No. 23-3548

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

MARGARITO FIERRO CORDERO, *et al.*,

Plaintiffs,

vs.

STEMILT AG SERVICES, LLC,

Defendant-Appellee,

vs.

COLUMBIA LEGAL SERVICES,

Appellant, Counsel for Plaintiffs,

On Appeal from the U.S. District Court
for the Eastern District of Washington,
No. 2:22-cv-00013-TOR (Hon. Thomas O. Rice)

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE, PUBLIC JUSTICE, AND ACLU OF WASHINGTON AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS AND APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae the American Association for Justice, Public Justice, and ACLU of Washington certify that they are all non-profit organizations, they have no parent corporations, and no publicly owned corporations 10% or more of their stock.

Respectfully submitted this 8th day of May 2024.

/s/ Jaqueline Aranda Osorno
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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The **American Association for Justice** ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 77-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

Public Justice is a national public interest advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting to preserve access to justice for victims of corporate and governmental misconduct and preserving the civil justice system as an effective tool for holding the powerful accountable. To further its goal of defending access to justice for all, Public Justice has long conducted a special project devoted to ensuring court transparency. Public Justice regularly engages in litigation to unseal court records and challenge overly broad protective orders.

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[1] All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part. No person, other than amici curiae, their members, and their counsel, contributed money that was intended to fund the preparation or submission of this brief.

The **American Civil Liberties Union of Washington** (ACLU-WA) is a statewide, nonpartisan, nonprofit organization with over 150,000 members and supporters, dedicated to the preservation of civil liberties and the principles of liberty and equality embodied in the Washington and United States Constitutions and federal and state civil rights laws, and has a particular interest in advocating for greater transparency within the civil legal system. The ACLU of Washington also has a long history of advocating for broader access to the courts. As part of these efforts, the ACLU of Washington routinely advocates against measures that restrict access to the courts—particularly for marginalized communities.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises out of the district court's entry of a blanket protective order restricting Appellant's use of discovery information, including non-confidential discovery. Specifically, the district court's order states that "Before Plaintiffs or Plaintiffs' counsel utilize discovery from this matter in other advocacy, Plaintiffs must seek leave of this Court." This Court should vacate the district court's order because it is contrary to both law and public policy. As explained in Section I, a party seeking relief under Federal Rule of Civil Procedure 26(c) must demonstrate good cause to restrict use and dissemination of information. Any protective order that is unsupported by a finding of good cause, such as the order implicated in this appeal, violates Rule 26 and longstanding precedent recognizing the presumptively

public nature of discovery. As explained in Section II, blanket restrictions on the use and dissemination of discovery are contrary not only to law, but also to public policy. The district court's order must be vacated.

ARGUMENT

I. THIS COURT'S ORDER SHOULD BE VACATED BECAUSE THE BLANKET RESTRICTION ON THE USE OF DISCOVERY IS UNSUPPORTED BY GOOD CAUSE.

The district court's order contravenes the well-established principle that discovery is presumptively public. *See In re Roman Cath. Archbishop of Portland in Oregon*, 661 F.3d 417, 424 (9th Cir. 2011) (quoting *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999)). As courts have explained, "[u]nless the public has a presumptive right of access to discovery materials, the party seeking to protect the materials would have no need for a judicial order since the public would not be allowed to examine the materials in any event." *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 146 (2d Cir. 1987). Only a showing of good cause can override the presumption of public access to discovery. *See Phillips ex rel. Ests. of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002); Fed. R. Civ. P. 26(c) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .").

In some cases, however, parties agree to, and courts enter, blanket protective

orders that "typically do[] not make the 'good cause' showing required by Rule 26(c) with respect to any particular document." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1133 (9th Cir. 2003). Such orders are commonly entered in civil litigation that is likely to involve the production of voluminous confidential information, allowing parties to designate information as confidential upon the producing party's good faith belief that there is good cause to protect the information from disclosure.[2] *See* Robert Timothy Reagan, Fed. Jud. Ctr., Confidential Discovery: A Pocket Guide on Protective Orders 5 (2012); 8A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure (3d ed. 2021). As courts in this circuit have explained, when used appropriately, "the use of blanket protective orders conserves judicial resources—and taxpayer money—by eliminating the requirement that a party move for a protective order every time that party produces documents they contend are confidential." *Acosta v. Heritage*, 332 F.R.D. 347, 349 (D. Haw. 2019) (quoting *Van v. Wal-Mart Stores, Inc.*, No. C 08-5296 PSG, 2011 WL 62499, at *2 (N.D. Cal. Jan. 7, 2011)); *see Foltz*, 331 F.3d at 1131 (noting that

[2] A recently conducted study of over 2.2 million federal cases active between January 1, 2005, and December 31, 2014, found that stipulated protective orders are more prevalent than previously thought. Nora Freeman Engstrom et al., *Secrecy by Stipulation*, 74 Duke L.J. (forthcoming 2024) (manuscript at 4–5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4811151 (finding stipulated protective orders are requested in 2.8 percent of all civil cases, including 8.5 percent of cases with an answered complaint). The researchers also found that judges grant joint motions for protective orders roughly 96 percent of the time. *Id.*

the district court's entry of a blanket protective order "was understandable for the unfiled documents given the onerous burden document review entails").

In this case, however, the parties did not request, and the court did not purport to enter a blanket protective order. The protective order entered in this case was intended to cover only two types of information: (1) health data and medical records, and (2) certain data concerning Defendant's sales, profits, and revenue. *See* R. at 1-ER-17 (adopting and incorporating Plaintiff's proposed protective order, R. at 2-ER-159, for health data and sensitive financial documents). But when entering the protective order, the district court also ordered that "[b]efore Plaintiffs or Plaintiffs' counsel utilize discovery from this matter in other advocacy, Plaintiffs must seek leave of this Court." *Id.* at 1-ER-18. By limiting the use of any information, including non-confidential information, and requiring Appellants to seek permission before sharing any information, the court's order functionally expanded the scope of the protective order beyond the two identified categories of information to include all materials produced in discovery. In other words, it turned *all* information into confidential information.

What was arguably a reasonably limited protective order became a blanket protective order unsupported by good cause. This blanket restriction on the use of any discovery was *not* entered to facilitate the exchange of discovery. Indeed, the district court order is devoid of any explanation for why a restriction on the use of

any discovery beyond the two agreed-upon categories was warranted. Instead, the district court only admonished Plaintiffs' counsel that they "[did] not have free reign to utilize the information and documents discovered in this action in other advocacy with which Plaintiffs are not involved"—a clear misstatement of the law.[3] R. at 1-ER-16 to -17; *In re Roman Cath. Archbishop*, 661 F.3d at 424.

Because the district court's order restricting the use of any discovery, including non-confidential discovery, is unsupported by good cause, the order must be vacated. As discussed below, this outcome is consistent not just with well-established law, but also with public policy disfavoring unnecessary restrictions on the use of information obtained in discovery.

II. STRONG PUBLIC POLICY CONSIDERATIONS FAVOR VACATING THE COURT'S ORDER.

Improper restrictions on the use of discovery, like the one at issue in this appeal, undermine the administration of a well-functioning civil justice system. The availability of information produced in discovery ultimately promotes justice in two ways. First, the sharing of information allows similarly situated plaintiffs to litigate cases against the same defendants in a more cost- and time-efficient manner. It also

[3] Oddly, the district court recognized the principle that "[g]enerally, the public can gain access to litigation documents and information produced during discovery unless the party opposing disclosure shows 'good cause' why a protective order is necessary" before proceeding to ignore it. R. at 1-ER-16 (quoting *Phillips*, 307 F.3d at 1210).

ensures that discovery is consistent across cases, promoting the integrity of the civil justice system. Second, the free flow of information can serve to protect the public from systemic harms that may otherwise remain shielded from the public through the use of protective orders, long after a case has concluded. These two public policy considerations support vacating the district court's order in this case.

A. Improper Limitations on the Dissemination and Use of Discovery Harms the Efficiency and Integrity of the Civil Justice System.

The district court's order improperly restricted Plaintiffs' ability to use discovery for any purpose other than prosecuting the underlying litigation. *See* R. at 1-ER-18 ("Before Plaintiffs or Plaintiffs' counsel utilize discovery from this matter in other advocacy, Plaintiffs must seek leave of this Court."). Courts routinely reject such provisions, finding that they are contrary to the purpose of the Federal Rules of Civil Procedure, which "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1; *see, e.g.*, *Duling v. Gristede's Operating Corp.*, 266 F.R.D. 66, 76 (S.D.N.Y. 2010) (collecting cases); Wright & Miller, *supra*, § 2044.1 (explaining that when modification of a protective order occurs "to enable litigants to use information in other cases, modification can serve important efficiency and litigation fairness goals"); Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 Notre Dame L. Rev. 283, 363 (1999) ("Discovery sharing, while arguably undermining the

efficiency of discovery in the immediate lawsuit, potentially avoids the wasteful duplication of discovery in collateral litigation, thereby ultimately advancing the efficient resolution of disputes.").

The Ninth Circuit specifically "strongly favors access to discovery materials to meet the needs of parties engaged in collateral litigation." *Foltz*, 331 F.3d at 1131 ("Allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery.") (internal citations omitted); *see also Madrid v. CertainTeed, LLC*, No. C20-1285-JCC, 2021 WL 3367253, at *2 (W.D. Wash. Aug. 3, 2021) (relying on *Foltz* in ordering defendant to produce unredacted deposition transcripts, despite their being marked as confidential); *Tomlinson v. United Behav. Health*, No. 19-CV-06999-RS (JCS), 2020 WL 2850182, at *4 (N.D. Cal. June 2, 2020) (noting that Ninth Circuit "strongly favors" ability to share discovery materials in collateral litigation) (quoting *Foltz*, 331 F.3d at 1131). As one district court reasoned in a products liability case:

> In this era of ever expanding litigation expense, any means of minimizing discovery costs improves the accessibility and economy of justice. If, as asserted, a single design defect is the cause of hundreds of injuries, then the evidentiary facts to prove it must be identical, or nearly so, in all the cases. Each plaintiff should not have to undertake to discover anew the basic evidence that other plaintiffs have uncovered. To so require would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of reinventing the wheel.

> Efficient administration of justice requires that courts encourage, not hamstring, information exchanges as that here involved.

Ward v. Ford Motor Co., 93 F.R.D. 579, 580 (D. Colo. 1982). Other courts have reached similar conclusions. *See, e.g.*, *Charter Oak Fire Ins. Co. v. Electrolux Home Prod., Inc.*, 287 F.R.D. 130, 134 (E.D.N.Y. 2012) (modifying a protective order to allow discovery to be shared with similar cases to avoid the "duplicative and costly discovery" of "litigat[ing] the same exact issue in each and every case"); *Thayer v. Liggett & Myers Tobacco Co.*, No. 5314, 1970 U.S. Dist. LEXIS 12796, at *6 (W.D. Mich. Feb. 19, 1970) (finding that the broad protective order "effectively throttled" any potential "[f]ruitful consultation between plaintiff's attorneys with similar cases"); *Metro Media Ent., LLC v. Steinruck*, No. CIV.A. DKC 12-0347, 2013 WL 1833266, at *8 (D. Md. Apr. 30, 2013) (finding that sharing discovery materials may "eliminat[e] the time and expense involved in 're-discovery'") (quoting *Culinary Foods, Inc. v. Raychem Corp*., 151 F.R.D. 297, 306 (N.D. Ill. 1993)); *Langenbach v. Wal-Mart Stores, Inc.*, No. 12-CV-1019, 2013 WL 3224583, at *3 (E.D. Wis. June 25, 2013) (same).

In addition to promoting efficiency, the sharing of information ensures reliability of the discovery process itself. *See, e.g.*, Francis H. Hare, Jr., *Confidentiality Orders in Products Liability Cases*, 13 Am. J. Trial Advoc. 597 (1989) (noting that information sharing helps to "verify[] the accuracy of a

manufacturer's response to the plaintiff's discovery requests"). Comparison by various plaintiffs' attorneys of defendants' discovery responses enhances the reliability of the fact-finding process by providing an incentive for defendants to be forthcoming in discovery. *See, e.g.*, *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987) ("Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses."). This can be particularly important because, although defendants have strict ethical obligations to preserve discoverable information and answer discovery requests fully and truthfully, it is not uncommon for defense counsel to engage in obstructive behavior that includes lengthy delays in production or failure to produce relevant documents. *See, e.g.*, *In re Seroquel Prod. Liab. Litig.*, 244 F.R.D. 650, 664 (M.D. Fla. 2007) (imposing sanctions against drug manufacturer that had been "purposely sluggish" in making effective document productions); *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1132 (9th Cir. 1995) (holding that defendant participated in "a scheme to defraud the jury, the court, and [the Plaintiffs], through the use of misleading, inaccurate, and incomplete responses to discovery requests"); *N. Am. Watch Co. v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986) (holding that defendant falsely represented to the court that relevant documents did not exist).

Ultimately, by placing an improper restriction on the use of discovery, the

district court's order in this case is inconsistent with the strong public interest in the administration of a just and efficient civil legal system. These policy considerations weigh in favor of vacating the district court's order.

B. Blanket Protective Orders Shield Corporate Misconduct and Harm the Public.

In cases involving public health and safety, blanket protective orders that are unsupported by good cause can ultimately harm the public by shielding corporate actors from public scrutiny. As scholars have explained, "litigation—and the reciprocal discovery at its contemporary core—can help to uncover documents and other evidence that permit courts and commentators to map the extent of the problem, trace its root causes, allocate responsibility, and assign blame." Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 Stan. L. Rev. 285, 355 (2021). For example, tobacco litigation in the 1990s revealed evidence that the industry knew about the dangers of its product but nevertheless promoted its sale for decades at great cost to the American public. *Id.* at 355–36. Other examples include cases involving Zyprexa (a drug used to treat schizophrenia and bipolar disorder), Zomax (a prescription painkiller), the Dalkon Shield (intrauterine contraceptive device), tampons, defective vehicles and tires, and Agent Orange and other toxic chemicals. Engstrom et al., *supra* (manuscript at 4–5); *see, e.g.*, *In re Zyprexa Prod. Liab. Litig.*, 253 F.R.D. 69, 208 (E.D.N.Y. 2008) (granting motion under Rule 23(d) permitting

publication of approximately 350 documents previously designated confidential and modifying protective order accordingly); *In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 559, 572 (E.D.N.Y. 1987), *aff'd*, 821 F.2d 139 (2d Cir. 1987) (lifting blanket protective order due to public interest in issue affecting health of veterans and their families); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 8 (1st Cir. 1986) (permitting plaintiff to disclose to governmental authorities discovery information regarding toxic chemicals in the city's water supply because "public interest required that information bearing on this problem be made available to those charged with protecting the public's health").

For example, litigation against drug manufacturers has played a crucial role in uncovering the "scope, causes, and character" of the American opioid epidemic. Engstrom & Rabin, *supra*, at 356. More than 870 exhibits admitted in an Oklahoma trial against Johnson & Johnson, the maker of the fentanyl skin patch Duragesic, revealed the defendant's marketing strategy targeting "high-opioid-prescribing physicians,"[4] while a Massachusetts suit against Purdue, the manufacturer of OxyContin, exposed the company's practice of encouraging "reckless over-prescription" of the drug. *Id.* at 356–57. These and other related suits have generated a body of evidence that now "permits journalists, researchers, health experts, and the

[4] *See State v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 WL 4019929, at *1, *4, *9–10 (Okla. Dist. Ct. Aug. 26, 2019).

public to measure and map the precise roots and contours of the opioid epidemic for the first time, while also identifying, with precision, which manufacturers, distributors, and retailers shipped the most pills to the hardest-hit communities." *Id.* at 357.

Litigation against Goodyear Tire provides another potent example. For well over a decade, and across a myriad of lawsuits, Goodyear tried to conceal thousands of pages of documents related to the alleged dangers of its G159 tire. In 2005, Leroy, Donna, Barry, and Suzanne Haeger sued Goodyear alleging that a design defect in its G159 tire caused their motorhome vehicle accident in which they suffered serious injuries. *See Haeger v. Goodyear Tire & Rubber Co.*, 906 F. Supp. 2d 938, 941, 959 (D. Ariz. 2012) (*Haeger I*). During discovery, the Haegers made repeated requests to see "all testing data" for the G159 tire, but Goodyear and its attorneys decided to "mak[e] discovery as difficult as possible, providing only those documents they wished to provide." *Id.* at 959, 971. After enduring five years of stonewalling tactics, the family agreed to settle. *Id.* at 955. Months later, the Haegers' counsel learned from a newspaper article that Goodyear had disclosed a set of test results in a different G159 lawsuit that it had never disclosed to the Haegers. *Id.* at 659. Upon realizing they had settled based on incomplete information, the Haegers moved for sanctions against Goodyear and its attorneys, alleging discovery fraud. *Id.* at 960. The district court granted the Haegers a sanctions award of $2.7 million after finding

that "Goodyear and its attorneys adopted a strategy . . . to resist all legitimate discovery [and] withhold *obviously* responsive documents." *Id.* at 981 (emphasis in original); *See Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1237, 1245 (9th Cir. 2016), *rev'd and remanded*, 581 U.S. 101 (2017) (affirming the district court's factual determination that Goodyear and its lawyers practiced "fraud and deceit" on the court and "acted in bad faith"). Meanwhile, the Haegers filed a separate lawsuit in Arizona state court alleging that Goodyear and its attorneys committed fraud to secure the settlement agreement in *Haeger I*. *See Ctr. for Auto Safety v. Goodyear Tire & Rubber Co.*, 247 Ariz. 567, 569 (Ct. App. 2019). The court in that case issued a blanket protective order that allowed Goodyear to unilaterally designate documents as "confidential," which Goodyear did for hundreds of documents it later admitted were not, in fact, confidential. *Id.* at 569–70. Partly based on information discovered through litigation, the National Highway Traffic Safety Administration (NHSTA) opened an investigation, resulting in a 2022 recall of more than 170,000 tires produced between 1996 and 2003. Press Release, NHTSA, Consumer Alert: Goodyear Issues Recall for Select Tires Used on RVs (June 7, 2022), https://www.nhtsa.gov/press-releases/goodyear-recall-tires-rvs.

As these examples reveal, the cost of secrecy can be harmful—even deadly. Transparency and disclosure, meanwhile, furthers justice by allowing victims of wrongdoing to learn that they have legal claims, facilitating representation by

plaintiff attorneys who would otherwise not have the resources to litigate a discovery-intensive case, and helping consumers make informed decisions about which companies to do business with. For these reasons, restrictions on the use and dissemination of discovery should be carefully considered and sparingly entered.

One need not look further than the underlying case to see the transformative impact sharing information can have. Appellants compiled non-confidential, anonymized wage data received in discovery to successfully win a preliminary injunction in a separate farmworker prevailing wage lawsuit. Opening Br. at 10. Rather than punishing Appellants for their advocacy, this Court should recognize it as an example of the way in which improper limits on disclosure of discovery can hinder justice.

CONCLUSION

For the foregoing reasons, amici urge this Court to vacate the protective order.

Respectfully submitted,

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Dated: May 8, 2024

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rule 29-2 because this brief contains 3,555 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman type style.

Dated: May 8, 2024

/s/ Jaqueline Aranda Osorno
JAQUELINE ARANDA OSORNO

CERTIFICATE OF SERVICE

I, Jaqueline Aranda Osorno, counsel for amici curiae and a member of the Bar of this Court, hereby certify that on May 8, 2024, electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users.

/s/ Jaqueline Aranda Osorno
JAQUELINE ARANDA OSORNO