

No. 15-1211

In the
Supreme Court of the United States

FCA US LLC, F/K/A CHRYSLER GROUP LLC,
PETITIONER,

v.

THE CENTER FOR AUTO SAFETY,
RESPONDENT.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICUS CURIAE*¹

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

¹ Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that all parties, upon timely receipt of notice of intent to file this brief, have consented to its filing. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Discovery is often costly and contentious, in part because it “may seriously implicate privacy interests of litigants and third parties.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984). The Federal Rules of Civil Procedure protect those interests by authorizing district courts to limit the use and dissemination of discovered materials. Under Rule 26(c), a “court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c)(1). When that standard is satisfied, Rule 26(c) also grants courts authority to enter a protective order “requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.” Fed. R. Civ. P. 26(c)(1)(G).

The decision below “eviscerates Rule 26(c) and its benefits.” Pet. App. 35a (Ikuta, J., dissenting). The Ninth Circuit held that, even after a court has entered a protective order, a showing of “good cause” is *not* sufficient to maintain the confidentiality of documents attached to a pleading that is “more than tangentially related to the merits of a case.” Pet. App. 19a. Under the lower court’s approach, one standard (“good cause”) governs the decision to enter a protective order preventing the disclosure of confidential materials, but a different, more demanding standard (“compelling reasons”) applies in determining whether to continue to protect the

materials from public disclosure when they are attached as exhibits to court pleadings.

That dangerous and misguided precedent should not be allowed to stand. Protective orders under Rule 26(c) facilitate discovery because they are supposed to preserve the confidentiality of sensitive materials throughout litigation and not just during pre-trial discovery. No rational party could rely on a protective order if its protections are so ephemeral that they disappear whenever an opposing party unilaterally chooses to attach confidential materials as exhibits to court filings. For businesses, the risks of disclosure of trade secrets and other valuable commercial information are far too great. The Ninth Circuit's decision provides an excellent vehicle for addressing this important question and providing clarity to the lower courts on the proper balance that should be struck between protecting confidential materials and allowing the public reasonable access to judicial records. Moreover, if the Ninth Circuit's decision is not reversed, the consequences to litigants and especially businesses could be significant. Litigation abuse will become a greater problem, and courts will be faced with more protracted and expensive discovery disputes—the opposite of the “just, speedy, and inexpensive” litigation procedures contemplated by the federal rules. Fed. R. Civ. P. 1.

As the petition explains, the Ninth Circuit's decision conflicts with decisions of several other courts of appeals, and raises a recurring, important question of federal law. The Court should grant the petition and resolve the conflict in lower-court authority.

ARGUMENT

I. Review Is Warranted Because There Is A Split In Lower Court Authority.

Courts routinely enter protective orders, upon a showing of “good cause,” to protect confidential materials from public disclosure and to limit their use in litigation. Fed. R. Civ. P. 26(c). The issue in this case is whether the protections provided by Rule 26 apply only in the context of pre-trial discovery, or whether Rule 26 also applies to protect confidential materials from disclosure when they are attached as exhibits to pleadings.

The courts of appeals are in irreconcilable conflict over that question. *See* Pet. 11–16. At least three courts of appeals have held that, when a confidential document is attached to a pleading, a court may order the document sealed and protected from public disclosure upon a showing of good cause, as Rule 26 contemplates. *See id.* at 12–14. The Eleventh Circuit, for instance, has recognized that the confidentiality of “documents filed in connection with [a] motion for summary judgment may be resolved by the Rule 26 good cause balancing test.” *Chicago Tribune v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1313 (11th Cir. 2001). The Third and Seventh Circuits follow the same approach. *See Leucadia v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 166 (3d Cir. 1993); *Citizens First National Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999).

In contrast, two courts of appeals have concluded that Rule 26’s protections extend only to materials

attached to pretrial discovery and discovery-related motions. *See* Pet. 14–16. In the view of the First and Sixth Circuits, there is a strong presumption that the public is entitled to access court records and “only the most compelling reasons” can justify sealing materials attached as exhibits to court filings. *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987). Accordingly, even if good cause exists to protect confidential materials under Rule 26, there is no assurance in these circuits that the materials will remain protected if either party decides to attach them as exhibits to pleadings. Instead, materials are protected from public disclosure only if the party seeking protection comes forward with additional “compelling reasons” for keeping the confidential materials sealed and away from the public eye. *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983); *see also Standard Fin.*, 830 F.2d at 412.

The decision below complicates and deepens this split in authority. It adopts a third approach that applies a compelling-reasons standard for protecting confidential materials attached to pleadings that are “more than tangentially related to the merits of a case,” and a good-cause standard to protecting confidential materials attached to other types of pleadings. *See* Pet. 16. That unmanageable and uncertain standard—what the dissent below called a judicial “ink blot test,” Pet. App. 34a (Ikuta, J., dissenting)—undermines the purpose of Rule 26 and finds no support in this Court’s precedents.

Changing traditional common law practices, the Federal Rules of Civil Procedure were “designed to effect a revolution in litigation by broadening the

availability of discovery,” Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 6 (1983), while at the same time assuring parties that cooperating in discovery will not result in the release or dissemination of confidential materials. *See generally* John H. Beisner, *The Centre Cannot Hold: The Need for Effective Reform of the U.S. Civil Discovery Process* (2010), available at http://www.instituteforlegalreform.com/uploads/sites/1/ilr_discovery_2010_0.pdf (explaining that before the Federal Rules of Civil Procedure, pre-trial discovery at common law “was almost non-existent”). In this fashion, Rule 26 “has the beneficial effects of encouraging parties to exchange documents while reducing discovery disputes.” Pet. App. 35a (Ikuta, J., dissenting). The decision below endangers this careful balance and undermines the goals that Rule 26 was designed to serve.

“[F]or protective orders to be effective, litigants must be able to rely on them.” Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 501 (1991). Protective orders that extend only to pre-trial discovery are, by definition, ineffective. No rational party would rely on a protective order if documents subject to that order are no longer protected simply because the opposing party chooses to attach them to a pleading. Indeed, under the Ninth Circuit’s rule, “*all* sealed documents attached to *any* filing that has *any* relation to the merits of the case are subject to the public’s presumed right of access” and therefore will require compelling reasons to maintain in confidence. Pet. App. 35a (Ikuta, J., dissenting) (emphases in original). That “deprives protective

orders issued under Rule 26(c) of any force or effect” because, when it really matters, a showing of good cause is insufficient to preserve confidentiality. *Id.*

Nothing in this Court’s precedents justifies this departure from the standards established by the federal rules. As this Court has recognized, “[t]he right to inspect and copy judicial records is not absolute,” *Nixon v. Warner Commc’ns*, 435 U.S. 589, 598 (1978), and “a litigant has no First Amendment right of access to information made available only for purposes of trying his suit,” *Seattle Times*, 467 U.S. at 32 (citing *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965)). Moreover, while the public may have a general interest in understanding the judicial process and accessing judicial records, its common-law right of access does not and should not extend to confidential materials that under Rule 26(c) are entitled to protection. Indeed, precisely because the “coerced production of information” is a ready vehicle for abuse, *id.* at 35–36, Rule 26’s good-cause standard is a “necessary” tool for preventing such abuse.

II. The Question Presented Is Exceptionally Important.

The question presented by the petition is very important, as discovery abuse is a persistent problem in business-related litigation. Almost all major commercial litigation today involves the potential discovery of confidential information, which is why business litigants routinely seek protective orders to ensure that confidential discovery materials are not disseminated outside the litigation. Businesses thus depend on Rule 26’s good-cause standard to protect confidential materials from public disclosure. *See*

Kyle J. Mendenhall, *Can You Keep a Secret? The Court's Role in Protecting Trade Secrets and Other Confidential Business Information from Disclosure in Litigation*, 62 Drake L. Rev. 885, 900 (2014) (“the protective order is the primary tool for a judge to protect a party’s intangible secret assets”). A party suing a business is entitled to appropriate access to the documents it needs to litigate its case, but it should not be able to gain leverage or other advantages by attaching—or even merely *threatening* to attach—confidential materials to pleadings, with the risk that they will be publicly disclosed.

Protecting the confidentiality of trade secrets, sensitive research data, and other similar types of business information is essential to commerce. Companies invest heavily in research and development, and “the large and growing importance of trade secrets to the U.S. economy” is well established. David S. Almeling, *Four Reasons to Enact a Federal Trade Secrets Act*, 19 Fordham Intell. Prop., Media & Ent. L.J. 769, 783 (2009). As commentators have noted, protecting trade secrets and other confidential information from disclosure is “universally recognized as necessary to foster innovation.” Miller, 105 Harv. L. Rev. at 472. Recognizing the importance of such confidential materials, this Court has held in other contexts that depriving a party of protection for trade secrets can effect an unconstitutional taking. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–04 (1984). And, more generally, courts have “refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business

information that might harm a litigant's competitive standing." *Nixon*, 435 U.S. at 598.

Because it is important to commerce and the nation's economy that sensitive business information be maintained in confidence, Congress has enacted numerous statutory provisions to protect confidential commercial information. *See, e.g.*, 18 U.S.C. § 1832 (making some trade secret theft a crime subject to substantial penalties, including confinement and fines); 18 U.S.C. § 1905 (prohibiting disclosure of "trade secrets, processes, operations, style of work, or apparatus"). In fact, earlier this month, Congress passed the Defend Trade Secrets Act of 2016, which (if signed by the President) would create a federal cause of action for trade secret misappropriation. *See* S. 1890, 114th Cong. (2016). There is no reason to believe that Congress intended litigation and permissive discovery to become an end-run around these important protections.

Nor is there any sound policy reason for turning litigation into a vehicle for coercing the disclosure of confidential materials. It is already the case that "[d]espite the existence of protective orders, trade secrets often are eventually disclosed, whether intentionally or inadvertently." James R. McKown, *Taking Property: Constitutional Ramifications of Litigation Involving Trade Secrets*, 13 *Rev. Litig.* 253, 276 (1994). The Ninth Circuit's misguided approach increases that risk, compelling business litigants to assume even higher (and altogether improper) discovery costs in their efforts to protect confidential information.

The split in authority is especially intolerable because it allows some circuits in effect to set the disclosure rules for the rest of the country. If released in one jurisdiction, trade secrets and other confidential information become available everywhere. And “[o]nce a trade secret is disclosed, especially to a competitor, the value of this property right is destroyed and the competitive advantage it affords the owner is lost.” S. Shawn Stephens, *Is the “Good Cause” Standard Inadequate to Protect Trade Secrets in Discovery Disputes?*, 52-APR Hous. Law. 20, 20 (2015). That alone provides reason for this Court to grant certiorari. The whole point of the federal rules is to create uniform standards that apply to litigation in all federal courts. That objective is undermined if some courts, like the Ninth Circuit, can override the protections for confidential information that Rule 26 supplies by placing a heavy thumb on the scale in favor of public disclosure. Mendenhall, 62 Drake L. Rev. at 916 (suggesting that litigants “may be wary of litigation in local California courts due to the Ninth Circuit’s strong presumption of access”). Indeed, as a practical matter, the Ninth Circuit’s rule is controlling for *any company* that has minimum contacts with any State within the Ninth Circuit.

The potential for abuse is also increasingly a problem in business-focused litigation. Rule 26 is designed to keep confidential materials protected from disclosure as long as the party seeking protection takes reasonable steps to maintain the materials in confidence—for example, by seeking and securing a protective order before producing confidential documents in response to discovery

requests. But the Ninth Circuit's rule gives an opposing party in litigation the unilateral discretion to abrogate a protective order by attaching confidential material to a motion styled in a way that touches the merits of a case. That is especially problematic in light of the massive expansion of public interest groups that engage in litigation for strategic purposes that extend beyond the specifics of any particular case. See U.S. Courts, *Federal Judicial Caseload Statistics* (2015), available at <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015> (civil case filings have increased by 15.4% since 2006); Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 611 (2009) (survey findings indicate that 90% of public interest organizations bring impact litigation cases). It is too easy for a party subject to a protective order to attach confidential materials to a pleading and then work hand-in-hand with a public interest group that can intervene and move to unseal the documents. Indeed, that appears to be exactly what happened in this litigation.

The fact that the Ninth Circuit's rule invites this type of coordinated action by litigants and outside interest groups is deeply concerning. Whatever the scope of the right of public access, it has never extended so far as to permit court records to "become a vehicle for improper purposes." *Nixon*, 435 U.S. at 598. It is the very abuse of invasive discovery that Rule 26 is intended to protect against. See *Seattle Times*, 467 U.S. at 32, 35. And this Court has often recognized the need to protect against abusive discovery tactics. See *Bell Atl. Corp. v. Twombly*, 550

U.S. 544, 559 (2007) (noting “common lament that the success of judicial supervision in checking discovery abuse has been on the modest side”); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (noting “possible abuse of the liberal discovery provisions” through “opportunity for extensive discovery of business documents” as “an in terrorem increment of the settlement value”).

Finally, the Ninth Circuit’s rule increases the already onerous costs and burdens of discovery. Effective protective orders are essential to the operation of the modern litigation system. If parties cannot rely on protective orders to preserve the confidentiality of sensitive information, then cooperation will diminish and costs will increase, to the detriment of litigants and courts. Miller, 105 Harv. L. Rev. at 500-01. For businesses, the risk is especially high. *See* Beisner, *supra*, at 18–19, 31 (noting that discovery is the top litigation concern for major corporate defendants and that discovery abuse is “rapidly growing more pernicious”). The more sensible course will be “to contest discovery requests when private or commercially valuable data is involved.” Miller, 105 Harv. L. Rev. at 500-01. As Judge Ikuta recognized in her dissent below, “it is clear that no future litigant can rely on a protective order and will have to chart its course through discovery cautiously and belligerently, to the detriment of the legal system.” Pet. App. 36a (Ikuta, J., dissenting).

Even worse, businesses may be forced to settle a dispute rather than risk involuntary disclosure of valuable, confidential materials. *See* Miller, 105

Harv. L. Rev. at 470; *see also id.* at 473. Indeed, the risk of disclosure could have an overall “chilling effect.” *Id.* at 469 n.214. “[E]ven a significant increase in the risk of disclosure of the property undermines a business’s willingness to incur the often enormous expenses of developing information-based assets.” *Id.* at 473. That can only work against the larger public interest.

* * *

Although courts have recognized the existence of a common-law right to access judicial records, the right is not absolute. Nor should it trump the provisions of the Federal Rules of Civil Procedure. Instead, the right of public “access must be balanced against the factors militating against access,” *Bank of Am. Nat. Trust & Sav. Ass’n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339, 344 (3d Cir. 1986), including “the property and privacy interests of the litigants,” *Citizens First National Bank of Princeton*, 178 F.3d at 945. Rule 26’s good-cause standard is designed to balance these interests. Once good cause is shown to justify protecting confidential materials at the discovery stage of litigation, they should not be subject to later disclosure merely because one of the parties attaches them as exhibits to a court filing. Under the Ninth Circuit’s contrary approach, the benefits of Rule 26 will largely evaporate, leaving litigants faced with significant and unnecessary litigation costs. To defuse this risk, and to bring greater certainty to this important area of law, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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