documents *maintained on paper* will be deemed unsealed 60 days after the final disposition of a case") (emphasis added).

[60] *Cf.* W.D.N.C. L. Civ. R. 6.1 (district court local rule cited by Professor Volokh, which provides that sealed documents "may be subject to unsealing *by the Court* upon the close of the case") (emphasis added).

[61] *Cf.* district court local rules cited by Professor Volokh, including D. Kan. R. 79.4 (automatic unsealing after 10 years); N.D. Ca. R. 79-5 (automatic unsealing after 10 years); 3d Cir. R. 106.0(c)(2) (automatic unsealing after 5 years); E.D. Pa. R. 51.5 (automatic unsealing after 2 years); S.D. Flor. R. 5.4 (automatic unsealing after 1 year).

overload court clerks offices.[62] It could require changes to document management systems and practices, as well as the creation and management of a centralized website.[63] Of course, the main source of new burdens would be complex civil cases[64] because the proposed rule would bar the use of stipulated protective orders where parties agree to file agreed-upon categories of records under seal, which today are widely employed in large disputes, including multi-district litigation, to "expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication."[65] The document-by-document adjudication the proposed rule will require in such cases is highly likely to overwhelm the current capabilities of clerks offices, even in the largest and busiest districts.

E. The Proposed Rule Would Disrupt Rule 45's Well-Balanced Protections That Enable Discovery from Non-Parties

Rule 45 protects non-parties from undue burdens, including subpoenas that might require disclosure of confidential information, in order to enable discovery from people and entities who have no stake in the litigation.[66] It does so by giving parties an affirmative duty to avoid imposing "undue burden or expense" on non-parties and mandating that courts "must" enforce that duty by imposing sanctions for failure to meet it.[67] Rule 45 requires courts to modify or quash subpoenas when compliance would subject non-parties to undue burdens,[68] and specifically allows courts to quash or modify subpoenas that would result in "disclosing a trade secret or other confidential research, development, or commercial information."[69] Finally, Rule 45 obligates courts to impose cost-shifting (when certain requirements are met) to protect non-parties from "significant expense resulting from compliance" with subpoenas.[70] These provisions are designed to streamline the process to allow parties to obtain third-party discovery while simultaneously protecting third parties from the burdens of being involuntarily brought into litigation.

Unfortunately, Suggestion 20-CV-T would fatally disrupt Rule 45's careful balance. By banning stipulated sealing and protective orders, Suggestion 20-CV-T would preclude parties from obtaining confidential documents from non-parties without imposing the significant burden and

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[62] *See* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 50 (Dec. 9, 2020) (highlighting the possible burdens associated with requiring particularized findings).
[63] *Id*.
[64] *See* MANUAL FOR COMPLEX LITIGATION 4th § 11.432, at 64 (Federal Judicial Center) (2004) ("[c]omplex litigation will frequently involve information or documents that a party considers sensitive").
[65] *Id*.
[66] *See generally* The Sedona Conference, *Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition*, 22 SEDONA CONF. J. 1, 42-77 (forthcoming 2021); *See also* In re Northshore Univ. Health Sys., 254 F.R.D. 338, 343-44 (N.D. Ill. 2008) ("Thus, as this case demonstrates, if a non-party is not fearful of public disclosure of their proprietary documents due to the protection gained from a protective order, they will likely be more forthcoming. As a result, cases will be able to proceed more efficiently through the discovery phase.").
[67] Fed. R. Civ. P. 45(d)(1); Voice v. Stormans Inc., 738 F.3d 1178, 1184 (9th Cir. 2013) (finding that Rule 45 requires courts to enforce cost shifting when an undue burden would be placed on a third party receiving a subpoena). *See also* Linder v. Calero-Portocarrero, 251 F.3d 178, 182 (D.C. Cir. 2001); Iowa Pub. Emples. Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 17-6221, 2019 WL 7283254 (S.D.N.Y. Dec. 26, 2019).
[68] Fed. R. Civ. P. 45(d)(3).
[69] *Id.*
[70] Fed. R. Civ. P. 45(d)(2)(B)(ii)

expense on those non-parties of demonstrating the need for sealing by satisfying the rule's four-part test with "particularized findings," and then defending against any number of challenges and motions to unseal brought by any member of the public at any time in the proceedings. Perhaps even worse, the automatic termination of sealing orders 60 days after final case disposition would impose additional, ongoing burdens and expenses on non-parties who likely have had no involvement in the litigation and might have no knowledge about the resolution of the case. Does a party's Rule 45 duty to avoid imposing undue costs and burdens apply to the increased motion costs that will result from Suggestion 20-CV-T, and does that duty continue after resolution of the case, including non-party eligibility for cost-shifting? Will the court be required to notify non-parties regarding the pending expiration of the sealing at case conclusion? Because non-parties do not affirmatively place their confidential information into the public record,[71] but instead are obligated to comply with subpoena requests, the proposed rule does not sufficiently address the implications to Rule 45 and the protections it affords.[72]

F. The Proposed Rule's Implementation Would Be Confused by Its Inconsistency with Numerous Federal Statutes

Suggestion 20-CV-T is inconsistent with numerous federal statutes that specifically require or permit the sealing of documents in certain situations.[73] Although it purports to exclude situations governed by such statutes from its presumption that all filed documents "shall be open to the public," the proposed rule does not allow such exceptions from its other terms. For example, the proposed rule would permit "any member of the public" to file a motion to unseal documents "at any time," even when the sealing of those documents is required by statute. Similarly, the proposed rule would automatically terminate all sealing orders 60 days after final disposition of a case, making no exception for orders entered pursuant to statutes barring disclosure of information that endangers specific individuals or national security. By running directly counter to laws requiring confidentiality, the proposed rule creates confusion and, at the very least, unnecessary and inappropriate litigation. This is a profound flaw, and the solution should not be to assume that courts will simply ignore the rule when needed.

G. The Proposed Rule Would Affect the Scope of Discovery by Complicating Rule 26's Proportionality Requirement

Suggestion 20-CV-T would have unintended consequences on the scope of parties' discovery obligations because it would cause new and recurring motion practice that would impose significant burdens and expense. Achieving proportionality under Rule 26(b)(1) is "critically

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[71] *See* U.S. v. Bazaarvoice, Inc., No. 13-cv-00133, 2014 WL 11297188, at *1 (N.D. Cal. Jan. 21, 2014) (granting third parties' motions to seal and stating, with respect to the protected confidential information, "the third parties did not voluntarily put it at issue in this litigation").

[72] *See, e.g., id.* at *1 (in case where thousands of documents were subpoenaed from third parties, granting third parties' motions to seal because the "information contains pricing and competitive information that could cause damage to the third parties if made public"); In re Northshore Univ. Health Sys., 254 F.R.D. at 342-44 (in ruling on protective order, stating that "[d]eference should be should be paid to the interests of non-parties who are requested to produce documents or other materials that contain confidential commercial information or trade secrets").

[73] *See* Part I, *supra*.

important" to ensuring the "just speedy and inexpensive resolution" of civil disputes.[74] The key to proportionality is "whether the burden or expense of the proposed discovery outweighs its likely benefit."[75] By disallowing stipulated protective orders, allowing "any member of the public" to litigate sealing orders "at any time," and automatically terminating all sealing orders after 60 days following resolution, Suggestion 20-CV-T would materially change this calculus, particularly in complex litigation where the confidentiality of thousands of documents could be continually in dispute. Even after the court finds a compelling basis for sealing under the proposed rule's four-part test, and articulates "particularized findings" supporting its decision, the proposed rule still provides an open door to unlimited motions challenging the court's order, which the producing party would need to defend. The burden for proportionality purposes would not only include the expense of motions practice, but also the risks of public disclosure of the party's sensitive and proprietary information. Inevitably, these burdens will alter the outcome of proportionality analysis, leading to the conclusion that any discovery benefit of certain documents is outweighed by the additional burden and expense of litigating and re-litigating their confidentiality under the proposed rule's standards.

H. The Proposed Rule Would Chill Meritorious Litigation

The Supreme Court recognizes that requiring parties to produce sensitive information can have a chilling effect on meritorious litigation, noting that "rather than expose themselves to unwanted publicity, individuals may well forgo the pursuit of their just claims."[76] *A fortiori*, the regime that Suggestion 20-CV-T would impose—striping courts of their discretion to make sealing determinations, allowing "any member of the public" to challenge sealing orders "at any time," and automatically terminating all sealing orders 60 days following case disposition—would no doubt cause companies, governments, hospitals, individuals, and non-profits to forego litigating their just claims and defenses in federal courts. The rule would also discourage parties from appealing arbitration awards under the Federal Arbitration Act because of the consequence that otherwise confidential and non-discoverable records in the arbitration will be subject to public disclosure in the federal court action under this rule.

I. The Proposed Rule Would Conflict with the Federal Rules of Appellate Procedure while Burdening Circuit Courts with New Sealing Motions

Adopting Suggestion 20-CV-T would result in conflict with the approaches taken by federal appellate courts and require changes to the Federal Rules of Appellate Procedure ("Appellate Rules"). Currently, the Appellate Rules do not govern sealing of the appellate record, leaving that determination to each circuit. By establishing a new four-part test for district courts, imposing the requirement of "particularized findings," and automatically terminating all sealing orders 60 days after case disposition, Suggestion 20-CV-T would change the standards for the district courts in all circuits while also forcing appellate courts to consider many more motions to seal pending appeal. The resulting inconsistency and confusion amid a higher volume of

[74] *See generally* The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141, 147 (2017).
[75] Fed. R. Civ. P. 26(b)(1).
[76] Seattle Times Co. v. Rhinehart, 467 U.S. 20, n.22 (1984).

motions would almost certainly require the Advisory Committee on Appellate Rules to consider rule amendments.

IV. IF A NEW FEDERAL RULE IS CONSIDERED, IT SHOULD DISTINGUISH BETWEEN DOCUMENTS THAT ARE NECESSARY TO DISPOSITIVE MOTIONS AND DOCUMENTS THAT DO NOT NEED TO BE FILED WITH THE COURT

A. Any New Sealing Rule Should Apply Only to Documents Filed with The Court, Not Discovery Materials

If, despite the shortcomings of Suggestion 20-CV-T described above, the Committee proceeds to consider a new federal rule governing sealing, it should limit any new provision only to documents filed with the court, and not interfere with confidentiality agreements relating to discovery. Information exchanged during discovery is not subject to a First Amendment or common-law public right of access.[77] Litigants often enter into protective agreements and proposed protective orders to guide the access to and use of confidential, proprietary, or trade secret information that is exchanged during discovery. Many federal courts provide useful tools and resources, such as model or standard protective orders, to help parties agree on efficient and effective procedures.[78] New restrictions on such protective orders are not warranted and would impair parties' ability to obtain and protect sensitive information. While the distinction between protecting discovery documents and sealing documents filed with the court may be obvious to the Committee, not all practitioners and stakeholders understand the important difference. Any rule draft should explicitly separate these two very different concepts to ensure that courts, counsel, and parties do not wrongfully assume that documents exchanged in discovery should be subject to the same presumptions and procedures as court filings.[79]

B. Any New Rule Should Distinguish Between Documents That Are Necessary for Dispositive Motions and Less Important Documents

While federal courts generally recognize a presumption of public accessibility to "judicial documents,"[80] a lower presumption applies to documents related to non-dispositive proceedings,

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[77] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) ("pretrial depositions and interrogatories are not public components of a civil trial"); *Cipollone v. Liggett Group, Inc*., 785 F.2d 1108, 1118–20 (3d Cir. 1986) (the standard for issuing a discovery protective order is good cause; First Amendment concerns are not a factor); *In re Gannett News Serv., Inc.*, 772 F.2d 113, 116 (5th Cir. 1985) ("The results of pretrial discovery may be restricted from the public."); *Bond v. Utreras*, 585 F.3d 1061, 1066 (7th Cir. 2009) ("[T]here is no constitutional or common-law right of public access to discovery materials exchanged by the parties but not filed with the court. Unfiled discovery is private, not public."); *Pintos v. Pacific Creditors Assoc*., 565 F.3d 1106, 1115 (9th Cir. 2009) ("[discovery] documents are not part of the judicial record"); *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986) ("Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation.").

[78] *See*, *e.g.,* https://www.cand.uscourts.gov/forms/model-protective-orders/, https://nysd.uscourts.gov/model-protective-order-0, https://www.insd.uscourts.gov/forms/uniform-protective-order.

[79] https://www.americanbar.org/groups/litigation/publications/litigation-news/practice-points/a-protective-order-doesnt-guarantee-sealing/.

[80] Most, if not all, circuits apply a higher standard to overcome the presumption of public accessibility to "judicial documents." *See*, *e.g.*, *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016);

such as discovery motions.[81] This two-tiered approach is appropriate to balance the public's interest in court records against the parties' right to confidentiality.[82] Although courts differ as to what constitutes a "judicial document" subject to the public access presumption,[83] drawing a line is important because parties often include confidential documents as exhibits merely as background information, for provocative effect, or to illustrate an ancillary point that has no ultimate bearing on the court's decision. If a party's confidential documents are not important to the court's determination of a dispositive motion or are otherwise unrelated to the merits of the case, they should not be treated as "judicial documents" whose public disclosure is presumed.

It would make sense for a sealing rule to define first-tier documents to include dispositive motions and judicial documents relied upon or directly relevant to the court's merit-based decision; these would be subject to the presumption of access. Second-tier documents—those filed with non-substantive motions, or documents that are not relevant to the court's decision[84] or the case merits—should be subject to a more lenient standard for sealing (such as a certification by counsel as addressed below). Such a framework would free judicial resources that would otherwise be spent on document-by-document sealing determinations regardless of the records' importance. Similarly, it would allow courts to dispose of requests to seal second-tier documents filed in relation to non-substantive motions efficiently without extensive evaluation of the various interests in public access to the documents. Of course, this approach also saves parties from spending significant time and resources preparing motions and gathering supporting evidence to seal confidential documents that have little or nothing to do with the merits of the case.

Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 139-40 (2d Cir. 2016); *United States v. Kravetz*, 706 F.3d 47 (1st Cir. 2013); *Romero v. Drummond Co.*, 480 F.3d 1234, 1245 (11th Cir. 2007); *Leucadia v. Applied Extrusion Technologies*, 998 F.2d 157, 164 (3d Cir. 1993).

[81] *See Brown v. Maxwell*, 929 F.3d 41, 50 (2d Cir. 2019) ("Although a court's authority to oversee discovery…surely constitutes an exercise of judicial power, we note that this authority is ancillary to the court's core role in adjudicating a case. Accordingly, the presumption of public access in filings submitted in connection with discovery disputes or motions in limine is generally somewhat lower than the presumption applied to material introduced at trial, or in connection with dispositive motions such as motions for dismissal or summary judgment."); *see also Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312-13 (11th Cir. 2001) ("The better rule is that material filed with discovery motions is not subject to the common-law right of access, whereas discovery material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right, and we so hold."); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) ("there is no presumptive first amendment public right of access to documents submitted to a court in connection with discovery motions").

[82] *Newsday LLC v. County of Nassau*, 730 F.3d 156, 166-67 (2d Cir. 2013).

[83] *Compare Newsday LLC v. County of Nassau*, 730 F.3d 156 (2d Cir. 2013) (whether public access presumption applies depends on the "degree of judicial reliance on the document in question and the relevance of the document's specific contents to the nature of the proceeding") *with United States v. Kravetz*, 706 F.3d 47, 58-59 (1st Cir. 2013) (public access presumption not dependent on whether the documents actually played a role in the court's deliberations; rather presumption applies to "relevant documents which are submitted to, and accepted by, a court"); *see also Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1099 (9th Cir. 2016) (holding a party must satisfy the higher, "compelling reasons" standard when the motion to which the documents are attached is more than tangentially related to the underlying cause of action).

[84] Second-tier documents would also include materials that are not relied upon by the court or relevant to the determination of the proceeding, as such documents are not considered "judicial documents."

C. For Second-Tier Documents, A Certification by Counsel That Documents Are Confidential Should Suffice for A Sealing Order

Because the sealing standards for "judicial documents" differ from those for less-important documents, any new rule should differentiate between the procedures for each category. A party seeking to seal records related to a discovery motion in which the public has no heightened interest should not have to file a fulsome declaration substantiating on a document-by-document basis why the documents should be sealed. For such motions, a certification of counsel affirming that the records are confidential should suffice. Such a certification procedure would save judicial resources while also minimizing the parties' costs and burdens of litigating sealing motions for documents that have no bearing on a dispositive issue.

D. Any New Rule Should Require Certification that Documents Filed with The Court Are Necessary

One of the best ways to reduce litigation over sealing would be to reduce the number of confidential documents that are filed unnecessarily. Unfortunately, private information is sometimes filed to give tangential background color or just for "the sake of filing." Even worse, confidential documents are sometimes filed out of gamesmanship or improper motive (perhaps even for the purpose of inviting press attention). Any new rule for the efficient handling of sealing motions should not presume that all filed documents are necessary to the proper determination of the motion or issue at hand. It should do so by requiring the party seeking to file documents to certify they are necessary.[85] Such a certification would relieve the court from having to make decisions on sealing documents that are not pertinent to the filing, reduce the number of documents a party would need to prove up for sealing, and allow everyone to focus attention on the merits and substantive issues in the case.

E. Any New Rule Should Require Notice of Intent to File Documents

To avoid unnecessary judicial attention to, and litigation over, sealing disputes, any new rule should require parties to provide notice before filing documents that could be subject to a sealing order. Unfortunately, parties (and non-parties) are often caught by surprise when documents they consider confidential or proprietary are filed with the court, usually in conjunction with a motion. Advanced notice of such filings would allow parties to avoid disputes by conferring about documents that are subject to sealing and important to any motion. It would also provide

[85] According to the Fourth Circuit, the right of public access to judicial documents "derives from two independent sources: the First Amendment and the common law," and accordingly, the Fourth Circuit applies two tests when considering whether any specific document may be filed under seal (or unsealed). *United States v. Appelbaum*, 707 F.3d 283. The threshold inquiry under the common law test is whether the document at issue qualifies as a "judicial record." The Fourth Circuit has explained that it is "commonsensical that judicially authored or created documents are judicial records," including court orders. *Id* at 290. Documents filed with the court, including motions and exhibits, qualify as judicial records "if they play a role in the adjudicative process, or adjudicate substantive rights." *Id.*; *see also In re: Policy Mgmt. Sys. Corp*., 1995 U.S. App. LEXIS 25900, at *13 ("we conclude that a document must play a relevant and useful role in the adjudication process in order for the common law right of public access to attach"). In *In re: Policy Mgmt. Sys. Corp*., the Fourth Circuit found that documents attached to a motion to dismiss "played no role in the court's adjudication of" the motion, and therefore, "did not achieve the status of judicial documents to which the common law presumption of public access attaches." *Id*.

the party seeking to seal such documents adequate time to file the necessary motion papers—and this is especially important when a party is filing confidential documents produced in discovery by someone else. In such situations, the filing party often does not know the facts that support sealing, merely stating that the producer designated the documents as confidential. The surprised producing party is frequently forced to scramble on short notice to put together a detailed pleading supported by evidence satisfying the applicable sealing requirements—or face denial of the filing party's motion for failure to meet the applicable standards. A rule providing notice of the intent to file[86] would allow the producing party to file the motion to seal, along with supporting documentation, at the same time as the underlying motion.

CONCLUSION

The Supreme Court has concluded that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[87] There is a comprehensive and effective legal framework already in place to govern the sealing of documents, including Rule 5.2, district court local rules, and an extensive body of caselaw. There is no reason for the Committee to re-visit this complicated issue, which it has examined repeatedly, concluding each time that no action is needed.

Suggestion 20-CV-T reflects a strongly one-sided perspective of an important public policy debate and asks that the FRCP be tilted sharply to its side. Its means of producing that outcome are unworkable. By stripping court discretion and imposing a duty to make "particularized findings" under a new four-part test, allowing "any member of the public" to litigate sealing orders "at any time," and automatically terminating all sealing orders, the proposed rule would inevitably consume significant judicial, private, and public resources by inviting new, time-intensive, and recurring litigation. It would also require judicial resolution of numerous conflicts with federal statutes, the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, local district court rules, and an entire body of caselaw. The proposal would invent a bold, new role for the federal judiciary as the information clearinghouse for access to private information, and would become the first FRCP provision with a time period of "forever." The proposal should be rejected.

If, however, the proposal convinces the Committee to undertake creation of a new national standard for sealing orders, that effort should be premised on the understanding that companies, hospitals, schools, governments, employers, and other entities hold proprietary information that should be protected from public disclosure—particularly when it relates to individual customers, patients, students, taxpayers, and employees. Any new rule should reflect that today's discovery exchanges commonly include information about data infrastructure that is irrelevant to any legal dispute but whose disclosure risks providing a roadmap to nefarious actors who commit cyber

[86] A party should serve a "Notice of Intent to File" 21 days prior to filing documents that may be subject to sealing, which would be consistent with other FRCP rules that provide similar time frames for notice, responses, objections, and deadlines. *See, e.g.*, Fed. R. Civ. P. 33, 34, and 36 (providing for a 30-day response period for Interrogatories, Requests for Production and Requests for Admission); *see also* Fed. R. Civ. P. 12 (in general, "unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows….").
[87] Warner Communications, 435 U.S. at 599.

espionage and cyber attacks. Finally, any new rule should distinguish between documents that are important to the determination of merits issues and those that are not, and provide a fair mechanism for minimizing the number of potentially confidential documents filed with the courts in the first place.