No. 12-2209

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

COMPANY DOE,
Plaintiff-Appellant,

v.

PUBLIC CITIZEN; CONSUMER FEDERATION OF AMERICA; and CONSUMERS UNION,
Parties-in-Interest-Appellants,

and

INEZ TENENBAUM, in her official capacity as Chairwoman of the Consumer Product Safety Commission; and CONSUMER PRODUCT SAFETY COMMISSION,
Defendants.

On appeal from the United States District Court for the District of Maryland
(Hon. Alexander Williams, Jr., U.S. District Judge)

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF PARTIES-IN-INTEREST-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union Foundation certifies that it is a not-for-profit corporation, with no parent corporation or publicly-traded stock.

Undersigned counsel certifies that no persons and entities as described in the fourth sentence of FED. R. APP. P. 28.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT OF *AMICUS CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has appeared before the federal courts on numerous occasions, both as direct counsel and as *amicus curiae*. The protection of the right of access to courts as guaranteed by both the First Amendment and the common law is of special concern to the organization.

By motion filed on December 20, 2012, the ACLU has sought leave to file this brief. The Appellants (Public Citizen, Consumer Federation of America and Consumers Union) have consented. Appellee Company Doe opposes participation by the ACLU. The ACLU's motion is pending.

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* states that no party's counsel authored this brief in whole or in part, and that no party or person other than *amicus* and its members contributed money toward the preparation or filing of this brief.

SUMMARY OF ARGUMENT

This entire case was litigated under "temporary" seal because the district court did not rule on Company Doe's sealing motion, which was filed together with the complaint, until it granted summary judgment nine months later. *See* D. MD. R. 105(11) ("Materials that are subject of the motion [to seal] shall remain temporarily sealed pending a ruling by the Court."). That outcome is wholly at odds with the values underlying the public's First Amendment and common law rights of access.

Our nation's long tradition of open judicial proceedings ensures public accountability for judges and litigants, enhances the legitimacy of the judicial system in the eyes of the people, and fosters more accurate fact-finding. These benefits, and the value of openness itself, depend on the public's ability to monitor judicial proceedings as they unfold. Thus, the public's right of access includes a right to contemporaneous review of judicial proceedings and documents.

Recognizing the importance of contemporaneous review, courts have held that documents and proceedings found subject to the right of access should be immediately disclosed to the public. This rule would be meaningless, and the values it protects would be jeopardized, if courts were not also required to resolve sealing motions expeditiously. This Court should therefore take this opportunity to make clear that courts must resolve sealing motions within a reasonable period of

time, which will ordinarily mean before further proceedings occur regarding the materials for which sealing is sought.

ARGUMENT

I. THIS COURT SHOULD HOLD THAT MOTIONS TO SEAL MUST BE RESOLVED WITHIN A REASONABLE PERIOD OF TIME.

A. The Public Right of Access Includes a Right to Contemporaneous Review.

To protect our country's tradition of open judicial proceedings, the public has well-established First Amendment and common law rights of access to court documents and proceedings in both criminal and civil cases. *See, e.g.*, *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). Because the value of openness is jeopardized whenever the public is denied prompt access to ongoing proceedings, the public's right of access includes a right to contemporaneous review of documents and proceedings subject to the right of access.

The public right of access is founded on the "core first amendment value" of openness. *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989). Openness assures the general public "that standards of fairness are being observed" in judicial proceedings, and thereby enhances both the basic fairness of those proceedings "and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984). Additionally, public scrutiny improves the fact-finding process by discouraging

perjury and encouraging witnesses and other interested parties to come forward. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596-97 (1980) (Brennan, J., concurring in the judgment). Public access to judicial proceedings and documents thus "promote[s] community respect for the rule of law," "provide[s] a check on the activities of judges and litigants," and "foster[s] more accurate fact finding." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (citing *Richmond Newspapers, Inc.*, 448 U.S. 555), *superseded on other grounds as recognized by Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009).

The public benefits provided by openness, however, depend on access to proceedings as they unfold. If potential witnesses and other interested parties are unaware of proceedings, they cannot come forward. No less significantly, judicial legitimacy and public accountability are undermined by delayed disclosure of documents and proceedings to which the public has a right of access. The public's attention span can be short, and "[t]he newsworthiness of a particular story is often fleeting." *Id.* As "[s]uppressed information grows older," and "[o]ther events crowd upon it," the story gradually recedes from public consciousness and is soon forgotten entirely. *Nebraska Press Ass'n v. Stuart* (*Stuart I*), 423 U.S. 1327, 1329 (1975) (Blackmun, Circuit Justice); *see also Nebraska Press Ass'n v. Stuart* (*Stuart*

II), 427 U.S. 539, 561 (1976) ("As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly."). Thus, any delay or postponement of public disclosure "undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh Distribs.*, 24 F.3d at 897.

For this reason, this Court has long recognized that the public has a right of contemporaneous access to court documents and proceedings. For example, in *In re Charlotte Observer*, the magistrate judge had expressed the view that "public disclosure, immediately after a jury is selected, of the basis for his earlier change of venue ruling and of the proceedings themselves necessarily would protect the right of access asserted by representatives of the press and public," because it only occasioned "minimal delay in access to the materials upon which a judicial decision was made and to the judicial reasoning behind the decision." 882 F.2d at 856 (internal quotation marks omitted). This Court firmly disapproved the magistrate's position, observing that such reasoning "unduly minimizes, if it does not entirely overlook, the value of openness itself," and concluding that "the magistrate failed to appreciate the significance of this underlying first amendment value in making his assessment." *Id.* Similarly, *In re Application & Affidavit for a Search Warrant* rejected the argument that the public's right of access could "be met by releasing the [search warrant] information after [the defendant's] trial has

concluded, when all danger of prejudice will be past," on the ground that the value of openness "is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for later public disclosure." 923 F.2d 324, 331 (4th Cir. 1991) (quoting *In re Charlotte Observer*, 882 F.2d at 856) (internal quotation marks omitted).[2]

This Court is not alone. Several other courts, including the Supreme Court, have also emphasized the importance of contemporaneous public review. *See Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring in the judgment) ("[P]ublic access to court proceedings is one of the numerous 'checks and balances' of our system, because '*contemporaneous review* in the forum of public opinion is an effective restraint on possible abuse of judicial power.'") (emphasis added) (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)); *United States v. Wecht*, 537 F.3d 222, 229 (3d Cir. 2008) ("[T]he value of the right of access would be seriously undermined if it could not be contemporaneous."); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006) (holding that "documents submitted to a court in support of or in opposition to a motion for summary judgment are judicial documents to which a presumption of immediate public

[2] Although these cases both concern criminal proceedings, the First Amendment right of access also applies to civil proceedings. *See, e.g.*, *Rushford*, 846 F.2d at 253; *cf. Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178-79 (6th Cir. 1983) (explaining that the justifications for the public right of access apply with equal strength in both the criminal and civil contexts).

access attaches under both the common law and the First Amendment"); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1310 (7th Cir. 1984) ("[T]he presumption of access normally involves a right of *contemporaneous* access . . . ."") (emphasis in original); *Associated Press v. United States District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) ("The effect of the [district court's blanket sealing] order is a total restraint on the public's first amendment right of access even though the restraint is limited in time.").

B. The Public's Right to Contemporaneous Review Requires Timely Resolution of Motions to Seal.

Recognizing the need for contemporaneous public review, courts have held, as a "necessary corollary" to the public right of access, that "once [disclosure is] found to be appropriate, access should be immediate." *Grove Fresh Distribs.*, 24 F.3d at 897 (citing *Stuart II*, 427 U.S. 539); *see also, e.g.*, *Lugosch*, 435 F.3d at 126-27; *In re Associated Press*, 162 F.3d 503, 506 (7th Cir. 1998) (quoting *Grove Fresh Distribs.*, 24 F.3d at 897); *cf. Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 664 (3d Cir. 1991) (denying a stay of the district court's unsealing order, in part because "the public interest encompasses the public's ability to make a contemporaneous review of the basis of an important decision of the district court"). Similarly, this Court has firmly rejected the notion that district courts may order delayed disclosure of documents subject to the right of access, *see, e.g.*, *In re Charlotte Observer*, 882 F.2d at 856, and has repeatedly made clear

that the press and public must receive notice and a reasonable opportunity to challenge sealing motions "*before* the court ma[kes] its decision," *see, e.g.*, *In re Knight Publ'g Co.*, 743 F.2d 231, 235 (4th Cir. 1984) (emphasis added).

Although *In re Knight* recognized that courts "may temporarily seal the documents while the motion to seal is under consideration so that the issue is not mooted by [their] immediate availability," *id.* at 235 n.1, the procedural protections outlined above would be meaningless—and the "core first amendment value" of openness they protect would be subverted—if documents filed under such a temporary seal could remain so indefinitely. Thus, in *Lugosch*, the Second Circuit held that a district court erred by failing to resolve expeditiously a motion to intervene for the purpose of accessing documents filed under seal, stating that the delay "was effectively a denial of any right to contemporaneous access—where '[e]ach passing day may constitute a separate and cognizable infringement of the First Amendment.'" 435 F.3d at 126 (alteration in original) (quoting *Grove Fresh Distribs.*, 24 F.3d at 897). Noting that the media organizations seeking to access the sealed files "had to wait for months during which the district court and magistrate judge seemingly took no action on their motion to intervene," and emphasizing that "[t]he public cannot properly monitor the work of the courts with long delays in adjudication based on secret documents," the panel urged the district court to "make its findings [regarding sealing] quickly" on remand. 435 F.3d at

126-27; *cf. United States v. Antar*, 38 F.3d 1348, 1363 (3d Cir. 1994) ("[T]he district judge appears not to have recognized that maintaining the transcripts under seal, though a passive act, was an active decision requiring justification under the First Amendment.").

This Court has similarly insisted that district courts may not indefinitely postpone decisions on pending motions to seal. In *Rushford*, it held that the "district court must address the question [whether discovery materials submitted under seal as part of a summary judgment motion should remain sealed] at the time it grants a summary judgment motion and not merely allow continued effect to a pretrial discovery protective order." *Rushford*, 846 F.2d at 253; *see also Virginia Dep't of State Police v. Wash. Post*, 386 F.3d 567, 576-77 (4th Cir. 2004) (quoting *Rushford*, 846 F.2d at 253-54). *Rushford* focused on the district court's grant of summary judgment as the critical juncture for resolving the outstanding sealing motion, because the documents at issue in that case had been submitted as part of a summary judgment motion filed twenty-one days before the court issued its decision. *See Rushford*, 846 F.2d at 251-52. But the harm to the value of openness is just as great, and the reasons compelling timely resolution of a sealing motion

are just as strong, where a case proceeds through multiple stages of litigation entirely in secret. *See, e.g.*, *In re Charlotte Observer*, 882 F.2d at 856.[3]

Here, nine months passed as the lawsuit proceeded from filing to judgment entirely in secret, pending the district court's resolution of Company Doe's motion to seal—which was submitted to the court along with the complaint. Consumer Groups Br. at 6. According to the court's opinion, numerous important litigation-related events occurred while the case remained under this "temporary" seal: Company Doe moved for a preliminary injunction; the Consumer Product Safety Commission moved to dismiss; the Commission revised the report it intended to publish on the database; Company Doe continued to dispute the report through the administrative process; both sides conducted scientific analyses regarding the Commission's report; Company Doe amended its complaint; the district court heard oral argument; and the parties filed cross-motions for summary judgment. *Id.* at 7. Indeed, the public was not even notified that Company Doe's motion for summary judgment had been granted, and its motion to seal granted in part, until three months *after* the district court issued its opinion to the parties. *Id.* at 7-8.

Whereas even "minimal delays" in the disclosure of documents and proceedings subject to the public's right of access threaten the value of openness,

[3] Indeed, this Court regularly provides mandamus relief for improper sealing decisions precisely because the public's right of access would be undermined if appellate review had to await final judgment. *See Under Seal v. Under Seal*, 326 F.3d 479, 485 n.5 (4th Cir. 2003).

In re Charlotte Observer, 882 F.2d at 856, extended delays of the sort here at issue often have the same practical result as complete suppression. The public cannot contribute to accurate fact-finding if the litigation has already concluded; the judge and litigants are significantly less likely to face public scrutiny over events that have already transpired; and the very secrecy in which the whole affair is conducted calls into question the legitimacy of the proceedings.[4]

This Court should therefore take this opportunity to elaborate on its decisions in *Rushford*, *In re Application & Affidavit*, *In re Charlotte Observer*, and other cases, by holding that a district court must resolve pending motions to seal within a reasonable period of time. Although what constitutes a reasonable period of time may depend on the specific facts at issue, courts should generally resolve sealing matters before further proceedings occur regarding the materials for which sealing is sought.

CONCLUSION

For the foregoing reasons, this Court should hold that courts must ordinarily resolve motions to seal before further proceedings occur regarding the materials for which sealing is sought.

[4] Moreover, because the district court did not notify the public that the case was going forward, members of the public had no opportunity to file a petition for a writ of mandamus challenging the court's decision to proceed without resolving Company Doe's sealing motion. *See Under Seal*, 326 F.3d at 485 n.5.

Dated: December 20, 2012 Respectfully submitted,

/s/ Ben Wizner

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because it contains 2,409 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Ben Wizner
Ben Wizner
December 20, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of December, 2012, the foregoing *Amicus Curiae* Brief for American Civil Liberties Union was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

/s/ Ben Wizner

Ben Wizner

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I certify that on December 20, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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