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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

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[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]

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[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

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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

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[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