SEALED JUSTICE: FEDERAL COURTS' INCONSISTENT RECORD-SEALING RULES AND THEIR IMPACT ON JUDICIAL TRANSPARENCY

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Public access to court records is a cornerstone of democratic governance, enabling public oversight of the judiciary and fostering confidence in the rule of law. Despite a strong presumption in favor of openness under both the First Amendment and common law, the sealing of federal court records has become widespread, often with minimal judicial scrutiny. Recent investigations have revealed that excessive court secrecy shields government and corporate misconduct, conceals vital public-safety information, and erodes public confidence in the courts.

This Article presents the first comprehensive analysis of the local rules governing sealing in all 94 federal districts, reviewing more than 700 provisions in both civil and criminal rules. The findings are concerning: Nearly half of all districts lack general sealing rules, many fail to reference the controlling legal standard, and basic procedural safeguards—such as public notice, consideration of alternatives to sealing, and case-specific identification of harms—are frequently absent. These deficiencies have created a patchwork of inconsistent, often toothless rules that enable secrecy to spread largely unchecked.

Without changes to federal rules, court-ordered secrecy will continue to erode public trust and obscure the work of the federal courts. This Article

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proposes three core principles to guide this reform. First, substantive clarity: Every rule governing sealing should expressly affirm the presumption of public access and incorporate, at a minimum, the common law's requirements for sealing. Second, procedural rigor: Rules should require public notice of sealing requests, an opportunity for objections, identification of specific harms, consideration of less-restrictive alternatives, and mechanisms for periodic review and unsealing. Third, administrative efficiency: Rules should require parties to limit the frequency and narrow the scope of their sealing requests, explore redaction as an alternative, and certify their efforts to minimize the need for sealing.

Introduction

Open courts are a cornerstone of democratic government, ensuring not only that justice is done but that it is seen to be done. As the Supreme Court recognized in *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise I*"),[1] "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[2] While public access to court *proceedings* is indispensable to preserving this openness, access to court *records* is equally critical. In practice, much of the business of the courts—particularly in the federal system—takes place through written filings: motions, briefs,

[1] 464 U.S. 501 (1984).

[2] *Id.* at 509 (internal quotation marks and citation omitted) (finding First Amendment right of access to jury voir dire proceedings).

evidentiary submissions, and judicial opinions.[3] Without access to these records, the public cannot understand and scrutinize the judiciary's work.[4]

Despite the longstanding presumption that court records are open for public inspection,[5] parties frequently attempt to "seal" documents in order to hide them from public view.[6] Empirical research reveals that the sealing of court records is

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[3] *See* Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 288 (1999) ("In federal court alone, the proportion of filed to tried cases has declined by four-fifths over the last fifty years, with only approximately four percent of all filed civil cases now resulting in a trial.").

[4] *See* David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1400–07 (2017) (examining the essential role that court records play in the public's understanding of the courts); Peter W. Martin, *Online Access to Court Records—From Documents to Data, Particulars to Patterns*, 53 VILL. L. REV. 855, 859 (2008) ("[E]ffective public understanding and scrutiny of the judicial process require access to rulings of the court and to documents filed by parties.").

[5] *See* David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 871–79 (2017) (discussing the presumption of public access under the First Amendment and common law). Some state constitutions also enshrine a right of public access to court records. *See, e.g.*, N.C. CONST. art. I, § 18 ("All courts shall be open . . . ."); FLA. CONST. art. I, § 24(a) ("Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf . . . . This section specifically includes the legislative, executive, and judicial branches of government . . . ."); N.D. CONST. art. 11, § 6 ("Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.").

[6] The definition of "sealing" varies, and many statutes and court rules do not define the term, but in general it refers to actions by a court to prevent public access to documents or information in a court's files. *See, e.g.*, D. ARIZ. L. CRIM. R. 49.4(e) ("If the Court orders the sealing of any document, the Clerk shall file the order to seal and secure the sealed document from public access."). Some jurisdictions also use the term "impoundment." *See, e.g.*, N.D. GA. L. CIV. R. 79.1(C)(2) ("Exhibits ordered sealed or impounded by the Court may not be inspected or copied by anyone, including attorneys for the parties, except upon leave of the Court."). I use the term "sealing" to cover any instance where a document or information is provided to a court but is kept from the public. I do not include under this definition information that was redacted from a court record before it was filed because the information was never provided to the court in the first place. *See, e.g.*, E.D. MO. L. R. 2.17(A) (stating that "parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal identifiers from all documents filed with the Court, including exhibits to such filings, unless otherwise ordered by the Court").

extensive and increasing, particularly in federal courts and states with broad sealing statutes.[7] Indeed, the sealing of court records is often routine, with minimal opposition or judicial scrutiny. A recent examination of sealing in federal district courts found that motions to seal were among the most common court filings, with over thirty thousand cases containing such motions in the past five years.[8] One federal judge even compared the increasing secrecy in the courts to "kudzu," a nearly uncontrollable creeping vine that "blocks access to sunlight, slowly strangling fields and forests in its wake."[9]

The harms that come from this secrecy are far from abstract. In a series of investigative reports titled "Hidden Injustice," Reuters revealed how secrecy in U.S. courts—particularly the sealing of court records—shields corporate misconduct and conceals information vital to public safety.[10] Their investigation discovered that federal judges had sealed evidence related to harmful products in about half of the 115 biggest product liability cases over the past twenty years and that in 85% of those instances judges provided no explanation for keeping the information from the public.[11] Looking specifically at opioid litigation, Reuters determined that judges allowed litigants to file under seal evidence that could have alerted

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[7] *See, e.g.*, Elizabeth A. Rowe, *Judicial Secrecy*, 59 U.C. DAVIS L. REV. 227 (2025) (finding that motions to seal were among the most common court filings in federal courts, with over thirty thousand cases containing such motions in the past five years); MEGAN KURLYCHEK, KIMBERLY MARTIN & MATTHEW DUROSE, IMPACT OF CRIMINAL RECORD SEALING ON STATE AND NATIONAL ESTIMATES OF OFFENDERS AND THEIR OFFENDING CAREERS (2019), https://perma.cc/GZ9W-NXPG (finding that a significant portion of arrest and prosecution records in New York are sealed, making them inaccessible for background checks and even to criminal justice officials outside the state); *Under Seal: Secrets at the Supreme Court*, REPS. COMM. FOR FREEDOM OF THE PRESS (2009), https://perma.cc/2D2D-L2ZD (finding that in 2009, at least 19 U.S. Supreme Court cases involved documents under seal, compared to nine known cases in 2005 and four known cases in 1994).

[8] Rowe, *supra* note 7, at 8. The study found that motions to seal go unopposed approximately 90% of the time and receive very little scrutiny from judges, owing in part to their high volume. *Id.*

[9] Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 FED. CTS. L. REV. 177, 180–81 (2009).

[10] *Hidden Injustice: How U.S. Courts Cover Up Deadly Secrets*, REUTERS (2019–2020), https://www.reuters.com/investigates/section/usa-courts-secrecy/. Reuters conducted interviews with legal experts, judges and litigants, and analyzed Westlaw data from 3.2 million federal civil suits filed between 2006 and 2016, focusing on mass torts and product liability cases. *Id.*

[11] Benjamin Lesser et al., *How Judges Added to the Grim Toll of Opioids*, REUTERS (June 25, 2019), https://perma.cc/3H48-2XU6.

regulators, doctors, and the public to the dangers of prescription opioids; this concealment, they concluded, played a significant role in prolonging and deepening the opioid crisis.[12]

Under current case law, as discussed in more detail below, the sealing of court records should be rare and permissible only under limited circumstances.[13] In practice, however, the opposite is true: Sealing has become disturbingly routine in the federal courts, often carried out with little meaningful judicial oversight.[14]

Critics of court secrecy point to the absence of clear, uniform rules on sealing as a key factor behind its widespread use in the federal courts.[15] The Federal Rules

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[12] *Id.* ("It would be 12 years—and 245,000 overdose deaths—before evidence Stephens and other judges kept hidden was made public, and then only after it was leaked to a newspaper."). In testimony before a House Judiciary Subcommittee examining court sealing practices, Reuters reporters Dan Levine and Lisa Girion emphasized that despite the limitations secrecy imposed on their investigation, they found that "hundreds of thousands of people were killed or seriously injured by allegedly defective products after judges in just a handful of cases allowed litigants to [file under seal] evidence that could have raised alarms about potential danger," with "[t]he opioid epidemic [being] the most significant example." *See The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 116th Cong. 58 (2019) (statement of Dan Levine and Lisa Girion, Reuters News). During the congressional hearing, a representative of the federal judiciary acknowledged that improper sealing practices do occur. *See id.* at 50 (testimony of Hon. Richard W. Story, U.S. District Judge, Northern District of Georgia).

[13] *See infra* Part I.B.

[14] *See, e.g.*, Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 716–19 (2004); Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375, 377–79 (2006); Smith, *supra* note 9, at 179–80; Rowe, *supra* note 7, at 3–4. Critics of reform argue that concerns about secrecy in the courts are overstated and focus too narrowly on product liability cases, ignoring the many non–personal injury suits where confidentiality serves legitimate interests, such as protecting trade secrets or individual privacy. *See* Doré, *supra* note 3, at 300–03 (summarizing the debate over secrecy in the courts).

[15] *See, e.g.*, Anderson, *supra* note 14, at 715; Goldstein, *supra* note 14, at 389; Rowe, *supra* note 7, at 24–27. Recently, advocates for public access have pressed the federal judiciary's Committee on Rules of Practice and Procedure to establish uniform baseline procedures for sealing court records. *See* Letter from Heather R. Abraham, Alex Abdo & Jonatham Manes to Rebecca A. Womeldorf, Secretary, Comm. on Rules of Prac. & Proc., Admin. Off. of the U.S. Cts. (Sep. 3, 2021), https://perma.cc/4UFP-3DWZ (asserting that "divergent [local] rules have resulted in inconsistent and

of Civil Procedure and Criminal Procedure mandate the protection of certain sensitive information, namely Social Security numbers, tax identification numbers, dates of birth, financial account numbers, names of minors, and home addresses.[16] Beyond this specific information, however, the federal rules offer little guidance on sealing to litigants and judges. As a result, when parties seek to seal records containing personal or other confidential information, the requirements and procedures are largely governed by the district court's local rules.[17]

This project is the first to comprehensively examine whether federal district courts provide clear and consistent local rules for sealing court records in civil and criminal cases.[18] It also evaluates whether these local rules align with established Supreme Court and circuit court precedent concerning the public's right of access to judicial records.

The analysis of more than seven hundred local rules across all ninety-four federal districts reveals alarming inconsistencies in sealing practices nationwide.[19] Nearly half of all districts lack general sealing rules, many fail to reference the

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improper sealing of court records, often in violation of the public's constitutional and common law rights of access"); Letter from Eugene Volokh, Gary T. Schwartz Professor of Law, UCLA Sch. of L., to Members of the Advisory Comm. (Aug. 7, 2020), https://perma.cc/BPN5-WTW8 (arguing that "a uniform rule governing sealing is needed: despite these local rules and the largely unanimous case law disfavoring sealing, records are still sometimes sealed erroneously, for reasons that fall short of what the public access precedents require").

[16] FED. R. CIV. P. 5.2(a); FED. R. CRIM. P. 49.1(a).

[17] All of the federal district courts have local rules that cover a wide range of matters, including what information can be filed with the court and how that information is to be filed. Some federal district courts also have standing orders that govern sealing and some judges have their own personal rules on sealing. *See infra* notes 168–170 and accompanying text.

[18] I am indebted to Eugene Volokh and the University of Buffalo Civil Rights and Transparency Clinic for their work in 2020 and 2021 alerting the Federal Rules Advisory Committee about inconsistencies in local civil rules on sealing. *See* Letter from Volokh, *supra* note 15; Letter from Abraham, Abdo & Manes, *supra* note 15.

[19] I collected and reviewed local civil and criminal rules with an effective date prior to January 1, 2025, from all 94 federal districts. I did not examine local bankruptcy rules, admiralty rules, patent rules, mediation/ADR rules, or attorney disciplinary rules. Each of the relevant rule provisions was reviewed and coded according to more than 40 different variables, including: federal circuit, district, effective date, rule type, record/matter type, access presumption, justification required, sealing standard, notice to the public, sequestration requirement, sealing expiration, and unsealing procedures.

controlling legal standard, and basic procedural safeguards—such as public notice, consideration of alternatives to sealing, and case-specific identification of harms—are frequently absent.[20] Overall, only eleven districts (12%) provide a specific standard for sealing that incorporates their circuit's requirements for civil cases and a mere six districts (6%) do so for criminal cases.[21] These deficiencies have created a patchwork of inconsistent, often-toothless rules that enable secrecy to spread largely unchecked.

Some might contend that local rules on sealing are unnecessary because the federal courts of appeals already provide sufficient guidance and district courts can be expected to follow those precedents. Empirical studies, however, do not support that assumption: In practice, most judges do not rigorously apply circuit law when evaluating motions to seal, often granting such requests with minimal scrutiny.[22] Furthermore, even if district courts were meticulous in applying governing case law, clear and comprehensive rules would still offer significant benefits.[23] Clear rules on sealing further consistency, transparency, and efficiency by establishing uniform procedures, reducing litigation costs, protecting the public's interest in open records, and reinforcing confidence in the judiciary through predictable and principled decision-making.[24]

This Article seeks to accomplish three principal objectives. First, it demonstrates that the lack of clear guidance on sealing is not confined to a few outlier districts but is a systemic issue across the federal judiciary.[25] While some districts have adopted rules that provide meaningful direction on sealing, such examples are rare. In fact, forty-one of the ninety-four federal districts—approximately 44%—do not have a general sealing provision in either their civil or criminal rules laying

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[20] *See infra* Part II.

[21] *See infra* Part II.D.

[22] *See* Rowe, *supra* note 7, at 8 (finding that motions to seal in federal district courts go unopposed approximately 90% of the time and receive very little scrutiny from judges); Lesser et al., *supra* note 11 (finding that judges failed to provide any justification for sealing in 85% of the sealing decisions Reuters examined).

[23] *See* Zachary D. Clopton & Marin K. Levy, *Local Rules*, 111 VA. L. REV. 1187, 1192 (2025) (concluding that published local rules "unify and codify judges' practices" and give lawyers "transparent" notice that reduces inadvertent error).

[24] *See infra* Part III.

[25] *See infra* Part II.C.

out the procedures for sealing court records.[26] The absence of such rules leaves litigants and judges without a framework for evaluating when and how court records may be sealed, increasing the risk of inconsistent and unprincipled sealing.[27]

Second, this Article offers recommendations for improving the clarity and consistency of sealing rules in the federal courts. The goal is not to impose a uniform substantive standard—such as the First Amendment right of access—on all districts, though I have argued elsewhere that all court records should be subject to the more stringent First Amendment right.[28] Rather, this project assesses each district's rules in light of the access standard adopted by its respective circuit. Even in circuits that apply only the more-deferential common law standard, the public's right of access would be better protected through clear, well-defined rules that ensure transparency and accountability in court decisions regarding sealing.

Third, it underscores the judiciary's responsibility to safeguard the public's right of access. By allowing the sealing of court records to become a routine, often-unexamined practice, many federal judges have abdicated this responsibility. This court-approved secrecy has, among other consequences, weakened the public trust that the judicial system relies upon.[29] This is a critical time for the federal courts to address this problem. Public confidence in the courts—and in government more

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[26] *See infra* Part II.B.

[27] While it may be the case that some judges provide additional guidance to litigants in their orders granting or denying sealing, such orders—which are often unpublished and buried in a district court's docket sheets—are no substitute for clear rules outlining the requirements for sealing. *See infra* Part III. In fact, studies of sealing orders suggest that most judges do not provide additional specificity in their sealing orders, instead granting motions to seal with very little scrutiny. *See* Rowe, *supra* note 7, at 8; Lesser et al., *supra* note 11.

[28] *See* Ardia, *Court Transparency*, *supra* note 5, at 906–16. While I still believe this to be true, *see* David S. Ardia, *A First Amendment Right to Know*, 111 CORNELL L. REV. 101 (forthcoming Jan. 2026), my goal here is not to force all districts to adopt a First Amendment right of access to their court records.

[29] *See, e.g.*, Shawn Patterson Jr. et al., *The Withering of Public Confidence in the Courts*, 108 JUDICATURE 22, 27–29 (2024) (examining how lack of knowledge about the nature and function of the judiciary impacts public perceptions of the courts); Stephan Grimmelikhuijsen & Albert Klijn, *The Effects of Judicial Transparency on Public Trust: Evidence From a Field Experiment*, 93 PUB. ADMIN. 995, 1006–08 (2015) (finding that judicial transparency has a positive effect on trust in judges).

broadly—is declining.[30] Strengthening the rules and practices that govern the sealing of court records is essential not only to restoring the legitimacy of the courts but also to reaffirming the judiciary's role as a guardian of open government.

This Article proceeds in three parts. Part I describes the benefits of public access to court records. It then surveys the principal standards courts have adopted for evaluating requests to seal court records, including the First Amendment, common law, and "good cause" standards. Part II analyzes how district courts implement these sealing standards through their local rules. As Part II shows, local rules on sealing vary widely—not only from one district to another, but even among districts within the same state—creating a patchwork of standards and practices for sealing.

Part III concludes by offering suggestions for how to create clearer and more consistent rules on sealing. It also suggests practical measures to reduce the administrative burdens on courts. Many of the current rules governing sealing are not only confusing but also unwieldy, creating unnecessary work for judges and litigants alike.

I. PUBLIC ACCESS TO COURT RECORDS

Transparency is fundamental to the legitimacy and effective functioning of the judicial system. As legal philosopher Jeremy Bentham wrote in the early nineteenth century, "[p]ublicity is the very soul of justice."[31] Without public oversight, he warned, "all other checks are insufficient."[32] Public oversight of the courts serves many salutary purposes: It promotes fairness, fosters accountability, and sustains public confidence in the administration of justice.[33] But the benefits of court

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[30] *See* Benedict Vigers & Lydia Saad, *Americans Pass Judgment on Their Courts*, GALLUP (Dec. 17, 2024), https://perma.cc/P2NE-NDQY (finding that Americans' confidence in the judicial system dropped to a record-low 35% in 2024).

[31] 4 JEREMY BENTHAM, *Bentham's Draught for the Organization of Judicial Establishments*, *in* THE WORKS OF JEREMY BENTHAM 305, 316 (Edinburgh, William Tait 1843).

[32] 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (London, Hunt & Clarke 1827) ("Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.").

[33] *See, e.g.*, Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 606 (1982).

transparency extend well beyond the courthouse, reinforcing the broader democratic principle that government must remain open to the people it serves.[34]

The sections that follow examine more closely the many beneficial functions provided by public access to court records. Because of these benefits, judges have long recognized a qualified public right of access to judicial documents.[35] Despite this recognition, however, courts have not applied a uniform standard for weighing public access against claims of confidentiality. This Part surveys the principal legal frameworks courts use to evaluate sealing requests, focusing on the First Amendment standard, the common law right of access, and the "good cause" standard that commonly applies in the discovery context.

A. The Benefits of Public Access to Court Records

Judges and scholars have identified many benefits that flow from allowing the public to observe the work of the courts. These include safeguarding the integrity of the fact-finding process;[36] ensuring the fairness of judicial proceedings;[37] educating the public about the implementation and impact of the law;[38] promoting public confidence in the justice system;[39] supporting the development of the common

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[34] *See* David S. Ardia, *Popular Sovereignty and a Right to Know About the Government*, 67 ARIZ. L. REV. 1, 19–28 (2025).

[35] *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) ("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." (internal citations omitted)).

[36] *See, e.g.*, *Globe Newspaper Co.*, 457 U.S. at 606 ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.").

[37] *See, e.g.*, Press-Enterprise Co. v. Superior Court (*Press-Enterprise I*), 464 U.S. 501, 509 (1984) ("[P]ublic proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct . . . ."); *In re* Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1313–14 (7th Cir. 1984) (noting that public access to court documents advances "the public's interest in assuring that the courts are fairly run and judges are honest" (quoting Crystal Grower's Corp. v. Dobbins, 616 F.2d 458, 461 (10th Cir. 1980))).

[38] *See, e.g.*, United States v. Criden, 648 F.2d 814, 827 (3d Cir. 1981) (noting "the educational and informational value of public observation" of court records).

[39] *See, e.g.*, *Press-Enterprise I*, 464 U.S. at 508 ("Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.").

law;[40] informing the public about important safety and welfare issues;[41] uncovering litigation fraud;[42] and fostering discussion about matters of public concern.[43] While this list is not exhaustive, it illustrates the broad range of benefits that can arise from public access to the courts.

The benefits of public access—especially to *court records*—extend well beyond individual cases or parties. Court records often illuminate issues of profound public importance.[44] Lawsuits over the safety of drugs, automobiles, and other products reveal the research behind these widely used products and allow the public to assess their societal costs and benefits.[45] Court files are replete with information on subjects ranging from the limitations of DNA identification to the failures of autonomous driving systems. Lynn LoPucki writes that "the courts are among the most

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[40] *See* Symposium, *Panel Discussion: Judicial Records Forum*, 83 FORDHAM L. REV. 1735, 1745–46 (2015) (Kenneth J. Withers asserting that access to court proceedings and records reveals how court decisions are made so that the basis for precedent is available for future litigants and courts to use in the development of the common law).

[41] *See, e.g.*, United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976) ("[T]he right of inspection serves to produce 'an informed and enlightened public opinion.'" (quoting Grosjean v. Am. Press Co., 297 U.S. 233, 247 (1936))), *rev'd sub nom.* Nixon v. Warner Commc'ns, Inc., 435 U.S. 598 (1978).

[42] *See* Eugene Volokh, *Shenanigans (Internet Takedown Edition)*, 2021 UTAH L. REV. 237, 242 (noting the importance of open court records for academics, judges, and other litigants to catch litigation fraud as well as other inconsistencies in court filings).

[43] *See, e.g.*, Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 839 (1978) ("The operation of the Virginia Commission, no less than the operation of the judicial system itself, is a matter of public interest, necessarily engaging the attention of the news media.").

[44] *See* Roy Shapira, *Law as Source: How the Legal System Facilitates Investigative Journalism*, 37 YALE L. & POL'Y REV. 153, 176 (2018) ("Courts centralize many potential sources: documents, victims, and experts, thereby significantly reducing the costs of sourcing deep-dive investigative projects."); MD. COURTS, REPORT OF THE COMMITTEE ON ACCESS TO COURT RECORDS 7 (2002), https://perma.cc/J4MA-8AEC ("Access to court records, and especially electronic court records, enables the public to learn of, and correct, lapses in the system—whether these take the form of injustice in an individual civil or criminal case or in a previously unrecognized pattern of cases.").

[45] *See supra* notes 10–12 and accompanying text.

information-rich institutions in society."[46] When court records are open to public scrutiny, systemic problems are more likely to come to light.[47]

Access to court records, which are the raw materials of judicial decision making, also is indispensable for the public to understand both the application of existing law and the contours and operation of their government.[48] Because the public is ordinarily excluded from the internal deliberations of governmental bodies, access to judicial records helps alleviate the information asymmetry between citizens and their government—a disparity that undermines the principle of democratic oversight.[49] As the D.C. Circuit has explained:

> A court proceeding, unlike the processes for much decisionmaking by executive and legislative officials, is in its entirety and by its very nature a matter of legal significance; all of the documents filed with the court, as well as the transcript of the proceeding itself, are maintained as the official "record" of what transpired.[50]

Indeed, it makes little sense to treat court records differently from court proceedings when considering the public's right of access. The reason the Supreme Court recognizes a First Amendment right of access to criminal proceedings is that public access facilitates "the free discussion of governmental affairs."[51] If a right to access court proceedings is necessary to ensure that public discussion about the government is well informed, then it logically follows that the public must also have a right to access the materials with which the courts work, including documents,

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[46] *See* Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 510 (2009).

[47] *See id.* at 494–95 (describing how researchers can use statistical tools to analyze case outcomes, noting that such tools can determine if judge-to-judge differences are attributable to the judges themselves or differences in the cases assigned to the judges).

[48] *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975) ("[O]fficial records and documents open to the public are the basic data of governmental operations."); Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 502 (1st Cir. 1989) ("The basis for this right is that without access to documents the public often would not have a 'full understanding' of the proceeding and therefore would not always be in a position to serve as an effective check on the system." (citing *In re* Globe Newspaper Co., 729 F.2d 47, 52 (1st Cir. 1984))).

[49] *See* Ardia, *Popular Sovereignty*, *supra* note 34, at 12–15.

[50] Wash. Legal Found. v. U.S. Sentencing Comm'n, 89 F.3d 897, 906 (D.C. Cir. 1996) (internal citation omitted).

[51] Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 604 (1982) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

evidence, and legal briefs, in order to understand how and why a court arrived at its decisions.[52] As the Third Circuit noted in *United States v. Antar*:[53]

> Access to the documentation of an open proceeding . . . facilitates the openness of the proceeding itself by assuring the broadest dissemination. It would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?[54]

The issues decided in courtrooms—whether headline-grabbing or seemingly routine—are invariably matters of public concern because every case involves the application of government power. In her influential work on the benefits of open courts, Judith Resnik asked, "[w]hat is the utility of having a window into the mundane as well as the dramatic?"[55] Her answer underscores the significance of public access to court records even in the most ordinary proceedings:

> That is where people live and that is where state control can be both useful and yet overreaching. The dense and tedious repetition of ordinary exchanges is where one finds the enormity of the power of both bureaucratic states and private sector actors. That power is at risk of operating unseen. The redundancy of various claims of right and the processes, allegations, and behaviors that become the predicates to judgments can fuel debate not only about the responses in particular cases but also about what the underlying norms ought to be.[56]

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[52] *See, e.g.*, Mueller v. Raemisch, 740 F.3d 1128, 1135–36 (7th Cir. 2014) ("Secrecy makes it difficult for the public (including the bar) to understand the grounds and motivations of a decision, why the case was brought (and fought), and what exactly was at stake in it."); Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 93 (2d Cir. 2004) ("[R]ight of access to judicial documents [is] derived from or a necessary corollary of the capacity to attend the relevant proceedings."); United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995) ("[Public monitoring of the courts] is not possible without access to . . . documents that are used in the performance of Article III functions."); Globe Newspaper Co. v. Pokaski, 868 F.2d at 502 ("[T]he basis for this right [of access to court records] is that without access to documents the public often would not have a 'full understanding' of the proceeding and therefore would not always be in a position to serve as an effective check on the system." (citation omitted)); Newman v. Graddick, 696 F.2d 796, 803 (11th Cir. 1983) ("This right, like the right to attend judicial proceedings, is important if the public is to appreciate fully the often significant events at issue in public litigation and the workings of the legal system.").

[53] 38 F.3d 1348 (3d Cir. 1994).

[54] *Id.* at 1360.

[55] Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 2, 56 (2011).

[56] *Id.*

As Resnik suggests, transparency in the courts supports legal and governmental reform. Courts are the primary institutional mechanism through which the government exercises a vast array of powers: They allocate rights, transfer assets, authorize the receipt of public benefits, regulate commerce, and legitimize the use of force against those who violate criminal laws. Access to court records allows the public to observe how these powers are exercised and to "see that law varies by contexts, decision makers, litigants, and facts."[57] Moreover, as Resnik notes, public access gives both the parties and the broader community an opportunity "to argue that the governing rules or their applications are wrong."[58] In this way, court transparency helps fulfill the democratic promise that laws are not fixed by the state alone but remain open to challenge and change through public participation.[59]

The legitimacy of the courts depends on the public's confidence that judges are properly performing their duties—a point recognized by the Framers, who enshrined the right to a public trial in criminal cases and the right to a jury trial in civil cases under the Sixth and Seventh Amendments, respectively.[60] Judges themselves have often acknowledged that their authority is rooted not in popular election but in rational justification and public oversight.[61] As Judge Frank Easterbrook observed, the political branches derive legitimacy from the ballot, while judges must

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[57] *Id.* at 61.

[58] *Id.*

[59] *See* Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 611 (2018) ("I link 'A2J' to 'A2K'—'access to knowledge'—to underscore the interdependencies of the two. Not only does the act of rendering judgments require knowledge, but assessing the justice of those judgments also requires that third parties be able to understand particular cases, watch interactions, and know the systems in which individual judgments are made.").

[60] *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 667–69, 678–79 (1973) (describing how the Seventh Amendment was intended to be a restraint on government power).

[61] *See, e.g.*, *In re* Search of One Device & Two Individuals Under Rule 41, 784 F. Supp. 3d 234, 255 (D.D.C. 2025) ("No secret courts. This means no forever sealed judicial decisions—including warrants—as they are the foundation for secret courts. Without visibility, the public cannot hold courts or the government accountable. The Framers knew this. Thomas Jefferson said 'wherever the people are well informed they can be trusted with their own government; that whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights.' Transparency is foundational to what makes America great." (internal citation omitted)).

earn it by providing reasoned decisions open to scrutiny.[62] This echoes Jeremy Bentham's admonition that "[p]ublicity is the very soul of justice,"[63] for, as he explained, transparency "keeps the judge himself, while trying, under trial."[64] In this way, public access to court records functions as a vital check—not only on judicial conduct, but on the exercise of government power more broadly.[65]

B. The Standards for Sealing Court Records

Although the public's right of access to court records is deeply rooted in the American legal tradition, the doctrinal basis and precise scope of this right remain unsettled.[66] The Supreme Court has explicitly held that the First Amendment guarantees public access to criminal trials and certain pretrial proceedings, emphasizing that openness is vital for self-government and for the functioning of the justice system.[67] However, the Court has not squarely addressed whether the First Amendment similarly protects public access to civil proceedings or court records. As I have argued elsewhere, the Supreme Court's reasoning in recognizing a First Amendment right of access to criminal proceedings—that public oversight is indispensable to democratic governance—logically extends to civil proceedings and court

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[62] *See* Hicklin Eng'g, L.C. v. Bartell, 439 F.3d 346, 348 (7th Cir. 2006) ("The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification."), *abrogated by* RTP L.L.C. v. ORIX Real Est. Cap., Inc., 827 F.3d 689 (7th Cir. 2016).

[63] BENTHAM, *supra* note 31, at 316.

[64] BENTHAM, *supra* note 32, at 523.

[65] Vincent Blasi has written extensively about the role of the First Amendment in checking government power. According to Blasi, "[t]he check on government must come from the power of public opinion, which in turn rests on the power of the populace to retire officials at the polls, to withdraw the minimal cooperation required for effective governance, and ultimately to make a revolution." Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RSCH. J. 521, 539 (1977).

[66] *See* Ardia, *Court Transparency*, *supra* note 5, at 851–56.

[67] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575–76 (1980) (holding that a First Amendment right of access applies to criminal trials); Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982) (same); *Press-Enterprise I*, 464 U.S. 501 (1984) (applying First Amendment right of access to jury voir dire); Press-Enterprise Co. v. Superior Ct. (*Press-Enterprise II*), 478 U.S. 1 (1986) (applying First Amendment right of access to preliminary hearings).

records.[68] Supporting this view, numerous lower courts recognize a qualified First Amendment right of access not only to civil trials but also to judicial records filed in criminal and civil cases.[69]

Still, a significant number of courts continue to wrestle with whether a First Amendment right of access extends to all court records. This section examines the key trends in these decisions and identifies common patterns in how judges approach disputes over access to court records.

1. First Amendment Standard

In what is now established constitutional doctrine, the Supreme Court held in *Richmond Newspapers, Inc. v. Virginia*[70] that the First Amendment guarantees a public right of access to criminal trials.[71] Although Chief Justice Warren Burger acknowledged that the First Amendment does not explicitly require public access to the courts, he concluded that the Amendment's provisions implied that such a right exists: "In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees."[72]

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[68] *See* Ardia, *Court Transparency*, *supra* note 5, at 889–906.

[69] *See infra* notes 81–84 and accompanying text.

[70] 448 U.S. 555 (1980) (plurality opinion).

[71] *Id.* at 580.

[72] *Id.* at 575. The First Amendment, Burger wrote, "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Id.* at 575–76 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)); *see also* Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (noting that "without some protection for seeking out the news, freedom of the press could be eviscerated").

Two years later, in *Globe Newspaper Co. v. Superior Court*, a majority of the Court adopted the view that the First Amendment protects not just the right to speak but also the right to acquire information from the courts when it invalidated a Massachusetts statute that excluded the public from the courtroom during the testimony of minors who were victims of certain sexual offenses. 457 U.S. 596 (1982). In striking down the statute, Justice Brennan's majority opinion affirmed that the First Amendment is "broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *Id.* at 604 (citing *Richmond Newspapers*, 448 U.S. at 579–80, 580 n.16). Underlying the First Amendment right of access to criminal trials, Brennan pointed out, "is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of

Building on *Richmond Newspapers*, the Supreme Court extended the First Amendment right of access beyond criminal trials in its landmark *Press-Enterprise* decisions. In those cases, the Court held that pretrial proceedings are also subject to a constitutional presumption of openness.[73] What is often overlooked, however—by judges and scholars alike—is that in both *Press-Enterprise* cases, the Court did not just reverse the closure of the hearings; it also struck down the sealing of the proceedings' transcripts.

In *Press-Enterprise I*, the trial judge excluded the public from almost all jury voir dire in a murder trial and withheld the transcript after the trial ended.[74] The Supreme Court unanimously held that the First Amendment right of access applies to jury selection, and when reversing the closure orders the Court suggested that this right extends to the transcript as well:

> [N]ot only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure *and to total suppression of the transcript*. The trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected.[75]

Two years later, in *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II*"),[76] the Supreme Court faced this issue a second time when a magistrate judge excluded the public from a forty-one-day preliminary hearing and refused to release the transcript.[77] Again, the Court held that the First Amendment provided a right of access to the proceeding in question and intimated that the public had a right to access the transcript as well.[78] In fact, when reversing the lower court's closure orders, the Court seemed to see the sealing of the transcript as an additional

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governmental affairs.'" *Id.* (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)). Echoing Burger's plurality opinion in *Richmond Newspapers*, Brennan wrote that a right of public access helps to "ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Id.* at 605.

[73] *See Press-Enterprise I*, 464 U.S. 501 (1984) (holding that the First Amendment provides a right of access to jury voir dire); *Press-Enterprise II*, 478 U.S. 1 (1986) (holding that the First Amendment provides a right of access to preliminary hearings).

[74] 464 U.S. at 503–04.

[75] *Id.* at 513 (emphasis added).

[76] 478 U.S. 1 (1986).

[77] *Id.* at 4–5.

[78] *Id.* at 13.

affront to the public's right of access, writing that "[d]enying the transcript of a 41-day preliminary hearing would frustrate what we have characterized as the 'community therapeutic value' of openness."[79] In elaborating on the benefits of public access, the Court noted that "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed."[80]

In the decades following *Richmond Newspapers*, every federal circuit court of appeals other than the D.C. Circuit has extended the First Amendment right of access to civil trials,[81] reasoning that a right of public access to civil proceedings logically flows from the Supreme Court's rationale for recognizing a right of access to criminal proceedings.[82] As to court records, all of the federal circuits—other than the Tenth Circuit—have held that the public has a First Amendment right of access

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[79] *Id.* (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 570 (1980)).

[80] *Id.* (quoting *Press-Enterprise I*, 464 U.S. at 508).

[81] *See, e.g.*, FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 & n.4 (1st Cir. 1987); Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984); Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 659 (3d Cir. 1991); Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 253 (4th Cir. 1988); Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. 1981); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1178–79 (6th Cir. 1983); Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994); *In re* Iowa Freedom of Info. Council, 724 F.2d 658, 661 (8th Cir. 1983); Courthouse News Serv. v. Planet, 750 F.3d 776, 786 (9th Cir. 2014); Courthouse News Serv. v. N.M. Admin. Off. of Cts., 53 F.4th 1245, 1264–65 (10th Cir. 2022); Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983). The D.C. Circuit has not definitively recognized a First Amendment right of access to civil trials, but it has noted that the contours of the First Amendment right of access are still being developed. *See In re* Reps. Comm. for Freedom of the Press, 773 F.2d 1325, 1331–33 (D.C. Cir. 1985). When an appeal does not involve substantive issues of patent law, the Federal Circuit applies the law of the regional circuit in which the district court sits. *See In re* TS Tech USA Corp., 551 F.3d 1315, 1319 (Fed. Cir. 2008). Nevertheless, the Federal Circuit has noted that both the First Amendment and the common law provide a right of public access to court proceedings. *See In re* Violation of Rule 28(d), 635 F.3d 1352, 1356 (Fed. Cir. 2011).

[82] *See, e.g.*, *Planet*, 750 F.3d at 785 (remarking that public access to the courts "ensure[s] that the individual citizen can effectively participate in and contribute to our republican system of self-government" and that access to civil proceedings and records "is an indispensable predicate to free expression about the workings of government." (quoting Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 604 (1982))).

to records filed in criminal cases.[83] The majority of circuits also recognize a First Amendment right of access to records filed in civil cases, including the Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits.[84]

The public's access to court records under the First Amendment, however, is not absolute.[85] As with other First Amendment rights, access may be restricted when countervailing interests are sufficiently compelling. The Supreme Court has emphasized that "the State's justification in denying access must be a weighty one"[86] and that restrictions on access, "although not absolutely precluded, must be rare."[87] While the Court has used slightly different formulations—at times requiring that a restriction be "essential to preserve higher values,"[88] and at other times that it be "necessitated by a compelling governmental interest"[89]—the standard for

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[83] *See, e.g.*, *In re* Providence J. Co., 293 F.3d 1, 10 (1st Cir. 2002); N.Y. Times Co. v. Biaggi, 828 F.2d 110, 114 (2d Cir. 1987); United States v. Smith, 776 F.2d 1104, 1111 (3d Cir. 1985); *In re* Wash. Post Co., 807 F.2d 383, 390 (4th Cir. 1986); United States v. Edwards, 823 F.2d 111, 118 (5th Cir. 1987); United States v. DeJournett, 817 F.3d 479, 485 (6th Cir. 2016); United States v. Peters, 754 F.2d 753, 763 (7th Cir. 1985); *In re* Search Warrant for Secretarial Area Outside Off. of Gunn, 855 F.2d 569, 573 (8th Cir. 1988); Associated Press v. U.S. Dist. Ct. for Cent. Dist. of Cal., 705 F.2d 1143, 1145 (9th Cir. 1983); United States v. Valenti, 987 F.2d 708, 715 (11th Cir. 1993); Wash. Post v. Robinson, 935 F.2d 282, 287–88 (D.C. Cir. 1991). For a discussion of Tenth Circuit precedent, see *infra* Part II.C.10.

[84] *See, e.g.*, Bernstein v. Bernstein Litowitz Berger & Grossman LLP, 814 F.3d 132, 141 (2d Cir. 2016); *Republic of Philippines*, 949 F.2d at 659; Courthouse News Serv. v. Schaefer, 2 F.4th 318, 328 (4th Cir. 2021); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1177; *Grove Fresh Distribs., Inc.*, 24 F.3d at 897; Courthouse News Serv. v. Planet, 947 F.3d 581, 585 (9th Cir. 2020); *N.M. Admin. Off. of Cts.*, 53 F.4th at 1264; Brown v. Advantage Eng'g, Inc., 960 F.2d 1013, 1015–16 (11th Cir. 1992).

[85] *See, e.g.*, *Globe Newspaper Co.*, 457 U.S. at 606.

[86] *Id.*

[87] *Press-Enterprise I*, 464 U.S. 501, 509 (1984).

[88] *See Press-Enterprise II*, 478 U.S. 1, 13–14 (1986) ("[P]roceedings cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" (quoting *Press-Enterprise I*, 464 U.S. at 510)).

[89] *Globe Newspaper Co.*, 457 U.S. at 606–07 ("Where . . . the State attempts to deny the right of access . . . , it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." (citation omitted)); FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 n.4, 410 (1st Cir. 1987) (explaining the "presumptively paramount right of the public to know" the content of judicial records in civil cases may be overcome for "only the most compelling reasons").

restricting public access to court proceedings and records generally aligns with the strict scrutiny test applied in other First Amendment contexts.[90]

Under this framework, the public's right of access to court records typically prevails over competing interests unless the party seeking sealing can satisfy a demanding three-part test: (1) the sealing must serve a compelling interest that is likely to be harmed by public access; (2) the sealing must be narrowly tailored to the protection of that interest; and (3) there must be no reasonable alternative to sealing.[91] The latter two requirements involve a "primarily empirical judgment about the means" used to advance the interest in secrecy.[92] As Eugene Volokh has explained, "[i]f the means do not actually further the interest, are too broad, are too narrow, or are unnecessarily burdensome, then the government can and should serve the end through [alternative means]."[93]

In addition, if a court determines that sealing is justified, it must make specific, on-the-record findings to support its conclusion.[94] The Supreme Court instructed in *Press-Enterprise I*, "[t]he interest [in restricting public access] is to be articulated along with findings specific enough that a reviewing court can determine whether

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[90] *See, e.g.*, Kamasinski v. Jud. Rev. Council, 44 F.3d 106, 109 (2d Cir. 1994) (concluding that "strict scrutiny is the correct standard" to be applied in access disputes governed by the First Amendment).

[91] *See, e.g.*, Phoenix Newspapers, Inc. v. U.S. Dist. Ct. for Dist. of Ariz., 156 F.3d 940, 949 (9th Cir. 1998) (citing *Press-Enterprise II*, 478 U.S. at 9). Courts sometimes differ about the level of certainty that must be shown to establish harm, at times requiring a likelihood of harm while at other times requiring a substantial probability of harm. *Compare* N.Y.C. C.L. Union v. N.Y.C. City Transit Auth., 684 F.3d 286, 304 (2d Cir. 2012) (requiring "an overriding interest that is likely to be prejudiced" (internal quotation marks and citation omitted)), *with* United States v. Guerrero, 693 F.3d 990, 1002 (9th Cir. 2012) (requiring a showing that "there is a substantial probability that, in the absence of closure, this compelling interest would be harmed" (internal quotation marks and citation omitted)).

[92] Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2419 (1996).

[93] *Id.*; *see also In re* Charlotte Observer, 882 F.2d 850, 855 (4th Cir. 1989) ("Where closure is wholly inefficacious to prevent a perceived harm, that alone suffices to make it constitutionally impermissible." (citation omitted)).

[94] *See, e.g.*, *In re* Time Inc., 182 F.3d 270, 271 (4th Cir. 1999); Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 898 (7th Cir. 1994); Romero v. Drummond Co., 480 F.3d 1234, 1244 (11th Cir. 2007).

the closure order was properly entered."[95] However, this requirement is not merely for the benefit of appellate review—it serves a deeper purpose: "It exists, most fundamentally, to assure careful analysis by the district court before any limitation is imposed, because reversal on review cannot fully vindicate First Amendment rights."[96]

Finally, many circuits impose additional procedural protections on top of the substantive strict scrutiny standard. For example, most circuits require that a district court explicitly consider less restrictive alternatives to sealing, including redaction of sensitive information.[97] Furthermore, nearly all circuits require that the judge provide adequate notice of a sealing request and afford the public an opportunity to object before ruling on a motion to seal.[98] As the Fifth Circuit has noted,

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[95] *Press-Enterprise I*, 464 U.S. 501, 510 (1984); *see also, e.g.*, *In re* N.Y. Times Co., 828 F.2d 110, 116 (2d Cir. 1987) (stating that documents may be sealed only 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"); Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 306 (6th Cir. 2016) (stating that a district court that decides to seal judicial records "must set forth specific findings and conclusions 'which justify nondisclosure to the public,'" even if no one objects to the closure (citation omitted)).

[96] United States v. Antar, 38 F.3d 1348, 1362 (3d Cir. 1994).

[97] The requirement that a court find there are no less-restrictive alternatives to sealing is part of the standard strict scrutiny test, but some courts expressly state that judges should consider redaction as an alternative to sealing. *See, e.g.*, *In re* Providence J. Co., 293 F.3d 1, 15 (1st Cir. 2002) ("Courts have an obligation to consider all reasonable alternatives to foreclosing the constitutional right of access. Redaction constitutes a time-tested means of minimizing any intrusion on that right." (internal citation omitted)); United States v. Amodeo, 44 F.3d 141, 147 (2d Cir. 1995) (stating "that it is proper for a district court, after weighing competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document").

[98] *See, e.g.*, United States v. Haller, 837 F.2d 84, 87 (2d Cir. 1988) ("[E]xcept in extraordinary circumstances the public [must] have a means of learning that a closure or sealing order has been proposed or issued."); Miller v. Ind. Hosp., 16 F.3d 549, 551 (3d Cir. 1994) ("[T]he district court, before taking such an unusual step, should have articulated the compelling countervailing interests to be protected, made specific findings on the record concerning the effects of disclosure, and provided an opportunity for interested third parties to be heard." (citation omitted)); *In re* Knight Publ'g Co., 743 F.2d 231, 235 (4th Cir. 1984) ("The public was entitled to notice of counsel's request to seal, and an opportunity to object to the request before the court made its decision." (citation omitted)); *In re* Hearst Newspapers, L.L.C., 641 F.3d 168, 182 (5th Cir. 2011) ("The courts of appeals that have addressed the question of whether notice and an opportunity to be heard must be given

"[t]he courts of appeals that have addressed the question of whether notice and an opportunity to be heard must be given before closure of a proceeding or sealing of documents to which there is a First Amendment right of access[] have uniformly required adherence to such procedural safeguards."[99]

2. Common Law Standard

Not all federal courts of appeal have held that a First Amendment right of access applies to records filed in both civil and criminal cases. Those that do not recognize a First Amendment right of access to court records typically cite to the Supreme Court's decision in *Nixon v. Warner Communications, Inc.*,[100] which was decided two years before the Court's pronouncement in *Richmond Newspapers v. Virginia* that the First Amendment provides a right of public access to criminal trials.[101] In *Nixon*, several television networks sought access to recordings that had been introduced as evidence at the trial of President Nixon's former advisors, who were charged with conspiring to obstruct justice in the Watergate investigation.[102] Although the trial court made transcripts of the recordings available to the public, the media companies argued that the public should be able to hear the actual conversations.[103]

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before closure of a proceeding or sealing of documents to which there is a First Amendment right of access, have uniformly required adherence to such procedural safeguards." (citation omitted)); *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 475–76 (6th Cir. 1983) ("If a party moves to seal a document, or the entire court record, such a motion should be made 'sufficiently in advance of any hearing on or disposition of the [motion to seal] to afford interested members of the public an opportunity to intervene and present their views to the court.'" (citation omitted)); *In re* Associated Press, 162 F.3d 503, 507 (7th Cir. 1998) ("[F]ull protection [of the right of access] requires adequate notice of any limitation of public access to judicial proceedings or documents and an adequate opportunity, under the circumstances of the case, to challenge that limitation by stating to the court the reasons why the material should remain subject to public scrutiny." (citation omitted)); Phoenix Newspapers, Inc. v. U.S. Dist. Ct. for Dist. of Ariz., 156 F.3d 940, 949 (9th Cir. 1998) ("[I]f a court contemplates sealing a document or transcript, it must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives. If objections are made, a hearing on the objections must be held as soon as possible.").

[99] *In re Hearst Newspapers*, 641 F.3d at 182.

[100] 435 U.S. 589, 598 (1978).

[101] 448 U.S. 555, 583 (1980).

[102] *Nixon*, 435 U.S. at 592–94.

[103] *Id.* at 594.

The Supreme Court avoided addressing the constitutional question directly. Instead, it emphasized that the information on the tapes had already been publicly disclosed through their presentation in open court and through the release of their transcripts.[104] "There is no question of a truncated flow of information to the public," the Court concluded.[105] The only remaining issue, in its view, was whether the press had a right to obtain physical copies of the tapes for duplication and broadcast.[106] Framing the matter as one of preferential access, the Court held that "[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public," which had been permitted to hear the tapes in court.[107] By narrowing the question in this way, the Court left unresolved whether the First Amendment would have been implicated had the trial court withheld all public access to the contents of the recordings.[108]

Although the Court in *Nixon* ultimately declined to recognize a First Amendment right of access to the tapes, it did affirm that the public enjoys a common law right of access to court records, including the Watergate tapes.[109] "[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents," the Court explained.[110] Accordingly, all of the federal circuits acknowledge the existence of a common law right of access to court records.[111] In fact, this common law right predates the

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[104] *Id.* at 609.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] As I have argued elsewhere, courts that reject a First Amendment right of access to court records are misreading *Nixon* and ignoring the Supreme Court's subsequent access decisions. *See* Ardia, *Court Transparency*, *supra* note 5, at 873–78; Ardia, *A First Amendment Right to Know*, *supra* note 28, at 38–52.

[109] *Nixon*, 435 U.S. at 597. The Court ultimately found that, because the public could eventually access the recordings under the Presidential Recordings Act, it did not need to do the careful weighing of interests required by the common law. *Id.* at 603.

[110] *Id.* at 597 (footnote omitted).

[111] *See, e.g.*, FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987); Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982); Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 161 (3d Cir. 1993); *In re* U.S. for an Ord. Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283, 293 (4th

Constitution and reflects the longstanding Anglo-American tradition of open judicial proceedings.[112] As the Third Circuit has noted, "[t]he existence of a common law right of access to judicial proceedings and to inspect judicial records is beyond dispute."[113]

Like the First Amendment right of access, the common law right of access to court records is not absolute. Courts retain inherent authority to manage their own records and may restrict public access where disclosure would serve improper purposes.[114] The Supreme Court has said that such improper purposes include gratifying private spite, promoting public scandal, disseminating libelous material, or revealing confidential business information such as trade secrets.[115] In determining whether to seal records, however, judges must "weigh[] the interests advanced by

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Cir. 2013); SEC v. Van Waeyenberghe, 990 F.2d 845, 849 (5th Cir. 1993); *In re* Morning Song Bird Food Litig., 831 F.3d 765, 777–78 (6th Cir. 2016); Smith v. U.S. Dist. Ct. for S. Dist. of Ill., 956 F.2d 647, 649–50 (7th Cir. 1992); IDT Corp. v. eBay, 709 F.3d 1220, 1222 (8th Cir. 2013); Valley Broad. Co. v. U.S. Dist. Ct. for Dist. of Nev., 798 F.2d 1289, 1292–93 (9th Cir. 1986); JetAway Aviation, LLC v. Bd. of Cnty. Comm'rs, 754 F.3d 824, 826 (10th Cir. 2014); Wilson v. Am. Motors Corp., 759 F.2d 1568, 1570 (11th Cir. 1985); Johnson v. Greater Se. Cmty. Hosp. Corp., 951 F.2d 1268, 1277 (D.C. Cir. 1991).

Of course, both a First Amendment right of access and a common law right of access can apply, depending on the type of court record at issue. *See, e.g.*, Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 120 (2d Cir. 2006) ("In addition to the common law right of access, it is well established that the public and the press have a 'qualified First Amendment right to attend judicial proceedings and to access certain judicial documents.'" (first quoting Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 91 (2d Cir. 2004); and then quoting Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177 (6th Cir. 1983) (noting that "the First Amendment and the common law do limit judicial discretion" to seal records))).

[112] *See, e.g.*, *Leucadia, Inc.*, 998 F.2d at 161 ("The existence of this right, which antedates the Constitution and which is applicable in both criminal and civil cases, is now beyond dispute." (internal quotation marks and citation omitted)); *Lugosch*, 435 F.3d at 119 ("The common law right of public access to judicial documents is firmly rooted in our nation's history." (citation omitted)).

[113] Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1066 (3d Cir. 1984) (citation omitted); *see also id.* ("[A]n examination of the authority on which the Supreme Court relied in these cases reveals that the public's [common law] right of access to civil trials and records is as well established as that of criminal proceedings and records.").

[114] *Nixon*, 435 U.S. at 598 (remarking that "[e]very court has supervisory power over its own records and files" and, even when a common-law right of access exists, a court can deny access to its files when they "might . . . become a vehicle for improper purposes").

[115] *Id.*

the parties in light of the public interest and the duty of the courts," carefully balancing the need for confidentiality against the longstanding presumption that favors public access.[116]

There are notable differences, however, in the standards courts apply when sealing records under the common law versus under the First Amendment. When the First Amendment right attaches to a record, any restriction on access must serve a compelling interest and be narrowly tailored to that purpose.[117] By contrast, under the common law, a judge need only find that the interest in secrecy "outweighs" the public's interest in access.[118] Reviewing courts grant significant deference to trial judges, typically overturning decisions to seal only upon a showing of "abuse of discretion."[119]

Nevertheless, judicial discretion to seal records under the common law is not unbounded. The strong common law presumption of access "does not permit the

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[116] *Id.* at 602; *see also, e.g.*, Phillips *ex rel.* Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1212 (9th Cir. 2002) (finding that the "strong presumption in favor of access to judicial documents . . . 'can be overcome' only by showing 'sufficiently important countervailing interests"' (quoting San Jose Mercury News, Inc. v. U.S. Dist. Ct. for N. Dist. of Cal., 187 F.3d 1096, 1102 (9th Cir. 1999))).

[117] *See supra* notes 86–93 and accompanying text.

[118] *See, e.g.*, *In re* Cendant Corp., 260 F.3d 183, 194 (3d Cir. 2001) ("The burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption." (internal quotation marks and citation omitted)); United States v. Beckham, 789 F.2d 401, 409–10 (6th Cir. 1986) (noting that the common law right of access is applied through a balancing test with a presumption in favor of access). Some circuits require that the countervailing interest must "heavily outweigh" the public interest in access. *See, e.g.*, Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 253 (4th Cir. 1988); United States v. Walker, 761 F. App'x 822, 835 (10th Cir. 2019).

[119] *See, e.g.*, United States v. McDougal, 103 F.3d 651, 657 (8th Cir. 1996); Belo Broad. Corp. v. Clark, 654 F.2d 423, 430 (5th Cir. 1981). There is some disagreement among the federal courts of appeal as to whether they should apply a more searching review than abuse of discretion. *See* United States v. Graham, 257 F.3d 143, 148–49 (2d Cir. 2001) (discussing the disagreement among the circuits but deciding that it could leave the decision to another day because the panel would affirm the district court's decision under either an abuse of discretion standard or a more stringent standard); *Beckham*, 789 F.2d at 412–13 (applying a more searching review); United States v. Criden, 648 F.2d 814, 818 (3d Cir. 1981) (same).

routine closing of judicial records to the public."[120] Appellate courts have admonished district court judges to "use caution in exercising [their] discretion to place records under seal,"[121] and to consider alternatives to sealing, including redaction.[122] Furthermore, as in the First Amendment context, several circuits require that judges afford the public an opportunity to object before ruling on a motion to

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[120] Miller v. Ind. Hosp., 16 F.3d 549, 551 (3d Cir. 1994); *see also id.* ("[A] party seeking to seal any part of a judicial record bears the heavy burden of showing that 'the material is the kind of information that courts will protect' and that 'disclosure will work a clearly defined and serious injury to the party seeking closure.'" (quoting Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984))).

[121] United States v. Holy Land Found. for Relief & Dev., 624 F.3d 685, 689–90 (5th Cir. 2010) (citation omitted); *see also* United States v. DeJournett, 817 F.3d 479, 485 (6th Cir. 2016) (stating discretion must "be exercised in light of the relevant facts and circumstances of the particular case" and must identify the "relevant facts and circumstances justifying non-disclosure" (internal quotation marks and citation omitted)).

[122] *See, e.g.*, United States v. Amodeo, 44 F.3d 141, 147 (2d Cir. 1995) (concluding that "it is proper for a district court, after weighing competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document"); *In re* Knight Publ'g Co., 743 F.2d 231, 235 (4th Cir. 1984) (applying common law test and overturning sealing order because "district court failed to consider alternatives to sealing the documents"); Mitze v. Saul, 968 F.3d 689, 692 (7th Cir. 2020) ("Even in cases involving substantial countervailing privacy interests . . . , courts have opted for redacting instead of sealing the order or opinion." (citation omitted)); IDT Corp. v. eBay, 709 F.3d 1220, 1225 (8th Cir. 2013) ("We remand the case for the district court to assess whether redaction of confidential business information is practicable."); Perry v. City & Cnty. of S.F., No. 10-16696, 2011 WL 2419868, at *21 (9th Cir. Apr. 27, 2011) ("For this reason, any sealing order must consider and use less restrictive alternatives that do not completely frustrate the public's First Amendment and common law rights of access." (citation omitted)); Luo v. Wang, 71 F.4th 1289, 1304 (10th Cir. 2023) (explaining that, when applying the common law right of access, "[r]edacting documents with confidential information is preferable to sealing entire documents"); Romero v. Drummond Co., 480 F.3d 1234, 1246 (11th Cir. 2007) ("In balancing the public interest in accessing court documents against a party's interest in keeping the information confidential, courts consider, among other factors, . . . the availability of a less onerous alternative to sealing the documents."); *In re* L.A. Times Commc'ns LLC, 28 F.4th 292, 297 (D.C. Cir. 2022) ("To the extent the hypothesized search warrant materials exist and any materials contain details that were not public when the district court denied L.A. Times' motion to unseal, the district court should reconsider whether sealing is still justified in view of the *Hubbard* factors or whether redaction would be an appropriate alternative.").

seal.[123] If the judge ultimately determines that sealing is justified, they must provide specific, on-the-record findings demonstrating that the interest in secrecy outweighs the public's interest in access.[124]

Failing to observe these procedural prerequisites constitutes error even if the sealing might otherwise be proper, and appellate courts generally will "remand the issue to the district court for a second consideration [that must] us[e] correct procedures and correct substantive standards."[125]

3. "Good Cause" Standard

A third standard sometimes mentioned in sealing rules arises from provisions that govern the discovery process in Rule 16 of the Federal Rules of Criminal Procedure and Rule 26 of the Federal Rules of Civil Procedure.[126] Both rules authorize courts, if there is "good cause," to issue protective orders limiting the disclosure of discovery material.[127]

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[123] *See, e.g.*, United States v. Kravetz, 706 F.3d 47, 59 (1st Cir. 2013) ("It is axiomatic that protection of the right of access suggests that the public be informed of attempted incursions on that right."); *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 475–76 (6th Cir. 1983) ("If a party moves to seal a document, or the entire court record, such a motion should be made sufficiently in advance of any hearing on or disposition of the motion to seal to afford interested members of the public an opportunity to intervene and present their views to the court." (internal marks and citations omitted)); *In re* Search Warrant for Secretarial Area Outside Off. of Gunn, 855 F.2d 569, 575 (8th Cir. 1988) ("The fact that a closure or sealing order has been entered must itself be noted on the court's docket, absent extraordinary circumstances."); Wash. Post v. Robinson, 935 F.2d 282, 288 (D.C. Cir. 1991) (requiring opportunity for objections to sealing, specific findings on the record to justify sealing, and entry on the public docket of notice of a sealed document).

[124] *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598–99 (1978).

[125] *In re* Wash. Post Co., 807 F.2d 383, 393 (4th Cir. 1986); *see also, e.g.*, United States v. Bacon, 950 F.3d 1286, 1294 (10th Cir. 2020) ("The district court also erred by failing to support its sealing decision with case-specific findings."); Danley v. Encore Cap. Grp., Inc., 680 F. App'x 394, 399 (6th Cir. 2017) (reversing district court's sealing order because it did not "set[] forth specific findings and conclusions 'which justify nondisclosure to the public'" (citation omitted)).

[126] FED. R. CRIM. P. 16(d); FED. R. CIV. P. 26(c).

[127] FED. R. CRIM. P. 16(d)(1) ("At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief."); FED. R. CIV. P. 26(c)(1) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .").

However, neither rule expressly grants a party the right to file protected records under seal.[128] In addition, both rules lack the common law's requirement that a court must find that the interests in secrecy outweigh the presumption of public access before it orders the sealing of judicial records.[129] Consequently, most courts evaluating requests to seal records covered by a protective order engage in some form of balancing between the asserted need for confidentiality and the public's right of access.[130] It is especially important that courts be required to perform this balancing because, in practice, judges often rubber stamp protective orders and allow documents to be filed under seal with little regard for the public's right of access.[131]

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[128] Rule 26(c) uses the word "sealed" twice, stating that a court may issue an order "requiring that a deposition be sealed and opened only on court order" and "requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs." FED. R. CIV. P. 26(c)(1)(F) & (c)(1)(H). Rule 26's use of the word seal, however, is not directed at the sealing of records filed with the court. *See* Goldstein, *supra* note 14, at 387–88 ("[B]y its terms the rule applies only to the issuance of protective orders during discovery."); Karla Gilbride & Jared Placitella, *Overcoming Secrecy*, TRIAL MAG., Nov. 2022, at 22 ("Motions to seal court records are subject to more exacting standards than Rule 26(c)—good cause is not sufficient."). Rule 16, on the other hand, does allow for the filing of ex parte statements under seal, but does not extend that privilege to other types of filings. *See* FED. R. CRIM. P. 16(d)(1) ("The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.").

[129] *See supra* notes 114–119 and accompanying text. Rule 16 does not define "good cause" and Rule 26 frames the analysis only in terms of shielding parties from "annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c)(1).

[130] *See, e.g.*, Chi. Trib. Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1313 (11th Cir. 2001) ("Federal courts have superimposed a balancing of interests approach for Rule 26's good cause requirement." (citation omitted)); Phillips *ex rel.* Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1213 (9th Cir. 2002) ("When a court grants a protective order for information produced during discovery, it already has determined that 'good cause' exists to protect this information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality.").

[131] *See* Gustavo Ribeiro, *[Marked Confidential]: Negative Externalities of Discovery Secrecy*, 100 DENV. L. REV. 171, 191–92 (2022) (warning that "there is a growing perception that (generally unopposed) sealing requests of material protected under Rule 26(c) are increasingly granted in a seemingly uncritical fashion"); Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1279–80 (2020) (examining one hundred stipulated protective orders in the federal courts and finding that "more than half of the entered orders failed to include a particularized

When it comes to sealing court records—as opposed to merely precluding disclosure of unfiled discovery—most federal circuits have expressly rejected reliance on the "good cause" standard, warning that it is "not sufficiently robust for assessing the public's right to access judicial records."[132] The need for a more robust standard stems from the fundamentally different roles that discovery materials and judicial records play in the litigation process. Discovery, governed by Rules 16 and 26, occurs in the pretrial phase and typically involves exchanges of information that may never be filed with the court or influence a judicial decision. Because such materials often include sensitive personal data, trade secrets, or other confidential

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showing of need"). Even if the parties agree on a protective order, the court must still make an independent determination that good cause exists for issuing the order. *See, e.g.*, City of Hartford v. Chase, 942 F.2d 130, 136 (2d Cir. 1991) ("We do not . . . give parties *carte blanche* either to seal documents related to a settlement agreement or to withhold documents they deem so 'related.' Rather, the trial court—not the parties themselves—should scrutinize every such agreement involving the sealing of court papers and [determine] what, if any, of them are to be sealed, and it is only after very careful, particularized review by the court that a Confidentiality Order may be executed.").

[132] *In re* Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 924 F.3d 662, 676 (3d Cir. 2019); *see also, e.g.*, Poliquin v. Garden Way, Inc., 989 F.2d 527, 533 (1st Cir. 1993) ("One generalization, however, is safe: the ordinary showing of good cause which is adequate to protect discovery material from disclosure cannot alone justify protecting such material after it has been introduced at trial." (emphasis omitted)); Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982) ("At the adjudication stage, however, very different considerations apply."); Springs v. Ally Fin. Inc., 684 F. App'x 336, 337–38 (4th Cir. 2017) (explaining that the "good cause" rule is "limited to the context of pretrial civil discovery" and concluding that the district court erred in not conducting the more stringent First Amendment analysis for judicial records connected with a summary judgment motion); June Med. Servs., L.L.C. v. Phillips, 22 F.4th 512, 521 (5th Cir. 2022) ("Different legal standards govern protective orders and sealing orders. Protective orders require a finding of 'good cause' by the district court . . . . Sealing judicial records and blocking public access require a 'stricter balancing test.'"); Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016) ("[T]here is a stark difference between so-called 'protective orders' entered pursuant to the discovery provisions of Federal Rule of Civil Procedure 26, on the one hand, and orders to seal court records, on the other."); Union Oil Co. of Cal. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000) ("Ever since *Continental Illinois*, we have insisted that only genuine trade secrets, or information within the scope of a requirement such as Fed. R. Crim. P. 6(e)(2) ('matters occurring before the grand jury'), may be held in long-term confidence."); *Phillips ex rel. Estates of Byrd*, 307 F.3d at 1212 (observing that even if a court finds "good cause" under Rule 26(c) to seal a document, it must still determine whether the common law right of access compels production); Helm v. Kansas, 656 F.3d 1277, 1292 (10th Cir. 2011) ("[T]he parties cannot overcome the presumption against sealing judicial records simply by pointing out that the records are subject to a protective order in the district court.").

information, courts afford parties broader latitude to shield those documents from public view.[133] Judicial records, by contrast, are documents filed with the court that form the basis for adjudicative decisions.[134] These records directly inform the court's exercise of its authority and carry a strong presumption of public access rooted in both common law and First Amendment principles.[135]

Indeed, applying the lenient "good cause" standard to records filed with a court substantially erodes the public's ability to scrutinize the judicial process.[136] As the Fifth Circuit has explained, a protective order under Rule 26 "may well be proper" during discovery when parties are merely exchanging information, "[b]ut at the adjudicative stage, when materials enter the court record, the standard for shielding records from public view is far more arduous."[137] The court went on to warn that this "conflation error—equating the standard for keeping unfiled discovery

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[133] In *Pansy v. Borough of Stroudsburg*, the Third Circuit outlined the following non-exhaustive list of factors a court should consider when deciding if "good cause" exists for a protective order: (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose; (3) whether disclosure will cause a party embarrassment; (4) whether the information is important to public health and safety; (5) whether sharing of information among litigants will promote fairness and efficiency; (6) whether the party benefiting from the confidentiality order is a public entity or official; (7) whether the issues involved are important to the public; and (8) whether a confidentiality order will promote settlement of the suit. 23 F.3d 772, 787–88 (3d Cir. 1994).

[134] *See, e.g.*, *June Med. Servs.*, 22 F.4th at 521 (describing the standard for protective orders "at the adjudicative stage" as "far more arduous," requiring courts to "undertake a document-by-document, line-by-line balancing of the public's common law right of access against the interests favoring nondisclosure").

[135] *See, e.g.*, *Phillips ex rel. Estates of Byrd*, 307 F.3d at 1212 (explaining that if a trial court finds that good cause exists, it must then determine whether there is a right to the material to be sealed under the common law right of access); *Helm*, 656 F.3d at 1292 (stating that parties seeking to overcome the presumption of public access must do more than "point[] out that the records are subject to a protective order in the district court . . . , the parties must articulate a real and substantial interest that justifies depriving the public of access to the records that inform our decision-making process").

[136] *See, e.g.*, *In re Avandia Mktg.*, 924 F.3d at 675 n.10 (stating that "[e]ven under the more lenient standard for a protective order," the party requesting the seal "must bear the burden of justifying sealing" and the trial court must complete a "document-by-document review" to determine whether sealing is proper and "articulate on the record findings to support its decision" (internal quotation marks and citations omitted)).

[137] Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 420 (5th Cir. 2021).

confidential with the standard for placing filed materials under seal—is a common one and one that over-privileges secrecy and devalues transparency."[138]

C. The Scope of the Public's Right of Access

A court's file for a single case may contain thousands of documents, ranging from motions, pleadings, and briefs to transcripts, admitted exhibits, and discovery materials filed with the court. In addition, judges and other court personnel maintain files for administrative and other non-adjudicatory purposes. Given the breadth of records held by the courts, it is neither practical nor legally required that the public have access to every document in the nation's courthouses.

To determine whether a First Amendment right of access attaches to a particular court record, courts generally apply the "experience and logic" test.[139] This two-pronged inquiry asks, first, "whether the place and process have historically been open to the press and general public" (the experience prong) and, second, "whether public access plays a significant positive role in the functioning of the particular process in question" (the logic prong).[140] If both criteria are satisfied, a qualified First Amendment right of access attaches, and any effort to deny access must satisfy strict scrutiny.[141]

As its formulation indicates, the Supreme Court developed the "experience and logic" test to assess public access to court proceedings, not court records. As a threshold standard for determining the scope of a First Amendment right of access to *court records*, the test has proven to be an awkward fit. Lower courts have struggled with its application to judicial records, resulting in confusion regarding how—and whether—the test should be adapted.[142]

Nevertheless, we can draw some guidance from the case law. *First*, the federal courts have extended a First Amendment right of access to nearly all records associated with criminal trials[143] as well as to records submitted in connection with

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[138] *Id.*

[139] *See Press-Enterprise II*, 478 U.S. 1, 9 (1986).

[140] *Id.* at 8 (citing Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 605–06 (1982)).

[141] *See Press-Enterprise I*, 464 U.S. 501, 510 (1984) (citing *Globe Newspaper Co.*, 457 U.S. at 606–07). Even if the "experience and logic" test is not satisfied, a common law right of access can still attach to the record in question. *See infra* Part I.B.2.

[142] *See* Ardia, *Court Transparency*, *supra* note 5, at 875–80.

[143] *See supra* note 83 and accompanying text.

other types of criminal proceedings, including documents accompanying pretrial proceedings,[144] venue transfer,[145] judicial disqualification,[146] conflicts of interest,[147] disqualification of defense counsel,[148] and plea and sentencing hearings.[149]

The case law concerning access to records in civil proceedings is more varied. In evaluating whether the First Amendment right of access attaches to a particular record, courts generally focus on whether the record "play[s] a role in the adjudicative process, or adjudicate[s] substantive rights."[150] Importantly, a record need

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[144] *See, e.g.*, *In re* Globe Newspaper Co., 729 F.2d 47, 52 (1st Cir. 1984) (documents in pretrial bail proceedings); *In re* N.Y. Times Co., 828 F.2d 110, 114 (2d Cir. 1987) (documents in suppression hearings); United States v. Smith, 776 F.2d 1104, 1111 (3d Cir. 1985) (bills of particular); Associated Press v. U.S. Dist. Ct. for Cent. Dist. of Cal., 705 F.2d 1143, 1145 (9th Cir. 1983) (documents in suppression hearings); Seattle Times Co. v. U.S. Dist. Ct. for W. Dist. of Wash., 845 F.2d 1513, 1517 (9th Cir. 1988) (documents in pre-trial detention proceedings); United States v. McVeigh, 119 F.3d 806, 813 (10th Cir. 1997) (documents in suppression hearings); United States v. Anderson, 799 F.2d 1438, 1441–42 (11th Cir. 1986) (indictments).

[145] *See In re* Charlotte Observer, 882 F.2d. 850, 852 (4th Cir. 1989).

[146] *See, e.g.*, *In re* Storer Commc'ns, Inc., 828 F.2d 330, 336 (6th Cir. 1987); *In re* Nat'l Broad. Co., Inc., 828 F.2d 340, 343–44 (6th Cir. 1987).

[147] *See, e.g.*, *In re Nat'l Broad. Co.*, 828 F.2d at 345.

[148] *See, e.g.*, United States v. Castellano, 610 F. Supp. 1151, 1167–68 (S.D.N.Y. 1985).

[149] *See, e.g.*, United States v. Kravetz, 706 F.3d 47, 55, n.6 (1st Cir. 2013) ("The courts of appeals have recognized a right of access to various pre-trial proceedings and the documents filed in regard to them, including, for example, suppression, due process, entrapment, and plea hearings." (citation omitted)); Wash. Post v. Robinson, 935 F.2d 282, 288 (D.C. Cir. 1991) ("In accord with the rulings of our sister Second, Fourth, and Ninth Circuits, we now find that plea agreements have traditionally been open to the public, and public access to them 'enhances both the basic fairness of the criminal proceeding and the appearance of fairness so essential to public confidence in the system.' Therefore, there is a [F]irst [A]mendment right of access to them." (citation omitted)).

[150] *In re* U.S. for an Ord. Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283, 290 (4th Cir. 2013); *see also* FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 412–13 (1st Cir. 1987) ("The presumption that the public has a right to see and copy judicial records attaches to those documents which properly come before the court in the course of an adjudicatory proceeding and which are relevant to the adjudication."); Newsday LLC v. Cnty. of Nassau, 730 F.3d 156, 164 (2d Cir. 2013) ("[W]e have held that the First Amendment right applies, among other things, to summary judgment motions and documents relied upon in adjudicating them, pretrial motions and written documents submitted in connection with them, and docket sheets." (citations omitted)). The settlement of a case prior to final adjudication on the merits does not alter the status of filings as judicial records

not be connected to a motion to dismiss or summary judgment to satisfy this standard.[151] Judicial records can be germane to the adjudicative process even when they are associated with non-dispositive motions.[152]

Second, even when a First Amendment right of access does not attach to a particular record, a common law right of access may still apply—so long as the record has been "filed with the court, or otherwise somehow incorporated or integrated

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or eliminate the public's right of access to them. *See* Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 140 (2d Cir. 2016).

[151] *See, e.g.*, Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 164 (3d Cir. 1993) ("We believe that our earlier decisions and those in other courts lead ineluctably to the conclusion that there is a presumptive right of public access to pretrial motions of a nondiscovery nature, whether preliminary or dispositive, and the material filed in connection therewith."); Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 253 (4th Cir. 1988) (finding that public has First Amendment right of access to summary judgment motions and accompanying exhibits); *In re* Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1309 (7th Cir. 1984) (finding First Amendment right of access attaches to documents associated with motion to terminate derivative action); Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1098 (9th Cir. 2016) (refusing to limit the First Amendment right of access only to those motions that are "literally dispositive"); Romero v. Drummond Co., 480 F.3d 1234, 1245 (11th Cir. 2007) ("There is a presumptive right of public access to pretrial motions of a nondiscovery nature, whether preliminary or dispositive, and the material filed in connection therewith.").

[152] In *Center for Auto Safety v. Chrysler Group, LLC*, the Ninth Circuit cautioned against limiting public access only to records attached to dispositive motions. The court explained that such a narrow approach would exclude access to records associated with motions that, while technically non-dispositive, nonetheless go "to the heart of a case," including motions for preliminary injunctions and motions in limine. 809 F.3d at 1098. The court emphasized:

> Most litigation in a case is not literally "dispositive," but nevertheless involves important issues and information to which our case law demands the public should have access. To only apply the compelling reasons test to the narrow category of "dispositive motions" goes against the long held interest "in ensuring the public's understanding of the judicial process and of significant public events." Such a reading also contradicts our precedent, which presumes that the "'compelling reasons' standard applies to *most* judicial records."

Id. (emphasis in original) (first quoting Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1179 (9th Cir. 2006); and then quoting Pintos v. Pac. Creditors Ass'n, 605 F.3d 665, 677–78 (9th Cir. 2009)).

into a district court's adjudicatory proceedings."[153] This encompasses a wider range of materials than are covered by a First Amendment right of access, potentially embracing "everything in the record, including items not admitted into evidence."[154] As courts have repeatedly emphasized, "the common law presumes a right to access *all* judicial records and documents."[155]

Third, there exist a few categories of court records to which neither the First Amendment nor the common law affords a right of public access. Chief among these are documents exchanged between parties during the discovery process that are never filed with the court. The presumption of public access generally does not extend to unfiled discovery materials.[156] Although case law on this point is limited

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[153] United States v. Wecht, 484 F.3d 194, 208 (3d Cir. 2007) (quoting *In re* Cendant Corp., 260 F.3d 183, 192 (3d Cir. 2001)); *see also, e.g.*, *Standard Fin. Mgmt. Corp.*, 830 F.2d at 408; *In re U.S. for an Ord. Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d at 290; *In re* Pratt, 511 F.3d 483, 485 (5th Cir. 2007); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177 (6th Cir. 1983); Newman v. Graddick, 696 F.2d 796, 801–03 (11th Cir. 1983); Wash. Legal Found. v. U.S. Sentencing Comm'n, 89 F.3d 897, 902 (D.C. Cir. 1996). In fact, several circuits apply both a First Amendment right of access and a common law right of access depending on whether the record at issue has historically been made available to the public. *See* Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 120 (2d Cir. 2006); Va. Dep't of State Police v. Wash. Post, 386 F.3d 567, 576 (4th Cir. 2004).

[154] Smith v. U.S. Dist. Ct. for S. Dist. of Ill., 956 F.2d 647, 650 (7th Cir. 1992) (rejecting argument that "only items of evidence are subject to the common law right of access" and noting that the cases "speak of judicial records, not items in evidence" and that "judicial records include transcripts of proceedings, everything in the record, including items not admitted into evidence"); *see also* United States v. Martin, 746 F.2d 964, 968 (3d Cir. 1984) ("The common law right of access is not limited to evidence, but rather encompasses 'all judicial records and documents' . . . . It includes 'transcripts, evidence, pleadings, and other materials submitted by litigants.'" (citations omitted)); *In re* Morning Song Bird Food Litig., 831 F.3d 765, 777–78 (6th Cir. 2016) ("A common law right of access generally applies to all public records and documents, including judicial records and documents." (citation omitted)).

[155] *In re U.S. for an Ord. Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d at 290 (emphasis in original).

[156] *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) ("[P]retrial depositions and interrogatories are not public components of a civil trial . . . and, in general, they are conducted in private as a matter of modern practice."); *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 355 (11th Cir. 1987) (stating newspaper "possess[ed] no First Amendment rights to the protected information which override the provisions of Fed. R. Civ. P. 26(c)" because "[t]he discovery process, as a 'matter of legislative grace,' is a statutorily created forum not traditionally open to the public" (quoting

in the criminal context, the Supreme Court has addressed the issue in terms of civil litigation. In *Seattle Times Co. v. Rhinehart*,[157] the Court held that "pretrial depositions and interrogatories are not public components of a civil trial."[158] The Court explained that "[s]uch proceedings were not open to the public at common law," and that, "in general, they are conducted in private as a matter of modern practice."[159]

However, once discovery materials are filed with the court and become part of the judicial record—particularly when they are submitted in connection with motions or hearings relevant to the adjudication of the case—First Amendment and common law rights of access can attach to the records.[160] Confidentiality designations, such as those imposed by protective orders, do not override this presumption; indeed, a leading treatise cautions that materials designated as confidential

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Seattle Times Co., 467 U.S. at 32)). However, the Sixth Circuit has ruled that a protective order was invalid because it prevented a party from sharing opioid data with the public and press, even though the party had obtained this data from the federal government through discovery under the order. *In re* Nat'l Prescription Opiate Litig., 927 F.3d 919, 938 (6th Cir. 2019).

[157] 467 U.S. 20.

[158] *Id.* at 33.

[159] *Id.* Some scholars argue that there should be a requirement to file discovery materials with the court. *See, e.g.*, Ribeiro, *supra* note 131, at 219–21.

[160] *See, e.g.*, Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 165 (3d Cir. 1993) ("[T]here is a presumptive right to public access to all material filed in connection with nondiscovery pretrial motions, whether these motions are case dispositive or not, but no such right as to discovery motions and their supporting documents."); Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016) ("The line between these two stages, discovery and adjudicative, is crossed when the parties place material in the court record."). As to motions regarding discovery itself, the First Circuit has concluded that "no right of access attaches to civil discovery motions themselves or materials filed with them." United States v. Kravetz, 706 F.3d 47, 55 (1st Cir. 2013). Some circuits have held that materials filed only in connection with discovery motions are not subject to a presumptive right of public access. *See, e.g.*, Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986) ("[T]here is no presumptive first amendment public right of access to documents submitted to a court in connection with discovery motions. Instead, the same good cause standard is to be applied that must be met for protective orders in general."); *Leucadia*, 998 F.2d at 165 (holding that common law right of access does not attach to material filed with discovery motions); Phillips *ex rel.* Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1213 (9th Cir. 2002) (applying "good cause" standard to documents attached to nondispositive sanctions motion).

"will lose confidential status (absent a showing of 'most compelling' reasons) if introduced at trial or filed in connection with a motion for summary judgment."[161]

Other categories of records can fall outside the scope of public access because they have long been shielded from disclosure for compelling policy reasons.[162] For instance, courts consistently uphold the confidentiality of materials related to grand jury proceedings, recognizing that secrecy is essential to the proper functioning of the grand jury.[163] Reflecting this tradition, the Federal Rules of Criminal Procedure provide that records of grand jury proceedings must remain confidential "to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury."[164]

II. Local Rules on Sealing in the Federal Courts

This Part examines how federal district courts implement sealing procedures through their local rules. It includes all local civil and criminal rules in effect as of

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[161] Fed. Jud. Ctr., Manual for Complex Litig. § 11.432 (4th ed. 2004).

[162] *See* Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006) ("A narrow range of documents is not subject to the right of public access at all because the records have 'traditionally been kept secret for important policy reasons.'" (quoting Times Mirror Co. v. United States, 873 F.2d 1210, 1219 (9th Cir. 1989))).

[163] *See, e.g.*, United States v. Index Newspapers LLC, 766 F.3d 1072, 1084 (9th Cir. 2014) ("Because the grand jury is an integral part of the criminal investigatory process, these proceedings are always held in secret." (citation omitted)). The public does have a right of access to the "ministerial records" of a grand jury, which "generally relate to the procedural aspects of the empanelling and operation of the . . . Grand Jury, as opposed to records which relate to the substance of the . . . Grand Jury's investigation." *In re* Special Grand Jury, 674 F.2d 778, 779 n.1, 780 (9th Cir. 1982).

[164] Fed. R. Crim. P. 6(e)(6). In determining whether to permit disclosure of grand jury testimony under Rule 6(e), the Second Circuit applies the Supreme Court's balancing framework established in *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979). Under this test, parties seeking grand jury transcripts must demonstrate three elements: (1) the material is needed to avoid a possible injustice in another judicial proceeding; (2) the need for disclosure outweighs the interest in continued grand jury secrecy; and (3) the request is narrowly tailored to cover only the materials genuinely required. *In re* Petition of Craig, 131 F.3d 99, 104 (2d Cir. 1997) (citing *Douglas Oil Co.*, 441 U.S. at 223). The federal circuits are split on whether judges have inherent authority to disclose historic grand jury records. *Compare* McKeever v. Barr, 920 F.3d 842, 844 (D.C. Cir. 2019) (finding that courts lack such inherent authority), *and* Pitch v. United States, 953 F.3d 1226, 1241 (11th Cir. 2020) (en banc) (same), *with* Carlson v. United States, 837 F.3d 753, 767–77 (7th Cir. 2016) (recognizing courts' authority to release grand jury records), *and In re* Petition of Craig, 131 F.3d at 106 (same).

January 1, 2025, across all ninety-four federal districts.[165] The analysis of more than seven hundred rules reveals significant variation in sealing practices nationwide. These differences appear both in procedural requirements and in the substantive standards—or frequent lack thereof—used to justify restrictions on public access to court records.

The sections that follow begin with a general overview of sealing-related provisions in the local rules of federal district courts. The discussion then turns to a detailed examination of the procedural and substantive standards that districts include in their civil and criminal rules. The final section compares each district's local rules with the sealing law of its regional circuit.[166]

A. Overview of Sealing Rules

Most federal districts have multiple provisions in their local rules addressing the sealing of court records. A small number of districts, however, have no local rules on sealing at all.[167] In several of these districts, including the Eastern and Southern Districts of New York, individual judges have adopted personal rules on sealing,[168] and some judges and districts have standing orders governing sealing.[169]

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[165] There is no central repository of local rules and each district's rules must be found on the district's website. I reviewed the table of contents for every district's local civil, criminal, and general rules and searched for the following terms in the full text of the rules: Classified, Confidential, Disclose, Disclosure, Impound, Personal Identifier, Privacy, Private, Privileged, Redact, Restrict Access, Restrict Public Access, Restricted, Seal, Secret, and Sensitive. This study did not examine local bankruptcy rules, admiralty rules, patent rules, or attorney disciplinary rules.

[166] I did not examine sealing law in the Federal Circuit. When an appeal does not involve substantive issues of patent law, the Federal Circuit applies the law of the regional circuit in which the district court sits. *See In re* TS Tech USA Corp., 551 F.3d 1315, 1319 (Fed. Cir. 2008). This includes the law on sealing. *See, e.g.*, Apple Inc. v. Samsung Elecs. Co., 727 F.3d 1214, 1220–21 (Fed. Cir. 2013) (stating that it is applying Ninth Circuit law in reviewing the district court's order sealing judicial records).

[167] *See infra* Table 1.

[168] *See, e.g.*, JUDGE SANKET J. BULSARA, E.D.N.Y. INDIVIDUAL PRACTICES FOR CIVIL AND CRIMINAL CASES 3 (2025), https://perma.cc/WR93-FJRE (setting forth the procedures for sealed or redacted filings); JUDGE VINCENT L. BRICCETTI, S.D.N.Y., INDIVIDUAL PRACTICES 5–7 (2024), https://perma.cc/ZQ3U-MSKF (same). I did not include individual judges' rules in the corpus of rules in this study.

[169] *See, e.g.*, M.D. LA. GEN. ORD. 2024-1 ("Amended Procedures for Filing, Service and Management of Highly Sensitive Documents"); E.D. ARK. GEN. ORD. 22 ("In re Search and Seizure Warrants").

This first phase of this project does not include a review of individual judges' rules or standing orders.[170] Because a district's local rules are the primary source of guidance for attorneys practicing before federal district courts,[171] the focus of this study is on district-level rules.[172]

This study also did not examine circuit court rules and operating procedures on sealing. Like federal district courts, each federal court of appeals has formal rules that govern practice before the circuit.[173] To the extent that circuit rules cover sealing—and many do[174]—they only apply to records filed with or transmitted to the circuit. They do not dictate sealing practices in district courts.

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[170] I intend to examine sealing provisions in standing orders and court policy manuals in the future. Extracting sealing requirements from standing orders can be extremely difficult; courts often have dozens if not hundreds of standing orders, the orders typically do not have descriptive titles, and most districts do not provide an index of their standing orders. This makes finding relevant sealing provisions challenging for researchers—and more importantly, for litigants. *See* COMM. ON RULES OF PRAC. & PROC. OF THE JUD. CONF. OF THE U.S., REPORT AND RECOMMENDED GUIDELINES ON STANDING ORDERS IN DISTRICT AND BANKRUPTCY COURTS 1 (2009), https://perma.cc/JR3B-4BA2 (identifying problems raised by standing orders, including the lack of public comment, difficulty in finding and retrieving them, and the significant variation within the same district and division).

The Committee on Rules of Practice and Procedure notes that "judges and lawyers have been concerned about the proliferation of 'standing orders,' 'administrative orders,' and 'general orders' in the federal district courts," and recommends that rules on sealing should not be included in such orders. *Id.* Moreover, the Committee concluded that "[i]ssues relating to such matters as filing pleadings and motions, litigating motions, and developing criteria for sealing documents[] are so important to the practicing bar that notice and public comment are essential." *Id.* at 3.

[171] *See* 12 BENDER'S FEDERAL PRACTICE FORMS (2025) ("[L]ocal rules may and frequently do cover virtually all aspects of federal practice. . . . Litigants and attorneys ignore local rules at their peril.").

[172] Most districts have separate local civil and criminal rules that govern the sealing of records in civil and criminal cases respectively, while a few districts have general or "comprehensive" rules that govern all case types in the district. These general rules were included in this study as well.

[173] *See, e.g.*, 2D CIR. L.R. 1.1 (describing the scope and organization of the circuit's local rules and internal operating procedures).

[174] *See, e.g.*, 7TH CIR. OP. PROCS. 10(a)–(b) ("Except to the extent portions of the record are required to be sealed by statute (*e.g.*, 18 U.S.C. §3509(d)) or a rule of procedure (*e.g.*, FED. R. CRIM. P. 6(e), Circuit Rule 26.1(b)), every document filed in or by this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be

Table 1: Federal Districts Without Local Rules on Sealing

No Civil Sealing Rules	No Criminal Sealing Rules	No Civil & Criminal Rules
Louisiana M.D.	Delaware	Alabama N.D.
Louisiana W.D.	Florida M.D.	Arkansas E.D.
New Mexico		Arkansas W.D.
		New York E.D.
		New York S.D.
		Washington E.D.
		Wisconsin W.D.

Table 1 lists the twelve districts that do not have any local civil or criminal rules on sealing. This leaves eighty-two federal districts with at least one local rule related to sealing in civil or criminal cases. The scope of these rules varies significantly. Some rules apply to specific kinds of records, such as search warrants, while others provide authority to seal records regardless of their type or content.[175] Table 2 lists the most common categories of sealing provisions in local civil and criminal rules.

sealed. . . . Documents sealed in the district court will be maintained under seal in this court for 14 days, to afford time to request the approval required by section (a) of this procedure.").

[175] *See, e.g.*, N.D. OKLA. L. CRIM. R. 32.1-1 ("The Clerk of Court should file under seal any petition and order for warrant or summons for a violation of pretrial release, probation, or post-conviction supervised release and shall seal the subsequent warrant or summons issued."); W.D. OKLA. L. CIV. R. 5.2.2 ("Leave of court is required to file a document or a portion of a document under seal, which shall be requested by filing a motion and submitting a proposed order granting the relief.").

Table 2: Most Common Categories of Sealing Provisions

Civil Cases	Freq	%	Criminal Cases	Freq	%
General Sealing	80	31%	Sentencing	94	26%
Personal Identifiers	28	11%	General Sealing	58	16%
Transcripts	21	8%	Grand Jury	28	8%
Authorized by Law	15	6%	Multiple Sealing Provisions	26	7%
Sealed Cases	12	5%	Warrants	22	6%
Jurors	11	4%	Personal Identifiers	20	6%
Multiple Sealing Provisions	10	4%	Transcripts	16	4%
Settlement	9	4%	Jurors	11	3%
Financial	7	3%	Pretrial Services	11	3%
Unsealing	7	3%	Plea Agreements	8	2%
Ex Parte	5	2%	Subpoenas	8	2%
Trial Exhibits	5	2%	Appointed Counsel	5	1%
In Camera	4	2%	Arrest	5	1%
Pseudonym	4	2%	Authorized by Law	5	1%
Attorneys	3	1%	Indictment	5	1%
Other	34	13%	Other	37	10%
Total	255	100%	Total	359	100%

As Table 2 shows, the most common category of sealing provisions in civil rules is "General Sealing," a designation for provisions that permit a party to request sealing regardless of the specific type of record or information involved.[176] The next most frequent category in civil rules is "Personal Identifiers," which covers rules requiring or permitting the sealing of records containing unredacted personal information, such as names of minor children, dates of birth, Social Security numbers, taxpayer identification numbers, financial account numbers, and home

[176] *See, e.g.*, E.D. WIS. L.R. 79(d)(1) ("The Court will consider any document or material filed with the Court to be public unless, at the time of filing, it is accompanied by a separate motion requesting that: access to the document be restricted to the Court and counsel for the parties; or that the document or material, or portions thereof, be sealed by the Court.").

addresses.[177] Rules relating to the sealing of transcripts, including transcripts of sidebar conferences, are also common in civil rules,[178] as are provisions that records can be sealed if already specifically "authorized by law," such as by statutes that permit or require the filing of certain records under seal.[179]

In criminal rules, "Sentencing" is the most frequent sealing category, covering provisions relating to presentence reports, sentencing memoranda, and other sentencing documents; most local rules specify that these records are subject to automatic sealing.[180] Rules requiring the sealing of records relating to grand jury proceedings are also common in criminal rules.[181] The "Multiple Sealing Provisions"

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[177] *See, e.g.*, N.D.N.Y. L. CIV. R. 5.2(b)(1) (allowing for the filing of unredacted documents with Social Security numbers, taxpayer identification numbers, names of minor children, dates of birth, financial account numbers, home addresses, and names of sexual assault victims under seal).

[178] *See, e.g.*, C.D. ILL. L. CRIM. R. 49.12(C) ("If any material should be redacted from a transcript, a party must file a Notice of Intent to Request Redaction within 7 days of the filing of the transcript.").

[179] *See, e.g.*, D. NEB. L. CIV. R. 7.5(a)(1) ("A motion to seal is not required if the document or object is . . . included within a category of documents or objects considered sealed under a federal statute or rule of procedure, local rule, or standing order of this court."). There are a number of statutes that either require or authorize the filing of records—and in some situations, entire cases—under seal. *See, e.g.*, False Claims Act § 3730(b)(2), 31 U.S.C. § 3730(b)(2) (requiring filing of complaint under seal); Classified Information Procedures Act § 6(d), 18 U.S.C. app. § 6(d) (requiring in camera hearing and sealing of certain classified information).

However, even in those instances when a statute authorizes or requires sealing, a district court's local rules should provide clear procedures for filing the document under seal. *See, e.g.*, N.D. MISS. CIV. R. 79(e)(1) ("A party submitting a document or portion of a document for filing under seal under a governing statute, rule, or order must note on the face of the document that it or a portion of it is filed under seal under that statute, rule, or order (specifying the statute(s), rule(s) or order(s) relied upon). The clerk will provide public notice by stating on the docket that the document contains sealed material.").

[180] *See, e.g.*, S.D. ALA. L. CRIM. R. 32(b)(6) ("The Probation Office shall file under seal the PSR, including guideline computations, an addendum indicating any unresolved factual disputes or objections by the parties with respect to the application of the guidelines or alleged inaccuracies in the PSR, and the sentencing recommendation.").

[181] *See, e.g.*, E.D. PA. L. CRIM. R. 6.1(c)(4) ("[A]ll motions, affidavits or other papers relative to legal proceedings relating to grand jury investigations shall be automatically impounded, i.e. filed under seal, by the Clerk of Court.").

category, which appears in both civil and criminal rules, identifies rules that include more than one type of record or information subject to mandatory sealing.[182]

Many other frequently occurring categories in Table 2, such as "Sealed Cases," "Jurors," "Warrants," "Pretrial Services," and "Financial," pertain to rule provisions that automatically seal specific information and records in civil or criminal cases.[183] As Table 2 suggests, there are more sealing provisions in criminal rules than in civil rules. This disparity is due to the significant number of information and record categories that are subject to automatic sealing in criminal cases either by statute or long-standing practice, including grand jury records, arrest warrants, wiretaps, subpoenas, pretrial services reports, and plea agreements.[184]

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[182] *See, e.g.*, W.D. VA. L. GEN. R. 9(c)(1) ("No motion or order is required to file the following under seal: a. An unredacted version of a pleading, paper, exhibit, a reference list or other document containing personal data identifiers in compliance with these rules, the federal rules of procedure, or the E-Government Act; b. An ex parte motion or application where sealing is permitted or required by law; c. Presentence investigation reports, pretrial services reports, psychiatric or psychological evaluations in criminal cases, including documents incorporating the content of the foregoing documents; d. Affidavits submitted in support of a motion for in forma pauperis status; e. Motions, orders, notices, and other matters occurring before the grand jury . . . ; f. Applications and orders for the disclosure of tax information; g. Motions and orders involving the Classified Information Procedures Act or Foreign Intelligence Surveillance Act; h. Pleadings and documents involving the Juvenile Delinquency Act; i. Requests and orders for authorization of investigative, expert, or other services pursuant to the Criminal Justice Act; j. Other documents required by law to be filed under seal." (internal citations omitted)).

[183] *See, e.g.*, D. MONT. L. CIV. R. 3.1(f) ("When a party files a civil action authorized to be initiated under seal, such as a qui tam action, the title of the pleading must include the phrase 'TO BE FILED UNDER SEAL' . . . . The case will be filed and conducted under seal without further leave of court unless the presiding judge orders otherwise."); S.D. W. VA. L. CRIM. R. 24.1(d) ("Juror questionnaires will be electronically filed under restricted access to only counsel and court personnel . . . ."); N.D. OKLA. L. CRIM. R. 32.1-1 ("The Clerk of Court should file under seal any petition and order for warrant or summons for a violation of pretrial release, probation, or post-conviction supervised release and shall seal the subsequent warrant or summons issued."); D. VT. L. CRIM. R. 57.2(b) ("Pretrial service records are confidential court records."); D. MINN. L.R. 67.2(b)(1) ("A party seeking to withdraw money from the court registry must file . . . a Withdrawal Payee Information form (under seal).").

[184] *See* Ardia, *Privacy and Court Records*, *supra* note 4, at 1429–39 (describing the use and problems associated with the categorical sealing of court records).

B. General Rules Addressing the Sealing of Court Records

General sealing rules—that is, rules that do not designate a specific category of records or information that may be sealed—typically outline the basic procedures and legal standards for sealing court records. Accordingly, the following analysis focuses on these provisions.

1. Initiating the sealing process

Seventy-five federal districts have adopted general sealing rules in civil cases, and fifty-five have done so in criminal cases. In the overwhelming majority of these districts—approximately 95%—the rules require a party to file a motion before the court will consider restricting public access to a court record.[185] However, a handful of districts do not explicitly impose this requirement.[186] For example, the Southern District of California's local civil rule merely instructs parties to submit a sealing order along with the sealed documents, without requiring a motion or any supporting briefing to justify the sealing.[187] Even more concerning, the rule allows parties to designate that the sealing order itself be placed under seal, again without any required justification: "Documents that are to be filed under seal must be accompanied by an order sealing them. If the order is also to be filed under seal, it must so state."[188]

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[185] *See infra* Chart 1.

[186] The following local rules do not explicitly require a party to file a motion to seal before the court will allow a document to be sealed: D. ARIZ. L. CRIM. R. 57.2; S.D. CAL. L. CIV. R. 79.2; D. DEL. L. CIV. R. 5.1.3; D. NEB. L. CIV. R. 7.5; D. NEB. L. CRIM. R. 12.5; E.D. PA. L. CIV. R. 5.1.5; W.D. TENN. L.R. app. A.

[187] S.D. CAL. L. CIV. R. 79.2(c).

[188] *Id.* The rule, which is the only general sealing rule in the district's local civil rules, states in its entirety:

> a. Files, Custody, and Withdrawal. All files of the Court must remain in the custody of the Clerk and no record or paper belonging to the files of the Court will be taken from the custody of the Clerk without special order of a judge and a proper receipt signed by the person obtaining the record or paper. No such order will be made except in extraordinary circumstances.
>
> b. Sealed Documents. Documents filed under seal in civil actions will be returned to the party submitting them upon entry of the final judgment or termination of the appeal, if any, unless otherwise ordered by the Court.

While most districts require a party to file a motion before the court will consider restricting public access, they are much less consistent in stating in their sealing rules that the public has a presumptive right of access to records filed with the court. Only a little over half of the districts with general sealing rules expressly acknowledge the public's right to inspect court records in their rules.[189] This is surprising given that all of the federal circuits have held that judicial records are subject to a common law presumption of public access.[190] The picture is more encouraging in civil rules as compared to criminal rules: Of the seventy-five districts with general sealing civil rules, forty include an express recognition of the presumption of public access, though thirty-five do not.[191] In contrast, fewer than half of the fifty-five districts with general sealing rules in criminal cases include such a provision: Twenty-six recognize the presumption, while twenty-nine are silent on it.[192]

In addition to recognizing a presumptive right of access to court records, most federal circuits have also held that the public should be given notice of a request to seal records, typically through public docketing of a motion to seal or by other comparable means.[193] However, public notification of a sealing request is explicitly mentioned in only 44% of federal district courts' general sealing rules.[194] Among

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c. Sealing Orders. Documents that are to be filed under seal must be accompanied by an order sealing them. If the order is also to be filed under seal, it must so state.

Id. at 79.2.

[189] Forty-three of the seventy-seven districts (56%) with general sealing rules include a presumption of public access in either their civil or criminal rules. However, the percentage of all federal districts (those with and without general sealing rules) that include a presumption of access in their local rules is much lower: Only forty-three of all ninety-four districts (46%) include a presumption of public access in their rules. *See infra* Chart 1.

[190] *See supra* notes 153–155 and accompanying text.

[191] *See infra* Chart 1.

[192] *Id.*

[193] *See supra* notes 98–99 & 123 and accompanying text.

[194] *See infra* Chart 1. Thirty-three districts state in their general sealing civil rules that the public must be notified of a request to seal and twenty-two districts do so in their criminal rules. *Id.* However, districts that do not explicitly state in their general sealing rules that the public will be given notice of a request to seal may still require public docketing of a motion to seal under their standard motions practice. If this is so, public notice should be restated in the rules governing sealing to ensure that the required notice actually occurs, given that sealing orders themselves are sometimes filed under seal. *See infra* Part III.C.

those districts that require public notice, some state that the motion to seal must be filed and made publicly available in the court's electronic filing system ("ECF").[195] Other districts go further by mandating more detailed procedures designed to ensure that interested parties have a meaningful opportunity to object before any sealing is granted.[196] For instance, the Western District of Virginia requires a party requesting sealing to file an "unsealed written motion," which must include "a generic, non-confidential identification of the document to be sealed"; "the bases upon which the party seeks the order, including the reasons why alternatives to sealing are inadequate"; and "the duration for which sealing is requested."[197] The rule also requires that "[a] motion to seal and any order to seal must be docketed according to the administrative procedures of the Court,"[198] ensuring public awareness of both the request to seal and the purported justification for sealing.

Finally, courts must also consider whether alternatives to sealing can adequately protect the asserted interests in secrecy.[199] A motion to seal should rarely succeed if less restrictive means are available. Despite this requirement, fewer than half of the districts with general sealing rules require that a party requesting sealing

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[195] *See, e.g.*, N.D.N.Y. L. CIV. R. 5.3(a) ("The application to seal shall be filed on ECF. The party should also attach to the application or file separately a redacted version of any document that is to contain the sealed material (unless the party seeks to seal the entire document).").

[196] *See, e.g.*, W.D.N.C. L. CIV. R. 6.1(e) ("No motion to seal or otherwise restrict public access shall be determined without reasonable public notice. Notice is deemed reasonable where a motion is filed in accordance with LCvR 6.1(c). Other parties, intervenors, and non-parties may file objections and briefs opposing or supporting the motion within the time provided by LCvR 7.1 and may move to intervene under Fed. R. Civ. P. 24."). Some districts state in their rules that the court will not rule on a motion to seal until a certain period of time has passed. *See, e.g.*, D. MD. L. CIV. R. 105(11) ("The Court will not rule upon the motion [to seal] until at least fourteen (14) days after it is entered on the public docket to permit the filing of objections by interested parties.").

[197] W.D. VA. L. GEN. R. 9(b)(2).

[198] *Id.* 9(b)(3).

[199] Where the public's right of access stems from the First Amendment, the requirement that a court find there are no less-restrictive alternatives to sealing is part of the established strict scrutiny test. *See supra* notes 91–93 and accompanying text. With regard to the common law right of access, most circuits require the consideration of reasonable alternatives to sealing as part of the balancing of interests. *See supra* notes 120–124 and accompanying text.

explain why no reasonable alternatives to sealing exist.[200] Many that do impose this requirement state that a motion to seal must address the feasibility of redacting sensitive information from the records before filing.[201] The Western District of Washington, for example, requires that a party "explore all alternatives to filing a document under seal."[202] The rule further provides that if sealing is requested because a document has been designated as confidential by another party, the parties must "meet and confer to determine whether the designating party will withdraw the confidential designation or will agree to redact the document so that sealing is unnecessary."[203]

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[200] *See infra* Chart 1. Twenty-nine districts state in their general sealing civil rules that a party requesting sealing must demonstrate that no reasonable alternative to sealing exists and seventeen districts impose this requirement in their criminal rules. *Id.*

[201] *See, e.g.*, S.D. IND. L. CIV. R. 5-11(e) ("A Brief in Support [of motion to seal] must include: (1) identification of each specific document or portion(s) thereof that the party contends should remain under seal; (2) the reasons demonstrating good cause to maintain the document, or portion(s) thereof, under seal including: (A) why less restrictive alternatives to sealing, such as redaction, will not afford adequate protection; (B) how the document satisfies applicable authority to maintain it under seal; and (C) why the document should be kept sealed from the public despite its relevance or materiality to resolution of the matter.").

[202] W.D. WASH. L. CIV. R. 5(g)(1).

[203] *Id.*

Chart 1: Sealing Initiation Requirements in General Sealing Rules

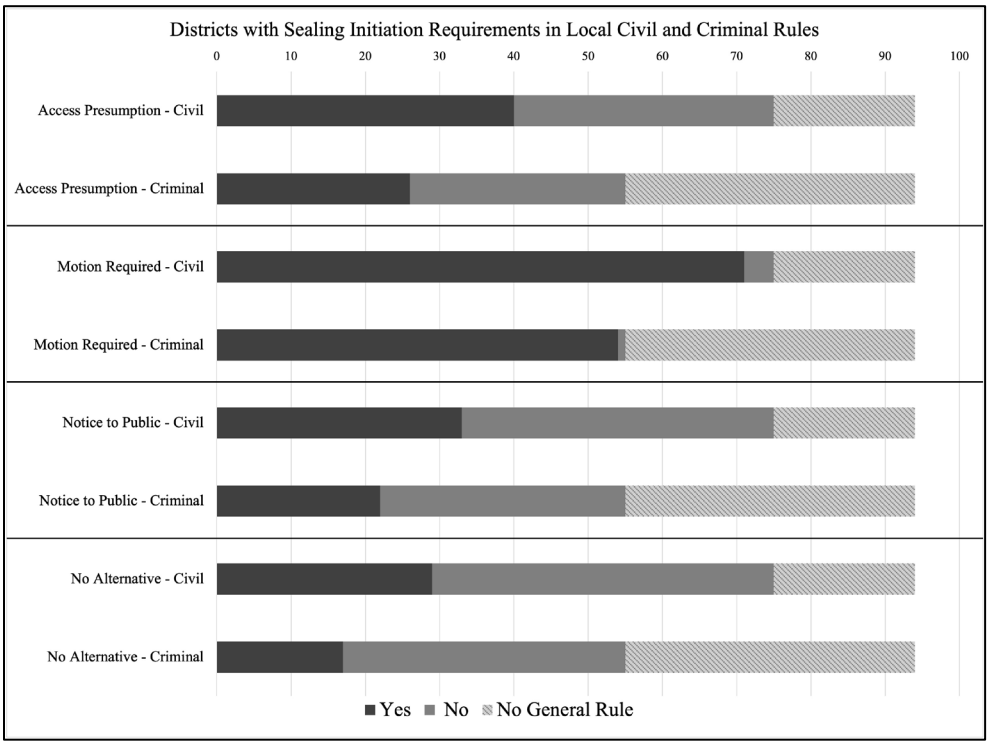

Chart 1 summarizes the sealing initiation requirements in the local rules of federal district courts. It reveals a worrying absence of basic procedural protections in general sealing rules, especially in criminal cases. Many districts lack general sealing rules and even those that have them can bolster their rules to ensure that the proper procedures regarding sealing are followed in civil and criminal cases. Strengthening local rules to include key procedural protections—such as affirming the public's right of access, mandating public notice, demanding a clear justification for sealing, and requiring explicit consideration of less restrictive alternatives—is essential to protecting the public's right of access and ensuring judicial accountability in sealing decisions.[204]

2. Applying the standards for sealing

Once a request to seal has been initiated, the court must decide whether the material at issue should indeed be sealed. This involves a three-step process. First, the court must determine whether the document qualifies as a "judicial record"—that is, whether it is subject to a presumptive right of public access. Second, the

[204] *See infra* Part III.C.

court must identify and apply the appropriate legal standard for sealing, which turns on whether the record implicates a right of access under the First Amendment or common law. Third, if the court concludes that sealing is warranted, it must provide specific, on-the-record findings justifying its sealing decision.

Most general sealing rules do not define which records are subject to a right of public access.[205] Those that do typically use sweeping language—such as "all documents filed in district court,"[206] "all pleadings and other papers of any nature filed with the Court,"[207] and "any pleading, motion, paper, physical item, or other submission that the Federal Rules of Civil Procedure or these rules permit or require to be filed."[208] Only a small number of districts (four out of ninety-four) take a narrower approach, applying their sealing procedures only to materials "used in the adjudication or other resolution of a claim or defense."[209] Even under this narrower definition, the district's sealing requirements extend to almost all documents filed with the court.

There is far more variation when it comes to the substantive standards for sealing in local rules. Some districts, for example, explicitly incorporate the First Amendment or the common law right of access in their rules.[210] Most districts, however, do not reference the First Amendment or common law standards directly. Instead, they use a variety of phrasing in their rules regarding what must be shown to justify the sealing of court records. For example, some require that the movant

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[205] Only twenty districts include a definition of covered records in their general sealing rules.

[206] E.D. KY. L.R. 5.6.

[207] E.D. TENN. L.R. 26.2(a).

[208] W.D. TEX. L. CIV. R. 5.2. Seventeen of the twenty districts that define the scope of records covered by a public right of access use these expansive terms, which comports with the broad definition of "judicial record" under the common law. *See supra* notes 153–155 and accompanying text.

[209] M.D. FLA. L. CIV. R. 1.11(a); *see also* D. CONN. L. CIV. R. 5(e)(3) (requiring a motion if sealing is sought for any "document used by parties moving for or opposing an adjudication by the Court"); N.D. MISS. L. CIV. R. 79(b) (requiring motion to seal for any "document used by parties moving for or opposing an adjudication by the court"); S.D. MISS. L. CIV. R. 79(b) (same).

[210] *See* D. CONN. L. CRIM. R. 57.1(c)(1)–(2) (stating that First Amendment or common law test might apply); N.D. W. VA. L. CIV. R. 26.05(b)(2)(C) (stating that a sealing motion must contain "a discussion of the propriety of sealing, giving due regard to the parameters of the common law and First Amendment rights of access"); S.D. W. VA. L. CIV. R. 26.4(b)(2)(C) (same).

state, "in general terms, the reason for sealing the document,"[211] while others demand "particularized findings demonstrating that sealing is supported by clear and compelling reasons."[212] To make sense of these differing formulations, I have grouped the sealing standards by the stringency of their requirements. These groupings are displayed in Table 3, which lists the sealing tests in general sealing provisions.[213]

Table 3: Sealing Tests in General Sealing Rules

Civil Sealing Test	Freq	%	Criminal Sealing Test	Freq	%
Not Specified	29	36%	Not Specified	23	40%
Apply Governing Case Law	20	25%	Apply Governing Case Law	16	28%
Good Cause	11	14%	Good Cause	7	12%
First Amendment	8	10%	Some Cause	6	10%
Some Cause	7	9%	Common Law	3	5%
Common Law	5	6%	First Amendment	3	5%
Total	80	100%	Total	58	100%

As Table 3 shows, the most common approach among district courts is to provide no sealing standard at all. More than a third of general sealing provisions fail to include any reference to a substantive standard.[214] These rules simply state that a party must file a motion or proposed order, without describing what the party must show to justify sealing.[215] As previously noted, the Southern District of California merely requires parties to submit a proposed sealing order alongside the sealed documents, with no requirement of a motion or supporting memorandum.[216]

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[211] W.D. LA. L. CRIM. R. 12.1.

[212] N.D. MISS. L. CIV. R. 79(b).

[213] The totals in Table 3 exceed the number of districts with general sealing rules because some districts have more than one general sealing provision in their civil or criminal rules.

[214] *See supra* Table 3.

[215] *See, e.g.*, D.D.C. L. CIV. R. 5.1(h) (merely stating that documents must "be accompanied by a motion to seal"); D.D.C. L. CRIM. R. 49(f)(6) (same); D. DEL. L. CIV. R. 5.1.3 (requiring motion "filed in accordance with CM/ECF Procedures"); N.D. FLA. L. GEN. R. 5.5(C) (party "must, if feasible, move in advance for leave to file the document under seal").

[216] S.D. CAL. CIV. R. 79.2(c).

Another approach in both civil and criminal rules is what I label "Some Cause." These rules require that a party provide some justification for sealing, but they provide no guidance as to the strength or specificity of that showing. Examples include rules that require a movant to state why sealing is "required,"[217] describe the "reason"[218] or "need"[219] for sealing, or "explain why inclusion in the public record is not appropriate."[220] These minimalist requirements offer little meaningful guidance to litigants and do not reflect the high standards required under the First Amendment and common law for restricting public access to court records. Although some judges likely provide additional guidance in their orders granting or denying sealing requests,[221] such orders—which are often unpublished and buried in a district court's docket sheets—are no substitute for clear rules outlining the procedures and requirements for sealing.[222]

Rules that include no substantive standard, or merely require "some cause," provide insufficient guidance to both litigants and judges. While the public's right of access to court records is not absolute, it cannot be overcome without a judicial determination that competing interests justify sealing.[223] Under the First Amendment, sealing requires a compelling interest and a narrowly tailored order.[224] Even under the less exacting common law test, courts must make case-specific findings

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[217] D. NEB. L. CIV. R. 7.5(a)(1); D. NEB. L. CRIM. R. 12.5(a)(1).

[218] W.D. LA. L. CRIM. R. 12.1; *see also* S.D. GA. L. CRIM. R. 49.1.

[219] D. ME. L. CIV. R. 7A; *see also* D. ME. L. CRIM. R. 157.6(b).

[220] D. MONT. L. CIV. R. 5.2; *see also* D. MONT. L. CRIM. R. 49.3.

[221] Studies of sealing orders suggest that most judges do not provide additional specificity in their sealing orders, instead granting motions to seal with very little scrutiny. *See* Rowe, *supra* note 7, at 8 (finding that motions to seal in federal district courts go unopposed approximately 90% of the time and receive very little scrutiny from judges); Lesser et al., *supra* note 11 (finding that judges failed to provide any justification for sealing in 85% of the sealing decisions Reuters examined).

[222] *See infra* Part III.

[223] *See supra* Part I.

[224] *See, e.g.*, *In re* N.Y. Times Co., 828 F.2d 110, 116 (2d Cir. 1987) ("Proceedings may be closed and, by analogy, 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."'" (quoting *Press-Enterprise II*, 478 U.S. 1, 13, (1986))).

showing that the need for sealing outweighs the public's presumptive right of access.[225]

Meanwhile, rules that authorize the sealing of records based solely on "good cause" (14% of general sealing provisions in civil cases and 12% in criminal cases) are not just insufficient but directly conflict with circuit precedent. As discussed in Part I, the "good cause" standard, which governs protective orders in discovery, is inadequate for the sealing of court records.[226] Nearly all federal circuits have expressly rejected the sole use of a "good cause" test when it comes to determining whether filed materials may be withheld from the public.[227] Although it is possible that districts with a "good cause" standard in their local rules actually impose a more rigorous test for sealing, empirical studies of sealing orders suggest that this is rarely the case.[228] And as the Fifth Circuit has cautioned, "equating the standard for keeping unfiled discovery confidential with the standard for placing filed materials under seal . . . is a common [error] and one that over-privileges secrecy and devalues transparency."[229]

Finally, a substantial number of general sealing provisions simply state that the movant must provide a "legal basis" for sealing or "apply governing case law."[230] While not improper on its face, this tactic is only marginally better than not

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[225] *See, e.g.*, Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 253 (4th Cir. 1988) ("Under common law, there is a presumption of access accorded to judicial records. This presumption of access, however, can be rebutted if countervailing interests heavily outweigh the public interests in access." (citing Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978))).

[226] *See supra* Part I.B.3.

[227] *See supra* notes 130–138 and accompanying text.

[228] *See* Nora Freeman Engstrom et al., *Secrecy by Stipulation*, 74 DUKE L.J. 99, 109 (2024) (examining 2.2 million federal docket reports to determine the prevalence of protective orders and finding that "POs and orders to seal are very frequently confused, including by litigants and judges"); Endo, *supra* note 131, at 1288 ("Probably the most notable finding from the Case Set is a common mistake of law in the entered stipulated protective orders wherein the standard for filing materials under seal is conflated with that for keeping unfiled discovery confidential.").

[229] Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 420 (5th Cir. 2021).

[230] *See, e.g.*, D.N.H. L.R. 83.12(c) (requiring that a motion "provide the factual and legal basis to justify sealing"); N.D. CAL. L. CIV. R. 79-5(c)(1) (requiring "specific statement of the applicable legal standard and the reasons for keeping a document under seal" (emphasis omitted)); E.D. VA. L. CRIM. R. 49(D) (requiring "references to governing case law"); W.D. WASH. L. CIV. R. 5(g)(3) (requiring "statement of the applicable legal standard").

providing a standard at all. By failing to specify a framework for evaluating sealing requests, such rules delegate the task of identifying the correct legal standard to litigants, increasing the risk of inconsistent and unprincipled sealing decisions.

When considered collectively, the sealing standards in local rules reveal a concerning deficiency: Only 16% of general sealing provisions in civil rules—and just 10% in criminal rules—include a standard that incorporates the common law's requirements for restricting public access to judicial records, let alone the First Amendment's more stringent mandates.[231] Furthermore, this already-low percentage does not even account for the nineteen districts that have no general sealing provisions in their civil rules and the thirty-nine districts that lack general sealing provisions in their criminal rules,[232] suggesting that these percentages understate the lack of clear standards for sealing in district court local rules.

C. Compliance with Circuit Law

As discussed in Part I, the law governing sealing is not uniform across the country. This section examines how each district's sealing rules align—or fail to align—with the governing law of its respective regional circuit. To aid in the analysis, each circuit and its corresponding district courts are evaluated separately and are listed in individual tables. The tables present the following information:

Column Heading	
Jurisdiction	Circuit or district under consideration
Access	Jurisdiction states a presumption of public access
Motion	Jurisdiction requires a motion to initiate sealing process
Notice	Jurisdiction requires public notice before sealing
No Alt.	Jurisdiction requires evaluation of alternatives to sealing
1st Amend.	Jurisdiction imposes First Amendment standard for sealing
Common L.	Jurisdiction imposes common law standard for sealing

[231] *See supra* Table 3. Because the First Amendment affords stronger protection for public access than the common law, rules that apply a First Amendment standard (10% in civil rules and 5% in criminal rules) necessarily satisfy the less demanding common law requirements as well.

[232] *See infra* Tables 4.1–4.DC.

1. First Circuit

The First Circuit recognizes a First Amendment right of access to records filed in criminal cases.[233] Although the First Circuit has not explicitly extended the First Amendment right of access to records filed in civil cases,[234] it does apply a common law right of access to records in civil and criminal proceedings.[235]

When evaluating requests to seal court records, the First Circuit employs a two-tiered analysis, beginning with the classification of the material in question. To determine whether the First Amendment right applies, the circuit uses the Supreme Court's "experience and logic" test, which requires a court to consider: (1) "whether [the documents] have been open to the public in the past, 'because a tradition of accessibility implies the favorable judgment of experience'"; and (2) "'whether public access plays a significant positive role in the functioning of the particular process in question.'"[236] When records are subject to a First Amendment right of access, a court must satisfy "the traditional compelling interest/least restrictive means test" before ordering sealing.[237]

Even if a First Amendment right of access does not extend to the record in question, the First Circuit has held that a common law right of access can apply in both civil and criminal cases if the material is a "judicial record," defined as "materials on which a court relies in determining the litigants' substantive rights."[238] If

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[233] *See, e.g.*, United States v. Kravetz, 706 F.3d 47, 52 (1st Cir. 2013).

[234] *See* Courthouse News Serv. v. Quinlan, 32 F.4th 15, 20 (1st Cir. 2022). While the First Circuit has not explicitly recognized a First Amendment right of access to civil records, *see id.*, it seems to have adopted a First-Amendment-like test for access by purporting to apply a common law right of access but stating that "only the most compelling reasons" can overcome the "strong and sturdy" presumption of public access to judicial records in civil cases, *see* FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987) (quoting *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983) (applying First Amendment right of access)).

[235] *See, e.g.*, *Standard Fin. Mgmt. Corp.*, 830 F.2d at 408.

[236] *In re* Boston Herald, Inc., 321 F.3d 174, 182 (1st Cir. 2003) (quoting *Press-Enterprise II*, 478 U.S. 1, 8 (1986)).

[237] Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 505 (1st Cir. 1989). This test is discussed *supra* in Part I.B.1.

[238] *In re* Providence J. Co., 293 F.3d 1, 10, 16 (1st Cir. 2002). Records relating only "to the judge's role in management of the trial" and which "'play no role in the adjudication process"' are not covered by the common law presumption of access. *Boston Herald*, 321 F.3d at 189 (quoting *Standard Fin. Mgmt. Corp.*, 830 F.2d at 408).

a filing qualifies as a judicial record, the First Circuit requires a heightened showing—beyond what other jurisdictions typically demand under the common law—to permit sealing.[239] In the First Circuit, "only the most compelling reasons can justify non-disclosure of judicial records" that fall within the common law right of access.[240]

Consistent with other federal courts of appeal, the First Circuit also mandates that a district court provide notice to the public prior to sealing and that the court issue "particularized findings" justifying any sealing of records.[241] Courts must also explore all reasonable alternatives to sealing, including redaction, before restricting public access.[242]

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[239] *See In re Providence J.*, 293 F.3d at 10 ("Although the two rights of access [First Amendment and common law] are not coterminous, courts have employed much the same type of screen in evaluating their applicability to particular claims."); *Standard Fin. Mgmt. Corp.*, 830 F.2d at 408 n.4, 410 (stating that the "presumptively paramount right of the public to know" the content of judicial records in civil cases may be overcome for "only the most compelling reasons"); Panse v. Shah, 201 F. App'x 3, 3 (1st Cir. 2006) ("Sealing is disfavored as contrary to the presumption of public access to judicial records of civil proceedings. It is justified only for compelling reasons and with careful balancing of competing interests." (citations omitted)).

[240] *Standard Fin. Mgmt. Corp.*, 830 F.2d at 410 (internal marks and citation omitted).

[241] United States v. Kravetz, 706 F.3d 47, 59, 61 (1st Cir. 2013) ("It is axiomatic that protection of the right of access suggests that the public be informed of attempted incursions on that right. Providing the public with notice ensures that the concerns of those affected by a closure decision are fully considered." (citation omitted)).

[242] *See In re Providence J.*, 293 F.3d at 15 ("Finally, we think that the district court's refusal to consider redaction on a document-by-document basis is insupportable. Courts have an obligation to consider all reasonable alternatives to foreclosing the constitutional right of access. Redaction constitutes a time-tested means of minimizing any intrusion on that right." (internal citations omitted)); *Kravetz*, 706 F.3d at 63 ("We note again that redaction remains a viable tool for separating this information from that which is necessary to the public's appreciation of the sentence imposed.").

Table 4.1: General Sealing Rules in the First Circuit

Jurisdiction	Civil Cases						Criminal Cases					
	Initiating Sealing				Standard		Initiating Sealing				Standard	
	Access	Motion	Notice	No Alt.	1st Amend.	Common L.	Access	Motion	Notice	No Alt.	1st Amend.	Common L.
1st Cir.	✓	✓	✓	✓	□	✓	✓	✓	✓	✓	✓	✓
D. Me.	□	✓	✓	✓	□	□	□	✓	□	□	□	□
D. Mass.	□	✓	□	□	□	✗	□	✓	□	□	✗	✗
D.N.H.	✓	✓	□	□	□	□	✓	✓	□	□	□	□
D.P.R.	No General Rule on Sealing						No General Rule on Sealing					
D.R.I.	□	✓	□	✓	□	□	□	✓	□	✓	□	□

✓ Required / Included □ Not Required / Not Included ✗ Conflicts with Circuit Law

As shown in Table 4.1, one district in the First Circuit, Puerto Rico, lacks a general rule governing the sealing of court records in civil and criminal cases. Although the other districts have general sealing rules, they fail to adequately incorporate the procedures for sealing required under First Circuit law. Only the District of New Hampshire includes a presumption of public access in its general sealing rules,[243] while only the District of Maine requires public notice—and even then, solely in civil cases.[244]

Most critically, all of the districts in the First Circuit either omit a specific sealing standard or provide an insufficient standard in their civil and criminal rules.[245]

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[243] *See* D.N.H. L.R. 83.12(a) ("All filings, orders, and docket text entries shall be public unless . . . .").

[244] *See* D. ME. L. CIV. R. 7A(d) ("The docket entry noting the filing of a motion to seal, any response and reply thereto, the filing of the Court's order thereon, and the filing of any sealed document(s) or pleading(s) shall be publicly available on ECF, but the document(s) or pleading(s) themselves shall only be available to the Court.").

[245] *See* D. MASS. L.R. 7.2(a) (allowing sealing if "supported by good cause"); D. ME. L. CIV. R. 7A(a) (stating that the "motion shall propose specific findings as to the need for sealing"); D. ME. L.

For example, the District of New Hampshire states that a motion to seal must "provide the factual and legal basis to justify sealing," leaving it to the movant to figure out what the proper legal standard is for sealing.[246] The District of Maine states in its civil and criminal rules that a motion to seal must include "specific findings as to the *need for sealing*," but does not require the movant to demonstrate that this need is compelling or that it outweighs the presumption of public access.[247] More concerning, the District of Massachusetts permits a party to file materials under seal indefinitely if its motion for impoundment is "supported by good cause."[248] As the First Circuit has stated, good cause alone cannot justify sealing.[249]

2. Second Circuit

The Second Circuit recognizes both a First Amendment right of access and a common law right of access to judicial records filed in criminal and civil cases.[250] As in the First Circuit, not all documents filed with the court are considered "judicial records" subject to a right of access.

To determine whether the First Amendment right of access applies, the Second Circuit uses the "experience and logic" test, which requires a court to examine

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CRIM. R. 157.6(b) (same); D.N.H. L.R. 83.12(c)(3)(2) (stating that movant must "provide the factual and legal basis to justify sealing the filing(s)"); D.R.I. L. GEN. R. 102(b)(1) (requiring that party file a motion "stating the basis for the sealing").

[246] D.N.H. L.R. 83.12(c) (requiring that a motion "provide the factual and legal basis to justify sealing"); *see also* D.R.I. L. GEN. R. 102(b) (requiring that a motion "stat[e] the basis for . . . sealing").

[247] D. ME. L. CIV. R. 7A(a); *see also* D. ME. L. CRIM. R. 157.6(b) (requiring a statement of the "basis for sealing," as well as "specific findings as to the need for sealing"). As the First Circuit has made clear: "Sealing is disfavored as contrary to the presumption of public access to judicial records of civil proceedings. It is justified only for compelling reasons and with careful balancing of competing interests." Panse v. Shah, 201 F. App'x 3, 3 (1st Cir. 2006) (citations omitted).

[248] *See* D. MASS. L.R. 7.2(a) ("Whenever a party files a motion to impound, the motion shall contain a statement of the earliest date on which the impounding order may be lifted, or a statement, supported by good cause, that the material should be impounded until further order of the court.").

[249] *See* Poliquin v. Garden Way, Inc., 989 F.2d 527, 533 (1st Cir. 1993) ("One generalization, however, is safe: the ordinary showing of good cause which is adequate to protect *discovery material* from disclosure cannot alone justify protecting such material after it has been introduced at trial." (emphasis in original)); *see also* FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987) (explaining that "only the most compelling reasons can justify non-disclosure of judicial records" that come within the common law right of access).

[250] *See, e.g.*, Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 91 (2d Cir. 2004).

whether the type of document has historically been open to the public and whether access would positively contribute to the judicial process.[251] If the First Amendment right applies, sealing is permitted only 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."[252]

If a record is not covered by a First Amendment right of access, a common law right of access may still apply if the record is "relevant to the performance of the judicial function and useful in the judicial process."[253] The strength of the presumption of access depends on the role the document plays in the case: The presumption is "at its zenith" when the document directly affects adjudication or is used to determine the parties' substantive legal rights and weakest when the document is neither relied upon by the court nor presented in a manner that could affect its decisions.[254] Once the court determines the strength of the access presumption, it must then balance that presumption against the competing secrecy interests.[255]

Before granting a motion to seal, the Second Circuit requires that a district court "carefully and skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need."[256] The court must also consider less restrictive alternatives to sealing, such as redacting sensitive information.[257] In addition, the Second Circuit has instructed that "interested parties should be given an opportunity to challenge the propriety of a sealing order before the decision to seal is final."[258]

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[251] *See* Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 120 (2d Cir. 2006).

[252] *In re* N.Y. Times Co., 828 F.2d 110, 116 (2d Cir. 1987) (internal quotation marks and citations omitted).

[253] *Lugosch*, 435 F.3d at 119 (internal quotation marks and citation omitted).

[254] Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 142 (2d Cir. 2016).

[255] United States v. Amodeo, 71 F.3d 1044, 1050 (2d Cir. 1995) (stating that under the common law, the court must "balance competing considerations against" the need for access).

[256] *In re* Orion Pictures Corp., 21 F.3d 24, 27 (2d Cir. 1994).

[257] *See* United States v. Amodeo, 44 F.3d 141, 147 (2d Cir. 1995) (stating "that it is proper for a district court, after weighing competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document").

[258] City of Hartford v. Chase, 942 F.2d 130, 135 (2d Cir. 1991); *see also* United States v. Haller, 837 F.2d 84, 87 (2d Cir. 1988) ("[E]xcept in extraordinary circumstances the public [must] have a means of learning that a closure or sealing order has been proposed or issued.").

Table 4.2: General Sealing Rules in the Second Circuit

Jurisdiction	Civil Cases						Criminal Cases					
	Initiating Sealing				Standard		Initiating Sealing				Standard	
	Access	Motion	Notice	No Alt.	1st Amend.	Common L.	Access	Motion	Notice	No Alt.	1st Amend.	Common L.
2d Cir.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
D. Conn.	✓	✓	✓	□	✓	□	✓	✓	✓	✓	✓	✓
E.D.N.Y.	No Rules on Sealing						No Rules on Sealing					
N.D.N.Y.	□	✓	✓	□	□	□	□	✓	✓	✓	□	□
S.D.N.Y.	No Rules on Sealing						No Rules on Sealing					
W.D.N.Y.	✓	✓	✓	□	□	□	✓	✓	□	□	□	□
D. Vt.	✓	✓	□	□	□	□	No General Rule on Sealing					

✓ Required / Included □ Not Required / Not Included ✗ Conflicts with Circuit Law

As shown in Table 4.2, two of the five districts in the Second Circuit, the Eastern and Southern Districts of New York, have no local rules governing the sealing of court records in civil and criminal cases.[259] In addition, the District of Vermont does not have a general sealing rule for criminal cases. Among the districts that do have general sealing provisions, only the District of Connecticut comes close to incorporating all of the procedural requirements for sealing required by the Second Circuit.[260] Vermont's civil rules are particularly deficient by failing to require public notice or an evaluation of alternatives to sealing,[261] as are the criminal rules in the Western District of New York.[262]

[259] Many judges in these districts have their own personal rules that govern sealing. *See supra* note 168 and accompanying text.

[260] *See* D. CONN. L. CIV. R. 5; D. CONN. L. CRIM. R. 57.1.

[261] *See* D. VT. L. CIV. R. 5.2.

[262] *See* W.D.N.Y. L. CRIM. R. 55.

Moreover, aside from Connecticut, which incorporates the First Amendment standard in its civil and criminal rules,[263] none of the districts in the Second Circuit provide an explicit standard for sealing in their local rules. The District of Vermont, for example, simply states in its general sealing rule that a party requesting sealing must file a motion, but it does not explain what the motion should include.[264] Similarly, the Northern and Western Districts of New York state that a party requesting sealing must describe the reasons for sealing under applicable law, leaving it to the movant to figure out what the governing legal standard is under Second Circuit law.[265]

3. Third Circuit

The Third Circuit recognizes both a First Amendment and a common law right of access to judicial records filed in civil and criminal cases.[266] Like the First and Second Circuits, it employs the Supreme Court's "experience and logic" test to determine whether the First Amendment right of access attaches to a particular record.[267]

When the First Amendment right applies to a record, a request to seal it is subject to "strict scrutiny."[268] A party seeking to overcome the First Amendment's presumption of public access must "demonstrate 'an overriding interest [in excluding

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[263] *See* D. CONN. L. CIV. R. 5(e)(1)(b); D. CONN. L. CRIM. R. 57.1(c)(2).

[264] D. VT. L. CRIM. R. 5.2(b); *see also* W.D.N.Y. L. CRIM. R. 55(c) (requiring a party to "comply with the procedures set forth in the [Western District of New York's] CM/ECF Administrative Procedures Guide").

[265] N.D.N.Y. L. CIV. R. 5.3(a) (requiring a statement of the "reason(s) that the referenced material should be sealed under the governing legal standard"); N.D.N.Y. L. CRIM. R. 49.2(b) (requiring a statement of the "reason(s) that the referenced material should be sealed under the governing legal standard"); W.D.N.Y. L. CIV. R. 5.3(c)(2)(D) (requiring "specific findings demonstrating that sealing is warranted under applicable law"). Although they do not define the standard for sealing, the rules in the Northern District of New York at least provide a helpful citation to *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119–27 (2d Cir. 2006). *See* N.D.N.Y. L. CIV. R. 5.3(a); N.D.N.Y. L. CRIM. R. 49.2(b).

[266] *See, e.g.*, United States v. Smith, 776 F.2d 1104, 1111 (3d Cir. 1985); Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 659 (3d Cir. 1991).

[267] *See In re* Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 924 F.3d 662, 673 (3d Cir. 2019).

[268] PG Publ'g Co. v. Aichele, 705 F.3d 91, 104 (3d Cir. 2013).

the public] based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'"[269]

If a record does not qualify for First Amendment protection, the common law right of access may still apply. Whether a common law right attaches to a particular record "turns on whether that item is considered to be a 'judicial record.'"[270] In the Third Circuit, a document is a judicial record if it "has been filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings."[271] To overcome the common law right of access, the party seeking sealing must show that the interest in secrecy "outweighs the presumption" of public access.[272]

The Third Circuit has cautioned that the "strong presumption of openness does not permit the routine closing of judicial records to the public,"[273] and that before granting a motion to seal under either standard, a district court must make specific, on-the-record findings about the potential consequences of disclosure.[274] The court must also provide "an opportunity for interested third parties to be heard."[275] Finally, the Third Circuit requires judges to undertake "a document-by-document

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[269] *In re Avandia*, 924 F.3d at 673 (alteration in original) (quoting Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1073 (3d Cir. 1984)).

[270] *In re* Cendant Corp., 260 F.3d 183, 192 (3d Cir. 2001) (quoting Pansy v. Borough of Stroudsburg, 23 F.3d 772, 781 (3d Cir. 1994)).

[271] *Id.*

[272] *In re Avandia*, 924 F.3d at 672 (quoting Bank of Am. Nat'l Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 344 (3d Cir. 1986)).

[273] Miller v. Ind. Hosp., 16 F.3d 549, 551 (3d Cir. 1994) (internal quotation marks omitted).

[274] *Cendant Corp.*, 260 F.3d at 194.

[275] *Miller*, 16 F.3d at 551 ("[T]he district court, before taking such an unusual step, should have articulated the compelling countervailing interests to be protected, made specific findings on the record concerning the effects of disclosure, and provided an opportunity for interested third parties to be heard."); *see also Cendant Corp.*, 260 F.3d at 194 (applying common law test but adopting the "stricter standard" from *Miller* and noting that "[t]his may or may not require a hearing" before sealing records in securities litigation class action).

review"[276] and to consider less restrictive alternatives, such as redaction, before resorting to wholesale sealing.[277]

Table 4.3: General Sealing Rules in the Third Circuit

Jurisdiction	Civil Cases						Criminal Cases					
	Initiating Sealing				Standard		Initiating Sealing				Standard	
	Access	Motion	Notice	No Alt.	1st Amend.	Common L.	Access	Motion	Notice	No Alt.	1st Amend.	Common L.
3d Cir.	✓	✓	□	✓	✓	✓	✓	✓	✓	✓	✓	✓
D. Del.	□	□	□	□	□	□	No General Rule on Sealing					
D.N.J.	□	✓	✓	✓	□	✓	No General Rule on Sealing					
E.D. Pa.	□	□	□	□	□	□	No General Rule on Sealing					
M.D. Pa.	✓	✓	□	□	□	□	✓	✓	□	□	□	□
W.D. Pa.	□	✓	□	□	□	□	No General Rule on Sealing					
D.V.I.	□	✓	□	□	□	□	No General Rule on Sealing					

✓ Required / Included □ Not Required / Not Included ✗ Conflicts with Circuit Law

Despite the Third Circuit's well-developed case law on sealing, its district courts take an inconsistent approach to sealing in their local rules. As shown in Table 4.3, five of the six districts lack any local rules governing the general sealing of records in criminal cases. Although all districts have general sealing provisions for civil cases, these rules fall short of incorporating the procedural protections required by the Third Circuit. Only the Middle District of Pennsylvania expressly provides a presumption of public access,[278] and the District of New Jersey is alone

[276] Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 167 (3d Cir. 1993).

[277] *See* United States v. Criden, 648 F.2d 814, 829 (3d Cir. 1981) (remanding "so that the district court can exercise its discretion to determine whether specific portions of the [audio and video] tapes merit excision" before being released to the public); *Leucadia*, 998 F.2d at 167 (remanding to district court because of "its failure to separate trade secrets and other sensitive business information from [materials] that may properly be subject to disclosure").

[278] *See* M.D. PA. L. CIV. R. 5.8; M.D. PA. L. CRIM. R. 49(a).

in requiring public notice and a showing that no reasonable alternatives to sealing exist.[279]

Furthermore, except for the District of New Jersey—which includes the common law standard in its civil rules[280]—none of the districts in the Third Circuit provide a specific sealing standard in their civil or criminal rules. The Middle District of Pennsylvania, for example, requires a movant to state the "legal and factual justification" for sealing, but leaves it to the party to determine what the appropriate standard is for sealing.[281] Two of the remaining districts do not specify the procedures or standards for requesting sealing,[282] and the others simply state that a party seeking sealing must file a motion and do not explain in their general sealing rules what the motion must include.[283]

4. Fourth Circuit

The Fourth Circuit recognizes both a First Amendment and a common law right of access to judicial records in civil and criminal cases.[284] Because these rights are governed by different legal standards, a district court must determine the source of the right at issue in any sealing request. This allows the court to "accurately weigh the competing interests at stake."[285]

In determining whether the First Amendment right of access applies to a particular judicial record, the Fourth Circuit—like its sister circuits—employs the

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[279] *See* D.N.J. L. CIV. R. 5.3(c).

[280] *See* D.N.J. L. CIV. R. 5.3(c)(2)(iv)(b)–(d) (requiring a "legitimate private or public interest which warrants the relief sought" as well as a statement of the "clearly defined and serious injury that would result if the relief sought is not granted" and an explanation of "why a less restrictive alternative to the relief sought is not available").

[281] M.D. PA. L. CRIM. R. 49(c) (requiring a "statement of the legal and factual justification for the sealing order"); M.D. PA. L. CIV. R. 5.8 (same).

[282] D. DEL. L. CIV. R. 5.1.3 (requiring filing "in accordance with CM/ECF Procedures," which fail to specify the requirements for making a request or a standard for sealing); E.D. PA. L. CIV. R. 5.1.5(a)(2) (failing to specify procedures or a standard for sealing).

[283] W.D. PA. L. CIV. R. 5.2 (failing to specify a standard for sealing); D.V.I. L. CIV. R. 5.4 (same).

[284] *See, e.g.*, Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 253 (4th Cir. 1988); *In re* Wash. Post Co., 807 F.2d 383, 390 (4th Cir. 1986).

[285] Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178, 181 (4th Cir. 1988).

"experience and logic" test.[286] If the First Amendment right attaches, sealing is permitted only if there is a compelling interest, and the restriction is narrowly tailored to serve that interest.[287] The Fourth Circuit has emphasized that the burden of overcoming the First Amendment right of access "rests on the party seeking to restrict access, and that party must present specific reasons in support of its position."[288]

Records not covered by a First Amendment right of access may still be subject to a common law right of access if the records "play a role in the adjudicative process, or adjudicate substantive rights."[289] When the common law right attaches, the party seeking to seal a record must demonstrate that "countervailing interests heavily outweigh the public interests in access."[290] The Fourth Circuit has warned that "the right of public access, whether arising under the First Amendment or the common law, 'may be abrogated only in unusual circumstances.'"[291]

Before granting a motion to seal under either standard, the district court must adhere to "certain procedural requirements."[292] First, the court must "give the public adequate notice that the sealing of documents may be ordered."[293] Second, it must afford interested parties an opportunity to object before issuing a ruling.[294] Finally, if the court grants the motion, it must state its reasons on the record, supported by specific findings, and explain why alternatives to sealing would be insufficient.[295] As the Fourth Circuit has noted, strict adherence to these procedures "serves to ensure that the decision to seal materials will not be made lightly and that it will be subject to meaningful appellate review."[296]

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[286] *See, e.g.*, *In re* U.S. for an Ord. Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283, 291 (4th Cir. 2013).

[287] *See, e.g.*, *Rushford*, 846 F.2d at 253.

[288] Va. Dep't of State Police v. Wash. Post, 386 F.3d 567, 575 (4th Cir. 2004) (citation omitted).

[289] *In re U.S. for an Ord. Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d at 290.

[290] *Rushford*, 846 F.2d at 253.

[291] Doe v. Pub. Citizen, 749 F.3d 246, 266 (4th Cir. 2014) (quoting Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178, 182 (4th Cir. 1988)).

[292] *Rushford*, 846 F.2d at 253.

[293] *Id.* (citing *In re* Knight Publ'g Co., 743 F.2d 231, 234 (4th Cir. 1984)).

[294] *Knight Publ'g*, 743 F.2d at 235.

[295] *Id.* at 234–35.

[296] Va. Dep't of State Police v. Wash. Post, 386 F.3d 567, 576 (4th Cir. 2004) (citation omitted).

Table 4.4: General Sealing Rules in the Fourth Circuit

Jurisdiction	Civil Cases						Criminal Cases					
	Initiating Sealing				Standard		Initiating Sealing				Standard	
	Access	Motion	Notice	No Alt.	1st Amend.	Common L.	Access	Motion	Notice	No Alt.	1st Amend.	Common L.
4th Cir.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
D. Md.	□	✓	✓	✓	□	□	□	✓	□	✓	□	□
E.D.N.C.	✓	✓	✓	□	□	□	✓	✓	✓	□	□	□
M.D.N.C.	✓	✓	✓	✓	□	□	No General Rule on Sealing					
W.D.N.C.	✓	✓	✓	✓	□	□	✓	✓	✓	✓	□	□
D.S.C.	□	✓	✓	✓	□	□	✓	✓	✓	✓	□	□
E.D. Va.	✓	✓	✓	✓	□	□	✓	✓	✓	✓	□	□
W.D. Va.	□	✓	✓	✓	□	□	□	✓	✓	✓	□	□
N.D.W. Va.	✓	✓	□	□	✓	□	✓	✓	□	□	□	□
S.D.W. Va.	✓	✓	□	✓	✓	□	No General Rule on Sealing					

✓ Required / Included □ Not Required / Not Included ✗ Conflicts with Circuit Law

As shown in Table 4.4, every district in the Fourth Circuit has adopted local rules governing the sealing of court records in civil cases. However, two districts—the Middle District of North Carolina and the Southern District of West Virginia—lack general sealing rules for criminal cases. Overall, most districts incorporate the procedural requirements mandated by the Fourth Circuit.

The districts' treatment of the substantive standards for sealing is less consistent. Only the Northern and Southern Districts of West Virginia include the First Amendment standard for sealing in their civil rules.[297] Most other districts do not

[297] *See* N.D. W. VA. L. CIV. R. 26.05(b)(2)(C) (requiring "a discussion of the propriety of sealing, giving due regard to the parameters of the common law and First Amendment rights of access, as interpreted by the Supreme Court and the United States Court of Appeals for the Fourth Circuit"); S.D. W. VA. L. CIV. R. 26.4(c)(2)(C) (same).

specify a standard for sealing in either their civil or criminal rules.[298] The Western District of North Carolina does do so, but it merely requires a party to explain "why sealing is necessary and why there are no alternatives to filing under seal."[299] It does not require a showing that the need for sealing "heavily outweigh[s]" the public interest in access, as required by Fourth Circuit law.[300]

5. Fifth Circuit

The Fifth Circuit recognizes a First Amendment right of access to records filed in criminal cases.[301] It has not extended the First Amendment right to records filed in civil proceedings. The Fifth Circuit does, however, apply a common law right of access to judicial records in both criminal and civil cases.[302]

To determine whether the First Amendment right applies to records in criminal matters, the Fifth Circuit employs the "experience and logic" test.[303] Although its case law on access to criminal court records is limited, the Fifth Circuit applies a variation of the strict scrutiny test when evaluating restrictions on public access under the First Amendment, requiring that district courts make specific, on-the-record findings "demonstrating that a substantial probability exists that an interest of a higher value will be prejudiced and that no reasonable alternatives to closure will adequately protect that interest."[304]

The Fifth Circuit also has held that records in both civil and criminal cases are subject to a common law right of access once the record is "filed in district court."[305]

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[298] *See, e.g.*, D. MD. L. CIV. R. 105(11) (requiring "reasons supported by specific factual representations to justify the sealing"); D. MD. L. CRIM. R. 207(2) (same); W.D. VA. L. GEN. R. 9(b)(2) (requiring a statement of "the bases upon which the party seeks the order").

[299] W.D.N.C. L. CIV. R. 6.1(c)(2); W.D.N.C. L. CRIM. R. 49.1.1(a).

[300] Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 253 (4th Cir. 1988); *see also* Doe v. Pub. Citizen, 749 F.3d 246, 265–66 (4th Cir. 2014) ("The common-law presumptive right of access extends to all judicial documents and records, and the presumption can be rebutted only by showing that 'countervailing interests heavily outweigh the public interests in access.'" (quoting *Rushford*, 846 F.2d at 253)).

[301] *See, e.g.*, United States v. Edwards, 823 F.2d 111, 118 (5th Cir. 1987).

[302] *See, e.g.*, SEC v. Van Waeyenberghe, 990 F.2d 845, 849 (5th Cir. 1993).

[303] *See* Sullo & Bobbitt, P.L.L.C. v. Milner, 765 F.3d 388, 392 (5th Cir. 2014).

[304] *In re* Hearst Newspapers, L.L.C., 641 F.3d 168, 181 (5th Cir. 2011).

[305] *Van Waeyenberghe*, 990 F.2d at 849.

When evaluating requests to seal judicial records, the court must "balance the public's common law right of access against the interests favoring nondisclosure."[306] The Fifth Circuit has not prescribed a specific weight to be given to the presumption of access,[307] but it has emphasized that a district court's discretion to seal judicial records must be "exercised charily."[308]

The Fifth Circuit evaluates disputes over the common law right of access "on a case-by-case basis."[309] While district courts have discretion in sealing matters, they are required to articulate their reasoning when granting or denying sealing requests.[310] Additionally, the Fifth Circuit requires district courts to, before sealing documents governed by a First Amendment right of access, provide notice and afford interested parties an opportunity to be heard.[311]

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[306] *Id.* at 848 (citation omitted).

[307] Bradley *ex rel.* AJW v. Ackal, 954 F.3d 216, 225 (5th Cir. 2020) (citation omitted).

[308] Fed. Sav. & Loan Ins. Corp. v. Blain, 808 F.2d 395, 399 (5th Cir. 1987) (citation omitted).

[309] United States v. Sealed Search Warrants, 868 F.3d 385, 395 (5th Cir. 2017).

[310] *Id.* at 388 ("The Court concludes that such requests for access must be assessed on a case-by-case basis by balancing the public's right of access with interests favoring nondisclosure and that the judgment of the district court must be vacated and remanded for further factual findings in the context of this balancing test.").

[311] *In re* Hearst Newspapers, L.L.C., 641 F.3d 168, 182 (5th Cir. 2011). The Fifth Circuit has also suggested that district courts should consider alternatives to sealing under the common law. *See* Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 420 (5th Cir. 2021) (criticizing district court's excessive sealing and noting that "[t]here was no grappling with public and private interests, no consideration of less drastic alternatives.").

Table 4.5: General Sealing Rules in the Fifth Circuit

Jurisdiction	Civil Cases						Criminal Cases					
	Initiating Sealing				Standard		Initiating Sealing				Standard	
	Access	Motion	Notice	No Alt.	1st Amend.	Common L.	Access	Motion	Notice	No Alt.	1st Amend.	Common L.
5th Cir.	✓	✓	□	□	□	✓	✓	✓	✓	✓	✓	✓
E.D. La.	✓	✓	✓	✓	□	□	No General Rule on Sealing					
M.D. La.	No Rules on Sealing						No General Rule on Sealing					
W.D. La.	No Rules on Sealing						□	✓	□	□	□	□
N.D. Miss.	✓	✓	✓	□	✓	□	✓	✓	✓	□	✓	□
S.D. Miss.	✓	✓	✓	□	✓	□	✓	✓	✓	□	✓	□
E.D. Tex.	□	✓	□	□	□	✗	✓	✓	□	□	□	□
N.D. Tex.	□	✓	□	□	□	□	□	✓	□	□	□	□
S.D. Tex.	No General Rule on Sealing						No General Rule on Sealing					
W.D. Tex.	✓	✓	□	□	□	□	No General Rule on Sealing					

✓ Required / Included □ Not Required / Not Included ✗ Conflicts with Circuit Law

As shown in Table 4.5, three of the nine districts in the Fifth Circuit lack a general rule governing sealing in civil cases, and two of these districts have no sealing rules of any kind for civil cases. The absence of guidance on sealing is even more pronounced in criminal cases, where four districts lack general sealing provisions. Among the districts that do have general sealing rules, three districts—the Eastern District of Louisiana and the Northern and Southern Districts of Mississippi—exceed the Fifth Circuit's procedural requirements in civil cases yet fall short of the access protections required in criminal cases.[312]

With respect to substantive standards, only the Northern and Southern Districts of Mississippi include a specific standard for sealing in their civil and criminal

[312] *See* E.D. LA. L. CIV. R. 5.6; N.D. MISS. L. CIV. R. 79; S.D. MISS. L. CIV. R. 79.

rules.[313] However, the First Amendment standard they apply in civil cases is actually more demanding than what Fifth Circuit precedent mandates. The general sealing rule in the Eastern District of Texas, on the other hand, provides less protection than the Fifth Circuit requires, stating that a party can file under seal "information that has been designated as confidential or proprietary under a protective order or non-disclosure agreement,"[314] without demanding any additional showing to justify sealing as required under Fifth Circuit law.[315] The remaining districts either omit a specific sealing standard or provide an insufficient standard in their civil and criminal local rules.[316]

6. Sixth Circuit

The Sixth Circuit recognizes both a First Amendment and a common law right of access to judicial records filed in civil and criminal cases.[317] In a blending of these rights, the circuit seems to have merged the First Amendment and common law

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[313] *See* N.D. MISS. L. CIV. R. 79(b) (requiring a demonstration that "sealing is supported by clear and compelling reasons and is narrowly tailored to serve those reasons"); N.D. MISS. L. CRIM. R. 49.1 (same); S.D. MISS. L. CIV. R. 79(b) (same); S.D. MISS. L. CRIM. R. 49.1 (same).

[314] E.D. TEX. L. CIV. R. 5(a)(7)(E) ("For purposes of this rule, 'confidential information' is information that the filing party contends is confidential or proprietary in a pending motion to file under seal; information that has been designated as confidential or proprietary under a protective order or non-disclosure agreement; or information otherwise entitled to protection from disclosure under a statute, rule, order, or other legal authority.").

[315] *See Binh Hoa Le*, 990 F.3d at 420 (rejecting reliance solely on the "good cause" standard and stating that "at the adjudicative stage, when materials enter the court record, the standard for shielding records from public view is far more arduous").

[316] *See, e.g.*, E.D. LA. L. CIV. R. 5.6 (requiring "a statement as to why sealing is necessary [with] reference to governing case law"); W.D. LA. L. CRIM. R. 12.1 (requiring "in general terms, the reason for sealing the document"); E.D. TEX. L. CRIM. R. 49(b) (requiring "findings specific enough that a reviewing court can determine whether the sealing or closure was properly entered"); N.D. TEX. L. CIV. R. 79.3(b) (failing to specify a standard for sealing); N.D. TEX. L. CRIM. R. 55.3 (b) (failing to specify a standard for sealing); W.D. TEX. L. CIV. R. 5.2 (requiring a statement of the "factual basis for the requested sealing order").

[317] *See, e.g.*, United States v. DeJournett, 817 F.3d 479, 485 (6th Cir. 2016); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177 (6th Cir. 1983).

standards into a single test that it applies to records filed in civil and criminal cases.[318]

To overcome the "strong presumption in favor of openness," a party seeking to seal court records bears a heavy burden.[319] The movant must demonstrate a "compelling" interest in confidentiality and show that the sealing request is narrowly tailored to serve that interest[320]—requirements that mirror the First Amendment test. At the same time, the Sixth Circuit also states that "[w]here a party can show a compelling reason for sealing, the party must then show why those reasons outweigh the public interest in access to those records"[321]—a balancing inquiry more characteristic of the common law standard.[322]

When sealing records, district courts must set forth specific findings that "justify nondisclosure to the public."[323] Courts are also required to consider whether redactions are appropriate and must explain why a sealing order is narrowly tailored.[324] Furthermore, the Sixth Circuit has said that motions to seal "should be made 'sufficiently in advance of any hearing on or disposition of the [motion to seal] to afford interested members of the public an opportunity to intervene and present their views to the court.'"[325]

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[318] *See Brown & Williamson Tobacco Corp.*, 710 F.2d at 1177–78 (describing the genesis of both the First Amendment right of access and common law right).

[319] Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016).

[320] Kondash v. Kia Motors Am., Inc., 767 F. App'x 635, 637 (6th Cir. 2019) (citing *Shane Grp.*, 825 F.3d at 305).

[321] *Id.*

[322] *See supra* Part I.B.2. Further evidencing the blending of these tests, the Sixth Circuit has said that it reviews a district court's decision to seal court records "for an abuse of discretion—although, 'in light of the important rights involved, the district court's decision is not accorded' the deference that standard normally brings." *Shane Grp.*, 825 F.3d at 306 (quoting *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983)).

[323] *In re* Nat'l Prescription Opiate Litig., 927 F.3d 919, 939 (6th Cir. 2019) (internal quotation marks omitted) (quoting *Shane Grp.*, 825 F.3d at 306).

[324] *Id.*

[325] *Knoxville News-Sentinel*, 723 F.2d at 475–76 (alteration in original) (quoting United States v. Criden, 675 F.2d 550, 559 (3d Cir. 1982)).

Table 4.6: General Sealing Rules in the Sixth Circuit

Jurisdiction	Civil Cases						Criminal Cases					
	Initiating Sealing				Standard		Initiating Sealing				Standard	
	Access	Motion	Notice	No Alt.	1st Amend.	Common L.	Access	Motion	Notice	No Alt.	1st Amend.	Common L.
6th Cir.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
E.D. Ky.	✓	✓	□	□	□	□	✓	✓	□	□	□	□
W.D. Ky.	✓	✓	□	□	□	□	✓	✓	□	□	□	□
E.D. Mich.	✓	✓	□	□	□	□	No General Rule on Sealing					
W.D. Mich.	✓	✓	✓	□	✗	✗	□	✓	✓	□	✗	✗
N.D. Ohio	□	✓	□	□	□	□	□	✓	□	□	□	□
S.D. Ohio	□	✓	□	□	✗	✗	No General Rule on Sealing					
E.D. Tenn.	✓	✓	□	□	✗	✗	✓	✓	□	□	✗	✗
M.D. Tenn.	✓	✓	□	□	✓	□	No General Rule on Sealing					
W.D. Tenn.	□	□	□	□	□	□	□	□	□	□	□	□

✓ Required / Included □ Not Required / Not Included ✗ Conflicts with Circuit Law

As shown in Table 4.6, every district in the Sixth Circuit has local rules governing the general sealing of court records in civil cases. However, three districts—the Eastern District of Michigan, the Southern District of Ohio, and the Middle District of Tennessee—lack general sealing rules for criminal cases. Across the circuit, all districts fall short in incorporating the procedural safeguards required by the Sixth Circuit. Notably, only the Western District of Michigan explicitly requires public notice of a sealing request.[326]

The treatment of substantive sealing standards is even more problematic. Only the Middle District of Tennessee provides a correct sealing standard in its civil

[326] *See* W.D. MICH. L. CIV. R. 10.6(b) ("The docket entry and the NEF for any sealed document will be available for public viewing.").

rules,[327] whereas five districts fail to provide a specific standard altogether. More concerning, three districts—the Western District of Michigan, the Southern District of Ohio, and the Eastern District of Tennessee—include a "good cause" standard for sealing in their civil rules, and two of the three (the Western District of Michigan and the Eastern District of Tennessee) incorporate this same standard in their criminal rules.[328] As the Sixth Circuit has said, the "good cause" standard is not a sufficient test for the sealing of court records.[329]

7. Seventh Circuit

The Seventh Circuit recognizes both a First Amendment and a common law right of access to court records filed in civil and criminal cases.[330] Like the Sixth Circuit, it essentially merges the two tests into a single standard that it applies to "materials submitted to the court that 'affect the disposition' of the case."[331]

To overcome the "strong presumption" of public access, a party seeking to seal court records must demonstrate a "compelling interest in secrecy."[332] This interest is then "weighed against the competing interests,"[333] an approach that mirrors the

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[327] *See* M.D. TENN. L. CIV. R. 5.03(c) (requiring a showing of "compelling reasons to overcome the presumption that court records are open to the public").

[328] *See* W.D. MICH. L. CIV. R. 10.6(b) ("Documents may be submitted under seal only if authorized by statute or by the court for good cause shown."); W.D. MICH. L. CRIM. R. 49.8(a) (same); S.D. OHIO L. CIV. R. 5.2.1(a) ("Unless permitted by statute, parties may not file documents under seal without obtaining leave of Court upon motion and for good cause shown."); E.D. TENN. L.R. 26.2(b) ("Court Records or portions thereof shall not be placed under seal unless and except to the extent that the person seeking the sealing thereof shall have first obtained, for good cause shown, an order of the Court . . . .").

[329] *See, e.g.*, Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016) ("[T]here is a stark difference between so-called 'protective orders' entered pursuant to the discovery provisions of Federal Rule of Civil Procedure 26, on the one hand, and orders to seal court records, on the other.").

[330] *See, e.g.*, United States v. Peters, 754 F.2d 753, 763 (7th Cir. 1985); Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994).

[331] United States v. Curry, 641 F. App'x 607, 609 (7th Cir. 2016) (quoting City of Greenville v. Syngenta Crop Prot., LLC, 764 F.3d 695, 697 (7th Cir. 2014)); *see also* Jessup v. Luther, 277 F.3d 926, 928 (7th Cir. 2002).

[332] *Jessup*, 277 F.3d at 928.

[333] *Id.* (citing Cent. Nat'l Bank v. U.S. Dep't of Treasury, 912 F.2d 897, 900 (7th Cir. 1990)).

balancing inquiry characteristic of the common law standard.[334] In undertaking this balancing, the Seventh Circuit has acknowledged that "we are mindful of the difficulty of weighing the important [F]irst [A]mendment interests that cut in favor of disclosure."[335]

When entering sealing orders, the Seventh Circuit requires district courts to "articulate on the record their reasons for doing so,"[336] and to consider whether redaction, rather than full sealing, would adequately protect the relevant interests.[337] Moreover, the Seventh Circuit has emphasized that "full protection [of the right of access] requires adequate notice of any limitation of public access to judicial proceedings or documents and an adequate opportunity, under the circumstances of the case, to challenge that limitation by stating to the court the reasons why the material should remain subject to public scrutiny."[338]

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[334] *See supra* Part I.B.2.

[335] *In re* Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1313 (7th Cir. 1984).

[336] Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 898 (7th Cir. 1994).

[337] *See* Mitze v. Saul, 968 F.3d 689, 692 (7th Cir. 2020) ("Even in cases involving substantial countervailing privacy interests . . . courts have opted for redacting instead of sealing the order or opinion." (citation omitted)).

[338] *In re* Associated Press, 162 F.3d 503, 507 (7th Cir. 1998) (citation omitted).

Table 4.7: General Sealing Rules in the Seventh Circuit

Jurisdiction	Civil Cases						Criminal Cases					
	Initiating Sealing				Standard		Initiating Sealing				Standard	
	Access	Motion	Notice	No Alt.	1st Amend.	Common L.	Access	Motion	Notice	No Alt.	1st Amend.	Common L.
7th Cir.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
C.D. Ill.	✓	✓	□	□	□	□	✓	✓	□	□	□	□
N.D. Ill.	□	✓	✓	□	✗	✗	□	✓	✓	□	✗	✗
S.D. Ill.	No General Rule on Sealing						No General Rule on Sealing					
N.D. Ind.	□	✓	□	□	□	□	No General Rule on Sealing					
S.D. Ind.	□	✓	□	✓	✗	✗	✓	✓	□	✓	✗	✗
E.D. Wis.	✓	✓	✓	□	✗	✗	✓	✓	✓	□	✗	✗
W.D. Wis.	No General Rule on Sealing						No General Rule on Sealing					

✓ Required / Included □ Not Required / Not Included ✗ Conflicts with Circuit Law

As shown in Table 4.7, two of the seven districts in the Seventh Circuit lack general rules governing the sealing of court records in civil cases, and three districts have no general sealing rules for criminal cases. The Eastern District of Wisconsin comes closest to incorporating all of the procedural requirements required by the Seventh Circuit,[339] but the other districts fall short in this regard.

With respect to substantive standards, all of the districts either fail to include a specific sealing standard in their local civil and criminal rules or adopt standards that are in conflict with Seventh Circuit law. For example, the Central District of Illinois states that a motion to seal must provide "an explanation of how the document meets the legal standards for filing sealed documents," but leaves it to the movant to figure out what the proper legal standard is for sealing.[340] More concerning, the Northern District of Illinois, the Southern District of Indiana, and the

[339] *See* E.D. WIS. L. GEN. R. 79.

[340] C.D. ILL. L. CIV. R. 5.10; C.D. ILL. L. CRIM. R. 49.9; *see also* N.D. IND. L. CIV. R. 5-3 (failing to specify a sealing standard).

Eastern District of Wisconsin each permit sealing in civil and criminal cases based merely on "good cause."[341] Like its sister circuits, the Seventh Circuit has said that a finding of good cause is not sufficient for the sealing of court records.[342]

8. Eighth Circuit

The Eighth Circuit recognizes a First Amendment right of access to records filed in criminal cases,[343] but it has not extended that right to records filed in civil proceedings.[344] Nonetheless, it applies a common law right of access to judicial records in both criminal and civil contexts.[345]

To determine whether the First Amendment right applies to a specific record, the Eighth Circuit employs the "experience and logic" test.[346] When the First Amendment right attaches, sealing is permitted only if there is a compelling interest in doing so and the restriction is narrowly tailored to serve that interest.[347] If a district court orders sealing, it must explain why "sealing was necessary and why less restrictive alternatives were not appropriate."[348] The court's findings must be specific enough to allow appellate review of the sealing decision.[349]

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[341] *See* N.D. ILL. L.R. 26.2 ("Any motion seeking to seal a document or portion of document must articulate the basis for good cause to justify the sealing."); S.D. IND. L. CIV. R. 5-11(d)(4) (requiring "reasons demonstrating good cause to maintain the document, or portion(s) thereof, under seal"); S.D. IND. L. CRIM. R. 49.1-2(a) (same); E.D. WIS. L. GEN. R. 79(d)(3) ("Any motion to restrict access or seal must be supported by sufficient facts demonstrating good cause for withholding the document or material from the public record.").

[342] *See, e.g.*, Union Oil Co. of Cal. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000) ("Ever since *Continental Illinois*, we have insisted that only genuine trade secrets, or information within the scope of a requirement such as Fed. R. Crim. P. 6(e)(2) ('matters occurring before the grand jury'), may be held in long-term confidence.").

[343] *See, e.g.*, *In re* Search Warrant for Secretarial Area Outside Off. of Gunn, 855 F.2d 569, 573 (8th Cir. 1988).

[344] *See* IDT Corp. v. eBay, 709 F.3d 1220, 1224 (8th Cir. 2013).

[345] *See, e.g.*, Webster Groves Sch. Dist. v. Pulitzer Publ'g Co., 898 F.2d 1371, 1376 (8th Cir. 1990).

[346] *See, e.g.*, Flynt v. Lombardi, 885 F.3d 508, 512–13 (8th Cir. 2018); *In re Search Warrant*, 855 F.2d at 573–74.

[347] *See, e.g.*, *In re Search Warrant*, 855 F.2d at 574.

[348] *Id.* (citation omitted).

[349] *See id.*

In situations where the First Amendment right of access does not apply, a common law right of access may still be available—provided the records are judicial in nature and not merely related to discovery motions.[350] When the common law right applies, "the court must consider the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access and balance that interference against the salutary interests served by maintaining confidentiality of the information sought to be sealed."[351] Unlike most other circuits, the Eighth Circuit does not always apply a *strong* presumption favoring access.[352] Instead, the weight accorded to the presumption of public access depends on the role of the material in the judicial process.[353]

Before sealing records in criminal cases, district courts must provide notice that "affords the public and the press an opportunity to present objections to the motion."[354] If sealing is granted, the court must, absent extraordinary circumstances, issue findings on the public record explaining why sealing is necessary to protect a compelling interest and why no less-restrictive alternatives are practicable.[355] In civil cases, the Eighth Circuit's procedural guidance is less developed, although it has indicated that courts should consider alternatives to complete sealing, such as redactions.[356]

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[350] *See* IDT Corp. v. eBay, 709 F.3d 1220, 1223 (8th Cir. 2013) ("The companies, however, acquiesce in what appears to be a modern trend in federal cases to treat pleadings in civil litigation (other than discovery motions and accompanying exhibits) as presumptively public, even when the case is pending before judgment." (citations omitted)).

[351] *Id.* (citation omitted).

[352] *See* United States v. Webbe, 791 F.2d 103, 106 (8th Cir. 1986).

[353] *See IDT Corp.*, 709 F.3d at 1223–24.

[354] *In re Search Warrant*, 855 F.2d at 575.

[355] *Id.* ("[D]ocuments may be sealed if the district court specifically finds that sealing is necessary to protect a compelling government interest and that less restrictive alternatives are impracticable.").

[356] *See IDT Corp.*, 709 F.3d at 1225 ("We remand the case for the district court to assess whether redaction of confidential business information is practicable.").

Table 4.8: General Sealing Rules in the Eighth Circuit

Jurisdiction	Civil Cases						Criminal Cases					
	Initiating Sealing				Standard		Initiating Sealing				Standard	
	Access	Motion	Notice	No Alt.	1st Amend.	Common L.	Access	Motion	Notice	No Alt.	1st Amend.	Common L.
8th Cir.	✓	✓	□	✓	□	✓	✓	✓	✓	✓	✓	✓
E.D. Ark.	No Rules on Sealing						No Rules on Sealing					
W.D. Ark.	No Rules on Sealing						No Rules on Sealing					
N.D. Iowa	□	✓	□	□	□	□	No General Rule on Sealing					
S.D. Iowa	□	✓	□	□	□	□	No General Rule on Sealing					
D. Minn.	✓	✓	✓	✓	□	□	□	✓	✓	✓	□	□
E.D. Mo.	✓	✓	□	□	□	□	✓	✓	□	□	□	□
W.D. Mo.	No General Rule on Sealing						No General Rule on Sealing					
D. Neb.	□	✓	□	✓	□	□	□	✓	□	✓	□	□
D.N.D.	□	✓	□	□	□	□	□	✓	□	□	□	□
D.S.D.	□	✓	□	✓	□	□	□	✓	□	✓	□	□

✓ Required / Included □ Not Required / Not Included ✗ Conflicts with Circuit Law

As shown in Table 4.8, three of the ten districts in the Eighth Circuit lack general rules governing the sealing of court records in civil cases. The absence of guidance is even more pronounced in criminal cases, where five districts have no general sealing provisions. Among the districts that do have general sealing rules, none incorporate all of the procedural protections mandated by the Eighth Circuit. While the District of Minnesota provides more procedural protections than are required in civil cases, it falls short of the circuit's requirements in criminal cases.[357]

As for substantive standards, all of the districts either fail to include a specific sealing standard in their general sealing rules or adopt standards that are

[357] *See* D. MINN. L.R. 5.6 (setting forth procedures for sealing in civil cases); *id.* at 49.1 (setting forth procedures for sealing in criminal cases).

insufficient under Eighth Circuit law.[358] The District of Minnesota and District of Nebraska, for example, require a party to describe the "factual basis" for sealing and explain "why sealing is required,"[359] respectively, but do not require a showing that the interests supporting sealing outweigh the public interest in access, as mandated by Eighth Circuit law.[360]

9. Ninth Circuit

The Ninth Circuit recognizes both a First Amendment and a common law right of access to judicial records in civil and criminal cases.[361] The Ninth Circuit—like many other circuits—uses the "experience and logic" test to determine whether the First Amendment right applies to a particular record.[362]

When the First Amendment right of access attaches, sealing is permitted only if three conditions are met: (1) there is a compelling interest at stake; (2) there is a substantial probability that, absent sealing, this interest would be harmed; and (3) no alternatives to sealing would adequately protect the interest.[363] The Ninth

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[358] *See, e.g.*, N.D. IOWA L. CIV. R. 5(c) (failing to specify a sealing standard); S.D. IOWA L. CIV. R. 5(c) (same); E.D. MO. L.R. 13.05(A)(4)(a)(ii) (requiring the "legal grounds" for the sealing); D. NEB. L. CIV. R. 7.5(a)(1) (requiring a showing of "why sealing is required and whether redaction could eliminate or reduce the need for sealing"); D.N.D. L. CIV. R. 5.1 (failing to specify a sealing standard); D.N.D. L. CRIM. R. 49.1 (same); D.S.D. L. CIV. R. 7.1(A) (requiring "specific factual representations" as well as an explanation why "alternatives to sealing would not provide sufficient protection").

[359] D. MINN. L.R. 5.6(e)(3)(A)(ii)(c) (requiring a statement describing the "factual bases" necessitating sealing); *id.* at 49.1(d)(1)(B)(ii) (requiring party to "explain why the document should remain under seal"); D. NEB. L. CIV. R. 7.5(a)(1) (requiring a showing of "why sealing is required"); D. NEB. L. CRIM. R. 12.5(a)(1) (same).

[360] *See IDT Corp.*, 709 F.3d at 1223 ("[T]he court must consider the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access and balance that interference against the salutary interests served by maintaining confidentiality of the information sought to be sealed." (citation omitted)).

[361] *See, e.g.*, Associated Press v. U.S. Dist. Ct. for Cent. Dist. of Cal., 705 F.2d 1143, 1145 (9th Cir. 1983); Courthouse News Serv. v. Planet, 947 F.3d 581, 585 (9th Cir. 2020).

[362] *See, e.g.*, *Planet*, 947 F.3d at 590.

[363] *See* Phoenix Newspapers, Inc. v. U.S. Dist. Ct. for Dist. of Ariz., 156 F.3d 940, 949 (9th Cir. 1998).

Circuit has stressed that courts must "make specific factual findings," and must not base sealing decisions on "conclusory assertions alone."[364]

For records not covered by a First Amendment right of access, a common law right of access will apply if the documents are "relevant to the judicial function and useful in the judicial process."[365] However, documents associated with discovery motions unrelated to the merits of a case generally are not subject to a right of access.[366] Outside this narrow exception, the Ninth Circuit has been cautious in exempting filed records from either the First Amendment or common law right of access.[367]

When the common law right attaches to a judicial record, courts must begin with a "strong presumption in favor of access."[368] This presumption may be overcome only by "sufficiently compelling reasons," and the district court should consider all relevant factors before deciding to seal.[369] Any sealing order must be grounded in a compelling reason and the court must "articulate the factual basis for its ruling, without relying on hypothesis or conjecture."[370]

The Ninth Circuit also imposes procedural safeguards before sealing may be ordered. Prior to granting a motion to seal under either the First Amendment or common law standard, the district court "must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives."[371] If the court grants the motion, it needs to articulate its findings on the record and explain why less restrictive means—such as redaction—are inadequate.[372] As the Ninth

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[364] *Id.* (quoting Oregonian Publ'g Co. v. U.S. Dist. Ct. for Dist. of Or., 920 F.2d 1462, 1466 (9th Cir. 1990)).

[365] *Planet*, 947 F.3d at 592 (internal quotation marks and citations omitted).

[366] In disputes over discovery, sealing may be permitted under the more lenient "good cause" standard. *See* Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1097 (9th Cir. 2016).

[367] *See id.* at 1097–99 (refusing to limit the First Amendment right of access only to those motions that are "literally dispositive").

[368] Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995) (citation omitted); *see also* Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003) (explaining presumption of access may be overcome only by "sufficiently compelling reasons").

[369] *Foltz*, 331 F.3d at 1135.

[370] *Id.* (quoting *Hagestad*, 49 F.3d at 1434).

[371] Phoenix Newspapers, Inc. v. U.S. Dist. Ct. for Dist. of Ariz., 156 F.3d 940, 949 (9th Cir. 1998).

[372] *See* Oregonian Publ'g Co., 920 F.2d at 1466

Circuit has emphasized, adherence to these procedural safeguards "allows for meaningful 'appellate review of whether relevant factors were considered and given appropriate weight.'"[373]

Table 4.9: General Sealing Rules in the Ninth Circuit

	Civil Cases						Criminal Cases					
	Initiating Sealing				Standard		Initiating Sealing				Standard	
Jurisdiction	Access	Motion	Notice	No Alt.	1st Amend.	Common L.	Access	Motion	Notice	No Alt.	1st Amend.	Common L.
9th Cir.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
D. Alaska	□	✓	✓	✓	□	□	□	✓	□	✓	□	□
D. Ariz.	□	✓	✓	□	□	□	□	✓	□	□	□	□
C.D. Cal.	✓	✓	✓	✓	✗	✗	No General Rule on Sealing					
E.D. Cal.	✓	✓	✓	□	□	□	✓	✓	✓	□	□	□
N.D. Cal.	✓	✓	✓	✓	□	□	✓	✓	□	□	□	□
S.D. Cal.	□	□	□	□	□	□	No General Rule on Sealing					
D. Guam	No General Rule on Sealing						No General Rule on Sealing					
D. Haw.	□	✓	✓	□	□	□	□	✓	✓	□	□	□
D. Idaho	□	✓	□	□	□	□	□	✓	□	□	□	□
D. Mont.	✓	✓	✓	✓	□	□	□	✓	✓	□	□	□
D. Nev.	□	✓	□	□	□	□	□	✓	□	□	□	□
D.N. Mar. I.	□	✓	✓	✓	□	□	□	✓	✓	✓	□	□
D. Or.	□	✓	□	□	□	□	No General Rule on Sealing					
E.D. Wash.	No Rules on Sealing						No Rules on Sealing					
W.D. Wash.	✓	✓	□	✓	□	□	□	✓	□	□	□	□

✓ Required / Included □ Not Required / Not Included ✗ Conflicts with Circuit Law

[373] *Foltz*, 331 F.3d at 1135 (quoting *Hagestad*, 49 F.3d at 1434).

As shown in Table 4.9, two of the fifteen districts in the Ninth Circuit lack general rules governing the sealing of court records in civil cases and five districts have no general sealing rules for criminal cases. Those districts that do provide general sealing rules do a relatively thorough job in their civil rules of incorporating the procedural safeguards required by the Ninth Circuit. Three districts—the Central and Northern Districts of California, and the District of Montana—incorporate all the procedural requirements in their civil rules.[374] However, all of the districts fall well short of the Ninth Circuit's procedural requirements in their criminal rules.

With respect to substantive standards, none of the districts provide a sufficient sealing standard in their local rules for records filed in either civil or criminal cases. While some districts omit any reference to a substantive standard,[375] most districts state in their general sealing rules that a party must provide a legal basis for sealing; however, they leave it to the movant to determine what the appropriate standard is under Ninth Circuit law.[376]

More concerning, two districts have standards that deviate from circuit precedent. The District of Montana requires a party requesting sealing to "explain why inclusion in the public record is not appropriate,"[377] but its rule does not require

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[374] *See* C.D. CAL. L. CIV. R. 79-5.2.2; N.D. CAL. L. CIV. R. 79-5; D. MONT. L. CIV. R. 5.2.

[375] *See, e.g.*, S.D. CAL. L. CIV. R. 79.2 (failing to specify a sealing standard); D. IDAHO L. CIV. R. 5.3 (same); D. IDAHO L. CRIM. R. 6.0 (same); D. NEV. L.R. 10-5 (same); D. OR. L. CIV. R. 5-2(e)(1) (same).

[376] *See* D. ALASKA L. CIV. R. 7.3(f) (requiring party to "state the basis for sealing"); D. ALASKA L. CRIM. R. 47.1(f) (requiring party to "set forth the factual basis for filing the document under seal, why filing the document with redactions is not practicable, and citation to supporting authority"); D. ARIZ. L. CIV. R. 5.6(b) (requiring a "clear statement of the facts and legal authority justifying the filing of the document under seal"); D. ARIZ. L. CRIM. R. 49.4(b) (same); E.D. CAL. L. GEN. R. 141(b) (requiring a statement of "statutory or other authority for sealing"); N.D. CAL. L. CIV. R. 79-5(c)(1) (requiring a "specific statement of the applicable legal standard and the reasons for keeping a document under seal"); N.D. CAL. L. CRIM. R. 56-1(c)(2)(A)(i) (requiring party to "establish[] that the material sought to be filed under seal, or portions thereof, are sealable"); D. HAW. L. CIV. R. 5.2(c) (requiring party to "specify the applicable standard for sealing the information and discuss how that standard has been met"); D. HAW. L. CRIM. R. 5.2(b)(1)(A)(iii) (same); D.N. MAR. I. L.R. 79.2(a) (requiring "the legal bases upon which the party seeks the order, including the reasons why alternatives to sealing are inadequate"); W.D. WASH. L. CIV. R. 5(g)(3) (requiring a "statement of the applicable legal standard"); W.D. WASH. L. CRIM. R. 49.1(e) (same).

[377] D. MONT. L. CIV. R. 5.2(d)(2) (requiring a showing of "why inclusion in the public record is not appropriate"); *see also* D. MONT. L. CRIM. R. 49.3(c)(2) (same).

the movant to provide "compelling reasons" for sealing or explain why the interests in sealing outweigh the "strong presumption in favor of access" required under Ninth Circuit law.[378] Furthermore, in one of the more confusing provisions in any district's local rules, the Central District of California states that a party requesting sealing must submit a declaration "*establishing good cause* or demonstrating compelling reasons why the strong presumption of public access in civil cases should be overcome, with citations to the applicable legal standard,"[379] suggesting—contrary to circuit precedent[380]—that good cause alone would be sufficient for sealing.

10. Tenth Circuit

The Tenth Circuit recognizes a First Amendment right of access to records filed in civil cases,[381] but it has not extended that right to records in criminal proceedings.[382] Nonetheless, it applies a common law right of access to judicial records in both criminal and civil contexts.[383]

To determine whether a First Amendment right attaches, the Tenth Circuit uses the "experience and logic" test.[384] When the right applies, the presumption of public access may be restricted "only if 'closure is essential to preserve higher values and is narrowly tailored to serve those interests.'"[385] The Tenth Circuit has

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[378] Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995).

[379] C.D. CAL. L. CIV. R. 79-5.2.2(a) (emphasis added).

[380] *See, e.g.*, Phillips *ex rel.* Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1212 (9th Cir. 2002) (stating that even if a court finds "good cause" under Rule 26(c) to seal a document, it must still determine whether the common law right compels a right of access).

[381] *See* Courthouse News Serv. v. N.M. Admin. Off. of Cts., 53 F.4th 1245, 1263 (10th Cir. 2022) (applying First Amendment right of access to newly filed civil complaints).

[382] The Tenth Circuit has so far avoided deciding whether there is a First Amendment right of access to records in criminal proceedings. *See*, *e.g.*, Riker v. Fed. Bureau of Prisons, 315 F. App'x 752, 756 (10th Cir. 2009) ("Even assuming, without deciding, that there is a First Amendment right to court documents, that right is not absolute. . . . [A]NY interest Mr. Jordan has is outweighed by the safety needs of Mr. Riker." (internal citation omitted)).

[383] *See, e.g.*, United States v. Hickey, 767 F.2d 705, 708 (10th Cir. 1985); JetAway Aviation, LLC v. Bd. of Cnty. Comm'rs, 754 F.3d 824, 826 (10th Cir. 2014).

[384] *See, e.g.*, *N.M. Admin. Off. of Cts.*, 53 F.4th at 1264.

[385] *Id.* at 1270 (quoting Courthouse News Serv. v. Planet, 947 F.3d 581, 594–95 (9th Cir. 2020))).

described this standard as "a balancing test that weighs the qualified right of access against the interests asserted by the party seeking to restrict access."[386]

When a First Amendment right of access does not apply, a common law right of access may still apply if the records are used to determine a litigant's substantive legal rights.[387] Under the common law, the "strong presumption" in favor of access may be overcome only "'where countervailing interests heavily outweigh the public interests in access.'"[388] A party seeking to seal judicial records "bears the heavy burden of showing that 'the material is the kind of information that courts will protect' and that 'disclosure will work a clearly defined and serious injury to the party seeking closure.'"[389]

If sealing is granted, the district court must support its order with case-specific findings that consider the particular facts and circumstances in the case.[390] The court must also demonstrate that "no reasonable alternatives exist to 'adequately protect'" the interest in secrecy.[391] The Tenth Circuit has cautioned that "a district court abuses its discretion if it does 'not narrowly tailor its order' closing the record to public inspection."[392]

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[386] *Id.* (citation omitted).

[387] *See* Eugene S. v. Horizon Blue Cross Blue Shield of N.J., 663 F.3d 1124, 1135–36 (10th Cir. 2011); Colony Ins. Co. v. Burke, 698 F.3d 1222, 1241–42 (10th Cir. 2012).

[388] United States v. Walker, 761 F. App'x 822, 835 (10th Cir. 2019) (emphasis and citation omitted).

[389] *Id.* (quoting Miller v. Ind. Hosp., 16 F.3d 549, 551 (3d Cir. 1994)).

[390] *See* United States v. Bacon, 950 F.3d 1286, 1294 (10th Cir. 2020).

[391] Courthouse News Serv. v. N.M. Admin. Off. of Cts., 53 F.4th 1245, 1270 (10th Cir. 2022) (quoting Courthouse News Serv. v. Planet, 947 F.3d 581, 596 (9th Cir. 2020)).

[392] *Walker*, 761 F. App'x at 835 (quoting Davis v. Reynolds, 890 F.2d 1105, 1110 (10th Cir. 1989)).

Table 4.10: General Sealing Rules in the Tenth Circuit

Jurisdiction	Civil Cases						Criminal Cases					
	Initiating Sealing				Standard		Initiating Sealing				Standard	
	Access	Motion	Notice	No Alt.	1st Amend.	Common L.	Access	Motion	Notice	No Alt.	1st Amend.	Common L.
10th Cir.	✓	✓	□	✓	✓	✓	✓	✓	□	✓	□	✓
D. Colo.	✓	✓	✓	✓	□	✓	✓	✓	✓	✓	□	✓
D. Kan.	✓	✓	✓	✓	□	✓	□	✓	□	□	□	□
D.N.M.	No Rules on Sealing						□	✓	□	□	□	□
E.D. Okla.	✓	✓	□	✓	□	✓	No General Rule on Sealing					
N.D. Okla.	✓	✓	□	✓	□	✓	No General Rule on Sealing					
W.D. Okla.		✓	□	□	□	□	□	✓	□	□	□	□
D. Utah	✓	✓	✓	✓	✗	✗	✓	✓	✓	✓	□	✓
D. Wyo.	No General Rule on Sealing						No General Rule on Sealing					

✓ Required / Included □ Not Required / Not Included ✗ Conflicts with Circuit Law

As shown in Table 4.10, two of the eight districts in the Tenth Circuit lack general rules governing the sealing of court records in civil cases and three districts have no general sealing rules for criminal matters. Among the districts that do have general sealing rules, most incorporate the procedural protections mandated by the Tenth Circuit in civil cases. Notably, the Districts of Colorado, Kansas, and Utah go beyond the Tenth Circuit's requirements by including public notice of motions to seal in their civil rules.[393] Colorado and Utah also provide broad procedural protections in their local criminal rules.[394]

This strong performance largely extends to the inclusion of sealing standards, at least in local civil rules. All districts with general sealing rules—except the Western District of Oklahoma and the District of Utah—include the common law

[393] *See* D. COLO. L. CIV. R. 7.2(d); D. KAN. L. CIV. R. 5.4.2(b); D. UTAH L. CIV. R. 5-3(b)(1).

[394] *See* D. COLO. L. CRIM. R. 47.1; D. UTAH L. CRIM. R. 49-2, *suspended and replaced by*, D. UTAH GEN. ORD. No. 24-004.

standard in their civil rules.[395] However, none of the districts incorporate the First Amendment standard recently recognized by the Tenth Circuit.[396] Curiously, Utah provides an incorrect standard in its civil rules—"good cause"—but includes the correct common law standard in its criminal rules.[397] As for other districts, most do not provide an explicit substantive standard for sealing in their criminal rules.[398]

11. Eleventh Circuit

The Eleventh Circuit recognizes both a First Amendment and a common law right of access to judicial records in civil and criminal cases.[399] Like many other circuits, it applies the "experience and logic" test to determine whether the First Amendment right attaches to a particular record.[400]

When the First Amendment applies, sealing is permitted only if the party seeking to restrict public access demonstrates that sealing "is essential to preserve higher values and is narrowly tailored to serve that interest."[401] The Eleventh Circuit has emphasized that the "presumption of access must be indulged to the fullest extent not incompatible with the reasons for closure."[402] When ordering sealing, the district court "must articulate the overriding interest 'along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'"[403]

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[395] *See* D. COLO. L. CIV. R. 7.2; D. KAN. L. CIV. R. 5.4.2; E.D. OKLA. L. CIV. R. 79.1; N.D. OKLA. L. CIV. R. 5.2-2.

[396] *See N.M. Admin. Off. of Cts.*, 53 F.4th at 1263.

[397] *Compare* D. UTAH L. CIV. R. 5-3 (allowing sealing upon a "showing of good cause"), *with* D. UTAH L. CRIM. R. 49-2 (requiring the sealing party to "identify . . . why the restriction is necessary and why it outweighs the presumption of public access"), *suspended and replaced by*, D. UTAH GEN. ORD. No. 24-004.

[398] *See, e.g.*, D. KAN. L. CRIM. R. 49.6 (failing to specify a sealing standard); D.N.M. L. CRIM. R. 49.4 (same); W.D. OKLA. L. CRIM. R. 12.2 (same).

[399] *See, e.g.*, United States v. Valenti, 987 F.2d 708, 715 (11th Cir. 1993); Brown v. Advantage Eng'g, Inc., 960 F.2d 1013, 1015–16 (11th Cir. 1992).

[400] *See, e.g.*, *Valenti*, 987 F.2d at 712.

[401] United States v. Sajous, 749 F. App'x 943, 944 (11th Cir. 2018) (quoting *Press-Enterprise II*, 478 U.S. 1, 9 (1986)).

[402] Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983) (internal citation omitted).

[403] United States v. Ochoa-Vasquez, 428 F.3d 1015, 1030 (11th Cir. 2005) (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984)).

For records not covered by a First Amendment right of access, a common law right of access still applies if the records are "filed in connection with any substantive pretrial motion, unrelated to discovery."[404] Even where discovery materials are involved, if a motion requires resolution of legal or factual issues relevant to the merits, the records will still be subject to a common law right of access.[405] The Eleventh Circuit has held that any material attached to a "motion that is 'presented to the court to invoke its powers or affect its decisions,' whether or not characterized as dispositive, is subject to the public right of access."[406]

When the common law right applies, courts must balance the competing interests of the parties "in light of the relevant facts and circumstances of the particular case."[407] In describing this balancing, the Eleventh Circuit sometimes frames the analysis in terms of whether the party has shown "good cause" to seal.[408] However, like other circuits that mention "good cause" in their sealing decisions,[409] the Eleventh Circuit also requires a meaningful balancing of interests before granting a request to seal.[410]

Like many of its sister circuits, the Eleventh Circuit imposes procedural safeguards that must be satisfied before sealing may be ordered. District courts must provide public notice and an opportunity for interested parties to be heard.[411] Courts are further required to consider less-restrictive alternatives to sealing,

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[404] Romero v. Drummond Co., 480 F.3d 1234, 1245 (11th Cir. 2007).

[405] *See* Chi. Trib. Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1312 (11th Cir. 2001).

[406] *Romero*, 480 F.3d at 1245 (quoting United States v. Amodeo, 71 F.3d 1044, 1050 (2d Cir. 1995)).

[407] Comm'r, Ala. Dep't of Corr. v. Advance Loc. Media, LLC, 918 F.3d 1161, 1168–69 (11th Cir. 2019) (internal quotation marks and citation omitted).

[408] *See, e.g.*, *Romero*, 480 F.3d at 1246.

[409] *See supra* notes 130–138 and accompanying text.

[410] *See, e.g.*, *Chi. Trib. Co.*, 263 F.3d at 1313 ("Federal courts have superimposed a balancing of interests approach for Rule 26's good cause requirement." (citation omitted)); *Comm'r, Ala. Dep't of Corr.*, 918 F.3d at 1168–69 ("Where a party seeks to protect material under Rule 26 of the Federal Rules of Civil Procedure, and the material is then admitted in connection with a substantive motion, 'confidentiality imposed by Rule 26 is [not] automatically forgone'; rather, courts still conduct a balancing test to compare the respective interests of the parties." (alteration in original) (citation omitted)).

[411] *See* United States v. Ochoa-Vasquez, 428 F.3d 1015, 1030 (11th Cir. 2005).

including redacting sensitive information or limiting access to specific portions of the record.[412]

Table 4.11: General Sealing Rules in the Eleventh Circuit

Jurisdiction	Civil Cases						Criminal Cases					
	Initiating Sealing				Standard		Initiating Sealing				Standard	
	Access	Motion	Notice	No Alt.	1st Amend.	Common L.	Access	Motion	Notice	No Alt.	1st Amend.	Common L.
11th Cir.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
M.D. Ala.	No General Rule on Sealing						No General Rule on Sealing					
N.D. Ala.	No Rules on Sealing						No Rules on Sealing					
S.D. Ala.	□	✓	✓	✓	□	□	□	✓	✓	✓	□	□
M.D. Fla.	✓	✓	✓	✓	✓	□	No Rules on Sealing					
N.D. Fla.	✓	✓	□	□	□	□	□	✓	□	□	□	□
S.D. Fla.	✓	✓	✓	□	□	□	□	✓	□	□	□	□
M.D. Ga.	No General Rule on Sealing						No General Rule on Sealing					
N.D. Ga.	No General Rule on Sealing						No General Rule on Sealing					
S.D. Ga.	✓	✓	□	□	✓	□	□	✓	□	□	□	□

✓ Required / Included □ Not Required / Not Included ✗ Conflicts with Circuit Law

As shown in Table 4.11, four of the nine districts in the Eleventh Circuit lack general rules for sealing records in civil cases, and five districts have no general sealing rules for criminal cases. Only the Middle District of Florida incorporates all of the procedural protections required by the Eleventh Circuit, albeit only in its civil rules.[413] The remaining districts do not provide the full set of procedural safeguards in their local rules.

With respect to substantive standards, the Middle District of Florida and the Southern District of Georgia incorporate the First Amendment standard for sealing

[412] *See Romero*, 480 F.3d at 1246.

[413] *See* M.D. FLA. L. CIV. R. 1.11.

in their civil rules.[414] The other districts either omit a substantive sealing standard altogether or include one that falls short of the requirements established by Eleventh Circuit law.[415]

12. D.C. Circuit

The D.C. Circuit recognizes a First Amendment right of access to records filed in criminal cases,[416] but it has not extended that right to records in civil proceedings. Nonetheless, the D.C. Circuit applies a common law right of access to judicial records in both criminal and civil cases.[417]

To determine whether the First Amendment right attaches to a particular record, the D.C. Circuit applies the Supreme Court's "experience and logic" test.[418] When the First Amendment right of access applies, the presumption of access may be overridden only if three conditions are met: (1) sealing serves a compelling interest; (2) there is a substantial probability that, absent sealing, this interest would be harmed; and (3) no alternatives to sealing would adequately protect the interest.[419] The D.C. Circuit has further instructed that where both the common law and First Amendment rights of access apply, courts should apply the First Amendment standard because it affords "heightened protections of access" over the common law.[420]

For records not covered by a First Amendment right of access, a common law right of access applies if the record plays a significant role in the adjudicatory

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[414] *See id.* (requiring a reason "sufficiently compelling to overcome the presumption of public access"); S.D. GA. L. CIV. R. 79.7 (requiring a showing that sealing is "essential to preserve some higher interest and is narrowly tailored to serve that interest").

[415] *See* S.D. ALA. L. GEN. R. 5.2 (merely requiring "[t]he basis upon which the party seeks [sealing]"); N.D. FLA. L. GEN. R. 5.5 (failing to specify a sealing standard); S.D. FLA. L. R. 5.4 (merely requiring "the factual and legal basis for departing from the policy that Court filings be public"); S.D. GA. L. CRIM. R. 49.1 (requiring "supporting reasons with reference to applicable law").

[416] *See* Wash. Post v. Robinson, 935 F.2d 282, 287–88 (D.C. Cir. 1991).

[417] *See, e.g.*, United States v. El-Sayegh, 131 F.3d 158, 160–61 (D.C. Cir. 1997); Johnson v. Greater Se. Cmty. Hosp. Corp., 951 F.2d 1268, 1277–78 (D.C. Cir. 1991).

[418] *See, e.g.*, *Robinson*, 935 F.2d at 288.

[419] *See id.* at 290 (quoting Oregonian Publ'g Co. v. U.S. Dist. Ct. for Dist. of Or., 920 F.2d 1462, 1466 (9th Cir. 1990)).

[420] *Id.* at 288 n.7.

process.[421] In such instances, the party seeking to seal must overcome the "strong presumption in favor of public access,"[422] and the district court must "articulate the precise reasons why" the interest in secrecy outweighs "this country's strong tradition of access to judicial proceedings."[423]

The D.C. Circuit also imposes "procedural prerequisites" that must, except in extraordinary cases, be satisfied before sealing is granted.[424] These include: (1) the filing party must submit a written motion to seal, and notice of the motion must be placed on the public docket; (2) the district court must provide interested persons with an opportunity to be heard before ruling on the motion; and (3) the court must articulate specific findings on the record demonstrating that sealing is justified.[425] Furthermore, if the district court grants the motion to seal, it must publicly note on its docket that the document has been sealed.[426]

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[421] *See* SEC v. Am. Int'l Grp., 712 F.3d 1, 3 (D.C. Cir. 2013). The common law right of access does not apply to documents "whose contents were not specifically referred to or examined upon during the course of th[e] proceedings." United States v. Hubbard, 650 F.2d 293, 316 (D.C. Cir. 1980).

[422] *In re* Application of Leopold, 964 F.3d 1121, 1128–29 (D.C. Cir. 2020) (quoting *Hubbard*, 650 F.2d at 317).

[423] Johnson v. Greater Se. Cmty. Hosp. Corp., 951 F.2d 1268, 1277–78 (D.C. Cir. 1991) (quoting *Hubbard*, 650 F.2d at 317 n.89). The D.C. Circuit identified six factors that might overcome the common law right of public access: (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) someone objecting to disclosure, and the identity of that person; (4) the strength of any property or privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings. *Hubbard*, 650 F.2d at 317–22; *see also Johnson*, 951 F.2d at 1277–78.

[424] *Robinson*, 935 F.2d at 289.

[425] *See id.*; *Johnson*, 951 F.2d at 1277–78.

[426] *Robinson*, 935 F.2d at 289.

Table 4.DC: General Sealing Rules in the D.C. Circuit

Jurisdiction	Civil Cases						Criminal Cases					
	Initiating Sealing				Standard		Initiating Sealing				Standard	
	Access	Motion	Notice	No Alt.	1st Amend.	Common L.	Access	Motion	Notice	No Alt.	1st Amend.	Common L.
D.C. Cir.	✓	✓	✓	✓	□	✓	✓	✓	✓	✓	✓	✓
D.D.C.	✓	✓	□	□	□	□	□	✓	□	□	□	□

✓ Required / Included □ Not Required / Not Included ✗ Conflicts with Circuit Law

As shown in Table 4.DC, the District Court for the District of Columbia's civil and criminal rules fall short of meeting the D.C. Circuit's procedural requirements for sealing. Equally disappointing, the district's general sealing rules for both civil and criminal cases fail to provide a substantive standard for sealing.[427]

D. Summary of Findings

Across the federal judiciary, there are significant gaps between the requirements imposed by circuit precedent and the sealing procedures and standards reflected in district court local rules. Nearly all federal courts of appeals recognize both a First Amendment and a common law right of access to judicial records, yet many districts either omit sealing rules altogether or fail to specify what must be shown to overcome these rights. Even where local rules on sealing exist, they frequently fall short of—and at times directly contradict—the mandates of their governing circuit.

The most obvious failure is the total absence of general sealing rules in many districts: Thirty-nine of the ninety-four districts (42%) have no general sealing rules for criminal cases, and nineteen districts (20%) lack them for civil cases.[428] Even in districts that do have general sealing rules, most do not include the procedural safeguards required by their circuit. Only seventeen districts (18%) incorporate all of their circuit's procedural requirements in their civil rules, and a mere six districts

[427] *See* D.D.C. L. CIV. R. 5.1(h) (failing to specify a sealing standard); D.D.C. L. CRIM. R. 49(f)(6) (same).

[428] *See supra* Tables 4.1–4.DC.

(6%) do so in their criminal rules.[429] This deficiency is systemic, pervading every federal circuit. In no circuit do all districts provide in their local rules the complete set of procedural requirements mandated by their circuit precedent. In fact, in more than half of the circuits—the First, Third, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits—not a single district incorporates all of its circuit's procedural requirements in its local rules.[430]

The absence of substantive sealing standards is equally troubling. More than one-third of all districts—thirty-five of ninety-four (37%)—provide no substantive guidance at all, while another twenty-one districts (22%) merely direct parties to "apply governing law" without identifying what that law is.[431] Moreover, those districts that do include a standard in their rules often fail to make clear that even under the more lenient common law test, the party requesting sealing must demonstrate that the need for secrecy *outweighs* the public's interest in access.[432] Overall, only eleven districts (12%) include a sealing standard in their local civil rules that specifies their circuit's standard for sealing under the First Amendment or the common law, and just six districts (6%) do so in their criminal rules.[433] The failure to include a proper standard for sealing records in criminal cases is especially troubling because all of the federal circuits, other than the Tenth Circuit, have held that the public has a First Amendment right of access to records filed in criminal proceedings.[434]

With such low overall compliance with circuit precedent, it should come as no surprise that the lack of guidance in local rules regarding sealing standards exists in every federal circuit. In five of the twelve circuits, including the First, Seventh, Eighth, Ninth, and D.C. Circuits, not a single district provides a sealing standard in its local rules that satisfies even the common law threshold for sealing.[435] Furthermore, although nearly every federal court of appeals has explicitly rejected the

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[429] *See id.*

[430] *See supra* Tables 4.3, 4.6, 4.7, 4.8, 4.11 & 4.DC.

[431] *See supra* Table 3.

[432] *See supra* note 118 and accompanying text.

[433] *See supra* Tables 4.1–4.DC.

[434] *See supra* note 83 and accompanying text.

[435] *See supra* Tables 4.3, 4.6, 4.7, 4.8 & 4.11.

"good cause" standard for sealing court records,[436] districts in the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits continue to rely on this test in their local rules governing sealing.[437]

There are, to be sure, a few exemplary districts. For instance, the Western District of North Carolina, the Eastern District of Virginia, the District of Colorado, and the District of Minnesota all provide broad procedural protections in both their civil and criminal rules.[438] In addition, the District of Connecticut, the Northern and Southern Districts of West Virginia, the Northern and Southern Districts of Mississippi, the Middle District of Tennessee, the Middle District of Florida, and the Southern District of Georgia incorporate the First Amendment standard for sealing in their local rules.[439] These examples, however, are exceptions rather than the norm.

Taken together, the findings of this study reveal deep and pervasive gaps between existing circuit law on sealing and district-level implementation in local rules. The result is a fragmented and inconsistent set of rules in which the public's ability to access court records—and the transparency such access is meant to protect—varies dramatically, not only from one circuit to another, but even from district to district within the same circuit.

III. Creating Coherent and Consistent Rules on Sealing

The absence of clear, consistent guidance on sealing has produced predictable—and troubling—consequences. As noted in the Introduction, mounting evidence shows that vague and incomplete local rules have enabled excessive secrecy in the federal courts, often concealing not only the contents of sealed records but even the fact that such sealed records exist.[440]

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[436] *See supra* notes 130–138 and accompanying text.

[437] *See* D. Mass. L. R. 7.2; E.D. Tex. L. Civ. R. 5; W.D. Mich. L. Civ. R. 10.6; W.D. Mich. L. Crim. R. 49.8; S.D. Ohio L. Civ. R. 5.2.1; E.D. Tenn. L. R. 5.2.1; N.D. Ill. L. R. 26.2; S.D. Ind. L. Civ. R. 5-11; S.D. Ind. L. Crim. R. 49.1-2; E.D. Wis. L. R. 79; D. Neb. L. Civ. R. 7.5; D. Neb. L. Crim. R. 12.5; C.D. Cal. L. Civ. R. 79-5.2.2; D. Utah L. Civ. R. 5-3.

[438] *See* W.D.N.C. L. Civ. R. 6.1; W.D.N.C. L. Crim. R. 49.1.1; E.D. Va. L. Civ. R. 5; E.D. Va. L. Crim. R. 49; D. Colo. L. Civ. R. 7.2; D. Colo. L. Crim. R. 47.1; D. Minn. L. R. 5.6.

[439] *See* D. Conn. L. Civ. R. 5; D. Conn. L. Crim. R. 57.1; N.D. W. Va. L. Civ. R. 26.05; S.D. W. Va. L. Civ. R. 26.4; N.D. Miss. L. Civ. R. 79; N.D. Miss. L. Crim. R. 49.1; S.D. Miss. L. Civ. R. 79; S.D. Miss. L. Crim. R. 49.1; M.D. Tenn. L. Civ. R. 5.03; M.D. Fla. L. Civ. R. 1.11; S.D. Ga. L. Civ. R. 79.7.

[440] *See supra* notes 8–12 and accompanying text.

Fortunately, this is a problem that judges have the tools to fix. The most straightforward solution would be for the federal judiciary to adopt national rules governing sealing. While such rules have been proposed, they have yet to materialize. Since at least 2003, the Judicial Conference of the United States' Standing Committee on Rules of Practice and Procedure ("Rules Committee") has considered adopting rules for the sealing of cases and court records in federal courts.[441] In recent years, advocates for public access have renewed calls to create national sealing standards, and several proposals have been submitted to the Rules Committee, including a draft Federal Rule of Civil Procedure 5.3 aimed at implementing uniform procedures for sealing civil court records.[442] Despite ongoing discussions, however, the Rules Committee has not advanced a formal proposal to the Judicial Conference.[443]

Because prospects for a national rule thus remain uncertain, the most practical path forward is for individual districts to revise their local rules and establish a basic framework for sealing—one that combines clear procedural safeguards with appropriate substantive standards. The sections that follow outline some core principles that should guide the development of such a framework, including the importance of affirming the presumption of public access to court records; articulating specific standards for sealing; adopting robust procedures for both sealing and unsealing; and implementing mechanisms that minimize the administrative burdens on the courts. By adopting clear and consistent local rules, districts can mitigate many of the problems caused by the current piecemeal approach and advance meaningful reform even in the absence of a uniform national rule on sealing.

A. Affirming the Presumption of Public Access

Every rule on sealing should begin by affirming the public's presumptive right of access to records filed with the court. The presumption of public access to court records is a foundational principle of the American judicial system, rooted in both

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[441] In 2003, the Rules Committee asked the Federal Judicial Center to conduct a study of sealed settlement agreements filed in federal district courts. *See* ROBERT TIMOTHY REAGAN ET AL., FED. JUD. CTR., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 1 (2004), https://perma.cc/N6TN-TEL2.

[442] *See* Letter from Abraham, Abdo & Manes, *supra* note 15; Letter from Volokh, *supra* note 15.

[443] *See* Meeting Minutes, Civ. Rules Advisory Comm., Fed. Jud. Conf. 7–9 (Apr. 9, 2024), https://perma.cc/2HUY-47RL (discussing the need for new rules on sealing but taking no action).

the common law and the First Amendment.[444] While this presumption is well established in doctrine,[445] it does not carry its proper force unless courts explicitly recognize it in their rules on sealing. A clear acknowledgment by federal courts serves to anchor the presumption in the procedural and cultural norms of the judiciary, reminding litigants, counsel, and judges that openness is the baseline from which any departure must be justified.[446]

Explicit affirmation also serves an important educational role for the bench and bar. As Vincent Blasi has noted, the articulation of clear principles, such as the nearly universal prohibition against prior restraints,[447] have "thrust."[448] That is, their use "represents a notable value commitment that says much about how particular disputes will be adjudicated."[449] In comparison, Blasi points out that open-ended balancing tests "do[] not provide a strong indication of how a particular dispute will be resolved."[450] This is not to say that the right of access must be absolute in order to serve this signaling function. As Blasi explains, even a qualified right can communicate clear principles:

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[444] *See, e.g.*, Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597–98 (1978) ("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.").

[445] *See supra* Part I.B.

[446] *See, e.g.*, E.D. VA. L. CIV. R. 5 ("Motions to file documents under seal are disfavored and discouraged. Agreement of the parties that a document or other material should be filed under seal or the designation of a document or other material as confidential during discovery is not, by itself, sufficient justification for allowing a document or other material to be filed under seal."); E.D. LA. L. CIV. R. 5.6(C) ("Motions to seal an entire pleading or brief are disfavored and—unless a federal statute or federal rule provides otherwise—will be granted only in extraordinary circumstances. Parties should not routinely seek to file even portions of a pleading or brief under seal."); N.D. CAL. L. CIV. R. 79-5(a) ("The public has a right of access to the Court's files. This local rule applies in all instances where a party seeks to conceal information from the public by filing a document, or portions of a document, under seal.").

[447] *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." (citations omitted)).

[448] Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 473 (1985).

[449] *Id.*

[450] *Id.*

> A mode of analysis that emphasizes principles . . . can broaden the perspective of the decisionmaker and make the regulatory concerns of the moment seem less monumental. . . . A legal culture that talks and thinks in terms of principles is somewhat less likely, by virtue of that mode of discourse, to trivialize its ideals in the process of case-by-case application, or lose the capacity to subject its ad hoc, pragmatic impulses to some form of discipline.[451]

In the sealing context, this principle-centered approach is especially important because the public's right of access exists independent of the litigants' preferences.[452] Many practitioners—particularly in high-stakes civil litigation—may view sealing as routine, even reciprocal: a bargaining chip in discovery or settlement negotiations.[453] Others might not understand how strong their circuit law is on sealing and simply assume that any record can be sealed. When courts clearly state that the public enjoys a presumption of access and that sealing will be permitted only in narrowly defined circumstances, they recalibrate those expectations. This clarity deters the routine use of sealing, fosters compliance with procedural safeguards, encourages alternatives to sealing, and reduces the workload on the courts.

In affirming the presumption of access in their local rules, courts also acknowledge their role as guardians of the public's right to know.[454] In many sealing disputes, the district judge is the only party representing that interest—and may face institutional pressures that conflict with it. As commentators, including judges,

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[451] *Id.* at 474.

[452] *See, e.g.*, Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999) ("The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it)." (citing Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 492 (1991))).

[453] *See, e.g.*, Black v. Emerson, No. 25-CV-01035-WJM-NRN, 2025 WL 1635264, at *5 (D. Colo. June 9, 2025) ("Federal judges and their court staff are not legal pawns to be deployed in secret by wealthy disputants trying to get private answers to their problems."). This expectation is hardly surprising, given the dearth of clear sealing standards in local rules. In a 2020 study of federal court dockets, Seth Endo found that out of 100 proposed stipulated protective orders, only five were denied, and eighty-three were approved with no changes. Endo, *supra* note 131, at 1277. He also found that out of the ninety-five approved orders, two-thirds "only included generic language, such as a recitation of the list of confidential information from Rule 26(c)(1)(g) or definitions drawn from model orders." *Id.* at 1286.

[454] *See* Ardia, *Popular Sovereignty*, *supra* note 34, at 36–37.

have noted, district courts "are under great pressure to clear their calendars" and "tend, therefore, to approve secrecy agreements that encourage settlement."[455] Of course, this will likely make sealing requests less common, but that is in keeping with the Supreme Court's directive that "[c]losed proceedings . . . must be rare and only for cause shown that outweighs the value of openness."[456]

From a democratic standpoint, explicit acknowledgment of the presumption of public access strengthens the legitimacy of the judicial branch, and of government generally.[457] The Supreme Court has repeatedly recognized that open judicial proceedings allow the public to evaluate the quality of justice and that public access to the courts is essential to "the free discussion of governmental affairs."[458] When court rules explicitly affirm the presumption of public access to court records, they promote government accountability, deter abuses of secrecy, and ensure that justice is not only done, but seen to be done.

B. Evaluating Countervailing Interests

As Part II has shown, a fundamental defect in many district court rules on sealing is their failure to articulate specific standards governing when court records may be sealed.[459] Vague language—such as permitting sealing when "required" or "needed"[460]—invites inconsistent application and undermines the presumption of public access. Without well-defined standards in their rules, courts risk resorting to ad hoc approaches to sealing that vary not only from district to district but from

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[455] Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 517 (1994); *see also* Anderson, *supra* note 3, at 729 ("[J]udges face incredible pressure to go along with court-ordered secrecy in the heat of battle."); *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 SEDONA CONF. J. 141, 144 (2007) ("Under the pressure of court workloads, some judges may be tempted to improperly forgo the individual determinations necessary to seal court documents, and instead issue orders in accordance with the parties' stipulations.").

[456] *Press-Enterprise I*, 464 U.S. 501, 509 (1984).

[457] *See* Ardia, *Popular Sovereignty*, *supra* note 34, at 12–15.

[458] Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 604 (1982) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

[459] *See supra* Part II.D.

[460] D. NEB. L. CIV. R. 7.5(a)(1) (requiring a movant to "state why sealing is required"); D. NEB. L. CRIM. R. 12.5(a)(1) (same); D. ME. L. CIV. R. 7A ("The motion shall propose specific findings as to the need for sealing and the duration the document(s) should be sealed."); D. ME. L. CRIM. R. 157.6(b) (same).

courtroom to courtroom, producing inconsistency and eroding confidence in the judiciary's commitment to open courts.

To be sure, the presumptive right of public access described above is a qualified one. As the Supreme Court has made clear, even a First Amendment right of access may yield when countervailing interests are sufficiently compelling.[461] Given the wide variety of disputes that come before the courts, it should come as no surprise that court records are awash with private and sensitive information about the litigants, witnesses, jurors, and others who come into contact with the court system.[462] For example, information ranging from bank account numbers to details about an individual's past sexual activity can appear in court files raising, among other concerns, the risk of identity theft and reputational harm.[463] For businesses and other organizations, court proceedings may disclose trade secrets and other confidential business information that can lead to substantial economic harm.[464] For the government, information disclosed in court records, such as the names of confidential informants and descriptions of intelligence-gathering techniques, can potentially harm national security or undermine law enforcement efforts.[465] In the criminal context, public access to certain records can also prejudice a defendant's right to a fair trial.[466] These serious harms underscore the necessity for courts to carefully balance the importance of public access against the need for secrecy.

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[461] *See, e.g.*, *Globe Newspaper Co.*, 457 U.S. at 606–07 ("Where . . . the State attempts to deny the right of access . . . it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.").

[462] *See, e.g.*, David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807, 1825–26, 1882–90 (2015) (discussing the wide range of privacy interests implicated by public access to the courts).

[463] *Id.* at 1845–47.

[464] *See, e.g.*, Kyle J. Mendenhall, Note, *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 (2014).

[465] *See* Arthur L. Burnett Sr., *The Potential for Injustice in the Use of Informants in the Criminal Justice System*, 37 SW. U. L. REV. 1079, 1082–83 (2008).

[466] *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 356–61 (1966) (discussing the prejudicial impact of pretrial publicity and a judge's duty to protect the defendant's constitutional right to a fair trial).

The point here, however, is that this balancing must be guided by clear standards so that sealing occurs only when it is justified.[467] Reluctance to adopt a national rule likely stems, in part, from the fact that not all circuits recognize a First Amendment right of access to court records.[468] In practice, however, there is less disagreement than it seems. All of the federal circuits acknowledge a common law right of access to judicial records filed in both civil and criminal cases.[469] While the circuits vary somewhat in how they define a "judicial record," every circuit applies the common law's presumption of public access to materials filed in support of dispositive motions,[470] and most also extend the presumption to any record that is "filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings."[471]

Accordingly, districts should, at a minimum, incorporate the common law standard in their rules. By explicitly stating that sealing requires a showing sufficient to overcome the common law presumption of access—and, where applicable, the more stringent First Amendment standard[472]—a district's local rules will place

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[467] *See* Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 417, 421 (5th Cir. 2021) ("[I]ncreasingly, courts are sealing documents in run-of-the-mill cases where the parties simply prefer to keep things under wraps."); *In re* Xyrem (Sodium Oxybate) Antitrust Litig., 789 F. Supp. 3d 760, 764 (N.D. Cal. 2025) ("Too often, in this case and others, [sealing] requests are granted because it is easier to leave something sealed than it is to explain why it should be unsealed.").

[468] *See supra* Part I.C.

[469] *See supra* notes 110–113 and accompanying text.

[470] *See supra* notes 150–152 and accompanying text.

[471] United States v. Wecht, 484 F.3d 194, 208 (3d Cir. 2007) (citation omitted). The common law's definition of judicial records encompasses a wider range of materials then are covered by a First Amendment right of access, embracing potentially "everything in the record, including items not admitted into evidence." Smith v. U.S. Dist. Ct. for S. Dist. of Ill., 956 F.2d 647, 650 (7th Cir. 1992) (citation omitted). However, in most circuits it does not include unfiled discovery material and records attached to non-dispositive discovery motions. *See supra* notes 156–160 and accompanying text.

[472] As noted in Part II, all of the circuits, other than the Tenth Circuit, apply a First Amendment right of access to records filed in criminal cases and the First, Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits apply the First Amendment test to many court records in civil cases. *See supra* Part II.C.

the burden squarely on the party requesting secrecy to justify sealing.[473] Rules that provide a clear statement of the standard for sealing will discourage boilerplate sealing motions and force litigants to identify the specific harms disclosure would cause.[474] Indeed, even in circuits that apply only the more-deferential common law standard, the public's right of access will be better protected through a clear, well-defined standard that ensures that sealing decisions are based on the specific articulation of harms.

The District of Connecticut offers a model for such clarity. Its local criminal rule on sealing expressly includes both the common law and First Amendment tests:

> (1) Common-Law Right of Access. Any document that a party presents to the court, which is relevant to the performance of a judicial function and useful to the judicial process, is a judicial document to which the public has a presumptive right of access under the common law. The court may seal a document, or any part of a document, subject to the common-law right of public access only if it makes particularized findings on the record that the presumption of access to the particular document is outweighed by countervailing factors in favor of sealing, such as the danger of impairing law enforcement or judicial efficiency, and privacy interests.
>
> (2) First Amendment Right of Access. The court may seal a document, or any part of a document, to which the First Amendment right of access attaches only if it makes particularized findings on the record demonstrating that sealing is essential to preserve compelling interests, and that sealing in whole or in part is narrowly tailored to serve those interests.[475]

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[473] *See, e.g.*, S.D. GA. L. CIV. R. 79.7 ("The party seeking to have any matter placed under seal must rebut the presumption of the openness derived from the First Amendment by showing that closure is essential to preserve some higher interest and is narrowly tailored to serve that interest.").

[474] *See* Steven S. Gensler & Lee H. Rosenthal, *Breaking the Boilerplate Habit in Civil Discovery*, 51 AKRON L. REV. 683, 686 (2017) ("It is up to the judiciary . . . to take a loud and visible stand against boilerplate [in discovery]."). As the former Chief United States District Judge for the District of South Carolina has observed: "In my view, courts too often rubber-stamp confidentiality orders presented to them, sometimes altogether ignoring or merely giving lip service to the body of law and existing court rules that are supposed to apply when the parties request that discovery documents be filed under seal, that settlements be subject to a gag order, or that previously filed orders be vacated." *See* Anderson, *supra* note 14, at 715.

[475] D. CONN. L. CRIM. R. 57.1(c).

Most districts, however, do not incorporate either the First Amendment or the common law standard directly into their rules, instead leaving the applicable legal standard unstated and requiring litigants to decipher it from case law.[476]

The absence of clear standards not only hamstrings litigants, it also hinders meaningful appellate review. Appellate courts have repeatedly emphasized that district courts must state their reasoning when departing from the presumption of access.[477] Local rules that require specific showings from the party requesting sealing help to create a reviewable record. Moreover, as the Third Circuit has noted, these requirements are not merely for the benefit of appellate review—they also serve a deeper purpose: They "exist[], most fundamentally, to assure careful analysis by the district court before any limitation is imposed."[478]

C. Procedures for Sealing and Unsealing Court Records

Procedural protections can be just as critical as substantive standards for safeguarding the public's right of access to court records.[479] Robust procedural requirements are essential to ensuring that sealing decisions are consistent with the constitutional and common law presumptions of public access.[480] Even where substantive standards are clear, the absence of explicit procedures in local rules can lead to sealing orders being entered without adequate justification or transparency. Local rules that require procedural safeguards—such as public notice of sealing

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[476] A scant 15% of districts reference either the common law or First Amendment standard in their civil rules on sealing and only 12% do so in their criminal rules. *See supra* Table 3.

[477] Regardless of which standard applies, a court must make particularized findings justifying sealing or other restrictions on disclosure. *See supra* notes 94–96, 124–125 and accompanying text. This is so even under the "good cause" standard for protective orders. *See, e.g.*, Phillips *ex rel.* Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1210–11 (9th Cir. 2002) ("For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted." (citation omitted)).

[478] United States v. Antar, 38 F.3d 1348, 1362 (3d Cir. 1994).

[479] *Cf.* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 112–13 ("Substance and process are intimately related. The procedures one uses determine how much substance is achieved, and by whom. Procedural rules usually are just a measure of how much the substantive entitlements are worth, of what we are willing to sacrifice to see a given goal attained.").

[480] *See, e.g.*, *Press-Enterprise I*, 464 U.S. 501, 510 (1984) (explaining that procedural protections must be satisfied before closure).

requests, opportunity for objections, and explicit consideration of less-restrictive alternatives—protect against unjustified and overbroad restrictions on access.[481]

One essential procedural protection is providing public notice before sealing occurs. Notice allows the public and interested parties to voice objections and present arguments in favor of public access. Without it, sealing can happen silently, with the public unaware that records have been withheld until long after the opportunity to contest the sealing decision has passed.[482] As the First Circuit has said: "It is axiomatic that protection of the right of access suggests that the public be informed of attempted incursions on that right. Providing the public with notice ensures that the concerns of those affected by a closure decision are fully considered."[483] Local rules that require courts to publicly docket sealing motions, identify the records at issue, and provide a reasonable window for objections ensure that sealing is subject to the same adversarial testing as other judicial decisions.[484]

When applying a First Amendment right of access, nearly all federal circuits require that a district court provide adequate notice of a sealing request and afford interested parties an opportunity to object before ruling on a motion to seal.[485] Even under the common law, judges are instructed to give the public an opportunity to object before ruling on a motion to seal.[486] Of course, the same notice should accompany any orders to seal so that the public can see whether a sealing order was issued in a case and potentially seek unsealing.[487] The Western District of Virginia,

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[481] *See supra* Part II.B.1.

[482] *See* Hon. T. S. Ellis III, *Sealing, Judicial Transparency and Judicial Independence*, 53 VILL. L. REV. 939, 949–50 (2008).

[483] United States v. Kravetz, 706 F.3d 47, 59 (1st Cir. 2013) (citation omitted).

[484] *See, e.g.*, D. KAN. L. CIV. R. 5.4.2(c) ("A Proponent that seeks to maintain any portion of the document under seal, or to allow the document to be filed in the public record with redactions, must file a motion to seal or redact in the public record."); D. MD. L. CIV. R. 105(11) ("The Court will not rule upon the motion [to seal] until at least fourteen (14) days after it is entered on the public docket to permit the filing of objections by interested parties.").

[485] *See supra* note 98.

[486] *See supra* note 123.

[487] *See, e.g.*, United States v. Haller, 837 F.2d 84, 87 (2d Cir. 1988) ("[T]he fact that a sealing order [has] been entered must be docketed."); *In re* Search Warrant for Secretarial Area Outside Off. of Gunn, 855 F.2d 569, 575 (8th Cir. 1988) ("The fact that a closure or sealing order has been entered must itself be noted on the court's docket, absent extraordinary circumstances.").

for instance, explicitly requires that both a motion to seal and any order to seal must be publicly docketed.[488]

Another indispensable procedural safeguard imposed by many federal courts of appeal is the requirement that district courts explicitly consider less-restrictive alternatives before ordering records sealed.[489] Sealing is a blunt tool, eliminating public access entirely, but many privacy and security concerns can be addressed through narrower means, such as redaction or paper filing.[490] By requiring parties to explain why such alternatives are inadequate in a given case, local rules can preserve the maximum amount of public access possible while also protecting legitimate confidentiality interests.[491]

Equally important is the inclusion of clear procedures for unsealing court records once the justification for sealing has lapsed. Without such provisions, sealed materials can remain hidden indefinitely, even when the interests that once supported sealing no longer exist. For example, a trade secret may lose its protected status over time, an investigation may conclude, or a defendant's fair-trial concerns may dissipate after a verdict.[492] Yet in many district court local rules, there is no

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[488] W.D. VA. L. GEN. R. 9(b)(3) ("A motion to seal and any order to seal must be docketed according to the administrative procedures of the Court.").

[489] Consideration of alternatives to sealing is already part of the First Amendment's requirement of narrow tailoring, *see Press-Enterprise II*, 478 U.S. 1, 13–14 (1986), but many circuits require this under the common law as well. *See supra* notes 122–125 and accompanying text.

[490] *See* Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S.C. L. REV. 791, 820 (2004); Ardia, *Privacy and Court Records*, *supra* note 4, at 1439–42.

[491] *See, e.g.*, N.D. CAL. L. CIV. R. 79-5(a) ("A party must explore all reasonable alternatives to filing documents under seal, minimize the number of documents filed under seal, and avoid wherever possible sealing entire documents (as opposed to merely redacting the truly sensitive information in a document."); D. MD. L. CIV. R. 105(11) ("Any motion seeking the sealing of pleadings, motions, exhibits, or other documents to be filed in the Court record shall include (a) proposed reasons supported by specific factual representations to justify the sealing and (b) an explanation why alternatives to sealing would not provide sufficient protection.").

[492] *See, e.g.*, Miller v. Ind. Hosp., 16 F.3d 549, 551–52 (3d Cir. 1994) ("Even if the initial sealing was justified, when there is a subsequent motion to remove such a seal, the district court should closely examine whether circumstances have changed sufficiently to allow the presumption allowing access to court records to prevail.").

formal process to revisit sealing orders,[493] meaning that sealing restrictions persist into perpetuity by default.

Local rules should require litigants, at the time sealing is requested, to specify the duration of the seal. In addition, the rules should set forth the conditions that will trigger unsealing or reconsideration and provide a mechanism—whether by motion of a party, an intervenor, or on the court's own initiative—for unsealing when circumstances change.[494]

Former United States District Court Judge Thomas Ellis III has argued forcefully against indefinite sealing:

> Permanent sealing is both pernicious and unnecessary. It is pernicious for all the reasons already canvassed that counsel against secrecy in court proceedings, including the potential for this practice to conceal abuses by judges or parties—indeed, even providing an incentive for such abuses. Further, where the participants in certain court proceedings, including the judge, know the proceedings will be permanently sealed from public scrutiny, they may feel less restrained in their conduct, knowing that they will not be held to account publicly for their actions.[495]

Judge Ellis has urged that "every order sealing records should explicitly limit its own duration or, alternatively, require the party seeking protection to reappear and reestablish the necessity of the seal."[496] "This simple mechanism," he concludes "will ensure that materials requiring protection from the public's rights of access are maintained under seal—but only as long as necessary, and no longer."[497]

In codifying these procedural protections—public notice, consideration of alternatives, and periodic review for unsealing—in their rules, district courts can better safeguard the public's right of access while still protecting legitimate interests in

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[493] Only thirty-six of the ninety-four districts (38%) include procedures for unsealing court records in their general sealing rules.

[494] *See, e.g.*, D. HAW. L. CIV. R. 5.2(e) ("If the court determines at any time that any pleading, declaration, affidavit, document, picture, exhibit, or other matter has been improperly sealed or no longer needs to be sealed, the court may order its unsealing."); E.D. CAL. L. GEN. R. 141(e) ("Upon the motion of any person, or upon the Court's own motion, the Court may, upon a finding of good cause or consistent with applicable law, order documents unsealed.").

[495] Ellis, *supra* note 482, at 949.

[496] *Id.*

[497] *Id.*

secrecy.[498] For instance, the Northern District of California states in its rules that "[a] party must explore all reasonable alternatives to filing documents under seal, minimize the number of documents filed under seal, and avoid wherever possible sealing entire documents (as opposed to merely redacting the truly sensitive information in a document)."[499] The point is not to eliminate sealing altogether but to ensure that it occurs rarely, with full transparency, and only when the law and facts allow it.

D. Minimizing the Burdens on the Courts

In addition to affirming the presumption of public access and establishing clear substantive and procedural standards, local rules on sealing should address the practical realities of judicial administration. Unnecessary or poorly managed sealing motions impose considerable burdens on judges and court staff, straining already limited resources. Court rules that incorporate procedures to streamline the handling of sealing requests and encourage efficient party conduct can reinforce transparency while allowing courts to manage their dockets effectively.

One important tool for easing administrative strain is the provision for temporary, short-term sealing while a motion to seal remains pending.[500] Allowing records to be filed under provisional seal for a limited, clearly defined period while the court evaluates a sealing request will ensure that sensitive information is protected without derailing the docket or requiring multiple rounds of filings.[501] For example, the Middle District of North Carolina's civil rules require all briefing to be filed

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[498] These recommendations also align with the procedural checklist for sealing provided by the Federal Judicial Center, the research and education agency of the federal judicial system. *See* ROBERT TIMOTHY REAGAN, FED. JUD. CTR., SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE 19–22 (2010), https://perma.cc/ZHB7-5LQ4.

[499] N.D. CAL. L. CIV. R. 79-5(a).

[500] *See, e.g.*, *In re* Knight Publ'g Co., 743 F.2d 231, 235 (4th Cir. 1984) ("The court may temporarily seal the documents while the motion to seal is under consideration so that the issue is not mooted by the immediate availability of the documents.").

[501] Courts must be cautious in implementing interim sealing procedures. The public generally has a right of contemporaneous access to judicial records. *See, e.g.*, Courthouse News Serv. v. Schaefer, 2 F.4th 318, 328 (4th Cir. 2021). Nevertheless, reasonable restrictions on access to court records that are tied to a court's administrative needs are likely to be permissible. *See* Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 607 n.17 (1982) (stating that "limitations on the right of access that resemble 'time, place, and manner' restrictions on protected speech . . . would not be subjected to . . . strict scrutiny").

within fourteen days of a motion to seal and states that "the underlying documents for which sealing is sought shall be filed under temporary seal" until the court rules on the motion to seal.[502]

Another way to reduce the administrative burden is to place the onus on the parties to minimize both the frequency and scope of sealing requests. Many sealing motions are avoidable: Parties may submit far more material for sealing than is necessary or seek to seal categories of information that could be satisfactorily protected through redactions.[503] As I have argued elsewhere, "we must discard the notion that the protection of privacy is exclusively the job of judges and court staff."[504]

> Ensuring that privacy interests are protected should be the shared responsibility of all participants in the legal system. The current approach to privacy and court records can best be described as "dump it all in and let the courts sort it out." . . . [L]itigants and their lawyers too often file every document that seems even remotely relevant to their case, relying on the court to seal or redact the most sensitive and damaging information. Understaffed and overworked courts, however, do not have the resources to parse the millions of documents that are filed every year.[505]

Local rules should require parties to certify that they have conferred in good faith to narrow their sealing requests, explored all reasonable alternatives, and limited the request only to material truly deserving of confidential treatment. Several districts have adopted versions of this approach, mandating that any motion to seal include a detailed explanation of steps taken to minimize the scope of the request and a justification for why less-restrictive alternatives are inadequate.[506] This not only streamlines judicial review—allowing courts to focus on genuinely contested or complex sealing questions—but also curbs attempts to shield routine filings from public view.

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[502] M.D.N.C. L. Civ. R. 5.4(c).

[503] Ardia, *Privacy and Court Records*, *supra* note 4, at 1443–47.

[504] *Id.* at 1443.

[505] *Id.*

[506] *See, e.g.*, E.D. VA. L. CIV. R. 5 ("Anyone seeking to file a document or other material under seal must make a good faith effort to redact or seal only as much as necessary to protect legitimate interests."); E.D. WIS. L. R. 79(d)(4) ("Any party seeking to restrict access to documents or materials or to file confidential documents or materials under seal, whether pursuant to a Court-approved protective order or otherwise, must include in the motion a certification that the parties have conferred in a good faith attempt to avoid the motion or to limit the scope of the documents or materials subject to sealing under the motion.").

Incorporating these measures into local rules benefits all stakeholders. Courts avoid being inundated with unnecessary or duplicative sealing motions; parties receive greater clarity about the procedures and expectations for sealing; and the public sees that transparency is not sacrificed merely for convenience. Ensuring that the administrative aspects of sealing are managed efficiently reinforces the presumption that public access is the default and secrecy the exception—not only as a matter of principle, but also as a matter of rules-based practices.

Conclusion

Across the federal system, local rules governing the sealing of court records too often fail to provide meaningful guidance. Many local rules lack a clear substantive standard, relying instead on vague formulations—such as allowing sealing when "required" or "necessary"—that invite uneven and ad hoc application. Others omit critical procedural safeguards, including failing to require public notice of sealing motions, identification of specific harms from disclosure, and consideration of less-restrictive alternatives.

The findings described above are concerning. Thirty-nine of the ninety-four districts (42%) have no general sealing provision in their criminal rules, and nineteen districts (20%) lack such a provision in their civil rules.[507] Even in districts that do have general sealing rules, they frequently omit required procedural safeguards: Only seventeen districts (18%) incorporate all of their circuit's procedural requirements in their civil rules, and a mere six districts (6%) do so in their criminal rules.[508] In half of all circuits—the First, Third, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits—not a single district incorporates all of the circuit's procedural protections in its civil or criminal rules.[509]

Moreover, more than one-third of all districts—thirty-five out of ninety-four (37%)—provide no substantive standard for sealing in their civil or criminal rules. Another twenty-one districts (22%) offer only the directive to "apply governing law," without identifying what that law is.[510] In those districts that do include a standard in their rules, only eleven districts (12%) provide a standard for sealing that incorporates their circuit's requirements in civil cases and a meager six districts

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[507] *See supra* Tables 4.1–4.DC.

[508] *See id.*

[509] *See supra* Tables 4.3, 4.6, 4.7, 4.8, 4.11 & 4.DC.

[510] *See supra* Table 3.

(6%) do so in criminal cases.[511] The result is a patchwork of inconsistent standards and practices, not only between circuits but often among districts within the same circuit, producing uncertainty for litigants and undermining the public's right of access to the courts.

The analysis in this Article shows that reform is both urgently needed and achievable. Over-sealing remains a pervasive problem in federal courts, one that not only diminishes public trust but, in some instances, also jeopardizes public safety by concealing information the public has a legitimate interest in knowing. A uniform national rule would most efficiently address the deficiencies in local rules, but inaction by the Judicial Conference makes such systemic reform unlikely in the near term. In its absence, responsibility falls to individual districts to revise and strengthen their own rules.

This Article proposes three core principles to guide that work. First, substantive clarity: Every rule governing sealing should expressly affirm the presumption of public access and incorporate, at a minimum, the common law's requirements for sealing. Second, procedural rigor: Rules should require public notice of sealing requests, an opportunity for objections, identification of specific harms, consideration of less-restrictive alternatives, and mechanisms for periodic review and unsealing when secrecy is no longer justified. Third, administrative efficiency: Rules should require parties to limit the frequency and narrow the scope of their requests, explore redaction as an alternative, and certify their efforts to minimize sealing.

Adopting these measures will allow federal courts to better balance the legitimate need to protect sensitive information with the constitutional and democratic imperative of ensuring public access to the courts. Clear, enforceable court rules will promote consistency across districts, reduce unnecessary administrative burdens, and, most importantly, reaffirm the judiciary's role as a guardian of open government.

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[511] *See supra* Tables 4.1–4.DC. The failure to include a proper standard for sealing records in criminal cases is especially troubling because all of the federal circuits, other than the Tenth Circuit, have held that the public has a First Amendment right of access to records filed in criminal proceedings. *See supra* note 83 and accompanying text.