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

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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.

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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.

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[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.

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[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 *Trans-Union* 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 *pending* 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) ("*Trans-Union* 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,

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