NO. _____

IN THE

Supreme Court of the United States

EDDIE TARDY,

Petitioner,

v.

CORRECTIONS CORPORATION OF AMERICA, nka CORECIVIC, ET AL.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL A. HORWITZ
LINDSAY E. SMITH
MELISSA K. DIX
HORWITZ LAW, PLLC
4016 Westlawn Dr.
Nashville, TN 37209
(615) 739-2888
daniel@horwitz.law
lindsay@horwitz.law
melissa@horwitz.law

JOHN J. BURSCH
Counsel of Record
BURSCH LAW, PLLC
9339 Cherry Valley Ave., #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

Counsel for Petitioner

QUESTIONS PRESENTED

In *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440 (1989), and *Federal Election Commission* v. *Akins*, 524 U.S. 11 (1988), this Court recognized that Article III's injury requirement is satisfied when a litigant seeks to vindicate a right of public access to information. If that principle is true for ABA judicial evaluations and records of political activities that an organization is required to disclose to the public, it is doubly so when an individual seeks access to improperly sealed court records.

The Sixth Circuit reached the opposite conclusion here, holding that a member of the public lacks standing to intervene and unseal court documents unless he also shows personalized "adverse effects." App.7a. As the dissent explained, that analysis "fails to heed" this Court's decisions in *Public Citizen* and *Akins* and places the Sixth Circuit "at odds with [its] sister circuits." App.10a (Gibbons, J., dissenting). Though "the public right of access to judicial records is deeply rooted in Anglo-American history and tradition, the majority's holding suggests that the Constitution prevents any specific member of the public from vindicating that right." *Id.* at 16a–17a.

The question presented is:

Whether an intervenor's interest in transparency is sufficient to confer standing to seek access to sealed or protected judicial records (as the First, Third, Fourth, and Eleventh Circuits hold); whether an intervenor's standing turns on whether the underlying case is still pending (as the Fifth Circuit holds); or whether an intervenor must show personalized "adverse effects" to seek document unsealing (as the Sixth Circuit held here).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Eddie Tardy, an individual person.

Respondents are Corrections Corporation of America, nka CoreCivic, a corporation; Damon T. Hininger; David M. Garfinkle; Todd J. Mullenger; and Harley G. Lappin, Director.

Additional parties are individual Plaintiffs Nikki Bollinger Grae and Luvell L. Glanton; Plaintiff Amalgamated Bank, as Trustee for the LongView Collective Investment Fund; and individual Intervenor Marie Newby.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit, Case No. 22-5312, *Grae* v. *Tardy*, opinion issued January 13, 2023, en banc review denied March 9, 2023.

U.S. District Court for the Middle District of Tennessee, No. 3:16-cv-02267, Order entered April 8, 2022.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT ii

LIST OF ALL PROCEEDINGS ii

APPENDIX TABLE OF CONTENTS v

TABLE OF AUTHORITIES vi

DECISIONS BELOW 1

STATEMENT OF JURISDICTION 1

PERTINENT CONSTITUTIONAL PROVISION 1

INTRODUCTION 2

STATEMENT OF THE CASE 6

I. The public right to access court documents 6

II. Nature of the case and proceedings below 9

REASONS FOR GRANTING THE WRIT 15

I. The Sixth Circuit's decision created a 4-1-1 circuit split over whether an intervenor must allege adverse effects to have standing to unseal judicial documents. 16

A. The Fourth and Eleventh Circuits broadly allow intervenors standing to seek unsealing of judicial records. 16

B. The First and Third Circuits have held that the public has standing to seek modification of protective orders for the purpose of accessing court documents. 18

C. In conflict with multiple circuits, the Fifth Circuit holds that third parties generally have standing to intervene and unseal documents—but not after a case has concluded. 20

II. The Sixth Circuit's rule conflicts with this Court's decisions in *Public Citizen* and *Akins*. .. 22

III. This case is of immense importance to the principle of government transparency and an ideal vehicle to resolve the circuit conflict and resolve the question presented. 25

CONCLUSION 27

APPENDIX TABLE OF CONTENTS

United States Court of Appeals for the
Sixth Circuit,
Order in 22-5312,
Issued January 13, 2023 ..... 1a–17a

United States District Court for the
Middle District of Tennessee,
Order in 3:16-cv-02267,
Issued April 8, 2022 ..... 18a–24a

United States Court of Appeals for the
Sixth Circuit,
Order Denying Petition for Rehearing
En Banc in 22-5312,
Issued March 9, 2023 ..... 25a–26a

TABLE OF AUTHORITIES

Cases

Anderson v. *Cryovac, Inc.*,
805 F.2d 1 (1st Cir. 1986) 19

Beckman Indus., Inc. v. *Int'l Ins. Co.*,
966 F.2d 470, 472 (9th Cir. 1992)..... 20

Brown & Williamson Tobacco Corp. v. *F.T.C.*,
710 F.2d 1165 (6th Cir. 1983) 3, 6, 8

Brown v. *Advantage Eng'g, Inc.*,
960 F.2d 1013 (11th Cir. 1992).....4, 17, 18, 19

Campaign Legal Center v. *Scott*,
49 F.4th 931 (5th Cir. 2022) 13, 15, 24

City of Hartford v. *Chase*,
733 F. Supp. 533 (D. Conn. 1990) 19

City of Hartford v. *Chase*,
942 F.2d 130 (2d Cir. 1991) 19

Comm'r v. *Advance Loc. Media, LLC*,
918 F.3d 1161, 1172 n.5 (11th Cir. 2019) 21

Dep't of Air Force v. *Rose*,
425 U.S. 352 (1976)..... 23

Dep't of Justice v. *Julian*,
486 U.S. 1 (1988)..... 22

Dep't of Justice v. *Reporters Comm. for Freedom of Press*,
489 U.S. 749 (1989)..... 22

Deus v. *Allstate Ins. Co.*,
15 F.3d 506 (5th Cir. 1994) 20

Doe v. *Pub. Citizen*,
749 F.3d 246 (4th Cir. 2014) 3, 16, 17

E.E.O.C. v. *Nat'l Children's Ctr., Inc.*,
146 F.3d 1042, 1047 (D.C. Cir. 1998)..... 21

FBI v. *Abramson*,
456 U.S. 615 (1982)..... 22

FDIC v. *Ernst & Ernst*,
677 F.2d 230, 231–32 (2d Cir. 1982) 20

Federal Election Comm'n v. *Akins*,
524 U.S. 11 (1988)..... i, 2, 12, 23

Globe Newspaper Co. v. *Pokaski*,
868 F.2d 497 (1st Cir. 1989) 7

Goodman v. *Fuller*,
960 F.2d 149 (6th Cir. 1992) 3

Grae v. *Corr. Corp. of Am.*
(6th Cir. Jan. 13, 2023) (No. 22-5312)..... 10

Grove Fresh Distrib., Inc. v. *Everfresh Juice Co.*,
24 F.3d 893 (7th Cir. 1994) 7

Hartford Courant Co. v. *Pellegrino*,
308 F.3d 83 (2d Cir. 2004)..... 7

In re Alexander Grant & Co. Litig.,
820 F.2d 352 (11th Cir. 1987) 19

In re Knoxville News Sentinel Co.,
723 F.2d 470 (6th Cir.1983) 3, 11

In re Lobe Newspaper Co.,
729 F.2d 47 (1st Cir. 1984)..... 19

In re Providence Journal Co.,
293 F.3d 1 (1st Cir. 2002)..... 7

In re San Juan Star Co.,
662 F.2d 108 (1st Cir. 1981) 19

In re Search Warrant,
855 F.2d 569 (8th Cir. 1988) 7

Ipsen Biopharmaceuticals, Inc. v. *Becerra*,
2021 WL 4399531 (D.D.C. Sept. 24, 2021) 24

Kelly v. *RealPage Inc.*,
47 F.4th 202 (3d Cir. 2021) 14

Kleindienst v. *Mandel*,
408 U.S. 753 (1972)..... 3

L. Singer & Sons v. *Union Pac. R.R. Co.*,
311 U.S. 295 (1940)..... 17

Leucadia, Inc. v. *Applied Extrusion Technologies, Inc.*,
998 F.2d 157, 161 n.5 (3d Cir. 1993)..... 20

Lugosch v. *Pyramid Co. of Onondaga*,
435 F.3d 110 (2d Cir. 2006) 5

Meyer Goldberg, Inc. of Lorain v. *Fisher Foods*,
823 F.2d 159 (6th Cir.1987) 3, 11

Newby v. *Enron Corp.*,
443 F.3d 416 (5th Cir. 2006) 4, 20, 21

Nixon v. *Warner Commc'n, Inc.*,
435 U.S. 589 (1978)..... 6

Pansy v. *Borough of Stroudsburg*,
23 F.3d 772 (3d Cir. 1994)..... 4, 19

Phoenix Newspapers, Inc. v. *United States Dist. Court*,
156 F.3d 940 (9th Cir. 1998) 7

Press-Enterprise Co. v. *Superior Ct. of Ca., Riverside Cty.*,
464 U.S. 501 (1984)..... 8

Public Citizen v. *Liggett Grp., Inc.*,
858 F.2d 775 (1st Cir. 1988)..... 4, 18, 19

Public Citizen v. *United States Dep't of Justice*,
491 U.S. 440 (1989)..... i, 2, 12, 13, 22, 23

Richmond Newspapers, Inc. v. *Virginia*,
448 U.S. 555 (1980)..... 3, 7

Rudd Equip. Co. v. *John Deere Constr. & Forestry Co.*,
834 F.3d 589 (6th Cir. 2016) 11

SEC v. *Van Waeyenberge*,
990 F.2d 845 (5th Cir. 1993) 8

Smith v. *United States*,
431 U.S. 291 (1977)..... 3

Stanley v. *Georgia*,
394 U.S. 557 (1969)..... 2

State ex rel. Colscott v. *King*,
57 N.E. 535 (Ind. 1900)..... 6

State ex rel. Ferry v. *Williams*,
41 N.J.L. 332 (1879) 6

TransUnion LLC v. *Ramirez*,
141 S. Ct. 2190 (2021).....2, 11, 12, 13, 24

TransUnion LLC v. *Ramirez*,
141 S. Ct. 792 (2020)..... 24

Trichell v. *Midland Credit Mgmt., Inc.*,
964 F.3d 990 (11th Cir. 2020) 11

United Nuclear Corp. v. *Cranford Ins. Co.*,
905 F.2d 1424, 1427 (10th Cir. 2990)..... 20

United States v. *Amodeo*,
71 F.3d 1044 (2d Cir. 1995) 5

United States v. *Antar*,
38 F.3d 1348 (3d Cir. 1994) 7

United States v. *Cianfrani*,
573 F.2d 835 (3d Cir. 1978) 19

United States v. *Weber Aircraft Corp.*,
465 U.S. 792 (1984)..... 22

Van Cleve v. *U.S. Sec'y of Commerce*,
2022 WL 1640669 (11th Cir. May 24, 2022)..... 25

Wilson v. *Am. Motors Corp.*,
759 F.2d 1568 (11th Cir. 1985)..... 17, 18

Statutes

28 U.S.C. 1248..... 1

28 U.S.C. 1254(1) 1

28 U.S.C. 1331..... 1

Other Authorities

1 J. Bentham, Rationale of Judicial Evidence 524
(1827)..... 7

3 W. Blackstone, Commentaries 372–73..... 7

David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835 (2017) 8

M. Hale, The History of the Common law of
England 343–45 (6th ed. 1820) 7

U.S. Const. art. III, § 2..... 1

DECISIONS BELOW

The district court's order granting and denying in part Intervenor Marie Newby's Motion to Intervene and Unseal Judicial Documents and Exhibits is not reported but is reprinted at App.18a.

The Sixth Circuit's opinion denying Petitioner Eddie Tardy's Motion to Intervene and Unseal Judicial Documents and Exhibits is reported at 57 F.4th 567 (6th Cir. 2022) and reprinted at App.1a. The Sixth Circuit's order denying rehearing en banc is not reported but is available at 2023 WL 2752575 and reprinted at App.25a.

STATEMENT OF JURISDICTION

The Sixth Circuit entered judgment on January 13, 2023, and denied rehearing en banc on March 9, 2023. Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1248. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

Article III, § 2 of the U.S. Constitution states, in relevant part: "The judicial Power shall extend to … Controversies … between Citizens of different States."

INTRODUCTION

Transparency in court proceedings promotes confidence in the judicial system and the fair administration of justice. It also encourages judges to act impartially and consistently. Yet the 2-1 published panel decision below impairs the judiciary's promise of transparency by holding that members of the public lack standing to unseal improperly sealed court documents unless they demonstrate personalized "adverse effects." App.7a. Judge Gibbons' dissent chastised the ruling, which "fails to heed [this] Court's decisions in *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), and *Federal Election Commission v. Akins*, 524 U.S. 11 (1998)," and puts the Sixth Circuit "at odds with [its] sister circuits[.]" App.10a (Gibbons, J., dissenting).

In reaching that holding, the panel applied the "adverse effects" language in *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190 (2021), to claims involving sealed judicial documents—a position that no party's brief advanced. *TransUnion* was a damages case, and the opinion made clear that its holding did *not* apply to situations where the public's right to public information was at stake. *E.g.*, *id.* at 2214 (distinguishing *Akins* and *Public Citizen* because "those cases involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information.").

TransUnion further explained that, for standing purposes, "traditional harms may also include harms specified by the Constitution itself." *Id.* at 2204. That observation controls here, given that the right to receive information is a constitutional right. *E.g.*, *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969) ("It is

now well established that the Constitution protects the right to receive information"); *Smith* v. *United States*, 431 U.S. 291, 319, n.18 (1977) ("the First Amendment necessarily protects the right to 'receive information and ideas.'") (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 762–63 (1972)). Accord *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 576–77 (1980) ("'In a variety of contexts, this Court has referred to a First Amendment right to 'receive information and ideas.' What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors.") (quoting *Kleindienst*, 408 U.S. at 762).

The panel majority's holding also transformed the Sixth Circuit's sealing precedent. That precedent used to afford members of the public an essential "check on courts," which guards against secrecy that "insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1178–79 (6th Cir. 1983). The Sixth Circuit previously regarded that check as "a presumptive right to inspect and copy judicial records." *Goodman v. Fuller*, 960 F.2d 149 (6th Cir. 1992) (citing *Meyer Goldberg, Inc. of Lorain v. Fisher Foods*, 823 F.2d 159, 163 (6th Cir.1987); *In re Knoxville News Sentinel Co.*, 723 F.2d 470, 473–74 (6th Cir.1983)).

By now taking the opposite view, the Sixth Circuit created an irreconcilable 4-1-1 circuit conflict. As Judge Gibbons explained it, "[t]wo circuits have held that intervenors have standing to vindicate the public's First Amendment right of access to judicial records." App.15a (Gibbons, J., dissenting) (citing *Doe* v. *Pub. Citizen*, 749 F.3d 246, 262–65 (4th Cir. 2014),

and *Brown* v. *Advantage Eng'g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992)). "Two other circuits," she continued, "have held that intervenors have standing to seek modification of discovery-related protective orders, suggesting *a fortiorari* that they would also have standing to seek unsealing of documents on a court's docket." App.15a–16a (citing *Pub. Citizen* v. *Liggett Grp., Inc.*, 858 F.2d 775, 787 (1st Cir. 1988), and *Pansy* v. *Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994)).

The Fifth Circuit, Judge Gibbons explained, "holds that intervenors have standing to vindicate the public right of access to information by unsealing in cases that are still pending" but also "says that intervenors lack standing to seek unsealing in situations like this one where the underlying case is closed." App.16a (discussing *Newby* v. *Enron Corp.*, 443 F.3d 416, 421–22 (5th Cir. 2006)). But the panel majority's opinion here makes the Sixth Circuit "the *only* one to hold that intervenors categorically lack standing to vindicate the public right of access to information." *Ibid.* (emphasis added). And the majority did so based on a single sentence from the same *TransUnion* opinion that specifically excepted public-disclosure claims from its scope, "treating *TransUnion* as if it overruled *Public Citizen* to the extent that *Public Citizen* enumerated the exclusive requirements for standing in cases where a litigant seeks to vindicate a public right of access to information." App.13a (Gibbons, J., dissenting).

By requiring unsealing proponents to demonstrate personalized "adverse effects from the denial of information," App.7a, the panel majority's ruling will have catastrophic effects on all manner of informational and public-disclosure claims—from sealing, to

FOIA, to courtroom closure, to gag orders. At best, the panel's decision will require citizens to disclose to a judge—one whose rulings they may be investigating for impropriety—their motivation to seek records held by their government to satisfy the panel's heightened injury standard. Contra, *e.g.*, *Lugosch* v. *Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006) ("what the Newspapers seek to do with the documents has no effect on our consideration"); *United States* v. *Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995) ("we believe motive generally to be irrelevant to defining the weight accorded the presumption of access."). At worst, it will stymie such claims entirely, because without speculating, litigants cannot plausibly know *how* they were injured by being denied access to information that they have a right to receive but cannot see. As Judge Gibbons put it, "How can a member of the public, unfamiliar with the contents of a sealed judicial record, establish how the failure to disclose that record harms him?" App.16a. (Gibbons, J., dissenting).

At bottom, it does not even matter whether the Sixth Circuit was correct in its interpretation of this Court's precedents addressing the right to information. It simply cannot be the case that the right of a third party to access sealed court documents, or documents subject to a protective order, varies depending on the district where the litigation is venued. The Court should grant review, resolve the 4-1-1 circuit split, and either affirm that citizens with a transparency interest have no standing to pursue public records or reverse and hold that there is an Article III injury when a court improperly prevents the public from seeing such records. Given the importance of the issue and the uncertainty caused by the circuit split, certiorari is warranted.

STATEMENT OF THE CASE

I. The public right to access court documents

American courts have long recognized a "general right to inspect and copy … judicial records and documents." *Nixon* v. *Warner Commc'n, Inc.*, 435 U.S. 589, 597 (1978) (numerous citations omitted). And, contrary to the practice in English courts, American courts "generally do *not* condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit." *Id.* (emphasis added). Rather, the "interest necessary to support the issuance of a writ compelling access has been found" in mere transparency, such as a "citizen's desire to keep a watchful eye on the workings of public agencies." *Id.* at 598 (citing *State ex rel. Colscott* v. *King*, 57 N.E. 535 , 536–38 (Ind. 1900), and *State ex rel. Ferry* v. *Williams*, 41 N.J.L. 332, 336–39 (1879)). To be sure, this right is "not absolute;" but the reasons for denying access to judicial records must be compelling—such as protecting proprietary business information, *id.*

The foundation for this broad right of access goes to the very root of our constitutional democracy: "[t]he English common law, the American constitutional system, and the concept of the 'consent of the governed' stress the 'public' nature of legal principles and decisions." *Brown & Williamson Tobacco Corp.* v. *FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983). And the need for public access to judicial records is not limited to transparency. It also increases judicial accountability.

This Court, in the context of open judicial proceedings, quoted Jeremy Bentham for the proposition that transparency is the keystone to an effective—and accountable—judiciary. "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 569 (1980) (quoting 1 J. Bentham, Rationale of Judicial Evidence 524 (1827)). Indeed, an open court system is the bulwark against "decisions based on secret bias or partiality." *Id.* (citing M. Hale, The History of the Common law of England 343-45 (6th ed. 1820); 3 W. Blackstone, Commentaries 372–73).

Following this reasoning, "[n]umerous federal and state courts have [ ] extended the First Amendment protection provided by *Richmond Newspapers* to particular types of judicial documents, determining that the First Amendment itself, as well as the common law, secures the public's capacity to inspect such records." *Hartford Courant Co.* v. *Pellegrino*, 308 F.3d 83, 91–91 (2d Cir. 2004) (citing *In re Providence Journal Co.*, 293 F.3d 1, 10–13 (1st Cir. 2002); *Phoenix Newspapers, Inc.* v. *United States Dist. Court*, 156 F.3d 940, 948 (9th Cir. 1998); *United States* v. *Antar*, 38 F.3d 1348, 1359–60 (3d Cir. 1994); *Grove Fresh Distrib., Inc.* v. *Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994); *Globe Newspaper Co.* v. *Pokaski*, 868 F.2d 497, 505 (1st Cir. 1989); *In re Search Warrant*, 855 F.2d 569, 573 (8th Cir. 1988)).

Applying these principles, a trial court that intends to seal a court record is required to set forth its specific findings and conclusions "which justify nondisclosure to the public"—even if neither party objects to the sealing. *Brown & Williamson*, 710 F.2d at 1176. Accord, *e.g.*, *SEC* v. *Van Waeyenberge*, 990 F.2d 845, 849 (5th Cir. 1993) (reversing trial court because of a lack of "evidence in the record that the district court balanced the competing interests prior to sealing the final order"). And in the rare instance where circumstances require sealing a judicial document or record, the trial court must engage in a narrow tailoring analysis and "seal only such parts … as necessary." *Press-Enterprise Co.* v. *Superior Ct. of Ca., Riverside Cty.*, 464 U.S. 501, 825–26 (1984).

Yet belying the commitment to transparency, "[j]udges across the country routinely close court proceedings and restrict public access to judicial records, including sealing entire cases." David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 838–39 (2017). "In recent years, it has come to light that some courts have maintained secret dockets containing thousands of cases." *Id.* at 839. And following the shift of many courts to electronic access to court records, "a number of courts and legislatures have sharply limited public access to certain proceedings and records." *Id.* at 843 (citations omitted). Other courts, such as the district court below, simply rubber-stamp requests to seal judicial documents, providing no reasoning at all.

Such secrecy is inimical to judicial transparency and public faith in the justice system. The solution comes in the form of third parties like Petitioner who seek intervention for the purpose of shedding light on the darkness of sealed court records.

II. Nature of the case and proceedings below

This case involves a private prison contractor—CoreCivic—that performed poorly enough that the federal government took remedial action to address the company's deficient safety and security record. During the underlying securities fraud litigation, the district court entered a series of uniformly unreasoned two-word (sometimes four-word) sealing orders that adopted whatever position sealing proponents advocated, merely scribbling "Motion GRANTED" in the corner of a proponent's motion without further analysis.[1] As a result, thousands of pages of records regarding matters of extraordinary public concern were sealed wholesale, without any accompanying findings or reasoning.

Shortly after the original litigation settled, non-party Marie Newby moved to intervene for the limited purpose of unsealing the illicitly sealed documents. App.3a. Again deferring to what proponents of sealing—who confessed substantial error at this point—wanted, the District Court unsealed some, but not all, of the improperly sealed documents. *Ibid.* Ms.

---

[1] 7/20/2018 Order, R.106, PageID.2830; 10/29/2018 Order, R.123, PageID.3483; 11/5/2018 Order, R.128, PageID.3511; 1/2/2019 Order, R.142, PageID.3652; 2/8/2019 Order, R.156, PageID.4219; 2/22/2019 Order, R.164, PageID.4411; 11/23/2020 Order, R.368, PageID.17661; 11/23/2020 Order, R.369, Page ID.17662; 11/23/2020 Order, R.371, PageID.17666; 11/23/2020 Order, R.372, PageID.17667; 12/7/2020 Order, R.377, Page ID.17756; 12/7/2020 Order, R.378, PageID.17757; 12/7/2020 Order., R.379, PageID.17758; 2/17/2021 Order, R.414, Page ID.23860; 2/17/2020 Order, R.415, PageID.23861; 2/22/2021 Order, R.432, PageID.24390; 2/22/2021 Order, R.433, Page ID.24391.

Newby appealed. But before the Sixth Circuit resolved her case, she and CoreCivic settled, and she moved to dismiss her appeal. *Ibid.*

The same day, Eddie Tardy—a member of the public who, like Ms. Newby, saw his child murdered in CoreCivic's care—moved to intervene and assume Ms. Newby's role. App.3a. He had good reason, too. In particular, he was preparing to (and then did) file a lawsuit in the same district that had just illicitly sealed thousands of record pages for CoreCivic's benefit. But rather than claiming that the improper sealing decisions meaningfully hindered his ability to litigate that suit, he claimed a right as a member of the public to access the treasure trove of documents that the district court improperly sealed.

In response to questioning about his standing to seek document unsealing, Mr. Tardy's counsel acknowledged that Mr. Tardy had not alleged any "adverse consequences in terms of damages to Mr. Tardy," though he explained that, unlike *TransUnion*, the present dispute is not about money damages.[2] He also maintained that asking whether he had suffered adverse consequences was not the proper inquiry for sealing claims, explaining that he wished to exercise his right "to check the district court's rulings" instead.

The Sixth Circuit panel majority concluded that this admission was fatal to Mr. Tardy's Article III standing, App.7a, because he "hasn't suffered an injury in fact," App.4a.

---

[2] Oral Argument at 1:53, 6:58, *Grae* v. *Corr. Corp. of Am.* (6th Cir. Jan. 13, 2023) (No. 22-5312), https://bit.ly/43I0Yoz.

The majority started with the accepted proposition that for "Tardy to have standing, his injury must be concrete and particularized." App.4a (citing *TransUnion*, 141 S. Ct. at 2203). The majority honed in on "the concreteness requirement." *Ibid.* Though the majority acknowledged that "intangible harms—like the denial of information" may satisfy the concreteness standard, it "first look[ed] to history to determine whether the harm was traditionally understood as concrete enough to support standing." *Ibid.*

The majority acknowledged a "long recognized" "common-law right of public access to court records." App.4a (citing *Meyer Goldberg*, 823 F.2d at 163, and *In re Knoxville*, 723 F.2d at 473–74). "That right," the majority continued, "flows from the 'long-established legal tradition' allowing the public to inspect and copy judicial records." *Ibid.* (citing *Rudd Equip. Co.* v. *John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593 (6th Cir. 2016)). "Thus, litigants who assert the violation of their right of access to judicial records," like Eddie Tardy, "stand on strong historical ground." *Ibid.*

Conflating public access to judicial documents with access to other forms of information, the majority then cited *TransUnion* for the proposition that "the mere denial of information is insufficient to support standing." App.5a (citing *TransUnion*, 141 S. Ct. at 2214), and *Trichell* v. *Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020)). Continuing that conflation, the majority said that "the courts of appeals have consistently recognized that, to have standing, a plaintiff claiming an information injury must have suffered adverse effects from the denial of access to information." App.5a (citations omitted).

To close the loop, the majority distinguished this Court's decisions in *Akins* and *Public Citizen* on the ground that the plaintiffs in those cases "had suffered adverse effects." App.6a. And the majority viewed *TransUnion* as framing the so-called "adverse-effects rule as part of the constitutional inquiry that applies across all cases." App.7a (citing *TransUnion*, 141 S. Ct. at 2214). Accordingly, the majority denied Tardy's motion to intervene and granted Newby's motion to dismiss. App.10a.

Judge Gibbons issued an acerbic dissent. App.10a. She began with *Public Citizen*, noting that this Court allowed the plaintiffs there to obtain information about the ABA's collaboration with the Department of Justice in the selection of judicial nominees even though the plaintiffs "were complaining of a mere 'generalized' grievance because they had not shown how denial of the information harmed them specifically—the same argument CoreCivic makes, and the majority accepts, here." App.10a–11a (citing *Public Citizen*, 491 U.S. at 448–50).

Similarly, explained Judge Gibbons, in *Akins*, this Court held that plaintiffs seeking "information about an organization's political activities that they contended the Federal Election Campaign Act (FECA) required be made public" had likewise "shown an 'information injury' sufficient to confer Article III standing." App.11a (citing *Akins*, 574 U.S. at 25). This Court "again explicitly rejected the argument that the plaintiffs were complaining of a mere 'generalized' grievance." *Ibid.* (citing *Akins*, 574 U.S. at 23). "[T]here is no reason to apply a more demanding standard," she concluded, "to litigants seeking to vindicate the public's common-law right of access to judicial records. Tardy therefore has standing." *Ibid.*

"Contrary to the majority's interpretation," Judge Gibbons continued, neither *Public Citizen* nor *Akins* suggests that a litigant seeking to vindicate the public's right of access to information must explain how he will use that information." App.11a–12a. Rather, "*Public Citizen* expressly holds that such litigants 'need show [no] more than that they have sought and were denied' the information to which the public right of access applies." App.12a (quoting *Public Citizen*, 491 U.S. at 449).

Judge Gibbons next criticized the majority for relying "entirely on a single sentence from *TransUnion*," *i.e.*, that "[a]n asserted informational injury that causes no adverse effects cannot satisfy Article III." App.12a–13a (quoting *TransUnion*, 141 S. Ct. at 2214). The panel majority, she said, "treats *TransUnion* as if it overruled *Public Citizen* to the extent that *Public Citizen* enumerated the exclusive requirements for standing in cases where a litigant seeks to vindicate a public right of access to information." App.13a.

In Judge Gibbons' view, "*TransUnion* did no such thing. Instead, and shortly before the sentence on which the majority relies, *TransUnion* distinguished *Public Citizen* and *Akins* on the grounds that 'those cases involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information." App.13a (quoting *TransUnion*, 141 S. Ct. at 2214). "At best," she concluded, "*TransUnion* is ambiguous as to whether its adverse-effects requirement applies to 'public-disclosure or sunshine laws," as recently noted by the Fifth Circuit in *Campaign Legal Center* v. *Scott*, 49 F.4th 931, 938 (5th Cir. 2022). *Ibid.*

"Rather than assume that [this] Court silently overruled *Public Citizen* without instruction to do so," Judge Gibbons "would adopt the reading of *TransUnion* that avoids conflict with [this] Court's longstanding precedent: *Public Citizen* and *Akins* govern when plaintiffs seek information pursuant to a public right of access, while *TransUnion* governs certain other theories of informational injury." App.13a–14a (citing *Kelly* v. *RealPage Inc.*, 47 F.4th 202, 212 (3d Cir. 2021)).

Finally, Judge Gibbons distinguished the circuit precedents on which the panel majority relied, noting that none of them "involve[d] 'public-disclosure or sunshine laws' like the ones at issue in *Public Citizen* and *Akins*." App.14a. And she detailed the 4-1-1 circuit split that is the subject of this petition. App.15a–16a.

"Thus, although all agree that the public right of access to judicial records is deeply rooted in Anglo-American history and tradition, the majority's holding suggests that the Constitution prevents any specific member of the public from vindicating that right." App.16a–17a. "Because the majority's view conflicts with [this] Court's cases applying Article III in the public-access context," Judge Gibbons respectfully dissented. App.17a. "Less than a majority" of the Sixth Circuit voted for en banc rehearing. App.26a.

REASONS FOR GRANTING THE WRIT

Public access to judicial records and documents is essential to a well-functioning judiciary and to public confidence in the court system. Yet now in the Sixth Circuit, the only time a citizen can seek access to improperly sealed records is if he or she can show the same types of "adverse effects" that this Court requires of litigants in damages cases. Such a result will cause many citizens to wonder what the judiciary has to hide.

It is for that reason that four other circuits have held that transparency is a sufficient interest for standing to seek access to sealed court records or documents subjected to a court's protective order, and another has said any interest is sufficient provided the underlying case is still pending. Those decisions accord with this Court's precedents in *Public Citizen* and *Akins*, both of which vindicated a strong public right of access to public documents. And the mature 4-1-1 conflict that now exists among six circuits over the issue requires this Court's immediate resolution.

TransUnion is not to the contrary. There, this Court did not overrule or even cast doubt on *Public Citizen* or *Akins*. Instead, it applied an adverse-effects standard for *damages* claims, as distinguished from public-disclosure claims. And to the extent *TransUnion* is "ambiguous as to whether its adverse-effects requirement applies to 'public-disclosure or sunshine laws,'" App.13a (Gibbons, J., dissenting); *Campaign Legal Center*, 49 F.4th at 938, that is another reason justifying review. The petition should be granted.

I. The Sixth Circuit's decision created a 4-1-1 circuit split over whether an intervenor must allege adverse effects to have standing to unseal judicial documents.

The panel majority's decision below makes the Sixth Circuit "the only one to hold that intervenors categorically lack standing to vindicate the public right of access to information." App.16a (Gibbons, J., dissenting). Two circuits, the Fourth and Eleventh, have held the exact opposite. Two more, the First and Third, have held the same in the context of protective orders. The Fifth Circuit stands on its own, holding that intervenors generally *do* have standing to seek unsealing but only if the underlying case is not yet closed—though it is not clear why the concreteness of an intervenor's injury in being unable to access sealed judicial documents should change merely because the underlying case reaches its conclusion. The Court should grant the petition and resolve the conflict.

A. The Fourth and Eleventh Circuits broadly allow intervenors standing to seek unsealing of judicial records.

Start with the Fourth Circuit. In *Doe* v. *Public Citizen*, 749 F.3d 246 (4th Cir. 2014), consumer groups moved to intervene and unseal a Consumer Product Safety Commission report attributing an infant's death to a manufacturing company's product, and for access to the district court's memorandum ordering the sealing, which was heavily redacted. In assessing whether the consumer groups alleged a sufficiently concrete injury for Article III standing, the court looked to this Court's decisions in *Public Citizen* and *Akin*.

Although the consumer groups' "right of access stems not from a statute [as in *Public Citizen* and *Akins*] but from the Constitution and common law, the nature of their alleged injury is indistinguishable from the informational harm suffered by the plaintiffs in [those] cases." 749 F.3d at 264. That injury flows from the groups' "inability to access judicial documents and materials filed in the proceeding below, information that they contend they have a right to obtain and inspect." *Ibid.* "Because the public right of access under the First Amendment and common law protects individuals from the very harm suffered by Consumer Groups, their injury transcends a mere abstract injury such as a 'common concern for obedience to law.'" *Ibid.* (quoting *L. Singer & Sons* v. *Union Pac. R.R. Co.*, 311 U.S. 295, 303 (1940)). The consumer groups' "interest in the litigation is that of a third party seeking access to documents filed with the court." *Id.* at 265. Accordingly, they "have a redressable, actual injury and a personal stake sufficient to make their claims justiciable." Full stop.

The Eleventh Circuit is in the same camp. In *Brown* v. *Advantage Engineering, Inc.*, 960 F.2d 1013 (11th Cir. 1992), the plaintiffs in one civil case moved to intervene to unseal a judicial record in an unrelated case brought by a different plaintiff against the same defendant. After the district court denied the motion, the Eleventh Circuit reversed, relying on its precedent that presumes judicial proceedings "are public proceedings." *Id.* at 1015 (quoting *Wilson* v. *Am. Motors Corp.*, 759 F.2d 1568, 1569 (11th Cir. 1985)). When a district court attempts to deny access to judicial records, "it must be shown that the denial is necessitated by a compelling governmental interest,

and is narrowly tailored to that interest." *Id.* at 1015–16 (quoting *Wilson*, 759 F.2d at 1571 (cleaned up)).

In direct conflict with the Sixth Circuit's decision here, the Eleventh Circuit held that "because it is the rights of the public, an absent third party, that are at stake, *any member of the public* has standing to view documents in the court file that have not been sealed in strict accordance with" the above standard, "and to move the court to unseal the court file in the event the record has been improperly sealed." *Advantage Eng'g*, 960 F.2d at 1016. Accordingly, the court vacated and remanded to the district court for the *Wilson* analysis without requiring the intervenors to allege any additional, perosnalized adverse effects.

B. The First and Third Circuits have held that the public has standing to seek modification of protective orders for the purpose of accessing court documents.

Decisions of the First and Third Circuits, though rendered in the protective-order context, are of a piece with those of the Fourth and Eleventh.

In *Public Citizen* v. *Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988), tobacco companies appealed from a district court's modification of a protective order to allow a public-interest group to access discovery documents. Though the case did not involve unsealing *per se*, the underlying question was exactly the same: did the public-interest group have standing?

The First Circuit answered unequivocally yes: "Courts, including this one, routinely have found that third parties have standing to assert their claim of access to documents in a judicial proceeding." *Id.* at 787 (citing *In re Alexander Grant & Co. Litigation*,

820 F.2d 352, 354 (11th Cir. 1987), *Anderson* v. *Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986); *In re Lobe Newspaper Co.*, 729 F.2d 47, 50 n.2 (1st Cir. 1984), and *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981)). Accordingly, Public Citizen, too, "had standing to intervene in the case and to ask the court to modify its pre-existing protective order." *Id.* at 790.

The Third Circuit reached the same conclusion in *Pansy* v. *Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994), a case involving newspapers that sought to intervene and modify a confidentiality order in a former police chief's civil-rights suit. The court quickly dispensed with the standing inquiry: "We have routinely found, as have other courts, that third parties have standing to challenge protective orders and confidentiality orders in an effort to obtain access to information or judicial proceedings." *Id.* at 777 (citing *Brown* v. *Advantage Eng'g*, 960 F.2d at 1016, *Liggett Group*, 858 F.2d at 787 & n.12, *In re Alexander Grant*, 820 F.2d at 354, *United States* v. *Cianfrani*, 573 F.2d 835, 845 (3d Cir. 1978), and *City of Hartford* v. *Chase*, 733 F. Supp. 533, 534 (D. Conn. 1990), *rev'd on other rounds*, 942 F.2d 130 (2d Cir. 1991)).

Though it was an injury shared by the public, the newspapers alleged "a distinct and palpable injury to" themselves sufficient to establish standing. *Pansy*, 23 F.3d at 777 (quoting *Cianfrani*, 573 F.2d at 845). The newspapers "have shown that the putatively invalid Confidentiality Order which the district court entered interferes with their attempt to obtain access to the Settlement Agreement, either under the right of access doctrine or pursuant to the Pennsylvania Right to Know Act." *Ibid.*

C. In conflict with multiple circuits, the Fifth Circuit holds that third parties generally have standing to intervene and unseal documents—but not after a case has concluded.

The Fifth Circuit follows the First, Third, Fourth, and Eleventh Circuit, with two caveats.

In *Newby* v. *Enron Corp.*, 443 F.3d 416 (5th Cir. 2006), the court confronted the issue of whether the Texas State Board of Public Accountancy had standing to intervene and seek access to discovery that had been protected by a court order. Distinguishing its decision in *Deus* v. *Allstate Insurance Co.*, 15 F.3d 506 (5th Cir. 1994), the Fifth Circuit held that a third party could not intervene for such purposes in a case that had already concluded, since there was no live controversy, but that intervention was warranted in an ongoing case. *Id.* at 421–22. So while a putative intervenor like Tardy would be left out, a citizen could intervene in an ongoing case. This rule itself conflicts with decisions in six circuits. *E.g.*, *FDIC* v. *Ernst & Ernst*, 677 F.2d 230, 231–32 (2d Cir. 1982) (allowing intervention two years after settlement to challenge a confidentiality order); *Leucadia, Inc.* v. *Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 161 n.5 (3d Cir. 1993) ("[A] district court may properly consider a motion to intervene permissively for the limited purpose of modifying a protective order even after the underlying dispute between the parties has long been settled."); *Beckman Indus., Inc.* v. *Int'l Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992) (allowing intervention to challenge a protective order two years after case was dismissed); *United Nuclear Corp.* v. *Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir.

2990) (allowing intervention three years after underlying action had settled; "courts have widely recognized that the correct procedure for a non-party to challenge a protective order is through intervention for that purpose"); *Comm'r* v. *Advance Loc. Media, LLC*, 918 F.3d 1161, 1172 n.5 (11th Cir. 2019) ("Courts retain jurisdiction to unseal judicial records and may allow parties to intervene well after judgment in a dispute."); *E.E.O.C.* v. *Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1047 (D.C. Cir. 1998) (allowing intervention "almost two years after the original parties had settled the case" to obtain materials under seal or protective order).

In addition, the *Newby* court suggested that there was "no Article III requirement that intervenors have standing in a *pendin*g case." *Id.* at 422. That rule goes far beyond the position that Tardy asserts—or the one that the First, Third, Fourth, and Eleventh Circuits have adopted. So the Fifth Circuit's rule is both broader (no "adverse effects" required) than the Sixth Circuit's decision here and narrower (no intervention after a case concludes) than the other four circuits with which the Sixth Circuit's opinion conflicts.

At the end of the day, that leaves six circuits in irreconcilable conflict over the question presented here. Indeed, if CoreCivic's case had arisen in the First, Third, Fourth, or Eleventh Circuits, there can be no doubt that those courts would have applied their precedents and recognized Tardy's standing to intervene to unseal improperly sealed documents. And if the underlying case had still been pending, the Fifth Circuit would have held the same. The Court should grant the petition and resolve that mature circuit conflict.

II. The Sixth Circuit's rule conflicts with this Court's decisions in *Public Citizen* and *Akins*.

The Sixth Circuit's decision below also conflicts with this Court's decisions in *Public Citizen* and *Akins*. Like Judge Gibbons (but unlike the Sixth Circuit panel majority), Petitioner Tardy does not read *TransUnion* as overruling either of those precedents. And to the extent there is any ambiguity, the bench and bar are best served by this Court's immediate clarification of the confusion rather than allowing it to percolate and spread.

Public Citizen involved public-interest groups seeking access via the Freedom of Information Act to documents, shared between the American Bar Association and Department of Justice, pertaining to federal judicial appointments. Like CoreCivic here, the ABA resisted the request by arguing that the groups had not alleged "injury sufficiently concrete and specific to confer standing" but rather only "a general grievance shared in substantially equal measure by all or a large class of citizens." 491 U.S. at 448–49.

This Court unanimously rejected the ABA's position, holding that an agency's denial of a FOIA request—alone—"constitutes a sufficiently distinct injury to provide standing to sue." 491 U.S. at 449. Indeed, this Court's FOIA decisions "have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records." *Ibid.* (citing *Dep't of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749 (1989), *Dep't of Justice* v. *Julian*, 486 U.S. 1 (1988), *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792 (1984), *FBI* v. *Abramson*, 456 U.S. 615 (1982), and

Dep't of Air Force v. *Rose*, 425 U.S. 352 (1976)). The fact that others might share the same injury "does not lessen [the interest groups'] asserted injury." *Ibid.*

To be sure, as the Sixth Circuit panel majority noted, *Public Citizen* referenced the public-interest groups' desire to "participate more effectively in the judicial selection process." App.7a (quoting *Public Citizen*, 491 U.S. at 449). But the Court did not say that its holding hinged on that desire. Instead, the holding was that the groups, and other FOIA plaintiffs like them, "'need show [no] more than that they sought and were denied' the information to which the public right of access applies." App.12a (Gibbons, J., dissenting) (quoting *Public Citizen*, 491 U.S. at 449).

Similarly, in *Akins*, a group of voters sought information about an organization's political activities that FECA purportedly required the organization to make public. The Sixth Circuit panel majority correctly noted the voters' interest in possessing the information to help them "evaluate candidates for public office." App.6a (quoting *Akins*, 524 U.S. at 21).

But this Court described the plaintiffs' concrete harm more generally as "informational injury," 524 U.S. at 24, not more specifically as "voting-information-impairment injury." And the Court expressly endorsed prior decisions holding that "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Id.* at 21 (citations omitted). That is because the statute protects "individuals such as respondents from the kind of harm they say they have suffered, *i.e.*, failing to receive particular information about campaign-related activities." *Id.* at 22.

TransUnion is not to the contrary, because it was a credit-reporting case involving a claim for damages, and did not concern FOIA, FECA, or any other "public-disclosure law." 141 S. Ct. at 2214. Indeed, the Court granted only "Question 1" of the *TransUnion* petition, *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 792 (2020), and that question was whether "either Article III or Rule 23 permits *a damages class action* where the vast majority of the class suffered no actual damages." *TransUnion LLC* v. *Ramirez*, No. 20-297, Pet. for Certiorari i (Sept. 2, 2020) (emphasis added).

The Court's opinion also went out of its way to distinguish *Public Citizen* and *Akins*, explaining that "those cases involved denial of information *subject to public-disclosure or sunshine laws* that entitle all members of the public to certain information." 141 S. Ct. at 2214 (emphasis added). When the Court criticized the *TransUnion* plaintiffs for failing to identify any "downstream consequences" from the failure to receive the information they demanded, it was immediately following the Court's comment that "*Akins* and *Public Citizen* do not control here." *Ibid.*

It is precisely that juxtaposition that caused the Fifth Circuit to observe that "*Akins* and *Public Citizen*, on one reading of *Spokeo* and *TransUnion*, may dispense with 'downstream consequences' on the earlier cases' reasoning that the nondisclosure violation alone creates concrete injury." *Campaign Legal Ctr.*, 49 F.4th at 938. Accord, *e.g.*, *Ipsen Biopharmaceuticals, Inc.* v. *Becerra*, 2021 WL 4399531, at *10 n.4 (D.D.C. Sept. 24, 2021) ("*TransUnion* suggested that the violation of 'public-disclosure or sunshine laws that entitle all members of the public to certain information' is necessarily a justiciable injury."); *Van Cleve* v. *U.S. Sec'y of*

Commerce, 2022 WL 1640669, at *4 (11th Cir. May 24, 2022) ("Van Cleve's alleged informational injury was not concrete because neither [statute] is a public-disclosure law that entitles all members of the public to certain information."). Or, to quote Judge Gibbons, *TransUnion* is at best "ambiguous as to whether its adverse-effects requirement applies to 'public-disclosure or sunshine laws.'" App.13a (Gibbons, J., dissenting).

When an ambiguity in the Court's decisions causes confusion in the lower courts, as here, this Court is the only body with power to resolve that confusion. Again, certiorari is warranted.

III. This case is of immense importance to the principle of government transparency and an ideal vehicle to resolve the circuit conflict and resolve the question presented.

The 4-1-1 split in circuit authority and the conflict with (or at least ambiguity in) this Court's public-information standing decisions are reason enough to grant immediate review. Moreover, it is difficult to understate the importance of non-party standing when it comes to governmental transparency.

The rule of law is the heartbeat of the American governmental experiment, one that has been a beacon for nascent democracies around the world. But the principle is not one that can be simply created on paper by drafting checks and balances. It is one that must be earned—and re-earned—through the hard work and perseverance of individual presidents, members of congress, and judges.

Crucial to that trust-building process is transparency. What government officials do—indeed, what judges do—must be substantially open to the public's scrutiny. Clandestine meetings and Star Chamber judicial proceedings will result in mistrust, suspicion, and ultimately a lack of trust in our government institutions.

For those reasons, the Sixth Circuit's decision here creates problems that go far beyond a lack of judicial transparency. To be sure, if a judge can deal with a series of sealing requests by granting them *seriatim* with only two- to four-word unreasoned orders, that will inevitably cause a public loss of confidence in the judicial process and the justice system itself. But the court of appeals' standing analysis is far more sweeping.

Consider a FOIA request for public records. Until the records are disclosed, it is difficult for a citizen to predict—let alone plausibly allege—what "adverse effects" the *lack* of production will cause. And yet that difficulty alone will be enough to keep a FOIA lawsuit from proceeding in the Sixth Circuit if recalcitrant government officials refuse to produce public documents—even when the law requires it. The answer to that problem cannot be to assert the adverse effect of not being able to ensure transparency. After all, the same is true of Tardy's request here, and that effect was insufficient for the Sixth Circuit. With public confidence in government officials and institutions already in serious decline, there could not be a worse time for the judiciary to create a new, heightened barrier on the public's ability to ensure transparency through access to improperly sealed court records and other secret, public documents.

This case is also an ideal vehicle for correcting the Sixth Circuit's misstep. Because of the way proceedings unfolded below, the record is clean, and there are no factual disputes. The panel majority's opinion on the one hand and Judge Gibbons' dissent on the other draw a clear line over how the question presented can be resolved. And no matter which side of the line this Court ultimately chooses, a clear rule will be the result. The petition should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL A. HORWITZ
LINDSAY E. SMITH
MELISSA K. DIX
HORWITZ LAW, PLLC
4016 Westlawn Dr.
Nashville, TN 37209
(615) 739-2888
daniel@horwitz.law
lindsay@horwitz.law
melissa@horwitz.law

JOHN J. BURSCH
COUNSEL OF RECORD
BURSCH LAW, PLLC
9339 CHERRY VALLEY AVE., #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

AUGUST 2023

PETITION APPENDIX TABLE OF CONTENTS

United States Court of Appeals for the
Sixth Circuit,
Order in 22-5312,
Issued January 13, 2023 .....1a–17a

United States District Court for the
Middle District of Tennessee,
Order in 3:16-cv-02267,
Issued April 8, 2022 .....18a–24a

United States Court of Appeals for the
Sixth Circuit,
Order Denying Petition for Rehearing
En Banc in 22-5312,
Issued March 9, 2023 .....25a–26a

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0009p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NIKKI BOLLINGER GRAE, et al., *Plaintiffs*, *v.* CORRECTIONS CORPORATION OF AMERICA, nka CORECIVIC; DAMON T. HININGER; DAVID M. GARFINKLE; TODD J. MULLENGER; HARLEY G. LAPPIN, Director, *Defendants-Appellees*, MARIE NEWBY, *Intervenor-Appellant*, EDDIE TARDY, *Proposed Intervenor*.	No. 22-5312

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:16-cv-02267—Aleta Arthur Trauger,
District Judge.

Argued: November 15, 2022

Decided and Filed: January 13, 2023

Before: BATCHELDER, GIBBONS, and THAPAR,
Circuit Judges.

COUNSEL

ARGUED: Daniel A. Horwitz, HORWITZ LAW, PLLC, Nashville, Tennessee, for Appellant Marie Newby and proposed intervenor Eddie Tardy. Roman Martinez, LATHAM & WATKINS LLP, Washington, D.C., for Appellees. **ON BRIEF AND MOTIONS:** Daniel A. Horwitz, HORWITZ LAW, PLLC, Melissa K. Dix, Nashville, Tennessee, for Appellant Marie Newby and proposed intervenor Eddie Tardy. **ON APPELLEE BRIEF:** Brian T. Glennon, Eric C. Pettis, Michael A. Galdes, LATHAM & WATKINS LLP, Los Angeles, California, Steven A. Riley, Milton S. McGee, III, RILEY & JACOBSON, PLC, Nashville, Tennessee, for Appellees. Paul R. McAdoo, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Washington, D.C., for Amicus Curiae.

THAPAR, J., delivered an order and announced the judgment of the court in which BATCHELDER, J., joined. GIBBONS, J. (pp. 8–15), delivered a separate dissenting opinion.

ORDER

THAPAR, Circuit Judge. What started as a securities-fraud action against Corrections Corporation of America (now known as CoreCivic) has turned into a quest for documents. Eddie Tardy seeks to intervene and unseal documents that CoreCivic produced during discovery. Because he lacks standing, we deny his motion.

I.

CoreCivic operates private prisons. Years ago, the company's stockholders brought a class action alleging securities fraud. The company settled that suit, and the district court entered final judgment. The case remained dormant until Marie Newby moved to intervene three months later. Newby believed that documents produced in the securities action would help establish CoreCivic's responsibility for the death of her son in one of its prisons. The district court unsealed most, but not all, of the documents Newby sought. She appealed, but before we could decide her case, she settled with CoreCivic and moved to voluntarily dismiss her appeal. *See* Fed. R. App. P. 42(b). At the same time, Eddie Tardy moved to intervene in this appeal, seeking permission to carry on in Newby's stead. *See* Fed. R. Civ. P. 24(b).

Like Newby, Tardy had a son who died in a CoreCivic prison. But unlike Newby, Tardy waived any claim that the denial of documents in this action hinders his ability to litigate his separate suit against CoreCivic for the death of his son. Reply Br. 5 (ECF No. 36-1) ("[C]ivil litigation is barely even a material consideration here."). In fact, at oral argument, Tardy conceded that he hasn't suffered any adverse effects from the denial of documents. Instead, he seeks to vindicate the public's right of access to judicial records. We must decide whether Tardy has standing to intervene on the public's behalf, having repeatedly disclaimed any need for the documents himself.

II.

If the original parties to a case don't appeal the district court's decision, intervenors can in some instances "step into the shoes of the original part[ies]."

Wittman v. Personhuballah, 578 U.S. 539, 543–44 (2016) (citation omitted). But they must have standing to do so. *Diamond v. Charles*, 476 U.S. 54, 68 (1986). Without that requirement, courts would exceed their Article III authority to decide only "cases" and "controversies."

To stay within those Article III limits, courts must always verify that litigants have suffered an injury in fact that is fairly traceable to the defendant and likely redressable by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Here, Tardy hasn't suffered an injury in fact.

For Tardy to have standing, his injury must be concrete and particularized. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). This case concerns the concreteness requirement. Physical and pocketbook injuries easily satisfy this requirement. *Id*. at 2204. Though intangible harms—like the denial of information—may also qualify, we must first look to history to determine whether the harm was traditionally understood as concrete enough to support standing. *Id*.

So let's turn to the history. Our precedent has long recognized a common-law right of public access to court records. *Meyer Goldberg, Inc., of Lorain v. Fisher Foods, Inc.*, 823 F.2d 159, 163 (6th Cir. 1987) (quoting *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 473–74 (6th Cir. 1983)). That right flows from the "long-established legal tradition" allowing the public to inspect and copy judicial records. *Rudd Equip. Co. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593 (6th Cir. 2016) (quoting *Knoxville News-Sentinel*, 723 F.2d at 474). Thus, litigants who assert the violation of their right of access to judicial records stand on strong historical ground.

Nevertheless, the mere denial of information is insufficient to support standing. *TransUnion*, 141 S. Ct. at 2214. Precedent confirms this fundamental principle. For example, in *Huff v. TeleCheck Services, Inc.*, 923 F.3d 458, 461 (6th Cir. 2019), the plaintiff sued TeleCheck, which keeps files on consumers' checking history. TeleCheck uses that information to help merchants assess the risk of accepting a customer's check. *Id*. The plaintiff received a report from TeleCheck that omitted information he thought critical, but TeleCheck never told a merchant to decline Huff's checks. *Id*. at 461–62. So the "incomplete report had no effect on [the plaintiff] or his future conduct." *Id*. at 467. Thus, Huff did not have standing because he had not suffered any "adverse consequences." *Id*. at 465.

In a similar case, Judge Katsas cited *Huff* for the proposition that "an asserted informational injury that causes no adverse effects cannot satisfy Article III." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020). Then, in *TransUnion,* the Supreme Court adopted that principle from *Trichell*. *See TransUnion*, 141 S. Ct. at 2214 (quoting *Trichell*, 964 F.3d at 1004).

Since *TransUnion*, the courts of appeals have consistently recognized that, to have standing, a plaintiff claiming an informational injury must have suffered adverse effects from the denial of access to information. *See Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 444 (2d Cir. 2022); *Kelly v. RealPage, Inc.*, 47 F.4th 202, 211–14 (3d Cir. 2022); *Campaign Legal Ctr. v. Scott*, 49 F.4th 931, 936–39 (5th Cir. 2022); *Laufer v. Looper*, 22 F.4th 871, 880–81 (10th Cir. 2022); *see also Norvell v. Blue Cross & Blue Shield Ass'n*, No. 19-35705, 2021 WL 5542169, at *1 (9th Cir. Nov. 26,

2021).[1] And courts have further recognized that *TransUnion* did not work a "sea change"—it "simply reiterated the lessons of . . . prior cases: namely, to state a cognizable informational injury a plaintiff must allege that they failed to receive required information, and that the omission led to adverse effects or other downstream consequences." *Kelly*, 47 F.4th at 214 (cleaned up).

Two earlier Supreme Court informational-injury cases are not to the contrary. *See FEC v. Akins*, 524 U.S. 11 (1998); *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440 (1989). The plaintiffs in *Akins* and *Public Citizen* had suffered adverse effects. In *Akins*, voters were denied information that would have helped them "evaluate candidates for public office." 524 U.S. at 21. And in *Public Citizen*, the plaintiffs were denied

---

[1] The First Circuit took a somewhat different path but did not necessarily disagree with our reading of *TransUnion*. *See Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 268–75 (1st Cir. 2022), *petition for cert. filed*, Case No. 22-429 (Nov. 4, 2022). The First Circuit recognized *TransUnion's* adverse-effects rule but held that it was bound to follow a prior Supreme Court case that concluded the plaintiff had standing. *Id.* at 271 (discussing *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)). Even so, the First Circuit held in the alternative that the plaintiff in *Acheson Hotels* had suffered adverse effects. *Id.* at 274–75.

Recent cases from two other circuits discuss informational injury, but they don't cite, much less grapple with, *TransUnion*. *See Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 788–90 (D.C. Cir. 2022); *Inland Empire Waterkeeper v. Corona Clay Co.*, 17 F.4th 825, 833 (9th Cir. 2021). And in any case, *Campaign Legal Center* notes that the adverse effects the plaintiffs suffered were identical to the adverse effects in *FEC v. Akins*. *See Campaign Legal Ctr.*, 31 F.4th at 790 ("[I]t is clear, as in *Akins,* 'that the information would help [Appellants] . . . evaluate candidates for public office.'" (alterations in original) (quoting *FEC v. Akins*, 524 U.S. 11, 21 (1998))).

information that would have helped them "participate more effectively in the judicial selection process." 491 U.S. at 449. Those harms mattered because they transformed what otherwise would have been a "bare procedural violation" of a public-disclosure law into a concrete injury. *See Huff*, 923 F.3d at 467–68 (quoting *Spokeo, Inc. v. Robins,* 578 U.S. 330, 341 (2016)).

So a chorus of precedent all sings the same tune: to have standing, litigants must have suffered adverse effects from the denial of information.

That requirement dooms Tardy's case. At oral argument, Tardy told us he had not suffered any adverse effects. In fact, he admitted that if he were required to allege an adverse effect, he would lose. We take him at his word. *See Taylor v. Pilot Corp.*, 955 F.3d 572, 582 (6th Cir. 2020) (Thapar, J., concurring in part) (controlling opinion) ("Although parties cannot waive arguments *against* jurisdiction, they are more than free to waive (or forfeit) arguments *for* it."). Therefore, Tardy does not have standing to intervene in this appeal.

The dissent argues that *TransUnion*, *Trichell*, and *Huff* are all financial-reporting cases and thus don't affect public-disclosure cases like this one. Dissent at 11. It's true that *TransUnion*, *Trichell*, and *Huff* were financial-reporting cases. But standing is a constitutional principle that applies to all cases. *See Miller v. City of Wickliffe*, 852 F.3d 497, 502 (6th Cir. 2017). And *TransUnion* specifically framed the adverse-effects rule as part of the constitutional inquiry that applies across all cases: "[a]n 'asserted informational injury that causes no adverse effects cannot satisfy Article III.'" 141 S. Ct. at 2214 (quoting *Trichell*, 964 F.3d at 1004). Other courts read *TransUnion* just as we do and apply the adverse-

effects rule in public-disclosure cases. *See Scott*, 49 F.4th at 938 ("Thus, even in public disclosure-based cases, plaintiffs must and can assert 'downstream consequences,' which is another way of identifying concrete harm from governmental failures to disclose."); *see also Harty*, 28 F.4th at 444; *Kelly*, 47 F.4th at 214; *Looper*, 22 F.4th at 880–81. So the standing principles set out in *TransUnion*, *Trichell*, and *Huff* apply here.

The dissent also faults us for not explaining what we mean by "adverse effects." Dissent at 12. But there's no need to do so here, because Tardy conceded at argument that he hasn't alleged any adverse effects at all. And in cases where the issue has been presented, other courts have not found it difficult to define "adverse effects." *See, e.g.*, *Harty*, 28 F.4th at 444 (holding that a plaintiff "must show that he has an interest in using the information beyond bringing his lawsuit" (cleaned up)).

Next, Tardy claims that in *Price v. Dunn* the Supreme Court permitted the intervenors to unseal documents even though they hadn't suffered adverse effects. Not so. In *Price*, National Public Radio and a reporters' association moved to intervene in a headline-grabbing death-penalty case. Mot. for Leave to Intervene to File a Mot. to Unseal at 4, *Price v. Dunn*, 139 S. Ct. 2764 (2019) (Mem.) (No. 18A1238). Why? Because the denial of documents adversely affected their ability to report. *Id*. Thus, *Price* is fully consistent with the adverse-effects rule. And, in any event, *Price* predated *TransUnion*. So we cannot apply *Price* in a way that conflicts with *TransUnion*.[2]

---

[2] Tardy and the dissent also cite cases from other circuits allowing intervenors to seek documents that were not publicly

[Footnote continued on next page]

Finally, Tardy contends that we should unseal the documents even if he doesn't have standing. In making this request, he invokes our caselaw permitting a court to sua sponte consider whether to unseal documents. *See, e.g.*, *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 306–07 (6th Cir. 2016) ("A court's obligation to keep its records open for public inspection is not conditioned on an objection from anybody."). Tardy misapplies that caselaw. We may unseal documents "on our own motion" during an ongoing case. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1176 (6th Cir. 1983). But the underlying case here is no longer ongoing, and we have never held that courts possess the power to unseal documents outside a justiciable case or controversy. That would undermine the separation-of-powers principles that standing protects. *TransUnion*, 141 S. Ct. at 2203. Under Article III, federal courts may adjudicate only cases or controversies; yet Tardy would turn us into a "roving commission" in search of documents to unseal. *Id*. The Constitution prevents any such freewheeling inquiry. No matter how important the public's right to access judicial records, we may adjudicate only "a real controversy with real impact on real persons." *Id*. (quoting *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring in the

---

available. *See Doe v. Pub. Citizen*, 749 F.3d 246, 262–65 (4th Cir. 2014); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994); *Brown v. Advantage Eng'g*, 960 F.2d 1013, 1016 (11th Cir. 1992); *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 787 (1st Cir. 1988); *but see Deus v. Allstate Ins. Co.*, 15 F.3d 506, 525–26 (5th Cir. 1994) (holding that intervenors don't have standing to seek document unsealing). But those cases all predate *TransUnion*.

judgment)). And absent any alleged adverse effects, this isn't such a controversy.

Accordingly, Tardy's motions to intervene and file a reply brief are denied. Newby's motion to dismiss the appeal is granted.

DISSENT

JULIA SMITH GIBBONS, dissenting. The majority holds that a member of the public suffers no injury when denied access to documents on a court's docket absent "adverse effects." Maj. Op., at 5. Because the majority's analysis fails to heed the Supreme Court's decisions in *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), and *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), and reaches a result that puts us at odds with our sister circuits, I respectfully dissent.

In *Public Citizen*, the plaintiffs sought information pursuant to the Federal Advisory Committee Act (FACA) about the Department of Justice's collaboration with the American Bar Association in the selection of judicial nominees. *See* 491 U.S. at 447-48. The Supreme Court held that "refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue." *Id.* at 449. The Court further explained that its "decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they have sought and were denied specific agency records." *Id.* (citing cases). There was "no reason" to apply a different rule in the FACA context. *Id.* The Court also rejected the

argument that the plaintiffs were complaining of a mere "generalized" grievance because they had not shown how denial of the information harmed them specifically—the same argument CoreCivic makes, and the majority accepts, here. *See id.* at 448-450.

Similarly, in *Akins*, the plaintiffs sought information about an organization's political activities that they contended the Federal Election Campaign Act (FECA) required be made public. *See* 574 U.S. at 15-16. The Supreme Court held that those plaintiffs had shown an "informational injury" sufficient to confer Article III standing. *Id.* at 25. That injury "consist[ed] of their inability to obtain information . . . that . . . the statute requir[ed] that [the organization] make public." *Id.* at 21. The Supreme Court again explicitly rejected the argument that the plaintiffs were complaining of a mere "generalized" grievance. *Id.* at 23.

Here, all agree that Tardy "sought" and "[was] denied specific . . . records." *Public Citizen,* 491 U.S. at 449. As *Public Citizen* made clear, that is all that Article III requires where a litigant seeks to vindicate a statutory right of public access to information. And there is no reason to apply a more demanding standard to litigants seeking to vindicate the public's common-law right of access to judicial records. Tardy therefore has standing.

The majority distinguishes *Public Citizen* and *Akins* because the plaintiffs there would have used the information to "evaluate candidates for public office," Maj. Op., at 5 (quoting *Akins*, 524 U.S. at 21), and "participate more effectively in the judicial selection process," *id.* (quoting *Pub. Citizen*, 491 U.S. at 449), and the majority says that Tardy fails to offer any similar explanation as to how the denial of information harms him. Contrary to the majority's

interpretation, neither *Public Citizen* nor *Akins* suggests that a litigant seeking to vindicate the public's right of access to information must explain how he will use that information. Instead, *Public Citizen* expressly holds that such litigants "need show [no] more than that they have sought and were denied" the information to which the public right of access applies. 491 U.S. at 449.

Moreover, the statements from *Public Citizen* and *Akins* on which the majority relies only restate at the most general level the rationale for the relevant public right of access. The purpose of the FECA disclosure requirements in *Akins* was to allow citizens to "evaluate candidates for public office," 524 U.S. at 21, while the purpose of FACA's disclosure requirements in *Public Citizen* was to allow citizens to "participate more effectively" in public processes to which the disclosures were relevant, 491 U.S. at 449. Here, the rationale for public access to documents on a court's docket includes such interests as understanding the basis for a judicial ruling and monitoring the judiciary to prevent corruption. *See Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016). Throughout this litigation, Tardy has maintained that those interests apply in this case. *See, e.g.*, Reply Br., at 2 (quoting *Shane Grp.*, 825 F.3d at 305). So even if *Public Citizen* and *Akins* could be read to require a litigant to recite some generic rationale for the public right of access he seeks to vindicate, Tardy has done that here.

In holding that Tardy lacks standing, the majority relies entirely on a single sentence from *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021) (internal quotation marks omitted): "An asserted informational injury that causes no adverse effects cannot satisfy

Article III." *TransUnion* is a credit-reporting case in which the plaintiffs argued that they received their personal information in the wrong format, *see id.*, rather than a case in which a litigant sought to vindicate a right of access to information to which the public was entitled. Nevertheless, and despite also saying that *TransUnion* did not work a "sea change," Maj. Op., at 4–5 (quoting *Kelly v. RealPage, Inc.*, 47 F.4th 202, 211-214 (3d Cir. 2022)), the majority treats *TransUnion* as if it overruled *Public Citizen* to the extent that *Public Citizen* enumerated the exclusive requirements for standing in cases where a litigant seeks to vindicate a public right of access to information. 491 U.S. at 449.[1]

TransUnion did no such thing. Instead, and shortly before the sentence on which the majority relies, *TransUnion* distinguished *Public Citizen* and *Akins* on the grounds that "those cases involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information." 141 S. Ct. at 2214. At best, *TransUnion* is ambiguous as to whether its adverse-effects requirement applies to "public-disclosure or sunshine laws," as recently noted by another court addressing the issue of standing in such a context. *See Campaign Legal Ctr. v. Scott*, 49 F.4th 931, 938 (5th Cir. 2022) ("Consequently, *Akins* and *Public Citizen*, on one reading of *Spokeo* and *TransUnion*, may dispense with 'downstream consequences' on the earlier cases' reasoning that the nondisclosure violation alone creates concrete injury."). Rather than assume that

[1] In the same vein, the majority dismisses the nearly unanimous views of our sister circuits in cases addressing the issue before us, discussed in more detail below, on the sole ground that those cases "predate *TransUnion*." Maj. Op. at 7 n.2.

the Supreme Court silently overruled *Public Citizen* without instruction to do so, I would adopt the reading of *TransUnion* that avoids conflict with the Supreme Court's longstanding precedent: *Public Citizen* and *Akins* govern when plaintiffs seek information pursuant to a public right of access, while *TransUnion* governs certain other theories of informational injury. *See Kelly v. RealPage Inc.*, 47 F.4th 202, 212 (3d Cir. 2022) ("*TransUnion* did not cast doubt on the broader import of [*Public Citizen*] and [*Akins*]. In fact, the Court cited [those cases] with approval, reaffirming their continued viability and putting *TransUnion* in context.")

Most of the "chorus of precedent" that the majority cites does not support the conclusion it reaches today. Maj. Op., at 5. The majority cites several credit-reporting cases that, like *TransUnion* itself, expressly distinguish between the public-access context and the credit-reporting context. *See id.* (citing *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020), *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 467 (6th Cir. 2019), and *Kelly*, 47 F.4th at 812). The majority also cites cases in which a "tester" with no intention of visiting a facility sought information about the facility's compliance with the Americans with Disabilities Act pursuant to regulatory requirements. *See id.* (citing *Harty v. West Point Realty, Inc.*, 28 F.4th 435, 444 (2d Cir. 2022) and *Laufer v. Looper*, 22 F.4th 871, 880-81 (10th Cir. 2022)). Because those cases did not involve "public-disclosure or sunshine laws" like the ones at issue in *Public Citizen* and *Akins*, they had no occasion to address whether *TransUnion* overruled those earlier cases and introduced a new requirement for standing in the public-access context.

The majority cites only one case applying an "adverse effects" requirement where a litigant sought to vindicate a public right of access. *See id.* (citing *Scott*, 49 F.4th at 938). In *Scott*, the Fifth Circuit (like the majority today) did not discuss *Public Citizen's* express holding that public-access litigants have standing if they "sought and were denied" the information they seek. 491 U.S. at 449. Thus, although the Fifth Circuit acknowledged *TransUnion's* ambiguity, as discussed above, it adopted the same reading of *TransUnion* the majority adopts now. *See Scott*, 49 F.4th at 938. I would not follow the Fifth Circuit's opinion in *Scott* for the same reasons as I respectfully dissent from the majority's opinion today. Moreover, even if there were some "adverse effects" requirement in the public-access context, *Public Citizen* and *Akins* show that it could not preclude Tardy's standing here. That is because Tardy articulated the injury he suffers at the same level of generality as did the plaintiffs in those cases, as discussed in more detail above.

Perhaps unsurprisingly, then, none of our sister circuits that have considered the issue of intervenor standing to seek unsealing of documents on a court's docket has reached the conclusion that the majority reaches here. Two circuits have held that intervenors have standing to vindicate the public's First Amendment right of access to judicial records. *See Doe v. Pub. Citizen*, 749 F.3d 246, 262-65 (4th Cir. 2014); *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992). Two other circuits have held that intervenors have standing to seek modification of discovery-related protective orders, suggesting *a fortiori* that they would also have standing to seek unsealing of documents on a court's docket. *See Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 787 (1st Cir.

1988); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994).

To be sure, the Fifth Circuit says that intervenors lack standing to seek unsealing in situations like this one where the underlying case is closed. *See Newby v. Enron Corp.*, 443 F.3d 416, 421-22 (5th Cir. 2006) (citing *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 522 (5th Cir. 1994)). *Deus*, the Fifth Circuit case that so holds, mentions neither Article III nor the requirement of an injury-in-fact, and instead apparently uses the term "standing" loosely to invoke some personal interest relevant to the intervention analysis under Federal Rule of Civil Procedure 24. *See* 15 F.3d at 25-26. *Deus* also predates *Akins*. Moreover, unlike the majority today, the Fifth Circuit also holds that intervenors have standing to vindicate the public right of access to information by seeking unsealing in cases that are still pending. *Newby*, 443 F.3d at 421-22. The majority's opinion therefore makes this circuit the only one to hold that intervenors categorically lack standing to vindicate the public right of access to information.

The majority does not explain at what level of specificity future litigants will have to show "adverse effects" to challenge nondisclosure where a public right of access applies. If future panels follow *Public Citizen* and *Akins*, then the intervenor's burden will be easily met, and the harm limited to this case. If the majority's view instead requires a more specific showing, an obvious problem arises. How can a member of the public, unfamiliar with the contents of a sealed judicial record, establish how the failure to disclose that record harms him? Such an exercise will inherently require the kind of "speculation" that does not satisfy Article III. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 567 (1992). Thus, although all agree that the

public right of access to judicial records is deeply rooted in Anglo-American history and tradition, the majority's holding suggests that the Constitution prevents any specific member of the public from vindicating that right. Because the majority's view conflicts with the Supreme Court's cases applying Article III in the public-access context, I respectfully dissent.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NIKKI BOLLINGER GRAE, Individually and on Behalf of All Others Similarly Situated,	)	**Case No. 3:16-cv-2267**
	)	**Judge Aleta A. Trauger**
Plaintiff,	)	
v.	)	
CORRECTIONS CORPORTION OF AMERICA, DAMON T. HININGER, DAVID M. GARFINKLE, TODD J. MULLENGER, and HARLEY G. LAPPIN,	)	
Defendants.	)	

ORDER

Marie Newby, acting on her own behalf and as the administrator of the Estate of Terry Childress, has filed a Motion to Intervene and Unseal Judicial Documents and Exhibits (Doc. No. 481), to which the defendants and the Bureau of Prisons ("BOP") filed Responses in partial opposition (Doc. Nos. 490 & 492), and Newby has filed a Reply (Doc. No. 493). The lead plaintiff has filed a Response (Doc. No. 487) formally taking no position on the dispute. For the reasons set out herein, the motion will be granted in part and denied in part.

The corporate defendant in this closed case, CoreCivic, operates private detention facilities including prisons. Class action plaintiffs sued CoreCivic and some of its executives for securities fraud related to representations that the company and its executives had made relevant to the possibility that the BOP would cease doing business with the company in light of its alleged history of poor performance in areas including inmate safety and security. After an unusually lengthy and hard-fought discovery process—and the filing of more than a thousand documents with the court, some under seal and some not—the parties settled the case prior to trial. The court approved the settlement and entered a judgment of dismissal on November 8, 2021. (Doc. Nos. 477–80.)

On February 11, 2022, Newby sued CoreCivic and a number of individual defendants based on events surrounding the death of her son, Childress, in a CoreCivic facility. (Doc. No. 481-1; *see* Case No. 3:22-cv-00093 (Crenshaw, C.J.).) A week later—well before any kind of meaningful discovery could have been performed in her own case—Newby filed the currently pending motion requesting "permission from the Court to intervene in this case for the limited purpose of requesting that the Court unseal the parties' motions for class certification, for summary judgment, sealed portions of the parties' *Daubert* motions, responses, replies, and supporting documentation. ([Doc.] Nos. 120, 121, 122, 336, 338, 347, 352, 358, 359, 386, 387, 388, 389, 396, 397, 398, 399, 400, 401, 422, and 423)." (Doc. No. 481 at 1.) Newby argues that "[t]he same allegations of understaffing and hiring underqualified staff" that allegedly damaged CoreCivic's relationship with the BOP also led to her son's death. (*Id.* at 3.) Some of the sealed documents, she argues, may therefore be relevant to her claims.

She also argues that, even aside from her own particularized litigation-related interests, the public interest favors unsealing the materials.

CoreCivic responds that, while some of the underlying documents can be safely unsealed, others "include[] operational information which, if disclosed, could negatively affect the safety of residents and staff at CoreCivic facilities and proprietary information which, if disclosed, could negatively affect CoreCivic's competitive standing in the marketplace." (Doc. No. 492 at 1–2.) The Bureau of Prisons opposes the unsealing of a number of documents—some of which overlap with CoreCivic's list and others of which do not—on the ground that they include confidential "source selection information" that was "prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract" and "has not been previously made available to the public or disclosed publicly." (Doc. No. 490 at 7 (quoting 48 C.F.R. § 2.101).) Federal contracting rules require that "source selection information must be protected from unauthorized disclosure" in accordance with the law. 48 C.F.R. § 3.104-4(b); *accord Torres Advanced Enter. Sols., LLC v. United States*, 135 Fed. Cl. 1, 6 (2017).

There is a "'strong presumption in favor of openness' as to court records." *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016) (quoting *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983)). "Shielding material in court records, then, should be done only if there is a 'compelling reason why certain documents or portions thereof should be sealed.'" *Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593 (6th Cir. 2016)

(quoting *Shane Grp.*, 825 F.3d at 305). Among the reasons that may support a "narrowly tailored" seal are the "privacy right[s] of third parties" or the need to "legitimately protect" "trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault)." *Id.* at 594–95 (quoting *Baxter Int'l, Inc. v. Abbott Lab'ys*, 297 F.3d 544, 546 (7th Cir. 2002)).

In considering whether to keep some materials under seal, the court must balance any interests supporting the seal against the strong public interest in accessing the "evidence and records . . . relied upon in reaching" judicial decisions. *Shane Grp.*, 825 F.3d at 305 (quoting *Brown & Williamson*, 710 F.2d at 1181). The Sixth Circuit's demanding standard for sealing documents applies "even if neither party objects to the motion to seal." *Id.* at 306. Consistently with that edict, this court has already made all seal decisions in this case based on a weighing of all relevant interests and with a presumption of open access. Newby's motion, therefore, is the equivalent of a motion to intervene for the purpose of asking the court to reconsider those earlier determinations.

The court finds, first, that Newby's litigation-related interests are insufficient to support intervention or warrant a change in the court's earlier conclusions. Newby's case involves, at most, shortcomings related to one prisoner at one CoreCivic facility at one time. The subject matter of this case was far broader and involves numerous topics irrelevant to her claims. Newby, moreover, will have access to all the ordinary tools of discovery in her own case. There is not a single document under seal that she

cannot seek in her own right, if it is actually relevant to her claims. The only potentially persuasive interest relevant to the court's seals in this case, therefore, is the general public interest in open records.

The public interest in the underlying records, however, is fundamentally unchanged since the court sealed the documents in the first place. CoreCivic is a public contractor accused of misrepresenting the quality of services it provided in exchange for public funds. Moreover, CoreCivic is responsible for the ongoing health, safety, and secrutity [sic] of the many individuals detained in its facilities. There are therefore strong, legitimate public interests in information regarding its operations and shortcomings, in addition to the ever-present public interest in transparent court proceedings. The court, moreover, recognizes that, "the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access." *Shane Grp.*, 825 F.3d at 305. The public's interests in accessing the materials at issue in this case are stronger than in most ordinary litigation between private parties, meaning that the bar for justifying a seal is higher. The court, however, considered those strong public interests when it made its initial seal determinations and found that countervailing considerations nevertheless supported a seal with regard to some documents.

Newby's briefing gives the court no persuasive reason to conclude that its earlier rulings were generally erroneous. Rather, she largely devotes her briefing to reiterating the general public-interest calculus governing seal decisions. That general public interest in open dockets is real, but the court already considered it and found that, with regard to these

particular materials, it should not prevail. CoreCivic and the BOP, moreover, have furnished detailed, document-specific reasons reiterating the legitimate grounds for the continued seal of many of the requested documents. (Doc. No. 490 at 1–2, 6–9; Doc. No. 492 at 5–15.)

Nevertheless, CoreCivic and the BOP have informed the court that, having freshly reviewed the documents, they do not object to a partial lift of the seal. Specifically, CoreCivic supports the unsealing of all of the relevant documents other than the following docket entries: Doc. Nos. 387-1, 387-2, 389-1, 389-2, 389-4, 398-2, 398-3, 398-8, 399-10, 399-11, 399-25, 400-6, 400-12, 400-13, 401-13, 401-15, 401-18, 401-20, 401-24, and 401-26. BOP seeks the continued seal of a somewhat longer list of items: Doc. Nos. 336-3, 336-5, 338, 338-1, 352-1, 367-1, 367-2, 389-1, 389-2, 389-4, 396, 397, 398-2, 398-3, 398-7, 398-8, 398-9, 398-10, 398-17, 398-18, 398-20, 398-22, 399-10, 399-11, 399-22, 400-6, 400-12, 400-13, 400-17, 401-15, 401-18, 401-19, 401-20, 401-24, 401-26, 401-30, 422, and 423.

Based on the court's review, that means that the unsealing of the following documents is unopposed: Doc. Nos. 120, 121, 122, 336, 336-1, 336-2, 336-4, 336-6, 347, 352, 352-2, 352-3, 358, 359, 386, 387, 388, 389, 389-3, 389-5, 398, 398-1, 398-4 to -6, 398-12 to -16, 398-19, 398-21, 398-23 to -25, 399, 399-1 to -9, 399-12 to -21, 399-23, 399-24, 400, 400-1 to -5, 400-7 to -11, 400-14 to -16, 400-18 to -25, 401, 401-1 to -12, 401-14, 401-16, 401-17, 401-21 to -23, 401-25, 401-27 to -29, 401-31, 401-32. Because Newby has not identified persuasive reasons for revisiting the court's original sealing decisions with regard to the other documents, the court will grant her motion only as to those

documents about which there are no objections to unsealing.

For the foregoing reasons, Newby's Motion to Intervene and Unseal Judicial Documents and Exhibits (Doc. No. 481) is hereby **GRANTED** in part and **DENIED** in part. The Clerk is hereby directed to unseal the following docket items: Doc. Nos.[1] 120, 121, 122, 336, 336-1, 336-2, 336-4, 336-6, 347, 352, 352-2, 352-3, 358, 359, 386, 387, 388, 389, 389-3, 389-5, 398, 398-1, 398-4 to -6, 398-12 to -16, 398-19, 398-21, 398-23 to -25, 399, 399-1 to -9, 399-12 to -21, 399-23, 399-24, 400, 400-1 to -5, 400-7 to -11, 400-14 to -16, 400-18 to -25, 401, 401-1 to -12, 401-14, 401-16, 401-17, 401-21 to -23, 401-25, 401-27 to -29, 401-31, 401-32. Although Newby shall be permitted to intervene for the limited purposes of this motion, she shall not be granted access to any of the documents that remain under seal.

It is so **ORDERED**.

ALETA A. TRAUGER
United States District Judge

---

[1] When the court refers, in this list, to a docket number that has a main document and a number of attached documents—for example, Doc. No. 336—the court refers only to the main document unless otherwise indicated. For example, the court's direction is to unseal the main document of Doc. No. 336 and the other sub-documents explicitly identified (e.g., Doc. No. 336-1) but not the other sub-documents under that docket entry (e.g., Doc. No. 336-3).

No. 22-5312

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NIKKI BOLLINGER GRAE, ET AL.,	)	
Plaintiffs,	)	ORDER
v.	)	
CORRECTIONS CORPORTION OF AMERICA, NKA CORECIVIC; DAMON T. HININGER; DAVID M. GARFINKLE; TODD J. MULLENGER; and HARLEY G. LAPPIN, DIRECTOR,	)	
Defendants-Appellees,	)	
MARIE NEWBY,	)	
Intervenor-Appellant,	)	
EDDIE TARDY,	)	
Proposed Intervenor.	)	

FILED Mar 9, 2023
DEBORAH S. HUNT, Clerk

BEFORE: BATCHELDER, GIBBONS, and THAPAR, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision. The petition then was

circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied. Judge Gibbons would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk