**No. 23-1808**

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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United States ex rel. Jon H. Oberg, *Plaintiff*,

and

Michael Camoin, *Movant-Appellant*,

***v.***

Nelnet, Inc.; Brazos Higher Education Service Corporation; Brazos Higher Education Authority, Inc.; Nelnet Education Loan Funding, Inc., *Defendants-Appellees*,

and

Vermont Student Assistance Corporation; Pennsylvania Higher Education Assistance Agency; Kentucky Higher Education Student Loan Corporation; Arkansas Student Loan Authority, *Defendants*.

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On Appeal from the United States District Court
for the Eastern District of Virginia at Alexandria
No. 1:07-cv-00960-CMH-JFA
Hon. John F. Anderson, USMJ

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# BRIEF FOR APPELLANT MICHAEL J. CAMOIN

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September 13, 2023

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**DISCLOSURE STATEMENT**

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1808 Caption: Michael Camoin v. Nelnet, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Michael J. Camoin
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Nandan M. Joshi Date: 09/13/2023

Counsel for: Michael J. Camoin



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## JURISDICTIONAL STATEMENT

In the order on appeal, the magistrate judge denied a request by appellant Michael J. Camoin to unseal documents filed in connection with the submission of summary judgment motions in a False Claims Act case against various companies involved in the student-loan industry. The district court had subject-matter jurisdiction over the underlying action pursuant to 28 U.S.C. § 1331 and 31 U.S.C. § 3732(a). The magistrate judge had jurisdiction to issue the order on appeal because the parties in the underlying action consented to the magistrate judge's jurisdiction pursuant to 28 U.S.C. § 636(c). *See* JA72. The magistrate judge issued his decision on July 3, 2023, JA169, and Mr. Camoin filed his notice of appeal on July 28, 2023, JA174. This Court has jurisdiction over this appeal under 28 U.S.C. §§ 636(c)(3) and 1291.

## STATEMENT OF THE ISSUE

Are summary judgment papers, including exhibits, judicial records to which the public has a right of access under the First Amendment and the common law?

## STATEMENT OF THE CASE

### A. The summary judgment documents at issue

This case began in 2007, when John H. Oberg filed a lawsuit under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, against various companies involved in the student-loan industry. Mr. Oberg alleged that the defendants developed schemes to manipulate their student-loan portfolios through sham transactions in order to submit false claims regarding the subsidy amounts that they were entitled to receive from the federal government. *See United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 912 F.3d 731, 734–35 (4th Cir. 2019); *see also* Third Am. Compl. ¶¶ 8–9 (Doc. 228 (JA27)).

In December 2009, the district court dismissed four of the defendants on the ground that they were state agencies and, therefore, not "person[s]" amenable to suit under the False Claims Act. *United States ex rel. Oberg v. Nelnet, Inc.*, No. 1:07-cv-960, 2009 WL 10676201, at *1 (E.D. Va. Dec. 1, 2009); *see also Oberg v. Nelnet, Inc.*, No. 1:07-cv-960, 2010 WL 11601476 (E.D. Va. Nov. 18, 2010). Although this Court subsequently vacated those dismissals, *see United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575 (4th Cir. 2012), those

four defendants were not part of the district court proceedings during the period relevant to this appeal.

Mr. Oberg and the remaining defendants—Nelnet, Inc., Nelnet Education Loan Funding, Inc., Panhandle-Plains Higher Education Authority, Panhandle-Plains Management and Servicing Corporation, SLM Corporation, Southwest Student Services Corporation, Education Loans Inc., Student Loan Finance Corporation, Brazos Higher Education Authority, and Brazos Higher Education Service Corporation—consented to the magistrate judge's exercise of jurisdiction over the case under 28 U.S.C. § 636(c). *See* JA72, JA181. On January 10, 2010, the magistrate judge issued a Federal Rule of Civil Procedure 16(b) scheduling order setting forth a discovery plan for the litigation. JA68. The scheduling order provided for a protective order to govern "the disclosure of information between the parties in discovery, provided that such protective order does not provide for the filing of documents under seal." JA69. Paragraph 12 of the scheduling order further provided that:

> Filings under seal are disfavored and discouraged. *See Va. Dep't of State Police v. Washington Post*, 386 F.3d 567, 575–76 (4th Cir. 2004). Any motion to file a document under seal, including a motion for entry of a protective order containing provisions for filing documents under seal, must comply with [Eastern District of Virginia] Local Rule 5 and must be

> noticed for a hearing in open court. The motion must state sufficient facts supporting the action sought, and each proposed order must include specific findings.

JA69. Fifteen days later, the court adopted the parties' proposed protective order for discovery. JA73. The protective order provided that, for confidential materials "required to be filed with the Court, the parties shall comply with paragraph 12" of the scheduling order. JA78.

On June 4, 2010, in anticipation of the filing of summary judgment motions, the defendants filed a joint motion for leave to file under seal summary judgment exhibits subject to confidential treatment under the protective order. JA92. The motion requested that the seal be maintained until 30 days after completion of summary judgment briefing. JA93. Mr. Oberg did not oppose the motion, "provided that it applies equally to [his] own summary judgment submissions," and noted that the proposal "would create a mechanism that properly places the burden of defending any continuing confidentiality of material … on the designating party." JA100.

The court granted the motion in relevant part. JA104. The court found that "allowing the parties to file certain exhibits to their summary judgment motions under seal temporarily would further the ends of due

process by allowing those parties and non-parties asserting confidentiality over certain documents the opportunity to move the court to maintain the documents under seal, should they so desire." JA104. The court accordingly ruled that "[a]ny motion to maintain an exhibit under seal shall be filed" by August 20, 2010, "and must comply fully with Local Civil Rule 5." JA104.

The defendants subsequently filed five summary judgment motions and a joint statement of stipulated facts. Docs. 315, 318, 321, 327, 328, 337 (JA36-39). Mr. Oberg also filed a motion for partial summary judgment, Doc. 332 (JA38), and later a consolidated opposition to the defendants' motions for summary judgment, Doc. 408 (JA46). The opposition was supported by a declaration, Doc. 409 (JA46), to which numerous exhibits were attached, Docs. 409–413 (JA46-47). Mr. Oberg also filed a response to the defendants' joint statement of undisputed facts. Doc. 414 (JA47). Several of Mr. Oberg's filings were partially or completely under seal, and portions of these filings are the subject of Mr. Camoin's unsealing request. *See infra* note 1.

On July 30, 2010, the court held a hearing on Mr. Oberg's summary judgment motion and two of the defendants' summary judgment motions.

Doc. 447 (JA54). On August 13, four days before trial was to begin, the court issued an order specifying that "all proceedings in this action relating to pending motions and the trial are stayed [until] further order of the court." JA106. The order provided that "[w]hile this matter is stayed no pleadings shall be filed other than those related to the resolution of claims by the parties." JA106; *see* JA107, JA108 (extending the stay).

The parties subsequently settled, and the district court implemented the settlements by issuing orders of dismissal or consent judgments. *See* Doc. 565 (JA63) (dismissing SLM Corporation and Southwest Student Services Corporation), JA110 (dismissing Nelnet, Inc. and Nelnet Education Loan Funding, Inc.), JA113 (dismissing Brazos Higher Education Service Corporation and Brazos Higher Education Authority), Doc. 569 (JA64) (dismissing Panhandle-Plains Higher Education Authority and Panhandle-Plains Management and Servicing Corporation), Docs. 571–574 (JA64) (entering consent judgment against Education Loans Inc. and Student Loan Finance Corporation).

### B. The present litigation

Beginning on March 31, 2023, Mr. Camoin, a documentary filmmaker focusing on the student-loan industry, submitted pro se requests to the district court seeking access to certain materials that Mr. Oberg had filed under seal in responding to the defendants' summary judgment motions. JA116, JA168.[1] The court docketed his initial correspondence as a motion. JA66. Mr. Oberg and most of the original defendants—Panhandle-Plains Higher Education Authority, Panhandle-Plains Management and Servicing Corporation, SLM Corporation, Southwest Student Services Corporation, Education Loans Inc., and Student Loan Finance Corporation—did not oppose Mr. Camoin's request. JA169. Four defendants, however, Nelnet, Inc., Nelnet Education Loan Funding, Inc., Brazos Higher Education Authority, and Brazos Higher Education Service Corporation (collectively, Nelnet and

[1] Specifically, Mr. Camoin sought unsealing of the redacted information in Mr. Oberg's opposition to the defendants' summary judgment motions and access to the following documents: Docs. 411 (Exs. 51–52, 54–55, 58–69, 72–77, 80–87), 412 (Exs. 88–107, 114–118, 122–126, 130–131, 134, 137–138, 142, 144, 149–155, 158–162), 413 (Exs. 167–175, 179–182, 184–200), 414 (attachment I, Part 2). JA116, JA126, JA168.

Brazos), filed a joint opposition to the entire request. JA128. Nelnet and Brazos made no attempt to demonstrate that the contents of the documents to which Mr. Camoin requested access contain information that was properly sealed and protected from public disclosure. Rather, they argued only that the filings should remain sealed because they were subject to the protective order that governed the discovery process and because the court did not decide the summary judgment motions to which the documents related. JA133.

Mr. Camoin filed a pro se reply to the opposition on May 15, 2023, Doc. 1002 (JA67), and, having secured counsel, a supplemental reply on June 2, 2023, JA154. He argued that the public has a First Amendment and common-law right to access the requested documents absent a judicial determination that sealing is warranted, JA155-157, and that the public's right of access extends to materials filed in connection with a summary judgment motion, regardless of whether a court rules on the motion, JA158-160, JA161.

In the order on appeal, the magistrate judge denied Mr. Camoin's request with respect to all the requested documents—including documents concerning the defendants that did not oppose Mr. Camoin's

request. The court stated that Mr Camoin has "no common law or First Amendment right to access the sought documents and portions of documents" because "a document must play a relevant and useful role in the adjudication process for either the First Amendment or common law rights of public access to attach." JA171 (citing *In re Policy Mgmt. Sys. Corp.*, 67 F.3d 296, 1995 WL 541623, at *4 (4th Cir. 1995) (table)). Because the claims in this case were settled prior to the magistrate judge's action on the motions for summary judgment, the magistrate judge determined the requested documents were not "judicial documents" to which the First Amendment or common-law right of access attached. JA172.

## SUMMARY OF ARGUMENT

Mr. Camoin has a right to access the summary judgment materials filed with the trial court in the underlying litigation, and that right was not extinguished when the case settled before the court decided the summary judgment motions.

**I.** As this Court has held, court proceedings are presumptively open to the public. The public, accordingly, has a right, secured by the First Amendment and the common law, to access documents filed with the

court. The burden of overcoming the presumption of access rests with the party seeking to prevent access and maintain filed documents under seal.

As this Court has also held, the public's right of access extends to summary judgment filings. Because summary judgment acts as a substitute for trial, materials filed with the trial court in support of or opposition to summary judgment motions lose their status as discovery materials and become judicial records presumptively open to public view.

**II.** Summary judgment filings are judicial records regardless of whether the trial court decides the summary judgment motion.

**A.** This Court has repeatedly stated that summary judgment filings are judicial records. Although trial courts may keep filed material under seal while considering motions for permanent sealing, the filing of the material triggers the court's duty to decide whether the standards for permanent sealing have been met. Courts, moreover, must decide that question expeditiously—regardless of the time taken to decide the summary judgment motion.

In reaching the opposite conclusion, the magistrate judge relied on an unpublished decision by this Court that dealt with exhibits attached to an opposition to a motion to dismiss. That decision expressly

distinguished summary judgment practice from motions to dismiss and provides no support for sealing in this case.

**B.** This Court has recognized the importance of ensuring that the public has access to newly filed complaints, even where complaints are withdrawn or settled before any judicial action is taken. Likewise, summary judgment materials become judicial records upon filing and do not lose that status if the court does not decide the summary judgment motion.

This Court, moreover, has analogized the summary judgment process to trials for purposes of defining the public's right of access. Yet if a trial were resolved through settlement before the court issued its judgment, the logic of the magistrate judge's rationale here would suggest that the public's right to access trial records would be lost—a result at odds with the goal of protecting public confidence in the courts by keeping judicial proceedings open. The Second and Third Circuits have taken the opposite tack, squarely holding that a settlement that leaves motions unresolved does not affect the public's right to access the underlying filings. This Court should reach the same result.

**III.** In light of the foregoing, the Court should reverse the magistrate judge's order. As to the defendants that did not oppose Mr. Camoin's request, the Court should remand with instructions to unseal the records concerning those entities. Because Nelnet and Brazos forfeited their argument that the material in which they have an interest satisfied the applicable First Amendment and common-law standards for permanent sealing, the Court should remand with instructions to unseal those records as well. Alternatively, the Court should remand with instructions that the magistrate judge order Nelnet and Brazos to promptly attempt to satisfy their burden of demonstrating that their records should be permanently sealed.

## STANDARD OF REVIEW

This Court reviews the question whether the First Amendment provides a right of access to judicial documents de novo. *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004) (*VDSP*). With respect to the common-law right of access, although the Court reviews a trial court's application of the common-law balancing test for abuse of discretion, *id.*, the Court has not expressly articulated the standard that applies to review of a trial court's conclusion about whether particular

documents constitute judicial records under the common-law right. In *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989), however, the Court's analysis of that question indicates a de novo standard of review. *See id.* at 63–64 (addressing whether a document is a judicial record without mentioning deference to the trial court's determination).

## ARGUMENT

### I. The summary judgment materials requested by Mr. Camoin are judicial records to which the public has a right of access.

#### A. The public has a right of access to judicial records under the First Amendment and the common law.

"[C]ourt proceedings are presumptively open to public scrutiny." *Company Doe v. Public Citizen*, 749 F.3d 246, 265 (4th Cir. 2014). Therefore, "[i]t is well settled that the public and press have a qualified right of access to judicial documents and records filed in civil and criminal proceedings." *Id.* That right of access springs from two sources: the First Amendment and the common law. *Id.*

"The First Amendment provides a right of access to a judicial proceeding or record: (1) that has historically been open to the press and general public; and (2) where public access plays a significant positive role in the functioning of the particular process in question." *Courthouse*

*News Serv. v. Schaefer*, 2 F.4th 318, 326 (4th Cir. 2021) (cleaned up). Accordingly, "the First Amendment secures a right of access 'only to particular judicial records and documents.'" *Company Doe*, 749 F.3d at 266 (quoting *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988)). The First Amendment right "extends to materials submitted in conjunction with judicial proceedings that themselves would trigger the right of access" and serves as "'a necessary corollary of the capacity to attend the relevant proceedings.'" *Id.* at 267 (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004)).

The common law also affords "a presumption of access" to judicial records. *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). Unlike the First Amendment right of access, the common-law right of access "presumes a right of the public to inspect and copy *all* judicial records and documents." *VDSP*, 386 F.3d at 575 (cleaned up, emphasis added). At the same time, the common-law right "does not afford as much substantive protection to the interests of the press and the public as does the First Amendment." *Company Doe*, 749 F.3d at 265 (internal quotation marks omitted). The First Amendment right can be overcome only by a "compelling government interest" and only if the

"denial of access is narrowly tailored to serve that interest." *Id.* at 266 (internal quotation marks omitted). By contrast, the common-law right "can be rebutted only by showing that 'countervailing interests heavily outweigh the public interests in access.'" *Id.* (quoting *Rushford*, 846 F.2d at 253).

"[W]hether arising under the First Amendment or the common law," the "right of public access … 'may be abrogated only in unusual circumstances.'" *Id.* (quoting *Stone*, 855 F.2d at 182). Indeed, this Court refers to sealing as a "drastic" measure. *See* 4th Cir. R. 25(c)(2)(B)(iii) (requiring that a motion to seal "explain why a less drastic alternative to sealing will not afford adequate protection"). And under either the First Amendment or the common law, the party seeking to restrict access bears the burden to overcome the presumption that court records should be open to the public. *VDSP*, 386 F.3d at 575.

In addition, *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984), has long imposed an affirmative duty on trial courts to make a judicial determination before allowing filings to remain sealed: The court must afford the public notice of the potential sealing and an opportunity to object before the court makes its decision, and if the court orders the

records sealed, it must state its "reasons" in an order "supported by specific findings." *Rushford*, 846 F.2d at 253–54 (quoting *In re Knight Publ'g*, 743 F.2d at 234). A district court "err[s] in allowing … documents to be sealed in the first instance" if it fails to "comply" with these procedures. *VDSP*, 386 F.3d at 578 n.8.

Local Civil Rule 5 of the Eastern District of Virginia implements these principles. That rule requires that a motion to maintain a document under seal would have to include, among other things, "why sealing is necessary," the "appropriate evidentiary support for the sealing request," "an analysis of the appropriate standard to be applied for that specific filing, and a description of how that standard has been satisfied." The local rule further provides that "[i]f the Court determines that the appropriate standards for filing material under seal have not been satisfied, it may order that the material be filed in the public record," and that "[f]ailure to file a timely motion to seal may result in the document being placed in the public record."

### B. The public's right of access extends to summary judgment materials.

This Court has "squarely held that the First Amendment right of access attaches to materials filed in connection with a summary

judgment motion." *Company Doe*, 749 F.3d at 267. Because the common-law right of access applies to *all* judicial records, the common-law right necessarily applies to these materials as well. *See Baltimore Sun*, 886 F.2d at 63–65 (recognizing that common law provided a right of access to the judicial records at issue, although the First Amendment did not).

This Court first recognized that the First Amendment right of access "appl[ies] to documents filed in connection with a summary judgment motion in a civil case" in *Rushford*, 846 F.2d at 253. *Rushford* distinguished between "the products of pretrial discovery" and "a motion filed by a party seeking action by the court." *Id.* at 252. As the Court explained, a protective order governing disclosure of pretrial discovery materials is generally not barred by the First Amendment. *Id.* (citing *Seattle Times v. Rhinehart*, 467 U.S. 20, 37 (1984)). However, "[o]nce documents are made part of a dispositive motion, such as a summary judgment motion, they lose their status of being raw fruits of discovery." *Id.* (internal quotation marks omitted). Therefore, "if the case had gone to trial and the documents were thereby submitted to the court as evidence," the protective order would not shield the documents from public disclosure. *Id.* Likewise, "[b]ecause summary judgment

adjudicates substantive rights and serves as a substitute for trial," *id.*, evidence submitted in connection with summary judgment is also not protected by a pretrial discovery order.

*VDSP* also addressed material produced "during pretrial discovery that was later filed (or addressed in filings) in the district court," including material filed in connection with the plaintiff's opposition to summary judgment motions. 386 F.3d at 576, 578. Citing *Rushford*, the Court affirmed the district court's conclusion that "the public has a right of access under the First Amendment" to summary judgment materials. *Id.* at 578.

In *Company Doe*, this Court applied the "same logic" to hold that "the First Amendment right of access extends to a judicial opinion ruling on a summary judgment motion." 749 F.3d at 267. In so doing, the Court took as its premise that "[t]he public has an interest in learning … the evidence and records filed in connection with summary judgment proceedings." *Id.*

## II. The absence of a summary judgment decision does not strip the requested materials of their status as judicial records to which the right of access attaches.

The magistrate judge held that the summary judgment materials requested by Mr. Camoin were not judicial records subject to the public's right of access because the underlying litigation settled before the court issued a summary judgment ruling. Under that view, either summary judgment materials are not judicial records until the court issues a summary judgment decision or, alternatively, such materials are judicial records when filed but lose that status if the case terminates without a summary judgment decision as a result of settlement. Neither possibility is tenable.

### A. Summary judgment materials become judicial records when they are filed with the court.

**1.** In holding that summary judgment materials are judicial records, this Court has consistently identified the filing of the materials as the point at which they cease being discovery material, which may be subject to a protective order, and become judicial records, which cannot be sealed unless the court makes the requisite findings under First Amendment and common-law standards. Although the Court has permitted filed documents to remain under seal temporarily to give the

trial court time to consider permanent sealing, it has never permitted a protective order applicable to discovery to act as a permanent barrier to public access to summary judgment filings.

In *Rushford*, for instance, the Court "question[ed] whether [a discovery order] remained in effect over … documents *once they were submitted* to the [district court] as attachments to a summary judgment motion." 846 F.2d at 252 (emphasis added). As the Court explained, the litigant's act of "seeking action by the court" separated the discovery process from "documents … submitted to the court as evidence," which "would have been revealed to the public" if submitted at a trial. *Id.*; *see also id.* at 253 (holding that the First Amendment standard "appl[ies] to documents filed in connection with a summary judgment motion in a civil case").

Likewise, in *In re Washington Post*, 807 F.2d 383 (4th Cir. 1986), the Court held that "the First Amendment right of access applies to documents *filed* in connection with plea hearings and sentencing hearings in criminal cases, as well as to the hearings themselves." *Id.* at 390 (emphasis added). In *In re United States*, 707 F.3d 283 (4th Cir. 2013), the Court held that motions filed under 18 U.S.C. § 2703(d) "are

'judicial records' because they were *filed with the objective of obtaining judicial action* or relief pertaining to § 2703(d) orders." *Id.* at 291 (emphasis added). And in *Baltimore Sun*, the Court held that search-warrant affidavits were "judicial records" because the Federal Rules of Criminal Procedure required that they be "file[d]" along with a warrant with the district court. 886 F.2d at 63–64. In all these cases, the act of filing created the judicial record to which the right of access attached.

**2.** *Rushford* recognized that "there may be instances in which discovery material should be kept under seal even after they are made part of a dispositive motion." 846 F.2d at 253. Accordingly, a "court may temporarily seal the documents while the motion to seal is under consideration so that the issue is not mooted by the immediate availability of the documents." *In re Knight Publ'g*, 743 F.2d at 235 n.1.

*Rushford* made clear, however, that a temporary seal to give the trial court time to follow the *Knight Publishing* process was just that—temporary. In *Rushford*, the unsealing request was made after the district court had decided the summary judgment motions, 846 F.2d at 252, and, in that context, the Court stated that "the district court must address the question at the time it grants a summary judgment motion,"

*id*. at 253. In *Company Doe*, however, this Court held that the public possesses a "contemporaneous right of access to court documents and court proceedings," 749 F.3d at 272, which is "not conditioned upon whether a litigant wins or loses," *id*. at 273. Accordingly, the Court faulted the district court for "allow[ing] Company Doe's motion to seal to remain pending for nine months while it adjudicated the merits of Company Doe's claims" by summary judgment. *Id*. Instead, the Court explained, a district court should have "act[ed] on [the] sealing request as expeditiously as possible." *Id*.

The requirement that trial courts act expeditiously on requests to seal summary judgment materials—and not delay the sealing decision until summary judgment is resolved—is inconsistent with the magistrate judge's ruling in this case that a summary judgment decision by the district court is required before summary judgment materials become judicial records subject to the public's right of access. Rather, the premise of the expeditiousness requirement is that the materials become judicial records upon filing, and that filing triggers the district court's affirmative duties under *In re Knight Publishing* and *Company Doe*.

**3.** In concluding that the summary judgment materials that Mr. Camoin sought were not judicial records, the magistrate judge invoked this Court's unpublished decision in *In re Policy Management*, 1995 WL 541623. There, the plaintiffs in two related civil actions filed discovery documents obtained in one of the actions as sealed exhibits to an opposition to a motion to dismiss in the second action. *Id.* at *1. The Court recognized that *Rushford* had held that "the First Amendment guarantee applies to documents filed in connection with a summary judgment motion." *Id.* at *3. A divided panel of the Court concluded, however, that "documents filed in connection with a motion to dismiss … are more akin to discovery material" than trial evidence. *Id.* The majority reasoned that, unlike a summary judgment motion, "[a] motion to dismiss tests only the facial sufficiency of the complaint; a court *may not consider* any materials outside the pleadings without providing proper notice and converting the motion into a summary judgment motion." *Id.* (emphasis added). If the motion were converted into a summary judgment motion, on the other hand, "the First Amendment guarantee of access" would attach, as well as the common-law right of access. *Id.* at *4 & n.5.

Because the materials at issue in this case are comprised solely of summary judgment filings, *In re Policy Management* would not apply here, even if it were binding precedent. *See Hall v. United States*, 44 F.4th 218, 233 n.11 (4th Cir. 2022) ("Unpublished decisions are not binding."). Nonetheless, the magistrate judge relied on language in *In re Policy Management* that, viewed out of context, could be read to deny public access to *any* filings in support of *any* motion that the district court does not resolve. *See* 1995 WL 541623, at *4 (stating that exhibits "excluded by the court do not play any role in the adjudicative process" and thus "retain their status as discovery materials … not subject to the First Amendment guarantee of access"); *id.* ("[A] document must play a relevant and useful role in the adjudication process in order for the common law right of public access to attach."). The magistrate judge's reading of *In re Policy Management* is irreconcilable with *Company Doe*'s holding that district courts must address sealing expeditiously rather than waiting until summary judgment motions are resolved. The better interpretation of *In re Policy Management* is that it adopts a categorical distinction between exhibits filed with motions to dismiss—which cannot play a role in the adjudication process because the court *cannot* consider

them, 1995 WL 541623, at *5—and exhibits filed with motions for summary judgment, including motions to dismiss converted to motions for summary judgment—which are properly "submitted to the court as evidence." *Rushford*, 846 F.2d at 252.

Any doubts about the limited reach of the unpublished decision in *In re Policy Management* are put to rest by *In re United States*, 707 F.3d 283, the only decision of this Court to cite *In re Policy Management*. *In re United States* considered whether law-enforcement motions for court orders to access stored electronic communications under 18 U.S.C. § 2703(d) are judicial records subject to the common-law right of access. *Id*. at 290. Citing *Rushford* and *Policy Management*, the Court concluded that "documents filed with the court are 'judicial records' if they play a role in the adjudicative process, or adjudicate substantive rights." *Id*. at 291. The Court further explained that documents filed with the court "play a role in the adjudicative process" based on the *purpose* they serve in the litigation: If they are "*filed with the objective* of obtaining judicial action or relief," they are judicial records. *Id*. (emphasis added). Summary judgment filings, including exhibits, are judicial records

because they are filed with such an objective, even where later developments obviate the need for a judicial ruling.

The magistrate judge also relied on two trial court decisions; neither is on point. First, in *ACLU v. Holder*, 652 F. Supp. 2d 654 (E.D. Va. 2009), *aff'd*, 673 F.3d 245 (4th Cir. 2011), the court held that the public did not have a right of access to sealed qui tam complaints. *Id.* at 660–61, 666. As this Court has recognized, qui tam complaints are "documents [that] are filed pursuant to a specific statutory scheme that mandates 'secrecy.'" *Courthouse News Serv.*, 2 F.4th at 327 n.6. *ACLU* does not stand for the point that complaints in general are not subject to a right of access—a point that *Courthouse News* roundly rejects. *See id.* at 328. Second, in *iHance, Inc. v. Eloqua Ltd.*, No. 2:11-cv-257, 2012 WL 4050169 (E.D. Va. Sept. 10, 2012), the magistrate judge expunged provisionally sealed pretrial motions and exhibits from the docket after the case settled. *See id.* The pretrial motions, however, do not appear to have been motions for summary judgment or attachments thereto. *See* Docs. No. 161–179, 196–202, 236–244, 246–247, 273–283, 300–301, and 315 (expunged docket entries pursuant to the court's order), in *iHance, Inc. v. Eloqua Ltd.*, No. 2:11-cv-257 (E.D. Va.); *see also id.* Docs. 316 &

318 (listing pending motions to seal and the motions to which they related). In any event, it does not appear that anyone contested the sealing, so the magistrate judge's decision on the matter was untested.

### B. Summary judgment materials do not lose their status as judicial records subject to the public's right of access if the litigation ends without a summary judgment decision.

As discussed above, the public obtains a presumptive right of access to summary judgment material as of the moment the material is filed with the trial court; the court may keep filed materials under seal temporarily until it decides whether permanent sealing is warranted, and the court must address the sealing question expeditiously and provide reasons for any decision to seal records permanently. Under those principles, the magistrate judge's order here must be reversed unless the requested summary judgment filings lost their status as judicial records because the underlying litigation settled without the court having issued a summary judgment decision. This Court has not addressed whether judicial records can lose their status as such based on subsequent developments in the litigation. There is good reason to hold that they cannot.

**1.** Denying the public access to judicial records to which the public previously had a presumptive right of access would ill-serve the goal of keeping the courts "open to public scrutiny." *Company Doe*, 749 F.3d at 265. "Public access serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of fairness." *Id.* at 266 (quoting *Littlejohn v. Bic Corp.*, 851 F.2d 673, 682 (3d Cir. 1988)). These objectives are important both while the litigation is ongoing and often, as in this case, after it has concluded. *See*, *e.g.*, *Rushford*, 846 F.2d at 252 (noting that The Washington Post sought unsealing after district court's summary judgment decision was on appeal); *Stone*, 855 F.2d at 180 (same with respect to the Baltimore Sun). Yet, if judicial records could lose their status as such based on whether the parties settled prior to a judicial determination, the public's ability to access the judicial records needed to understand and assess the judicial process would turn on when the request for unsealing was made. Those who seek contemporaneous access to summary judgment material would have a presumptive First Amendment and common-law right to the documents, while those who seek the same material after the

litigation has settled would not. There is no sound reason for this distinction.

The magistrate judge suggested that a summary judgment *order* is required for the presumption of access to apply to summary judgment *filings* because the purpose of the access right is "so that the public can judge the product of the courts in a given case." JA171 (quoting *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 203 F.3d 291, 303 (4th Cir. 2000)). But this Court recognized the public's right to access summary judgment filings *before* it recognized the public right to access summary judgment decisions: The Court first recognized the public's right to access summary judgment materials in 1988, in *Rushford*. The Court later recognized that the "First Amendment right of access extends to a judicial opinion ruling on a summary judgment motion" in 2014, in *Company Doe*. 749 F.3d at 267. In reaching that conclusion, *Company Doe* relied on *Rushford*. *Id*. Accordingly, in this Court, access to summary judgment filings is not a by-product of the right to access judicial decisions, but an independent right.

That the public right of access does not turn on the court's actions in a particular case is not unique to summary judgment filings. Thus, in

*Courthouse News*, 2 F.4th 328, this Court held that the public had a First Amendment right to access newly filed civil complaints. The Court explained that, even in the absence of any judicial action, "access to complaints logically plays a positive role in the functioning of the judicial process." *Id.* at 327. "Because [complaints] allow the public to understand the parties involved in a case, the facts alleged, the issues for trial, and the relief sought, access to complaints, like access to docket sheets, is crucial to 'not only the public's interest in monitoring the functioning of the courts but also the integrity of the judiciary.'" *Id.* (quoting *Company Doe*, 749 F.3d at 266). Summary judgment filings likewise provide the public with information about the parties, facts, issues, and relief sought in the litigation—and often in far greater detail than a complaint may allege.

*Courthouse News* also recognized the public's right to "reasonably contemporaneous access to civil complaints" because of the possibility that "some complaints are withdrawn or cause the parties to settle before any judicial action is taken." *Id.* at 328. Indeed, as the Ninth Circuit explained in *Courthouse News Service v. Planet*, 947 F.3d 581 (9th Cir. 2020), the public "has a right to know that the filing of the complaint in

our courts influenced the settlement of the dispute." *Id.* at 592–93. So too with summary judgment materials. Indeed, the parties here engaged in discovery for approximately six months before initiating the summary judgment process on June 10, 2010. The magistrate judge held a hearing on July 30, 2010, and, approximately two weeks later, all of the parties settled. In these circumstances, the public could fairly infer that the strength of the arguments and evidence set forth in the summary judgment papers—and the magistrate judge's reaction to them at the hearing—influenced the decision to settle and the terms of settlement. As the Courts held in the *Courthouse News* cases, the public has a right to assess how the court filings influenced the resolution of the dispute.

**2.** This Court has explained that summary judgment serves as a "substitute for trial," *Rushford*, 846 F.2d at 252, and the right to access summary judgment records is "a necessary corollary of the capacity to attend the relevant proceedings," *Company Doe*, 749 F.3d at 267 (quoting *Hartford*, 380 F.3d at 93). The magistrate judge believed that principle means that the public loses access to litigation filings "when the case is dismissed prior to the consideration and disposition of the motion for summary judgment, [because] the motion plays no adjudicative role in

the case." JA172. At the outset, the summary judgment filings here did play a role in the magistrate judge's "consideration" of the summary judgment motions because the court held a hearing on the motions on July 30, 2010, after which settlement discussions apparently began in earnest. JA54.

Moreover, the magistrate judge's reasoning would have far-reaching effects: In a trial that concludes by settlement prior to judgment, the public would lose the right to access trial materials because they would have played no "adjudicative role" in the litigation, as that phrase was interpreted by the magistrate judge. A trial concluding in settlement could be hidden from history, a result that would be at odds with the principle that "[o]pen trials protect … the confidence of the public that justice is being done by its courts in all matters, civil as well as criminal." *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993) (addressing access to evidence admitted at trial that was resolved by settlement). Indeed, the loss of access would extend not only to material for which confidentiality was requested, but to all evidentiary material, because the public's right of access (or lack thereof)

depends on the nature of the material requested, not whether it is marked as confidential.

The magistrate judge suggested that the original defendants could move to withdraw the motions for summary judgment and related pleadings, which the court "would have no reason not to grant." JA172. The court cited no authority for the suggestion that a granted motion to withdraw removes filings from the public docket and strips them of their status as judicial records. In any event, the summary judgment motions here were not withdrawn, and there is no indication that the material that Mr. Camoin requests is not within the control of the magistrate judge. *Cf. Littlejohn*, 851 F.2d at 683 (distinguishing between trial exhibits returned to the party and "items that properly remained part of the judicial record"). And where the "trial court has supervisory power" of a record, the record cannot remain sealed unless the court "state[s] the reasons for its decision to seal supported by specific findings." *In re Knight Publ'g*, 743 F.3d at 235.

**3.** Other circuits have squarely held that the public has a right to access motions and exhibits that remain unresolved as a result of settlement. In the Second Circuit, "documents submitted to a court for its

consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006). Citing *Lugosch*'s definition of a "judicial record," the Second Circuit has held that "[t]he fact that a suit is ultimately settled without a judgment on the merits does not impair the 'judicial record' status of pleadings." *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139–40 (2d Cir. 2016) (addressing sealing of complaint).

The Third Circuit has likewise held that "documents filed in connection with a motion for summary judgment are judicial records." *In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019). Citing the Second Circuit's *Bernstein* decision, the Third Circuit held that "[i]tems filed with a court retain judicial record status even if the case is 'settled without a judgment on the merits.'" *Alchem USA Inc. v. Cage*, No. 21-2994, 2022 WL 3043153, at *2 n.2 (3d Cir. Aug. 2, 2022) (quoting *Bernstein*, 814 F.3d at 140)). "'So long as the records remain under the aegis of the court, they are superintended by the judges who have dominion over the court,' and the court's supervisory power

over those records continues even when 'jurisdiction over the relevant controversy has been lost.'" *Id.* (cleaned up) (quoting *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d Cir. 2004)). Similarly, in *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157 (3d Cir. 1993), the Third Circuit held that the common-law right of access attached to documents "filed in connection with motions that sought court action," including a motion for a preliminary injunction, *id.* at 162, even though the parties had settled the case "[b]efore a hearing" on the preliminary-injunction motion "could be held," *id.* at 159.

This Court should reach the same conclusion here.

## III. The order denying Mr. Camoin's request for access to the summary judgment filings should be reversed.

In light of the foregoing, the magistrate judge's order concluding that the summary judgment materials to which Mr. Camoin requested access are not judicial records should be reversed. Those materials became judicial records the moment that they were filed, and they remain judicial records, even after the lawsuit settled.

Aside from Nelnet and Brazos, none of the original defendants opposed Mr. Camoin's request. Accordingly, this Court should remand

the case to the magistrate judge with instructions that materials relating to defendants that did not oppose unsealing be unsealed promptly.

With respect to Nelnet and Brazos, although they opposed Mr. Camoin's request, they did not argue that the material in which they have an interest satisfied the applicable First Amendment and common-law standards for permanent sealing. Because they had the burden to make such a showing, *VDSP*, 386 F.3d at 575, their failure to do so may be taken as a concession that they cannot carry their burden. *See*, *e.g.*, *Hicks v. Ferreyra*, 965 F.3d 302, 310 (4th Cir. 2020) (holding argument waived because it was not raised in the district court). The Court should therefore remand with instructions to unseal those records as well. Alternatively, the Court should instruct the magistrate judge to order Nelnet and Brazos to make the required showing promptly.

## CONCLUSION

This Court should reverse the magistrate judge's order denying Mr. Camoin's request for unsealing and instruct the judge to provide Mr. Camoin access to all of the requested filings. Alternatively, the Court should reverse and remand with instructions that the judge release all requested filings other than those pertaining to Nelnet and Brazos and that the judge order Nelnet and Brazos to promptly attempt to satisfy their burden of demonstrating that sealing is warranted.

## STATEMENT REGARDING ORAL ARGUMENT

Appellant requests that the Court hold oral argument. This case concerns the application of established law concerning the public's right to access summary judgment filings to a new circumstance: where the trial court did not issue a summary judgment decision because of settlement. Although other circuits have held that settlement in these circumstances does not eliminate the public's right of access, this Court has not addressed that question. Appellant therefore believes that oral argument would be helpful to the Court's consideration of the question presented.

September 13, 2023

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Appellant Michael J. Camoin complies with the type-style and type-volume limitations of Federal Rules of Appellate Procedure 32(a)(5), (6), and (7)(B). The brief is composed in a 14-point proportional typeface, Century Schoolbook. As calculated by my word processing software (Microsoft Word 365), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 7249 words.

/s/ Nandan M. Joshi
Nandan M. Joshi

**CERTIFICATE OF SERVICE**

I hereby certify that, on September 13, 2023, the foregoing was served through the Court's ECF system on counsel for all parties.

/s/ Nandan M. Joshi
Nandan M. Joshi