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Committee on the Judiciary

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Introduction

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to testify today on the Sunshine in Litigation Act of 2009. I am a Staff Attorney at Public Justice, a national public interest law firm based in Washington, D.C. and supported by the non-profit Public Justice Foundation. My testimony is based on Public Justice's work fighting unnecessary secrecy in the courts.

Public Justice (www.publicjustice.net) specializes in precedent-setting and socially significant litigation. For two decades, through a special project called "Project Access," Public Justice has opposed unnecessary court secrecy as a threat to public health and safety, the fair and efficient administration of justice, and our democratic system of government. As part of this project, we intervene in cases to fight for the public's right of access to information. In addition, through our approximately 3,000 member attorneys, the members of the Public Justice Foundation Board of Directors, and numerous inquiries from attorneys seeking our assistance, we have developed a great deal of institutional expertise about court secrecy and its effects.

Public Justice does not lobby and generally does not endorse or oppose specific legislation. We do, however, respond to informational requests from legislators and have occasionally testified before legislative and administrative bodies. In keeping with that practice, I am grateful for the opportunity to discuss our experience fighting court secrecy with the Subcommittee today.

There is no question that much of the civil litigation in this country is taking place in secret. Corporate defendants, especially in product defect, automobile design, toxic tort, environmental, and pharmaceutical cases, often refuse to produce documents in pretrial discovery without a protective order barring the plaintiff from sharing them with others. Gag orders prevent countless injury victims from publicly discussing the cause of their injuries as a condition of settling the case. Courts seal entire case files, making it impossible for the public or press to find out what happened. In short, through protective orders, secret settlements, and sealed court records, the public courts are being used by private parties to hide smoking-gun evidence of wrongdoing. All the while, Americans unsuspectingly continue to drive unsafe cars, take dangerous drugs, drink unsafe water, entrust our financial well-being to institutions that engage in fraud and deception, and seek treatment from incompetent doctors. In addition, secrecy subverts our system of open government and undermines trust in the court system.

Court-sanctioned secrecy is pervasive because defendants want it and because plaintiffs and judges do not do enough to oppose it. While Public Justice and other public interest groups have successfully challenged abusive sealing orders and protective orders by intervening in litigation, secrecy orders go unchallenged in the vast majority of cases. A law requiring federal judges to consider the public interest before entering a secrecy order would provide a substantial counterweight to the factors that allow secrecy to flourish.

How Court Secrecy Harms the Public's Health and Safety

Famous examples abound of damaging information revealed in litigation but kept secret from the public for long periods of time: defective Bic lighters, children's car seats, all-terrain vehicles, asbestos, and breast implants were all subject to protective orders while countless consumers continued to be at risk from using them.[1] Doctors continued unknowingly to implant defective heart valves into patients, even though documents disclosed in litigation brought by victims' families—but concealed from the public—revealed a high risk of fatal fracture.[2] Manufacturers of dangerous drugs have settled cases brought by injured patients on terms that forbade the patients' attorneys from notifying the FDA that the drug caused harm.

In 2000, the public learned that a safety defect in Firestone tires, when combined with the susceptibility of Ford Explorers to rolling over, had caused at least 250 injuries and 80 deaths in the United States. Firestone had known about the defect for a decade. But each time a victim or her survivors sued the tire manufacturer, the corporation settled the case on condition that the documents showing that the tires had safety defects be returned to the corporation and hidden from the public and the press. While a government investigation and television exposé ultimately forced the corporation to recall 14.4 million tires—6.5 million of which were still in use at the time—many of those injuries and deaths may not have occurred if Firestone had not successfully kept information about its defective

[1] *See* American Association for Justice, *Eight Deadly Secrets—How Court Secrecy Harms Families and Children*, at http://www.justice.org/cps/rde/xchg/justice/hs.xsl/3469.htm; Public Citizen, *The Hazards of Secrecy: 10 Cases Where Protective Orders Or Confidential Settlements Jeopardized Public Health And Safety*, at http://www.citizen.org/congress/civjus/archive/secrecy/articles.cfm?ID=571.

[2] *See* Public Citizen, *The Hazards of Secrecy*, *supra*.

product from reaching the public.[3] As of 2006, Firestone still had not notified all the owners of the dangerous tires that they had been recalled.[4]

Likewise, in several lawsuits against Cooper Tire, the families of victims killed or injured in accidents have uncovered documents allegedly showing that the accidents were caused by tread separation. But Cooper, in virtually every case, has fought to keep that evidence under seal, claiming that to release it would expose the corporation's trade secrets. In at least one case, Cooper sought and obtained a "draconian" protective order whereby the corporation was "effectively permitted to unilaterally designate any document it chose as confidential."[5] And a Mississippi court recently found that "Cooper Tires has engaged upon a course of conduct exhibiting an attitude that it does not have to provide documents or even the barest information about them unless and until plaintiffs have discovered from other sources that they exist."[6] The plaintiffs in a case in federal court in Utah cited five separate cases in which courts found that Cooper had willfully engaged in bad faith by failing to produce documents or respond to discovery.[7]

The costs of this court-sanctioned secrecy are all too clear to Johnny Bradley. In 2004, Mr. Bradley and his wife embarked on a cross-country drive from California to Mississippi to visit relatives on the way to new Navy recruiter assignments in Florida. Before the trip, Mr. Bradley decided to equip his Ford Explorer with new tires. Having heard recent publicity about the dangers of Firestone tires, he chose Cooper Tires. On a New Mexico highway, the tread on one of the rear tires separated, rolling the Explorer four times, putting Mr. Bradley into a coma for two weeks, and killing his wife instantly. Mr. Bradley believes his

[3] Memorandum of Law of *Amicus Curiae* Public Citizen in Support of Plaintiff's Motion to Compel and Opposition to Protective Order, *Trahan v. Ford Motor Co.*, No. 99-62989 (61st Dist. of Harris County, Tex. Sept. 18, 2000), *available at* http://www.citizen.org/litigation/briefs/OpenCourt/articles.cfm?ID=1070.

[4] *Bridgestone Firestone to Notify Owners of Recalled Tires*, U.S.A. Today, July 21, 2006, at http://usatoday.com/money/autos/2006-07-21-firestone-recall_x.htm.

[5] Fortunately, the order was subsequently reversed. *Mann v. Cooper Tire Co.*, 816 N.Y.S. 2d 45, 56 (App. Div. 2006).

[6] *Plaintiffs Fight Protective Order on Cooper Documents*, 26 No. 20 Andrews Automotive Litig. Rep. 14, Apr. 3, 2007 (discussing *McGill v. Ford Motor Co.*, No. 02-114 (Miss. Cir. Ct., July 30, 2002).

[7] *Id.*

wife would still be alive today if courts had not allowed Cooper to hide the evidence of the defect from the public.[8]

In another example, it recently came to light that Allstate Insurance Company had implemented a program designed to increase its shareholder profits by intentionally and significantly underpaying policyholders on legitimate claims.[9] The new program, which was conceived by McKinsey Consulting and documented in a series of PowerPoint slides now known as the "McKinsey documents," resulted in record operating income for Allstate during a period marked by several of the worst natural disasters in recent history, including Hurricane Katrina. The McKinsey documents showed how Allstate was forcing victims to litigate valid claims rather than settling them. The documents were produced in litigation, but were kept secret from the public pursuant to a protective order. Even after the protective order expired, Allstate refused to turn over the documents. Finally, a lawyer who had viewed the McKinsey documents published his notes and analysis, and the contents of the slides are now known to the public.[10]

More recently, the *New York Times* reported in December 2008 that documents produced in a lawsuit against Wyeth, the manufacturer of the hormone therapy drug Prempro, contain evidence that Wyeth paid a medical writing company to ghostwrite journal articles stating that there was no evidence linking the drug to breast cancer. One article was apparently published even after a federal study had linked Prempro to increased risk of breast cancer. Senator Charles Grassley is investigating these allegations, but most of the documents containing the evidence remain sealed pursuant to a court order. In the mean time, Prempro is still prescribed for treatment of severe menopausal symptoms, although its label now warns of the risk of cancer.[11]

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[8] The Sunshine in Litigation Act: Does Court Secrecy Undermine Public Health and Safety?: Hearing on S. 2449 Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary, 110th Cong. (Dec. 11, 2007), written testimony of Johnny Bradley, *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=3053&wit_id=6819.

[9] David J. Berardinelli, *An Insurer in the Grip of Greed*, TRIAL, July 7, 2007, at 32.

[10] *Id.*

[11] Duff Wilson, *Wyeth's Use of Medical Ghostwriters Questioned*, N.Y. Times, December 13, 2003, available at http://www.nytimes.com/2008/12/12/business/13wyeth.html?_r=1&scp=1&sq=Wyeth%20ghostwriters&st=cse ("The documents show company executives came up with ideas for medical journal articles, titled, them, drafted outlines, paid writers to draft the manuscripts,

These are not isolated instances. An award-winning *Seattle Times* investigative series in 2007 uncovered more than 400 cases in a single court that had been wrongly sealed in their entirety—many of them involving matters of public safety.[12]

How Unnecessary Court Secrecy Undermines the Civil Justice System

Whether or not unnecessary secrecy is acceptable in our nation's civil justice system depends on whether one views the publicly-funded courts as merely a means of resolving private disputes, or whether one believes that the public has a right of access to information about what happens in our court system.

No one would deny that there are some cases in which secrecy is appropriate. Coca-Cola certainly has a right to keep its competitors from knowing its secret formula. In such cases, judges can easily determine that no public interest would be harmed by confidentiality. But in cases where the information would alert the public to harmful corporate practices, the balance tips against secrecy.

This is not merely an question of ideals; it has serious practical ramifications. The first and most obvious effect of secrecy is that consumers remain unaware of risks to their safety and health and continue to use dangerous products. But there are other, more subtle costs as well.

Secrecy makes discovering the truth much more difficult and costly. When a defendant is able to keep its wrongdoing secret, it does not have to pay as much money to subsequent victims. In addition, it is harder for other victims to learn that they have legal claims. Others who know they have claims may be unable to sue because of the high cost of obtaining information that only the defendant possesses. Those who do sue will face protective orders at every corner, and the few who do prevail will likely be forced to agree to a secret settlement. Meanwhile, consumers can't make informed decisions about which companies to do business with, and the defendant continues to compete in the marketplace.

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recruited academic authors and identified publications to run the articles – all without disclosing the companies' roles to journal editors or readers.").

[12] Ken Armstrong, Justin Mayo, & Steve Miletich, *Your Courts, Their Secrets*, Seattle Times, March 5–15, 2007, series available at http://seattletimes.nwsource.com/html/yourcourtstheirsecrets/. The authors of the series were honored as finalists for the 2007 Pulitzer Prize in investigative journalism.

The cost to the judicial system—and to taxpayers—is enormous. Judges must decide the same discovery disputes over and over again. Cases that should be resolved easily if the truth were known take years to resolve or never reach resolution at all. Instead ensuring that the truth is discovered and justice is done, the public courtroom is being used all too often as a means of hiding the truth.

Examples of Public Justice's Work Fighting Unnecessary Court Secrecy

In the last several years, Public Justice has fought numerous overbroad protective orders and sealing orders. In some cases, though certainly not all, we have succeeded in making documents public that should never have been concealed in the first place. Although every court decision unsealing such documents is a victory, we cannot rely on this kind of litigation to make sure unnecessary secrecy is avoided. Literally hundreds of thousands of cases are handled each year by federal and state courts, and it is simply not possible for the handful of organizations dedicated to fighting court secrecy to intervene in more than a tiny fraction of them. Furthermore, challenges to secrecy orders offer no possibility of recovering any damages, and few lawyers can afford to undertake such cases on a *pro bono* basis. Thus, while the following examples demonstrate that it is possible, in some cases, to fight secrecy, it should also be remembered that for every success story, there are hundreds of equally harmful secrecy orders that remain in force.

Davis v. Honda: Unsealing of court record showing auto maker's expert witness intentionally destroyed evidence in a personal injury case (2005)

Sarah Davis was seventeen years old when the Honda Civic in which she was riding crashed, leaving her paralyzed. She filed a lawsuit against Honda in a California state court, and a key issue of fact at trial was whether she was wearing a seat belt at the time of the accident. After Ms. Davis had presented her case to the jury and Honda had begun its defense, the court granted permission for Honda's expert, automotive engineer Robert Gratzinger, to examine the car at issue in the presence of all counsel. During the inspection, Mr. Gratzinger was observed using a rag to intentionally wipe off marks on the seat belt that would have provided evidence of Ms. Davis's seat-belt use. Honda's attorney then refused to allow Ms. Davis's counsel to preserve the rag as evidence of spoliation.

As a result of this incident, Ms. Davis moved for sanctions, and the court halted the trial in order to investigate. After hearing testimony about what had happened, the court issued a scathing 36-page sanctions decision, finding that Mr. Gratzinger had "wrongfully and intentionally altered the most significant physical

evidence in the case" and that Honda's attorney had knowingly prevented the rag from being preserved.[13] The court sanctioned Honda by entering a judgment of liability against the corporation, leaving only the question of the amount of damages for the jury.

Unsurprisingly, a settlement was announced within a few days. Apparently as a condition of the settlement, the parties stipulated to an order sealing the sanctions decision. In addition to vacating that decision, the extraordinary sealing order banned all publication and sharing of the decision, and prohibited anyone from even mentioning it in any legal proceeding. As a result, Mr. Gratzinger was shielded from questions about his actions in *Davis* and continued to serve as an expert witness for automakers in crash cases around the country.

Public Justice challenged the secrecy order on behalf of the Center for Auto Safety, a national consumer group that works to improve automobile safety, and attorneys representing car crash victims against defendants who had named Mr. Gratzinger as an expert witness in their cases. On October 26, 2005, the court that had entered the sealing order reversed itself, agreeing that the order violated California law and the First Amendment.

Jessee v. Farmers Insurance Exchange: Reversal of overbroad protective order designating documents showing insurer linked employee compensation to limited payouts as confidential (2006)

After Ruth Jessee was injured in an automobile accident, she filed a lawsuit against Farmers Insurance for denying coverage of her insurance claim in bad faith. Before trial, Ms. Jessee's attorney, in addition to seeking discovery from Farmers, obtained a number of documents from an attorney representing an injury victim against Farmers in a different state. Among them were internal documents that show that Farmers linked its adjusters' compensation to the amount they saved the corporation on claims. Farmers then sought a protective order that would make this key evidence secret, even though it had been obtained not from Farmers in discovery, but from an attorney in another case against Farmers where it was not sealed—and thus was already public. The trial court granted the corporation's motion.

The unusually broad protective order in *Jessee*, which was issued without any showing of good cause for secrecy, required the plaintiff's counsel to identify all documents in his possession relating to the subject matter of the case—and

[13] The sanctions decision in *Davis* is available on the Public Justice web site at http://www.publicjustice.net/Repository/Files/Davis%20-%20Decision.pdf.

permitted the insurance company to label those documents "confidential" regardless of their source. It also required that any court records containing or referring to those documents be filed under seal. Finally, it obligated the crash victim and her attorney to return all "confidential" documents to the insurance company at the conclusion of the case.

Public Justice, representing the plaintiffs before the Colorado Supreme Court, argued that the order should be vacated because it violated Colorado law and the First Amendment.[14] On November 20, 2006, the court agreed, reversing the trial court's order and holding that the documents must remain public.[15]

***State Farm v. Foltz*: Unsealing of *court* records in consumer fraud case (2003)**

Debbie Foltz sued State Farm for conspiring with another company to conduct a phony medical review of her file in order to defraud her of medical coverage under her auto policy. After four years of litigation, the parties reached a secret settlement and asked the court to seal virtually the entire record. The court agreed to back-seal the record, and the entire case—including the docket sheet—was erased from the court's computer system. Following the settlement, the court also permitted State Farm to physically remove the case files from the courthouse. As a result, it was impossible for the public to determine that the case existed, much less view the record.

Public Justice intervened in 1999 on behalf of several public interest groups, and won a partial victory.[16] The court ordered the file returned to the courthouse and restored the docket sheet to the court's record-keeping system, but said it would continue to bar access to materials filed under seal pursuant to protective orders entered earlier in the case. These documents allegedly showed that State Farm was cheating its policyholders. Joined by other intervening litigants, Public Justice fought to have the remaining documents unsealed—but the district court denied further access to the evidence, holding that the parties' agreement to keep the documents secret justified the sealing orders.

On appeal, the U.S. Court of Appeals for the Ninth Circuit held that the discovery materials had been improperly sealed, because there had never been any

[14] Our brief is available at http://www.publicjustice.net/Repository/Files/jessee_reply_021506.pdf.

[15] *Jessee v. Farmers Ins. Exchange*, 147 P.3d 56 (Colo. 2006).

[16] The Public Justice briefs are available at http://www.publicjustice.net/Resources/Cases/Foltz-v-State-Farm.aspx?cpid=25&nid=4600.

showing of the "good cause" for secrecy required by Federal Rule of Civil Procedure 26(c).[17] The court also ruled that the court records in the case had been wrongly sealed; affirmed that the "strong presumption in favor of access to court records" can only be overcome by a showing of "compelling reasons" for secrecy; and made clear that reliance on an agreed-upon protective order did not constitute a compelling reason.[18]

* * *

While these cases are success stories, the vast majority of secrecy orders are never known to anyone except the parties and the court, let alone challenged by public interest groups. In our communications with numerous plaintiffs' attorneys, we have come to understand that secrecy orders are more widespread now than ever. In order to understand how to solve this problem, it is helpful to understand why secrecy is so pervasive.

Why Does Secrecy Flourish Under Current Law?

Secrecy continues to flourish because defendants want it and because plaintiffs and judges do not do enough to oppose it at any stage of the process. For corporate defendants, secrecy helps maximize profits. If evidence of wrongdoing is concealed, it will be much more difficult for future plaintiffs to sue the company, and the defendant will be able to avoid paying as much as it otherwise would in damages. In addition, secrecy enables defendants to avoid the negative public relations that would result from public knowledge of their wrongdoing—and the ensuing loss in profits.

Plaintiffs' lawyers often agree to secrecy out of perceived necessity. A plaintiff's lawyer may be so concerned with gaining access to the key documents she needs to present her client's case that she does not recognize an unlawful protective order or may decide it isn't worth slowing down the litigation to fight. And when faced with a settlement that will compensate their clients for their injuries—especially if the defendant is willing to pay a premium for secrecy—few attorneys balk at the condition that the case and the settlement be kept secret. To fight would be to delay justice for the client, or possibly to lose the chance to settle altogether, and many cannot afford that risk.

Judges, meanwhile, are frequently overburdened. If neither of the parties is arguing for the public's right of access to information, it is often possible, under

[17] *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1138 (9th Cir. 2003).

[18] *Id.* at 1135.

current law, to resolve disputes without considering the public interest at all. If the parties disagree about whether a protective order is proper, a busy judge may simply insist that they work it out. Few judges are likely to reject a proposed settlement that has a confidentiality clause if both parties agree to the term. The result is that as long as each participant in the legal process pursues her own narrow interest, no one in the process is protecting the *public* interest—and the public remains unaware of the underlying facts that prompted the desire for secrecy.

Although the public generally has a right of access to trials, this is insufficient to ensure public access to information about the vast majority of cases, given that most settle. A recent UCLA report found that the rate of resolution by trial of cases in federal court is less than a sixth of what it was in 1962.[19] Naturally, settlement is especially likely when facts revealed in discovery show that the defendant has put peoples' health or safety at risk, or has defrauded its customers. When such facts do come out, defendants who want to shield their actions from public scrutiny have the perfect solution: pay for a secret settlement.[20]

The Sunshine in Litigation Act

Federal legislation aimed at reducing unnecessary secrecy in the courts and ensuring the public's right to know is long overdue. The Sunshine in Litigation Act would restrict federal judges from entering a protective order, or sealing a case or settlement, without making specific factual findings that the secrecy order would not harm the public's interest in disclosure of information relevant to health or safety—or that the public's interest is outweighed by the need for secrecy in a particular case. It would also provide a record on which to base appeals of or challenges to secrecy orders. Equally importantly, the bill would prohibit courts from approving or enforcing settlements or issuing protective orders or sealing

[19] Henry Weinstein, *UCLA Law School Joins Others to Pry Into Judicial Secrecy*, L.A. Times, Nov. 3, 2007, at http://www.latimes.com/news/local/la-me-secrecy3nov03,1,1247556.story.

[20] One of the primary arguments advanced by secrecy proponents is that fewer cases will settle if the parties cannot stipulate to confidentiality, and that the resulting burden on the courts will be overwhelming. But the experience of the U.S. District Court for the District of South Carolina has proven differently. As U.S. District Court Judge Joseph F. Anderson has explained, in 2002 that court enacted a local rule barring all unnecessary court-sealed settlements. Despite warnings by the defense bar that the rule would mean hundreds more trials, the number of trials has actually decreased since the rule was adopted. *See* Joseph F. Anderson, Jr., *Secrecy in the Courts: At the Tipping Point?*, Villanova L.R. (forthcoming 2009) (manuscript at 8–9, on file with author).

orders that would restrict disclosure of information to regulatory agencies. Each of these provisions will go a long way to helping reduce unnecessary court secrecy.

However, if the intent of the legislation is to strengthen the standards that must be met before a court can enter a secrecy order, there are specific ways in which the bill's language may need to be modified. We therefore urge legislators to consider the following concerns.

1. As currently drafted, H.R. 1508 does not encompass public interests other than health and safety.

Several provisions of the bill are narrowly limited to ensuring public access to information "relevant to the protection of public health or safety." However, as explained above, secrecy orders are also commonly used to shield egregious misconduct that is not directly linked to health or safety, such as refusal by insurance companies to pay policyholders' legitimate claims after they have suffered severe injuries or lost their homes. The public has a broader interest in access to information concerning corporate wrongdoing, including fraud, discrimination, and insurance bad faith. Legislation would go much further towards eradicating the problem of court secrecy if it were not limited to information directly related to public health and safety.

2. As currently drafted, H.R. 1508 could be interpreted as supplanting or weakening the existing Constitutional and common-law right of access to court records.

As currently drafted, section (a)(1) imposes new requirements for the issuing of protective orders and orders sealing court records, but it does not make clear that these requirements must be satisfied in addition to any requirements that already exist under current law. In addition, it appears to impose a single standard for the issuing of any secrecy order, regardless of whether it is a protective order under Federal Rule of Civil Procedure 26(c) (which governs the sealing of materials produced in pretrial discovery but not court records or settlements) or an order restricting access to court records. Because of these ambiguities, the section, as currently drafted, could have the unintended effect of actually weakening existing protections against the sealing of court records.

Section (a)(1)(B), as written, provides that court records may be sealed as long as any public interest in information related to the protection of public health or safety is outweighed by a "specific and substantial interest" in confidentiality. However, under current law, court records are subject to an arguably much more

stringent test. Many courts have held that, under both the common law right of access and the First Amendment to the United States Constitution, court records are subject to a "strong presumption in favor of access" that can only be overcome upon a showing of "compelling reasons for secrecy"[21] or "exceptional circumstances."[22] While courts use varying language to describe the burden that must be satisfied before access to court records can be restricted, it is clear that this standard is different from—and higher than—the Rule 26(c) "good cause" standard for issuing protective orders. In keeping with this, numerous courts have held that the mere existence of a protective order is not enough to justify the sealing of court records.[23]

Because section (a)(1)(B) does not make clear how the provision relates to current legal standards—i.e., whether it is intended to supplement or to replace them—it could be interpreted as permitting a court to seal court records, despite a public interest, as long as an (arguably weaker) "specific and substantial interest" standard is satisfied. Thus, if the bill is intended strengthen existing standards, it should make clear that this provision does not replace the stronger standards currently applicable to court records with a weaker standard. This concern could be remedied, for example, by excluding reference to court records in the bill altogether. Alternatively, language could be added that clarifies that nothing in the bill should be interpreted as diminishing existing legal standards for the issuance of an order restricting access to court records in a civil case, and that the standards set forth in the bill are to be applied in addition to, not in lieu of, such existing legal standards.

3. As currently drafted, H.R. 1508 could be interpreted as weakening requirements for the sealing of discovery materials.

Section (a)(1)(B) could also be construed as weakening current requirements under Rule 26(c) for the issuing protective orders. Although the provision requiring a court to consider the public interest would strengthen the standard applied by courts in many jurisdictions, the other factor to be weighed in the

[21] *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1122 (9th Cir. 2003).

[22] *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982).

[23] *See, e.g.*, *Littlejohn v. BIC Corp.*, 851 F.2d 673, 680 (3d Cir. 1988) (rejecting argument that a stipulated protective order gave the defendant the power to unilaterally block public access to trial exhibits); *Bank of America Nat. Trust v. Hotel Rittenhouse*, 800 F.2d 339, 345 (3d Cir. 1986) (parties' private confidentiality agreement could not bar access to what had become judicial record).

balance—whether the proponent of secrecy can demonstrate a "specific and substantial interest" in confidentiality—is arguably a lesser standard in some contexts than that currently applied under Rule 26(c). For example, under existing law, a defendant's interest in avoiding embarrassment and possible loss of sales due to disclosure of its unethical practices would not be grounds for a protective order under Rule 26(c). But a defendant could argue that exactly that sort of interest is now cognizable under the new "specific and substantial interest" test.

Again, this concern could be remedied by adding language that makes clear that nothing in the bill should be interpreted as diminishing existing legal standards, and that the standards set forth in the bill are to be applied in addition to, not in lieu of, such existing legal standards.

4. As currently drafted, H.R. 1508 could be interpreted as permitting a court to enter a secrecy order as long as it finds that the information at issue does not relate to the public interest or that the public interest is outweighed, without complying with existing legal requirements.

As written, section (a)(1) could be interpreted as permitting a court to issue a protective order or sealing order simply upon finding either (A) that the material at issue does not relate to public health and safety, "or" (B) that the public interest is outweighed—without satisfying any other requirements. Because it is not clear that the existing standards still must be met, it is conceivable that a court could interpret this provision as obviating both the good cause standard of Rule 26(c) and the compelling interest standard applicable to court records, and permitting the secrecy order even if one of those additional requirements has not been met. This concern could also be addressed by making clear that the bill does not diminish existing standards.

Conclusion

While Public Justice has successfully unsealed court records and blocked overbroad protective orders in many cases, it is not possible for public interest organizations to discover and fight every instance of court secrecy that puts the public at risk. Without widespread change through legislation, corporate defendants will continue to invest their substantial resources into keeping evidence of wrongdoing from the public, and plaintiffs' attorneys will too often continue to have no choice but to agree to secrecy as a condition of achieving a fair outcome for their clients. Only judges have the power to protect the public's right to know. Federal legislation that gives judges a blueprint for determining whether secrecy is actually necessary and a legal basis for refusing to sanction secrecy—even if the

parties agree to it—is needed to protect the public's right to know. We cannot afford to continue to allow our historically rooted system of open government to be used as a tool for the powerful to hide the truth from the public.

I am grateful to the Subcommittee for bringing this very important issue to the attention of Congress, and I appreciate the opportunity to present this testimony.