

STATEMENT OF

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**BEFORE THE SUBCOMMITTEE ON ANTITRUST, COMPETITION
POLICY AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

CONCERNING

**THE SUNSHINE IN LITIGATION ACT:
HOW UNNECESSARY COURT SECRECY
UNDERMINES OUR CIVIL JUSTICE SYSTEM
AND THREATENS PUBLIC HEALTH AND SAFETY**

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Introduction

Mr. Chairman and Members of the Subcommittee:

I am pleased to accept your invitation to testify today on the issue of unnecessary court secrecy. I am an 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 for nearly two decades fighting unnecessary secrecy in the courts.

It is a fact that much of the civil litigation in this country is taking place in secret. This secrecy takes many forms. First, corporate defendants often refuse to produce documents in pretrial discovery unless the documents are subject to a protective order that prohibits the plaintiff or her attorney from distributing them to anyone else. Second, corporations often refuse to settle a case unless the settlement is confidential, insisting upon gag orders that bar the injury victim from publicly discussing the cause of her injury or the terms of the settlement, or even disclosing that the case existed. Third, courts are often asked to seal the record of a case in part (for example, certain pleadings or a decision) or its entirety. Once a case is sealed in its entirety, it becomes nearly impossible for any member of the public or press to learn what happened or to obtain any information about why the case is sealed.

Thus, through protective orders, secret settlements, and sealing of court records, the public courts are being used by private corporations to keep smoking-gun evidence of wrongdoing from the public eye. Plaintiffs' lawyers, obligated to put their clients' interests first, often feel they have no choice but to consent to secrecy in order to achieve justice for a particular victim. Judges, facing ever-escalating dockets and mounting time pressures, often sign off on overbroad protective orders and approve settlements with secrecy provisions, grateful for any

instance in which both parties agree. All the while, Americans unsuspectingly continue to drive unsafe cars, drink unsafe water, entrust our financial well-being to institutions that engage in fraud and deception, and seek treatment from incompetent doctors.

This secrecy subverts our system of open government, undermines public trust in the court system, and threatens public health and safety. Unfortunately, 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. If federal judges were required by law to consider the public interest before entering a secrecy order, this would provide a substantial counterweight to the factors that allow secrecy to flourish.

Background on Public Justice

Public Justice (formerly Trial Lawyers for Public Justice), founded in 1982, is a national public interest law firm dedicated to using trial lawyers' skills and resources to advance the public good. We specialize in precedent-setting and socially significant individual and class action litigation designed to further consumer and victims' rights, environmental protection and safety, civil rights and civil liberties, workers' rights, America's civil justice system, and the protection of the poor and powerless. Through our Access to Justice Campaign, we strive to keep the courthouse doors open to all by battling federal preemption of injury victims' rights, unfair mandatory arbitration, class action bans and abuse, unnecessary secrecy in the courts, attacks on the right to counsel and jury trial, and unconstitutional legislation.

Public Justice is the principal project of the Public Justice Foundation, a non-profit membership organization. We are supported by a nationwide network of over 3,500 attorneys and others, including trial lawyers, appellate lawyers, consumer advocates, constitutional

litigators, employment lawyers, environmental attorneys, civil rights lawyers, class action specialists, law professors and law students. Public Justice and the Public Justice Foundation are headquartered in Washington, D.C., and have a West Coast Office in Oakland, California.

For nearly two decades, through a special litigation 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 Project ACCESS, we have intervened in a wide variety of cases to fight for the public’s right to know and have advised attorneys in cases implicating public health, safety, and welfare. More information on Public Justice and Project ACCESS is available on our web site at www.publicjustice.net.

Public Justice does not lobby and generally takes no position in favor of or against specific proposed legislation. We do, however, respond to informational requests from legislators and persons interested in legislation, and have occasionally been invited to testify before legislative and administrative bodies on issues within our expertise. In keeping with that practice, we are grateful for the opportunity to share our experience with respect to the important issues the Subcommittee is considering today.

Unnecessary Court Secrecy is Pervasive

There is no question that secrecy pervades the justice system. Famous examples abound of damaging information revealed in litigation but kept secret from the public for long periods of time: Bic lighters, car seats, breast implants, and all-terrain vehicles were all subject to protective orders while countless consumers continued to be at risk from using them. Doctors continued unknowingly to implant defective heart valves into patients, even though documents disclosed in

litigation—but concealed from the public for far too long—revealed a high risk of valve failure. Manufacturers of dangerous drugs 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 the knowledge of its defective product from reaching the public.¹ As of last year, Firestone still had not notified all the owners of the dangerous tires that they had been recalled.²

Similar abuses continue to this day. An award-winning *Seattle Times* investigative series earlier this year 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.³ And protective orders, which

¹ 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>.

² *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.

³ Ken Armstrong, Justin Mayo, & Steve Miletich, *Your Courts, Their Secrets*, *Seattle Times*, March 5–15, 2007, series available at

keep information unveiled in the discovery process confidential, are routine, especially in product liability, automobile design, toxic tort, pharmaceutical, environmental, and medical malpractice cases.

For example, 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."⁴ 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."⁵ 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.⁶ But in an unknown number of other cases, courts have been persuaded to permit Cooper and other defendants to get away with hiding the truth.

<http://seattletimes.nwsourc.com/html/yourcourtstheirsecrets/>. The authors of the series were honored as finalists for the 2007 Pulitzer Prize in investigative journalism.

⁴ Fortunately, the order was subsequently reversed. *Mann v. Cooper Tire Co.*, 816 N.Y.S. 2d 45, 56 (App. Div. 2006).

⁵ *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)).

⁶ *Id.*

In an equally disturbing example, it has recently come to light that Allstate Insurance Company had implemented a program designed to increase its shareholder profits by intentionally and significantly underpaying policyholders on indisputably legitimate claims.⁷ The new paradigm, which was implemented on the advice of McKinsey Consulting in a series of PowerPoint slides now known as the “McKinsey documents,” resulted in record operating income for the corporation—during a time period marked by several of the worst natural disasters in recent history, including Hurricane Katrina. The purposeful denial of valid claims clearly constituted bad faith and violated insurance laws—after all, insurance companies have a fiduciary duty to their policyholders. The McKinsey documents, which also showed Allstate was forcing victims to litigate valid claims rather than settling them, were produced in litigation. However, they were kept secret from the public pursuant to a protective order. Even after the protective order expired, Allstate refused to turn over the documents, even when this subjected the corporation to contempt of court. 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.⁸

In the last few years, Public Justice has fought several 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, it should not take public interest litigants and lawyers being in the right place at the right time to make sure unnecessary secrecy is avoided. Literally

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

⁸ *Id.*

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.⁹ 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

⁹ The sanctions decision in *Davis* is available on the Public Justice web site at <http://www.publicjustice.net/Repository/Files/Davis%20-%20Decision.pdf>

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 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.¹⁰ On November 20, 2006, the court agreed, reversing the trial court’s order and holding that the documents must remain public.¹¹

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—

¹⁰ Our brief is available at http://www.publicjustice.net/Repository/Files/jessee_reply_021506.pdf.

¹¹ *Jessee v. Farmers Ins. Exchange*, 147 P.3d 56 (Colo. 2006).

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.¹² 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 showing of the “good cause” for secrecy required by Rule 26(c).¹³ Instead, the parties had simply agreed that the materials could remain secret. 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.¹⁴

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¹² The Public Justice briefs are available at www.publicjustice.net/Resources/Cases/Foltz-v-State-Farm.aspx

¹³ *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1138 (9th Cir. 2003).

¹⁴ *Id.* at 1135.

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.

Secrecy flourishes because no party to the litigation is advocating for the public.

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. Corporate defendants want secrecy, for the most part, because they are interested in maximizing profits. If evidence of their 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—especially if the defendant is willing to pay a premium for secrecy—few plaintiffs' 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. Because neither of the parties is arguing for the public's right of access to information, it is often possible 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, as long as 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 virtually meaningless, given that the vast majority of cases settle. A recent UCLA report found that the 2002 rate of resolution by trial of cases in federal court is less than a sixth of what it was in 1962.¹⁵ 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.

Unnecessary secrecy threatens public safety, undermines the civil justice system, and blocks the courthouse doors.

Whether or not unnecessary secrecy is acceptable in our nation's civil justice system depends on whether one views the publicly-funded courts as simply 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.

¹⁵ 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>.

No one would deny that there are some cases in which secrecy is appropriate. For example, Coca-Cola may understandably wish to prevent its competitors from knowing the secret formula of its soft drink. In such cases, judges could easily conclude that no public interest would be harmed by confidentiality. But in cases where the information at stake would alert the public to harmful corporate practices, the costs of secrecy are too high.

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.

Unnecessary 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, many other victims will never learn that they have legal claims against the corporation. Others who know they have claims will 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 are prohibited from making informed decisions about which companies to do business with, and the defendant continues to compete in the marketplace.

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 of the public courtroom being the institution that ensures the truth is discovered and justice is done, the courtroom is being used all too often as a means of hiding the truth.

In light of this, 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

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. A requirement that factual findings be issued would charge the court with examining whether the public interest in access to the information at stake outweighs the interest the proponent of the order has in secrecy. It would also provide a valuable record on which to base appeals of—or challenges by interveners to—any secrecy order entered. Equally importantly, the bill would prohibit courts from approving or enforcing settlements or issuing protective orders or sealing orders that would restrict disclosure of information to regulatory agencies. All of these things are likely to reduce unnecessary court secrecy.

However, if the intent of the legislation is to definitively strengthen the standards that must be met before a court can enter a secrecy order, there are ways in which the bill as currently drafted may fall short of delivering this effect. In light of this, the Subcommittee might consider the following concerns when evaluating potential revisions to the bill.

1. The bill does not encompass public interests other than health and safety.

As currently drafted, 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; for example, refusal by insurance companies to pay

policyholders' legitimate claims after they have suffered severe injuries or lost their homes.

While it is certainly true that health and safety information must not be concealed, 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 relevant to the protection of public health and safety.

2. The bill 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 and does not apply to 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”¹⁶ or “exceptional circumstances.”¹⁷ 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.¹⁸

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 to ensure that standards are strengthened, it should be made clear that the bill’s 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.

¹⁶ *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1122 (9th Cir. 2003).

¹⁷ *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982).

¹⁸ *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).

3. The bill 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 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 including language that makes clear 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.

4. The bill 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 simply not possible for public interest organizations to discover and fight every instance of court secrecy that puts the public at risk. Likewise, while some federal courts and local bar associations have adopted rules regulating secrecy to some extent, these rules do not go far enough to prevent the problems described above. 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 in each and every case. 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.