No. 23-1808

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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*.

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

REPLY BRIEF FOR APPELLANT MICHAEL J. CAMOIN

Leonard A. Bennett
Consumer Litigation Associates, P.C.
763 J. Clyde Morris Blvd., Suite 1-A
Newport News, VA 23601
(757) 930-3660

Nandan M. Joshi
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Appellant

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This Court has squarely held that the public has a right to access materials filed in connection with summary judgment motions. This case provides no occasion to reexamine that well-established precedent.

Rather, the question presented here concerns *when* the public's right to summary judgment material attaches and *whether* the public loses that right if the trial court does not issue a summary judgment decision. As the opening brief explaines, this Court has repeatedly signaled that the public's right of access attaches when summary judgment material is filed with the trial court. Indeed, this Court's admonition—backed by local rules—that trial courts should address sealing requests expeditiously reflects that the public's right of access attaches at the time of filing. Although this Court has not addressed whether the public can lose its right of access where a case terminates without a judicial decision, the tradition of openness in judicial proceedings, the conclusion that the right attaches at the time of filing, and decisions of the Second and Third Circuits all confirm that the public's right of access to court filings is not contingent on how the proceeding unfolds.

I. The public has the right to access summary judgment materials under the First Amendment and the common law.

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 v. Public Citizen*, 749 F.3d 246, 267 (4th Cir. 2014). The Court first recognized that right in *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988), in which the district court had sealed "the entire record accompanying the summary judgment motion." *Id.* at 250. The Court ordered the portions of the summary judgment record that were not properly sealed to be immediately unsealed "for public inspection." *Id.* at 252. The Court further directed the trial court to undertake the procedures set out in *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984), to evaluate whether three documents subject to a protective order should be unsealed. *Rushford*, 846 F.2d at 253.

Appellees Nelnet and Brazos make the peculiar suggestion that Mr. Camoin's opening brief does not rely on any decision other than *Rushford* that "involved summary judgment motions." Appellees' Br. 13. In reality, the opening brief cites *Virginia Department of State Police v. Washington Post*, 386 F.3d 567, 578–79 (4th Cir. 2004) (*VDSP*), which upheld the

unsealing of documents filed in connection with oppositions to summary judgment motions. *See* Appellant's Br. 18. It also cites *Company Doe*, which considered and rejected the "wholesale sealing of the parties' summary judgment motions and accompanying materials," 749 F.2d at 267, as well as "a judicial decision adjudicating a summary judgment motion," *id. at* 268, *cited in* Appellant's Br. 18. Both of those decisions confirm *Rushford*'s holding that the First Amendment right of access extends to summary judgment material. *See also Sprint Nextel Corp. v. Wireless Buybacks Holdings, LLC*, 938 F.3d 113, 120 n.2 (4th Cir. 2019) (directing the district court to address the "excessive portion of the summary-judgment record [that] is under seal" in light of "the public's right of access to judicial records under the First Amendment").

In short, the principle that the public has a First Amendment right to access summary judgment filings is not a novel one. It is, in fact, well-established precedent of this Court.[1]

[1] Because the common-law right of access applies to a broader category of judicial records than the First Amendment right, that precedent necessarily controls the question whether the public has a common-law right to summary judgment materials as well. *See Company Doe*, 749 F.3d at 265–66.

II. The public's right of access to summary judgment material attaches when the material is filed with the trial court.

A. As the opening brief explains, Appellant's Br. 19–21, this Court's decisions link the public's right of access to summary judgment material to the filing of the material with the trial court. *See*, *e.g.*, *Company Doe*, 749 F.3d at 267 ("[T]he First Amendment right of access attaches to documents and materials filed in connection with a summary judgment motion"); *Rushford*, 846 F.2d at 252 (holding that summary judgment material loses its status as discovery material "[o]nce the documents are made part of a dispositive motion"). Reflecting that filing triggers the right of access, Local Civil Rule 5 of the Eastern District of Virginia requires parties seeking sealing to file a motion to seal "contemporaneously with the material for which sealing is requested." As this Court has held, such a motion must be resolved "as expeditiously as possible." *Company Doe*, 749 F.3d at 273.

Nelnet and Brazos argue that "the requirement that a court rule expeditiously on requests to seal summary judgment materials … cannot be reconciled" with *Rushford*, which stated that "the district court must address the question at the time it grants a summary judgment motion." Appellees' Br. 17 (emphasis removed) (quoting *Rushford*, 846 F.2d at

253). But as they elsewhere acknowledge, *id.* 16 n.9, the speed at which the trial court acts on a motion to seal does not affect whether a particular document is a judicial record to which the right of access applies. And if Nelnet and Brazos were correct that the public does not have a right to access summary judgment material that a trial court has not considered in making a ruling, there would be little need for expeditious action on a motion to seal, because even a speedy denial of the sealing request would not give the public a right to access the material until after the court issues a summary judgment decision. The expeditiousness requirement for motions to seal is sensible precisely because the public's presumptive right of access attaches upon filing.

Moreover, the inconsistency that Nelnet and Brazos perceive between *Rushford* and *Company Doe* evaporates when the facts of the cases are considered. In *Rushford*, the district court ruled on summary judgment three weeks after the motion was filed. 846 F.2d at 251–52. In that context, this Court's statement that the district court should have addressed sealing "at the time it grants a summary judgment motion" is consistent with the principle that trial courts should act expeditiously on sealing requests. *Id.* at 253. In *Company Doe*, by contrast, nine months

had elapsed between the filing of the motion to seal and the summary judgment decision. 749 F.3d at 273. In that context, this Court made clear that the trial court "erred by failing to act expeditiously on the sealing motion." *Id.*

B. Mr. Camoin's opening brief also explains that summary judgment materials that become judicial records upon their filing with the trial court do not later lose that status, even if the litigation ends without a summary judgment decision. Appellant's Br. 27–35. As the brief explains, any other rule would treat members of the public differently based on whether they sought the material during the pendency of litigation or after its conclusion. *Id.* at 28–29. The opening brief also notes that access to summary judgment material provides the public with important information about the judicial process even in the absence of a summary judgment decision and that this Court has recognized the benefits in preserving the public's access to newly filed complaints even in the absence of further judicial action. *Id.* at 30–31 (citing *Courthouse News Serv. v. Schaefer*, 2 F.4th 318 (4th Cir. 2021)). Finally, the opening brief explains that depriving the public of access to documents filed in lawsuits that conclude by settlement would disserve

the goal of openness in judicial proceedings—an outcome that the Second and Third Circuits have squarely rejected. *Id.* at 31–35. Nelnet and Brazos offer little response to these points.

C. Nelnet and Brazos primarily contend that the First Amendment and common-law rights of access to summary judgment filings do not attach unless and until the court rules on a summary judgment motion. For this contention, they rely primarily on the unpublished decision in *In re Policy Management Systems Corp.*, 67 F.3d 296, 1995 WL 541623 (4th Cir. 1995) (table). There, the defendant had filed documents in connection with a motion to dismiss under Rule 12(b)(6). Rather than converting the motion to dismiss into a motion for summary judgment, the district court chose not to consider the material. *See id.* at *3 ("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."). In its unreported decision, this Court held that those materials therefore "retain[ed] their status as discovery materials" and did not become subject to the public right of access. *Id.* at *4. Although Nelnet and Brazos argue that the opinion identified "no difference for the purpose of a public

right of access analysis between documents filed as part of a motion to dismiss and documents filed as part of a summary judgment motion when in each instance the court does not consider the sealed documents," Appellees' Br. 15, the Court's decision in fact rested on the distinction between the two types of motions. *See In re Policy Mgmt. Sys. Corp.*, 1995 WL 541623, at *4 n.5 (stating that "[n]aturally, if the court converts the motion to dismiss into a motion for summary judgment, then the First Amendment guarantee of access attaches under *Rushford*").

Appellees also rely on the unpublished magistrate judge's decision in *iHance, Inc. v. Eloqua Ltd.*, No. 2:11-cv-257, 2012 WL 4050169 (E.D. Va. Sept. 10, 2012). *iHance* did not concern summary judgment material, but pretrial motions *in limine* relating to the evidence that could be presented at trial. Nelnet and Brazos argue that such motions "are much closer in nature to exhibits to a summary judgment motion than a motion to dismiss" and, therefore, that the magistrate judge's uncontested decision in *iHance* to expunge pretrial material from the court record supports the conclusion that the public lacks a right to access summary judgment material. *See* Appellees' Br. 18. Trial courts, however, must adhere to this Court's precedents, not the other way around; and this

Court has not addressed whether pretrial motions *in limine* are more like summary judgment motions or more like motions to dismiss when it comes to the public's right of access. *iHance* therefore provides no insight into the question presented here: whether the public's well-established right to access summary judgment material attaches when that material is filed.

Nelnet and Brazos' reliance on *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132 (2d Cir. 2016), is likewise misplaced. In that case, the Second Circuit defined a "judicial record" as a "filed item that is 'relevant to the performance of the judicial function and useful in the judicial process.'" *Id.* at 139 (quoting *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006)), *quoted in* Appellees' Br. 11. Contrary to Nelnet and Brazos's suggestion, *Bernstein* does *not* suggest that a judicial decision is necessary for the right of access to attach. To the contrary, *Bernstein* applied the principle quoted in Appellees' brief to affirm public release of a complaint that was withdrawn pursuant to a settlement *before* any judicial action had been taken. 814 F.2d at 140. Both the reasoning and the outcome in *Bernstein* are thus fully consistent with this Court's recognition that the public has

a right to access "materials filed in connection with a summary judgment motion." *Company Doe*, 749 F.3d at 267.

Nelnet and Brazos contend that "[a]ccess to documents that are not considered by the court as part of the judicial process does not promote" the policy of holding courts accountable and fostering public confidence in the administration of justice. Appellees' Br. 18. But this Court has rejected the idea that judicial accountability and public confidence are solely a function of the public's ability to evaluate the basis for a particular judicial decision. Thus, in *Company Doe*, the Court insisted that district courts act expeditiously on sealing requests so that the public could "monitor the progress of the litigation as it unfold[s]." 749 F.3d at 273. And in *Courthouse News*, the Court held the public has a right to "reasonably contemporaneous access to civil complaints" precisely because complaints could be "withdrawn or cause the parties to settle before any judicial action is taken." 2 F.4th at 328. These decisions are inconsistent with Nelnet and Brazos's theory that the public's right to access to summary judgment records is contingent on the issuance of a summary judgment decision.

Making a similar argument, Nelnet and Brazos contest the possibility that the summary judgment materials here influenced the outcome of settlement discussions and defends the magistrate's judge's assertion that the material played no "adjudicative role" in the case. Appellees' Br. 19–20. For the reasons discussed above, the public's right to access summary judgment material attaches when that material is filed with the trial court, regardless of whether the material influenced the court. But Nelnet and Brazos's argument misses the point in any event. One purpose of providing the public with the right to access judicial records is so that members of the public can evaluate for themselves the role that the documents played in the progress of a judicial proceeding. Thus, while Nelnet and Brazos assert that "there is absolutely no evidence offered by Mr. Camoin to suggest that these documents were mentioned at the summary judgment hearing or played any role in the decision to settle or the terms of the settlement," *id*. at 19, the public cannot evaluate the veracity of that assertion without access to the underlying documents. It is the presumptive right of access—not a party's assertion about how the litigation unfolded—that 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." *Company Doe*, 749 F.3d at 266 (quoting *Littlejohn v. Bic Corp.*, 851 F.2d 673, 682 (3d Cir. 1988)). Setting an expiration date on that right would undermine those important policy goals.

III. This Court should reverse the decision below.

Because the summary judgment materials at issue here are judicial records to which the public has a right to access, the Court should reverse the magistrate judge's order and remand this case so that the requested documents may be unsealed and made available to Mr. Camoin. With respect to documents relating to defendants who did not oppose the unsealing request, there should be no dispute that those documents should be unsealed without further delay.

As to Nelnet and Brazos, while opposing Mr. Camoin's request below, they did not carry their burden of demonstrating that the material in which they have an interest should remain sealed and thus forfeited any such argument. In this Court, they argue that they lacked the opportunity to satisfy their burden because Mr. Camoin's initial pro se request did not "identif[y] the sources of his claimed right to access the

sealed documents." Appellees' Br. 4 n.5. In *VDSP*, however, this Court ordered unsealing of a hearing transcript without deciding whether the transcript "should be accorded First Amendment or common law status" because the proponent of maintaining the seal "fail[ed] to offer any reason at all" to keep the document under seal "under either standard." 386 F.3d at 580. That is the situation here as well.

If, however, the Court excuses the failure of Nelnet and Brazos to meet their burden below, the Court should remand the case and order the magistrate judge to require them to make the requisite showing promptly. Nelnet and Brazos provide no reason why such a directive would not be an appropriate means to protect their interests.

CONCLUSION

For the forgoing reasons and those stated in the opening brief, 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 submit any attempt to satisfy their burden of demonstrating that sealing is warranted.

November 17, 2023

Respectfully submitted,

/s/ Nandan M. Joshi

Leonard A. Bennett
Consumer Litigation Associates, P.C.
763 J. Clyde Morris Blvd., Suite 1-A
Newport News, VA 23601
(757) 930-3660

Nandan M. Joshi
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply 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 2721 words.

/s/ Nandan M. Joshi
Nandan M. Joshi

CERTIFICATE OF SERVICE

I hereby certify that, on November 17, 2023, the foregoing was served through the Court's ECF system on counsel for all parties.

/s/ Nandan M. Joshi
Nandan M. Joshi