

SECRECY BY STIPULATION

Nora Freeman Engstrom, David Freeman Engstrom,
Jonah B. Gelbach, Austin Peters, & Aaron Schaffer-Neitz[†]

GM Ignition Switch. Dalkon Shield. Oxycontin. For decades, protective orders—court orders that require parties to maintain the confidentiality of information unearthed during discovery—have hid deadly defects and pervasive abuse from the public, perpetuating unnecessary harm.

But how worrisome are these protective orders, really? Under Rule 26(c)'s plain language, protective orders are to be granted only upon a showing of "good cause." Doesn't that adequately cabin the orders' entry? Prominent judges and scholars have long insisted it does and that, under Rule 26(c), the day-to-day grant of protective orders is careful, not cavalier. Critics disagree. They charge that parties frequently agree to sidestep Rule 26(c)'s "good cause" requirement and that judges, although formally duty-bound to protect the public interest, uncritically acquiesce to their demands. Worried about judicial rubber-stamping, some, in fact, have spent decades pushing to tighten Rule 26(c)'s standards—while others have, just as vigorously, opposed these efforts, insisting that the status quo works well enough.

This debate has raged since the late 1980s. But until now, it's mostly run aground on the shoals of basic, but unanswered, factual questions: Are stipulated protective orders really de rigeur? Are they becoming more prevalent?

[†] Nora Freeman Engstrom is the Ernest W. McFarland Professor of Law at Stanford Law School (SLS) and Co-Director of the Deborah L. Rhode Center on the Legal Profession (Rhode Center). David Freeman Engstrom is the LSVF Professor of Law at SLS and Co-Director of the Rhode Center. Jonah B. Gelbach is the Herman F. Selvin Professor of Law at Berkeley Law School and a Non-Resident Fellow at the Rhode Center. Austin Peters is a recent graduate of SLS and holds a Ph.D. in Political Science from Stanford. He is also a Non-Resident Fellow at the Rhode Center. Aaron Schaffer-Neitz is in the SLS Class of 2024 and a Civil Justice Fellow at the Rhode Center. We benefited from astute comments supplied by Stephen B. Burbank, William Eskridge Jr., C. Scott Hemphill, Deborah R. Hensler, Timothy D. Lytton, Larry C. Marshall, Robert L. Rabin, and Judith Resnik. We are grateful to Ari Berman, Devin Flynn, Sreya Guha, Vrushank Gunjur, and Jessica Seigel for excellent research assistance and to SLS, the Rhode Center, and the Arthur & Charlotte Zitrin Foundation for supporting this research. For a copy of the methodological Appendix, please contact Nora Freeman Engstrom at nora.engstrom@law.stanford.edu.

And are joint motions for protective orders actually meticulously scrutinized?

Using state-of-the-art machine-learning techniques, this Article analyzes an original dataset of over 2.2 million federal cases to answer these persistent and profoundly important questions. Along the way, we find that stipulated protective orders are surprisingly prevalent. Grant rates for stipulated protective orders are sky high. And even though many insist that judges are scrupulous in the entry of such orders, over our entire study period, a majority of federal judges never ever rejected a joint protective order request.

We offer the first comprehensive accounting of stipulated protective orders in federal litigation. In so doing, we aim not only to revitalize—and discipline—the perennial and consequential debate surrounding Rule 26(c). We also offer a fortified empirical foundation on which to ground inquiry into broader questions, including the role of transparency and privacy in a system ostensibly committed to “open courts,” tort law’s vital information-forcing function, adversarialism as a procedural cornerstone of American litigation, and trial-court discretion and fidelity to higher law.

Table of Contents

INTRODUCTION	3
I. THE FORMAL LAW REGARDING PROTECTIVE ORDERS	11
A. Protective Orders 101	11
B. Protective Orders, Generally	14
C. Stipulated Protective Orders	16
II. REFORM HISTORY: PERENNIAL PROPOSALS AND DEFICIENT DATA	22
A. Past Efforts to Limit Expansive Protective Orders	22
B. Political and Policy Debates Over Protective Orders	26
1. Reformers’ Arguments in Favor of Greater Transparency	27
2. Critics’ Arguments Opposing Reform Efforts	32
C. Why Debate Has Stalled: Dueling Anecdotes and Anemic Empirics	37
III. DATA: NEW EVIDENCE ON STIPULATED PROTECTIVE ORDERS	42

A. A Note About Methodology.....43

B. Motions for Stipulated Protective Orders: Time Trends and Prevalence47

C. Rule 26(c) Motions: Grants and Denials.....52

D. Qualitative Assessments56

 1. Qualitative Review of 300 Granted POs.....57

 2. Qualitative Review of 100 Denied POs.....63

IV. IMPLICATIONS65

 A. Rebooting the Rule 26(c) Debate66

 B. Stunting the Information-Forcing Function of Tort Law69

 C. Rule Fidelity, Judicial Hierarchy, and Judge Discretion71

 D. Open Courts, Adversarialism, and Access to Justice .77

CONCLUSION82

INTRODUCTION

What if you found out that one judge’s order could have saved the life of your loved one? Thousands of loved ones? Protective orders—court orders issued under the auspices of Rule 26(c), which require parties to maintain the confidentiality of information unearthed during discovery—have made these hypotheticals a grim reality.

Consider the 2014 General Motors ignition switch debacle.¹ As unusual accidents piled up, injured parties predictably sued. In one case, plaintiffs, the parents of Brooke Melton, a twenty-nine-year-old pediatric nurse who had died when her Chevy Cobalt stalled on a Georgia highway, uncovered smoking-gun evidence: Brooke’s Cobalt had had a defective ignition switch. Further digging revealed that some

¹ In 2014, the ignition switch problem led GM to recall some 2.6 million vehicles, and the defect was eventually implicated in 275 injuries and 124 deaths. See Mike Spector, Jaimi Dowell & Benjamin Lesser, *How Secrecy in U.S. Courts Hobbles the Regulators Meant to Protect the Public*, REUTERS (Jan. 16, 2020), <https://www.reuters.com/investigates/special-report/usa-courts-secrecy-regulators/>.

in GM knew and had long known the switch was defective.² Indeed, in new Cobalt models, the faulty ignition switch, responsible for Brooke’s accident, had been quietly replaced. Brooke’s parents wanted to share this explosive evidence. “We thought that people needed to know. There were still people out there driving those cars,” Brooke’s mother explained.³ But a 2011 stipulated protective order, entered by a Georgia state court, barred such disclosures.⁴ While the Meltons were muzzled, more motorists died.⁵

The Melton case is tragic. But it isn’t anomalous. Protective orders (sometimes called “POs”)—often used in conjunction with secret settlements, non-disclosure agreements (NDAs), attorney lockout provisions, and orders to seal judicial records—ensure that many documents surfaced in litigation never see the light of day.⁶ And while it can be

² Spector et al., *supra* note 1. For more on the GM ignition switch debacle and its aftermath, see generally Nora Freeman Engstrom, *When Cars Crash: The Automobile’s Tort Law Legacy*, 53 WAKE FOREST L. REV. 293, 328–35 (2018); ANTON R. VALUKAS, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS (2014); LANCE A. COOPER WITH MARK TABB, COBALT COVER-UP: THE INSIDE STORY OF A DEADLY CONSPIRACY AT THE LARGEST CAR MANUFACTURER IN THE WORLD (2020). For the roots of the Meltons’ extraordinary discovery, see Bill Vlasic, *An Engineer’s Eureka Moment with a G.M. Flaw*, N.Y. TIMES, Mar. 29, 2014, at A1, <https://www.nytimes.com/2014/03/29/business/a-florida-engineer-unlocked-the-mystery-of-gms-ignition-flaw.html>.

³ Spector et al., *supra* note 1 (quoting Beth Melton).

⁴ *Id.* The judge who issued the protective order justified her decision on the logic that “[t]he role of litigation is not to regulate GM.” *Id.* For the fact that the protective order was stipulated, see Consent Protective Order of Confidentiality, Melton v. General Motors, No. 2011-A-2652 (Cobb Cnty. Ct. Dec. 13, 2011), *available at* <https://www.autosafety.org/wp-content/uploads/import/Melton%20consent%20protective%20order%20Dec%20%202011.pdf>.

⁵ See Spector et al., *supra* note 1. According to Kevin Vincent, previously Chief Counsel for NHTSA, NHTSA was “stymied” by the protective order in the Melton litigation. If NHTSA had that evidence, Vincent said, “[w]e could have acted sooner.” *Id.* Likewise, Lance Cooper, the Meltons’ attorney, believes that if there had not been a PO the defective design would have been more quickly revealed. Telephone Interview with Lance Cooper, Founding Partner, The Cooper Firm (Feb. 29, 2024).

⁶ For further discussion of orders to seal, which are akin to POs in some respects, see *infra* notes 41–46 and accompanying text. For a discussion of secret settlements, see David Freeman Engstrom, Nora

difficult to decouple the effects of POs, as against other secrecy mechanisms (since they often exist in tandem), evidence indicates that overly broad POs have led to the suppression of a wide range of information that, if revealed sooner, could have avoided significant harms, even death.⁷ The list is long: Oxycontin,⁸ Zyprexa (a drug used to treat schizophrenia and bipolar disorder),⁹ Zomax (a prescription painkiller manufactured by McNeil Pharmaceutical, a subsidiary of Johnson & Johnson),¹⁰ the Dalkon Shield intrauterine contraceptive device,¹¹ Prempro (an estrogen

Freeman Engstrom, Jonah B. Gelbach, Austin Peters & Garret Wen, *Shedding Light on Secret Settlements: An Empirical Study of California's STAND Act*, 91 CHI. L. REV. (forthcoming 2024). For a discussion of attorney lockout (sometimes called “buyout”) provisions, which are formally banned by ABA Model Rule 5.6(b), see Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1957–65 (2017).

⁷ While all the harms of litigation secrecy cannot be laid at the feet of POs, reformers see POs as the keystone of a broader secrecy architecture. As one scholar puts it: “Almost all facets of the broader court-confidentiality problem stem from a common root—protective orders.” Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH & LEE L. REV. 2181, 2190 (2014).

⁸ Elizabeth Chamblee Burch & Alexandra D. Lahav, *Information for the Common Good in Mass Torts*, 70 DEPAUL L. REV. 345, 345–47 (2021) (explaining that a 2015 deposition of Richard Sackler contained damning information concerning Purdue’s activities but that the video of Dr. Sackler’s deposition was kept under wraps for years, by virtue of a stipulated PO).

⁹ *Sunshine in Litigation Act of 2008: Hearings on H.R. 5884 Before the H. Comm. on the Judiciary, Subcomm. on Commercial and Administrative Law*, 110th Cong. 51 (2008) (statement of Sen. Herb Kohl); Alexander C. Egilman, Aaron S. Kesselheim, Harlan M. Krumholz, Joseph S. Ross, Jeanie Kim & Amy Kapczynski, *Confidentiality Orders and Public Interest in Drug and Medical Device Litigation*, 180 JAMA INTERNAL MED. 292, 295 (explaining that information, leaked by a medical expert in violation of a protective order, clarified the drug’s risks).

¹⁰ Benjamin Weiser & Elsa Walsh, *Drug Firm’s Strategy Avoid Trial, Ask Secrecy*, WASH. POST, Oct. 25, 1988.

¹¹ Daniel J. Givelber & Anthony Robbins, *Sequestered Science: The Consequences of Undisclosed Knowledge*, 69 L. & CONTEMP. PROBS. 131, 133–34 (2006); S. REP. NO. 110-439, 110th Cong., 2d Sess. 4 (2008).

hormone therapy),¹² tampons,¹³ and cigarettes.¹⁴ POs have been used to hide deadly defects in Remington rifles,¹⁵ playground equipment,¹⁶ ATVs,¹⁷ cars,¹⁸ trucks,¹⁹ and tires.²⁰ They have concealed child sexual abuse.²¹ And they are often

¹² Egilman et al., *supra* note 9, at 293, 295 (reporting that information covered by protective order showed that the manufacturer “downplayed risks of hormone-associated breast cancer”).

¹³ See Tom Riley & Mary K. Hofer, *Protective Orders: Machiavelli Would Be Pleased*, TRIAL, Nov. 1984, at 30 (describing litigation involving Rely tampons).

¹⁴ See *infra* note 115 and accompanying text.

¹⁵ See Editorial, *Amid Court Secrecy, Guns Continued to Kill*, USA TODAY, Dec. 28, 2014, <https://www.usatoday.com/story/opinion/2014/12/28/sealed-settlements-remington-rifles-model-700-editorials-debates/20979945/> (discussing how sealing and protective orders concealed a defect in Remington’s Model 700 rifle); Scott Cohn, *Huge Trove of Remington Rifle Documents Is Made Public*, MSNBC, Nov. 15, 2016, [https://www.cnn.com/2016/11/15/huge-trove-of-remington-rifle-documents-is-made-public-
.html#:~:text=The%20documents%20%E2%80%94%20more%20than%20130%2C000,to%20make%20the%20documents%20public.
\(same\).](https://www.cnn.com/2016/11/15/huge-trove-of-remington-rifle-documents-is-made-public/)

¹⁶ For a discussion of how POs thwarted inquiry into defective playground equipment, see S. REP. NO. 110-439 110th Cong., 2d Sess. 7 (2008).

¹⁷ For how POs stymied regulators’ investigation into defective ATVs, see Spector et al., *supra* note 1.

¹⁸ Arlin R. Thrush, Note, *Public Health and Safety Hazards Versus Confidentiality: Expanding the Mediation Door of the Multi-Door Courthouse*, 1994 J. DISP. RESOL. 235, 249 (describing how GM used POs to silence scores of plaintiffs injured by negligently designed fuel tanks in the 1970s and 1980s).

¹⁹ Benjamin Lesser, Dan Levine, Lisa Girion & Jaimi Dowell, *How Judges Added to the Grim Toll of Opioids*, REUTERS (June 25, 2019), <https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges/#:~:text=The%20trail%20of%20hidden%20evidence,health%20and%20safety%20under%20wraps.>

²⁰ For how POs insulated Cooper Tire from scrutiny, see S. REP. NO. 110-439, 110th Cong., 2d Sess. 6. (2008).

²¹ See Annysa Johnson & Ellen Gabler, *Then-Archbishop Timothy Dolan Tried to Protect Money from Claims, Records Show*, MILWAUKEE J. SENTINEL (July 2, 2013), <https://archive.jsonline.com/news/religion/Cardinal-Dolan-sought-to-protect-money-from-claims-struggled-with-Vatican-to-defrock-abusers-b9943953z1-213832541.html> (explaining that information

used to shield the disciplinary records of police, frustrating civil rights litigation aimed at reforming department policies.²²

How are POs implicated in these scandals? The text of Federal Rule of Civil Procedure 26(c), which governs POs, seems to guard against these precise situations. Per Rule 26(c), POs, which bar dissemination of discovery materials beyond the litigants themselves, are to be issued only for “good cause.”²³ And, many appellate courts are quite emphatic that the willy-nilly issuance of POs violates Rule 26(c)’s clear command. As the First Circuit has explained: “[I]f good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection. Any other conclusion effectively would negate the good cause requirement of Rule 26(c).”²⁴ Clear enough.

And, even though appellate court authority gets a little murkier when the PO is filed jointly by the parties, most appellate courts hold that, even then, the trial court must independently conduct a good cause analysis.²⁵ As the Seventh Circuit has explained: “In deciding whether to issue a stipulated protective order, the district court must

about abusive Catholic priests was hidden behind a “broad protective order”).

²² Chelsea Hanlock, Note, *Settling for Silence: How Police Exploit Protective Orders*, 109 CALIF. L. REV. 1507, 1512, 1558–59 (2021) (concluding that POs prevent plaintiffs’ firms from building “a database of problem officers or collect[ing] misconduct and training materials that show systemic disciplinary failures”). POs may also prolong problematic officers’ tenures by preventing public pressure campaigns. *See id.* at 1522–24.

²³ FED. R. CIV. P. 26(c). Fortifying this view, in the early 1990s, the Advisory Committee considered, and rejected, a proposed amendment to Rule 26(c) that would have diluted this good cause requirement. For discussion of that failed attempt, see *infra* notes 78–80 and accompanying text.

²⁴ Pub. Citizen v. Liggett Grp., Inc., 858 F.2d 775, 789 (1st Cir. 1988).

²⁵ As explained in detail in Part I.C., we uncover a surprising circuit split when it comes to “stipulated” POs. Two circuits (the Eleventh and Ninth) hold that the parties say-so essentially substitutes for a judicial good cause analysis, while three circuits (the Seventh, Sixth, and Third) take the opposite view, holding that, even when a motion for a PO is jointly filed, the court must still conduct an independent Rule 26(c) review.

independently determine if ‘good cause’ exists.”²⁶ The Sixth insists that a court “cannot abdicate its responsibility to oversee the discovery process and to determine whether filing should be made available to the public.”²⁷ In fact, says the Sixth Circuit: “A district court abuses its discretion where it makes neither factual findings nor legal arguments supporting the need for the order.”²⁸ The Third Circuit likewise holds that even when both parties consent to a PO, Rule 26(c) still demands that the court make “an independent determination of ‘good cause.’”²⁹

Many have long suspected, however, that the on-the-ground reality is somewhat different. There have long been hints, in fact, that, particularly when the motion for a PO is jointly filed, many busy and burdened trial court judges simply acquiesce to the parties’ request.³⁰ Indeed, fueled by that concern, beginning in the 1980s, reformers repeatedly tried to beef up Rule 26(c), believing that without fortification the provision wasn’t adequately protective of the public interest. Yet, as we’ll see, reformers’ efforts ultimately came to naught, in no small part because reformers were never able to amass convincing evidence that, in day-to-day practice, Rule 26(c)’s dictates were not being scrupulously followed. Absent such evidence, the reformers’ campaign was overcome by inertia—and by opponents’ dogged insistence that nothing was amiss. Exemplifying this position, then-District Court Judge Mark Kravitz registered opposition to reforms on behalf of the Judicial Conference before the House in 2009, demanding: “what I want to hear is evidence of Federal courts . . . not doing

²⁶ *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994).

²⁷ *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1996).

²⁸ *In re Nat’l Prescription Opiate Litig.*, 927 F.3d 919, 929 (6th Cir. 2019) (quotation marks, citation, and alteration omitted).

²⁹ *Littlejohn v. Bic Corp.*, 851 F.2d 673, 680 n.15 (3d Cir. 1988).

³⁰ In fact, in an admittedly dated opinion, a district court went so far as to say that it was “unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order has not been agreed to by parties and approved by the court.” *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981). For further discussion, see Gustavo Ribeiro, *(Marked Confidential): Negative Externalities of Discovery Secrecy*, 100 DENV. L. REV. 171, 190 (2022) (observing that “courts regularly enter stipulated proposed protective orders with little to no . . . inquiry into whether good cause exists”).

what the rule says it should do, which is only grant protective orders for good cause shown.”³¹ Unless reformers could muster that evidence, Judge Kravitz (and so many others) successfully argued, *hands off*.³²

Reformers never could. And the almost total lack of evidence about POs’ entry and effect has remained, to date, the entire subject’s Achilles heel. As one scholar recently observed: “[D]espite the sizable amount of existing scholarship about confidential discovery, scholars have not deeply considered how confidential discovery is implemented in practice.”³³ Thus, while some who advocate for changes to Rule 26(c) insist that POs are too easily and too frequently granted, we have never known whether that is actually true. In fact, even basic empirical questions have so far resisted resolution. We haven’t known how common stipulated POs are. We haven’t known how closely judges scrutinize them. Nor have we known the kinds of cases in which stipulated POs actually appear.

This Article tackles these persistent and consequential questions. Drawing on a novel dataset consisting of more than 2.2 million federal court docket reports from 2005 through 2014, we show that approximately 45% of PO motions are the product of a jointly-filed Rule 26(c) motion, a much larger proportion than previous estimates suggest. We show that the percentage of stipulated POs steadily grew over the study period among cases in which an answer was filed. And, most provocatively, we show that most judges grant all, or almost all, of the stipulated motions for POs they consider. We estimate that judges grant 95% to 97% of all joint requests for POs, depending on the year. And we find that over half of the judges who considered at least 25 stipulated POs in our dataset *never denied a single stipulated PO request*.

³¹ *Sunshine in Litigation Act of 2009: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 59 (2009) (statement of Hon. Mark R. Kravitz for the Judicial Conference of the United States).

³² In the words of Arthur Miller: “Because proponents of reform have not demonstrated that significant modification of the present framework is necessary, the existing pragmatic and discretionary balancing technique should be retained.” Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 491 (1991).

³³ Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1253 (2020).

We also supplemented our quantitative review with a qualitative analysis of 400 stipulated POs, 300 of which granted the parties' joint request for a PO, and 100 of which consisted of (relatively rare) judicial denials. This analysis lends still further support to those who suggest that POs are routinely rubber-stamped. In all, 68% of stipulated POs in the "grant" dataset did not even pay lip service to Rule 26(c)'s good cause standard, and 83% lacked a particularized assessment of the parties' need for secrecy.

In short, stipulated POs are much more common than previously thought. They are granted at extremely high rates. They are often entered without so much as mentioning Rule 26(c)'s good cause standard. And their prevalence has grown over time.

The remainder of this Article proceeds in four Parts. Part I offers a primer on POs. This Part explains the role of POs, their close cousin sealing orders, and the legal standards for entering both. Then, it considers the peculiar case of *stipulated* POs. What are judges to do when litigants jointly ask for a PO? That depends. Some circuits permit judges to grant stipulated POs solely on the parties' say-so, but most others require a more searching inquiry.

Part II turns to policy and politics. It catalogs past reform efforts aimed at tightening Rule 26(c), identifies and assesses the arguments in favor of and against those reforms, and, lastly, points out that these efforts have sputtered because of something like empirical exhaustion. Reform opponents have been able to hang their hats on the fact that there is, as Robert Weiner put it, "[n]o academic study, no Rand Corp. analysis, no state-by-state survey" that "has suggested any problem with protective orders in our courts."³⁴ Absent such a study—and absent evidence that day-to-day PO practice departs from Rule 26(c)'s command—opponents have been able to insist that nothing is amiss.

The heart of this piece, Part III, offers that overdue academic study. Drawing on millions of federal court dockets, we present original evidence quantifying how often stipulated POs are granted, and we also bolster that quantitative

³⁴ Robert N. Weiner, *Protective Orders and Nest-Feathering: Plaintiffs Lawyers Around the Nation are Pressing for Laws that Would Open Discovery Files in Personal-Injury Cases to Public Scrutiny. Their Motivations are Not Nearly as Pure as Many Suppose*, LEGAL TIMES, Sept. 23, 1991.

assessment with a robust qualitative review. We find that stipulated POs are much more common than previously thought, are granted at extremely high rates, and often fail to so much as mention Rule 26(c)'s good cause standard. If there is, as Arthur Miller says, a problem when a judge's entry of a PO is "automatic or cavalier,"³⁵ then our evidence suggests we may have a widespread problem in our courts.

Finally, Part IV steps back to assess the implications of our findings and to situate these findings in larger debates. Most concretely, our evidence torpedoes long-articulated reassurances concerning the exercise of fine-tuned, individualized judicial discretion in the entry of POs. Accordingly, this Article ought to reorient policymaking regarding Rule 26(c), and it ought to reinvigorate reform activity. But, just as clearly, what we uncover has implications far beyond Rule 26(c). Indeed, our findings touch upon, and contribute to, broad and enduring debates, including the role of private civil litigation in general and tort litigation in particular, our wavering commitment to the adversarial (rather than inquisitorial) resolution of disputes, the gulf between the law on the books and the law in action, and lower courts' sometimes surprising disobedience to official commands.

I. THE FORMAL LAW REGARDING PROTECTIVE ORDERS

This Part offers a primer on POs. It unfolds in three steps. First, Subpart A provides a brief overview of POs, including how they differ from their close cousins, orders to seal. Subpart B explains how Rule 26(c) addresses POs, generally. Then Subpart C zeros in on *stipulated* POs. This last Subpart explains why some plaintiffs might agree to keep certain information under wraps, and it also canvasses how courts interpret Rule 26(c)'s good cause standard when the PO motion is the product of party consent.

A. Protective Orders 101

The discovery default is disclosure. A party that obtains information from her adversary through the civil discovery process is presumptively entitled to share that information with others, at her discretion. In the words of the Ninth Circuit: "It is well-established that the fruits of pretrial

³⁵ Miller, *supra* note 32, at 491.

discovery are, in the absence of a court order to the contrary, presumptively public.”³⁶

However, as any litigator well knows, some of the information that passes through parties’ hands in litigation realistically shouldn’t be shared. That is where POs come in. POs allow a party to override the pro-disclosure presumption by prohibiting parties from sharing the information that they unearth.³⁷

In the federal system, Federal Rule of Civil Procedure 26(c) governs this “override” mechanism. It provides that any party or person “from whom discovery is sought may move for a protective order,” and, upon such motion, “[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”³⁸ The resulting order may, among other things, prohibit discovery, condition its scope, prescribe special procedures for its dissemination, or limit who may view discovered or discoverable materials.³⁹ Furthermore, just as a Rule 26(c) order may vary in how the information may be used, an order granted pursuant to Rule 26(c) may be narrow-gauge or capacious; it may restrict the disclosure of just a targeted set of documents, or instead may offer “blanket” (also known as “umbrella”) protection.⁴⁰

³⁶ *San Jose Mercury News, Inc. v. U.S. Dist. Ct.—N. Dist. (San Jose)*, 187 F.3d 1096, 1103 (9th Cir. 1999); *see Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994) (“Absent a protective order, parties to a law suit may disseminate materials obtained during discovery as they see fit.”).

³⁷ *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34–35 (1984) (explaining that “the liberality of pretrial discovery” creates “significant potential for abuse” and that POs vindicate a substantial interest in preserving the secrecy of information that “could be damaging to reputation and privacy”).

³⁸ FED. R. CIV. P. 26(c).

³⁹ *See id.* 26(c)(1)(A)–(H).

⁴⁰ Blanket POs “provide that all assertedly confidential material disclosed (and appropriately identified, usually by stamp) is presumptively protected unless challenged.” DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION § 11.432 (4th ed. 2022). They are often entered “without a particularized showing [of good cause] to support the claim for protection.” *Id.* Thus, blanket POs empower litigants to designate, for themselves, any document or deposition as confidential or sometimes highly confidential. Documents are subject to the terms of the PO unless (or until) the

One additional introductory note about POs relates to their close cousin: orders to seal.⁴¹ POs and orders to seal are very frequently confused (including, as we will see, by litigants and judges).⁴² But the two are different, and they are subject to different standards. An order to seal comes in once the document or testimony, unearthed during discovery, becomes a “judicial record,” typically when it is “filed with the court, or otherwise incorporated or integrated into a district court’s adjudicatory proceedings.”⁴³ The paradigm instance is a document, produced by an opponent during discovery, that is attached as an exhibit to a summary judgment motion. Prior to the attachment process, the document is held privately by litigants and governed only by Rule 26(c); after the attachment process, the document is a “judicial record,” for which restrictions on public disclosure are subject to a higher standard.

Special protections for judicial records kick in because, unlike mere discovery material (for which there is no common law right of access and, correspondingly, no First Amendment protection), there is a common law and constitutionally-protected right to access judicial records—in part because these records necessarily play a role in the adjudicatory process.⁴⁴ These records inform the court’s determination, and, without the ability to scrutinize the ground for the court’s decision, the public cannot assess the decision itself. Given all this, motions to seal face a higher bar.⁴⁵ Indeed, in some

receiving party alleges that the document is not confidential, at which point the court will determine whether there is good cause to protect the file. Blanket orders are contrasted with “particularized protective orders,” which, as the name suggests, cover only the materials specifically listed in the PO. *Id.*

⁴¹ For cogent discussions of these mechanisms’ differences and similarities, see *June Med. Servs., L.L.C. v. Phillips*, 22 F.4th 512, 521 (5th Cir. 2022) and *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305–07 (6th Cir. 2016).

⁴² For the fact that courts and litigants sometimes confuse the two standards, see *Endo*, *supra* note 33, at 1254 & n.15.

⁴³ *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001) (internal citations omitted).

⁴⁴ See *Fair Lab’y Pracs. Assocs. v. Riedel*, 666 F. App’x 209, 211–12 (3d Cir. 2016) (“A strong presumption in favor of public accessibility attaches to judicial records. . . . The presumption of public access is a common law doctrine that predates the Constitution.”).

⁴⁵ *E.g.*, *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010) (“[A] party seeking to seal judicial records must show that compelling

circuits, sealing decisions are governed by a kind of strict scrutiny. As the Fourth Circuit puts it, when it comes to judicial records, “the denial of access must be necessitated by a compelling government interest and narrowly tailored to serve that interest.”⁴⁶ Compared to that strict scrutiny, as Subparts B and C explain, Rule 26(c)’s “good cause” requirement is markedly less demanding.

B. Protective Orders, Generally

As noted above, Rule 26(c) states “[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Yet, although the standard is clear enough, when it comes to the formal interpretation of this standard, there is some surprising inter-circuit variation.⁴⁷

Four circuits—the First, Fifth, Sixth, and Eighth—maintain that “[a] finding of good cause must be based on a particular factual demonstration of potential harm” that would occur if the particular information were to be divulged, “not on conclusory statements.”⁴⁸ In these circuits, mere assertions—that keeping the information under wraps is

reasons supported by specific factual findings outweigh the general history of access and the public policies favoring disclosure.” (quotation marks and alterations omitted)); *In re Neal*, 461 F.3d 1048, 1053 (8th Cir. 2006) (declaring that “only the most compelling reasons can justify non-disclosure of judicial records” (quotation marks omitted)).

⁴⁶ *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 253 (4th Cir. 1988).

⁴⁷ For a thorough analysis of this conflicting circuit precedent, see generally Austin Peters, Jonah Gelbach, David Freeman Engstrom, Nora Freeman Engstrom, Devin Flynn & Aaron Schaffer-Neitz, *Secrecy Roulette* (working paper, 2024).

⁴⁸ *Anderson v. Cryovac*, 805 F.2d 1, 7 (1st Cir. 1986); see also *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 698 (5th Cir. 2017) (holding that Rule 26(c) “contemplates a particular and specific demonstration of fact” (quotation marks omitted)); *Serrano v. Cintas Corp.*, 699 F.3d 884, 901 (6th Cir. 2012) (“This Circuit has endorsed the view that to justify a protective order, one of Rule 26(c)(1)’s enumerated harms ‘must be illustrated with a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.’” (quotation marks omitted)); accord 8A RICHARD L. MARCUS, *FEDERAL PRACTICE & PROCEDURE* (WRIGHT & MILLER) § 2035 (2023 update) (“The courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish good cause.”).

necessary, helpful, or valuable—do not cut it.⁴⁹ Two other circuits take a slightly different approach, explicitly weighing public versus private interests. The Seventh Circuit, for example, holds that “good cause” for secrecy exists when “the property and privacy interests of the litigants” predominate over the public’s interest in the publication of relevant information.⁵⁰ Likewise, the D.C. Circuit has ruled that district courts should “take[] into account,” and balance “all relevant interests,” including those of the litigants, third parties, relevant statutes, and even those protected by the First Amendment.⁵¹ And, in three other circuits—the Third, Ninth, and Eleventh—there is yet another standard. These circuits require something like particularized interest plus, where a movant seeking a PO must make a particularized showing of potential harm *and* demonstrate that the weight of interests favors secrecy.⁵² The upshot: Although there is disagreements as to the particulars, in all circuits—at least when the PO is contested—the law on the books requires some substantial level of scrutiny.

⁴⁹ *E.g.*, *P.R. Med. Emergency Grp., Inc. v. Iglesia Episcopal Puertorriqueña, Inc.*, 318 F.R.D. 224, 233 (D.P.R. 2016) (rejecting a motion for a PO where the movant offered only broad allegations of harm that would befall it absent the order, “devoid of substantiation through facts”).

⁵⁰ *Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999).

⁵¹ *United States v. Microsoft Corp.*, 165 F.3d 952, 960 (D.C. Cir. 1999).

⁵² *See, e.g.*, *Shingara v. Skiles*, 420 F.3d 301, 306 (3d Cir. 2005); *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1210–11 (9th Cir. 2002); *Kleiner v. First Nat’l Bank of Atlanta*, 751 F.2d 1193, 1205-06 (11th Cir. 1985). The law is less certain in the remaining three circuits (the Second, Fourth, and Tenth). For the Second, see *Haidon v. Town of Bloomfield*, 552 F. Supp. 3d 265, 269 (D. Conn. 2021) (describing various approaches to assessing good cause and noting “the Second Circuit has not yet weighed in on the issue”); *Schoolcraft v. City of New York*, 2013 WL 4534913, at *3 (S.D.N.Y. 2013) (“There is a split within the district courts of this Circuit as to the showing necessary to establish that good cause exists.”). For the Fourth, see *Ardrey v. United Parcel Serv.*, 798 F.2d 679, 682 (4th Cir. 1986) (noting that district courts enjoy a “wide latitude in controlling discovery”). And, for the Tenth, see *Rohrbough v. Harris*, 549 F.3d 1313, 1321 (10th Cir. 2019) (asserting that the 26(c) good cause standard is “highly flexible” (quoting *United States v. Microsoft Corp.*, 165 F.3d 952, 959 (D.C. Cir. 1999))).

C. Stipulated Protective Orders

The above assumes that the motion for a PO is, and will be, contested: that one litigant will seek the motion for a PO and the other litigant will oppose that motion. Yet, it turns out, motions for POs often are not contested. As we explain in Part III.B, our data reveal that motions for POs are commonly stipulated (sometimes called “unopposed,” “joint,” or “jointly filed”). In fact, we find that motions for POs are stipulated nearly half of the time.

Given that it is typically defendants who are eager to keep unflattering information out of the public eye, it might, initially, seem odd that so many PO motions are jointly filed. But, anecdotal evidence indicates that plaintiffs’ lawyers often make the strategic decision, essentially, to go along to get along.⁵³ Plaintiffs’ lawyers, it is said, recognize that, without a PO, the defendant is apt to put the brakes on discovery and to be less forthcoming in depositions, when responding to interrogatories, and when divulging documents—and, in the scheme of things, the PO battle isn’t the battle the lawyer wants to fight.⁵⁴ As one plaintiffs’ lawyer explained, the lawyer “may be so concerned with gaining access to the key documents she needs to present her client’s case that she . . . may decide it isn’t worth slowing down the litigation to fight.”⁵⁵ Or, as Lance Cooper, the lawyer for Ken and Beth Melton put it: “plaintiffs’ lawyers want to try to get the documents as soon as possible to prosecute their case.”⁵⁶ A

⁵³ S. REP. NO. 110-439, at 9 (2008) (Conf. Rep) (testimony of Leslie Bailey).

⁵⁴ As Professor Howard Erichson has observed: “With a protective order in place, a responding party is more willing to turn over information rather than asserting and litigating every plausible relevance objection and privilege objection.” Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI-KENT L. REV 357, 359 (2006); see also FRANCIS H. HARE, JAMES L. GILBERT & WILLIAM H. REMINE, *CONFIDENTIALITY ORDERS* 2 (1988) (“It is commonplace for defense counsel to offer to furnish the requested documents without opposition, if the plaintiff will stipulate to an order.”); Miller, *supra* note 35, at 492 n.322 (suggesting that plaintiffs agree to POs “to facilitate [their] own access to discovery materials”).

⁵⁵ S. REP. NO. 110-439, at 9 (2008) (Conf. Rep) (testimony of Leslie Bailey). There is, then, yet another question which is how broad the PO is to be. For a discussion of various options see *supra* note 40.

⁵⁶ Cooper Interview, *supra* note 5.

PO is thought to promote the prompt disclosure of documents—and so motions for POs are often jointly filed.

Even when the parties agree to the terms of a PO, however, that agreement is not judicially enforceable on its own. Even if the motion for a PO is jointly filed, the court must still enter the PO under Rule 26(c). But pursuant to what standard? Must a trial court still rigorously assess good cause, as it would if the Rule 26(c) motion were contested? In answering this question, appellate courts again differ on the particulars.⁵⁷

In two circuits, party agreement temporarily obviates the good cause showing.⁵⁸ Taking this tack, the Ninth Circuit has explained: “While courts generally make a finding of good cause before issuing a protective order, a court need not do so where (as here) the parties stipulate to such an order.”⁵⁹ Similarly, the Eleventh Circuit has held that stipulated POs may be entered based on agreement alone.⁶⁰ However, both Circuits hedge, explaining that, because the parties “never established good cause for protection in the first place,” any “party seeking the stipulated order’s protection must satisfy Rule 26(c)’s good cause standard” if secrecy is later challenged.⁶¹

⁵⁷ For a cogent summary of this debate, see generally Brief for Amici Curiae Civil Procedure Law Professors in Support of Petitioners, *Doe 7 v. Chiquita Brands Int’l, Inc.*, 142 S. Ct. 312 (2021) (No. 20-1599) [hereinafter Civil Procedure Scholar Br.].

⁵⁸ The Fifth Circuit may well agree that stipulation eliminates the need for a good cause showing but has never said so explicitly. *Cf. Binh Hoa Le v. Exeter Finance Corp.*, 990 F.3d 410, 418–20 (5th Cir. 2021) (faulting a district court for entering a sealing order, but not a PO, based solely on the parties’ stipulation).

⁵⁹ *In re Roman Catholic Archbishop of Portland in Or.*, 661 F.3d 417, 424 (9th Cir. 2011); *see also Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (explaining that parties did not have “to make a ‘good cause’ showing” when entering “a stipulated blanket [protective] order”).

⁶⁰ *In re Chiquita Brands Int’l, Inc.*, 965 F.3d 1238, 1249–50 (11th Cir. 2020) (accepting the district court’s practice of accepting stipulated POs without finding good cause); *see also Chicago Trib. Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1307 (11th Cir. 2001) (observing that the stipulation process “postpones the necessary showing of ‘good cause’ required for entry of a protective order until the confidential designation is challenged”).

⁶¹ *In re Chiquita*, 661 F.3d at 1249–50.

Operationalizing this standard, one district court from Florida (answerable to the Eleventh Circuit) has explained: “Parties have the freedom and flexibility to agree on the terms of stipulated protective orders designed to protect ‘confidential’ and ‘highly confidential’ material. . . . [C]ourts typically enter the proposed stipulated protective orders jointly submitted by the parties.”⁶² Likewise, a district court in California (hailing from the Ninth Circuit) has recently declared: “Although courts generally make a finding of good cause prior to issuing a protective order, a court need not do so if the parties stipulate to entry of a protective order.”⁶³

The Eleventh and Ninth Circuits, however, appear to be in the minority. In three circuits, the law is clear that trial court judges are duty-bound to subject even stipulated POs to quite careful scrutiny.⁶⁴ Thus, the Seventh Circuit has explained that, just as the trial court has a nondelegable duty to conduct an “independent inquiry” when assessing the fairness and adequacy of a class action settlement pursuant to Rule 23(e) (even when the parties agree to settle), “[i]n deciding whether to issue a stipulated protective order, the district court must independently determine if ‘good cause’ exists.”⁶⁵ Party agreement, the Seventh Circuit has emphasized, simply does not obviate the need for careful review. Similar to the Seventh, the Sixth Circuit has observed that, even when the parties agree to a PO’s terms, trial courts’ “discretion [to enter that order] is limited by the careful

⁶² *Malibu Media, LLC v. Doe*, 2014 WL 1292692, at *3 (M.D. Fla. 2014) (quotation marks and alterations omitted).

⁶³ *In re Facebook, Inc. Consumer Priv. User Profile Litig.*, 2021 WL 3209711, at *3 (N.D. Cal. 2021); *see also* *Ledford v. Idaho Dep’t of Juv. Corr.*, 2013 WL 5798682, at *1 (D. Idaho 2013) (“If the parties stipulate to a protective order—as they did here—the district court may enter a protective order without first finding good cause.”).

⁶⁴ In some circuits, no case clearly establishes a governing standard for stipulated POs. *See generally* *Peters et al.*, *supra* note 47 (expounding on relevant standards); *cf.* *Minter v. Wells Fargo Bank, N.A.*, 2010 WL 5418910, at *2 (D. Md. 2010) (“Neither this Court nor the Fourth Circuit has explicitly defined the parameters of the initial ‘good faith’ review required pursuant to a stipulated confidentiality order . . .”).

⁶⁵ *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994). Arthur Miller has also analogized the situation to the situation a court faces when reviewing a class action settlement. *See infra* note 75 and accompanying text.

dictates of Fed. R. Civ. P. 26.”⁶⁶ A trial court, the Sixth Circuit insists, simply “cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public.”⁶⁷ Thus, says the Sixth Circuit: “A district court abuses its discretion,” where it grants an uncontested motion for a PO and “makes neither factual findings nor legal arguments supporting the need for the order.”⁶⁸ Likewise, the Third Circuit has indicated that, even when both parties consent to a PO’s entry, Rule 26(c) still demands “an independent determination of ‘good cause.’”⁶⁹

Employing this stricter standard, a district court in the Seventh Circuit has explained: “[E]ven if the parties stipulate to the terms of a protective order . . . the parties must satisfy the good cause requirement contained in Rule 26(c)(1) Since the Court is the primary representative of the public interest in judicial proceedings, it must review requests for stipulated POs for good cause without acting as a rubber-stamp.”⁷⁰ Similarly, a district court in Pennsylvania (answerable to the Third Circuit) has explained: “Stipulated protective orders must still meet the requirements of Rule 26(c), which requires demonstrating the existence of confidential information and good cause as to why such information should not be disclosed.”⁷¹

Other influential voices have also come down in favor of this harder-edged position. Take the Federal Judicial Center. It has clearly stated that, even when the parties file a joint motion for a PO, that motion can only be granted upon

⁶⁶ *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1996).

⁶⁷ *Id.*

⁶⁸ *In re Nat’l Prescription Opiate Litig.*, 927 F.3d 919, 929 (6th Cir. 2019).

⁶⁹ *Littlejohn v. Bic Corp.*, 851 F.2d 673, 680 n.15 (3d Cir. 1988); *accord Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994) (declaring it “[d]isturbing[]” that “some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders” and further advising “whether an order of confidentiality is granted at the discovery stage or any other stage of litigation . . . good cause must be demonstrated to justify the order”).

⁷⁰ *Elder v. Bimbo Bakeries USA, Inc.*, 2022 WL 3443766, at *2 (S.D. Ill. 2022).

⁷¹ *Sprinturf, Inc. v. Sw. Recreational Indus., Inc.*, 216 F.R.D. 320, 323 (E.D. Pa. 2003).

an independent judicial determination “that the order is supported by good cause.”⁷² The canonical Wright & Miller treatise likewise advises that, even as the product of party stipulation, POs “are not authorized simply on the requesting parties’ say-so. . . . Even when the parties consent, the court may not enter an order unless Rule 26(c) is satisfied.”⁷³

Leading scholars, too, resist the notion that party agreement somehow substitutes for good cause under Rule 26(c). “Judges,” Arthur Miller explains, “must guard against any notion that the issuance of protective orders is routine, let alone automatic, even when the application is supported by all the parties.”⁷⁴ Miller elaborates: “When all the parties support the protective order . . . the court is faced with an essentially non-adversarial situation” similar to the fiduciary burden that federal judges bear when independently “evaluating a proposed class action settlement under Federal Rule 23(e).”⁷⁵ Professor Howard Erichson concurs. According to Erichson, “the parties’ say-so alone, without some showing of a need for confidentiality, does not constitute good cause for the granting of a protective order.”⁷⁶ Or, as Laurie Doré says:

Rule 26(c) authorizes a district court to issue a protective order only for “good cause shown.” It does not carve out any exception, temporary or otherwise, for stipulated orders. Even if the parties agree to the terms of a protective order, then, they must still demonstrate good cause to justify its issuance.⁷⁷

⁷² ROBERT TIMOTHY REAGAN, FEDERAL JUDICIAL CENTER, CONFIDENTIAL DISCOVERY: A POCKET GUIDE ON PROTECTIVE ORDERS 6 (2012).

⁷³ MARCUS, *supra* note 48, at § 2035.

⁷⁴ Miller, *supra* note 35, at 492. Miller further advised that this “careful[]” review must be “tailor[ed]” to the facts of each case and “should take account of a kaleidoscope of factors, including the likely outcome on the merits, the value or importance of commercial or personal data, the identity of the parties and any apparent outside interests, [and] the existence of any threat to health and safety.” *Id.* at 492–93.

⁷⁵ *Id.* at 492, n.322.

⁷⁶ Erichson, *supra* note 54, at 373.

⁷⁷ Laurie Kratyk Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV.

Lastly, there is something like a legislative history argument that further bolsters the position of the many courts, institutions, and academics who insist that party agreement does not constitute good cause under Rule 26(c). Namely, in the mid-1990s, rulemakers considered whether to amend Rule 26(c) to say that a PO could be issued “for good cause shown *or* on stipulation of the parties.”⁷⁸ The amendment was controversial, in part because it was understood at the time that, if the amendment passed, it would have, “worsened the court secrecy problem”—and, ultimately, the amendment was defeated.⁷⁹ Rejecting the amendment by voice vote, the Judicial Conference “express[ed] concern that the proposed rule would change existing practice by allowing entry of protective orders without a showing of good cause.”⁸⁰

Under the canon of statutory construction known as the “rejected proposal rule,” non-adopted amendments can reflect what a statute is not.⁸¹ So, the fact that the Judicial Conference

283, 342 (1999); *see also* Civil Procedure Scholar Br., *supra* note 57, at 14 (“There is no basis in the Federal Rules for a court to approve a stipulated protective order without conducting an independent assessment of good cause. To the contrary, though parties often will stipulate to the entry of a discovery protective order, it is the court that ultimately must enter the order, and the court may do so only in compliance with Rule 26(c)’s good cause requirement.” (quotation marks omitted)); Endo, *supra* note 33, at 1259 (“After the parties propose a stipulated protective order, the court must determine if there is good cause to issue the order.”).

⁷⁸ Memorandum of Comm. on Rules of Practice and Procedure to Comm. on Rules of Practice and Procedure 18 (June 2, 1995), https://www.uscourts.gov/sites/default/files/fr_import/CV6-1995.pdf [hereinafter Letter of June 2, 1995] (emphasis added).

⁷⁹ Saundra Torry, *Judges Reject Record-Secrecy Rule*, WASH. POST, Mar. 15, 1995, at A8, <https://www.washingtonpost.com/archive/politics/1995/03/15/judges-reject-record-secrecy-rule/2ec968fc-4f37-40ba-b430-2fc1054a0d4e/>.

⁸⁰ Letter of June 2, 1995, *supra* note 78, at 1–2. *See also* Linda Greenhouse, *Judicial Conference Rejects More Secrecy in Civil Court*, N.Y. TIMES, Mar. 15, 1995, at B9, <https://www.nytimes.com/1995/03/15/us/judicial-conference-rejects-more-secrecy-in-civil-court.html>.

⁸¹ *See* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 65 (2009) (explaining that a rejected amendment “provides fairly persuasive evidence that the content of the amendment was not the legislative intent”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000) (finding that Congress’s decision to reject “bills that would have granted the FDA [] jurisdiction” over

expressly considered and rejected an amendment to Rule 26(c) that would have established that party agreement could stand in for good cause supplies some ammunition to those who believe that, when it comes to POs, the parties' say-so doesn't suffice.⁸²

II. REFORM HISTORY: PERENNIAL PROPOSALS AND DEFICIENT DATA

This Part canvasses past and present debates regarding POs—as well as the meager empirical evidence that has informed the discussion. Subpart A explains that POs have long been the subject of reform efforts, while Subpart B catalogs prominent pro and con arguments. Then, Subpart C traces prior empirical studies, which have been well-intentioned but limited. Given this deficient data, it is no surprise that, to this point, debates addressing possible reforms to Rule 26(c) have backstopped on anecdote and hunches, rather than fact.

A. Past Efforts to Limit Expansive Protective Orders

The modern debate over litigation secrecy—and over the value of, and standards for issuing, POs—dates back to the late 1980s, when the premier plaintiff-side organization, the American Tort Law Association (ATLA), now renamed the American Association for Justice (AAJ), put litigation secrecy high on its organizational agenda.⁸³ In this initial push for

tobacco clarifies that the FDA does not have that jurisdiction). Like many statutory canons, this theory of interpretation is not iron-clad. See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 71, 94–108 (1988) (describing this rule and critiquing it); *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 427 (1967) (refusing to draw an inference as to intent from a rejected amendment).

⁸² Interestingly, in *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 485 & n.15 (3d Cir. 1995), the court rejected a reading of Rule 26(c) that would have been “tantamount to permitting the parties to control the use of protective orders,” and, in so doing, drew on this rejected amendment.

⁸³ *ATLA Fights Secrecy in Litigation*, ATLA ADVOC., Sept. 1989 at 1 (discussing a resolution that “discourage[d] attorneys from entering into secrecy agreements and . . . encourage[d] courts not to enter into or enforce secrecy agreements without good cause”). For a discussion of ATLA's early efforts, see Miller, *supra* note 32, at 442–43; Gail Diane Cox, *Yearly Meeting: Sunshine in San Diego for ATLA*, NAT'L L.J., July 30, 1990, at 3; Bill Wagner, *Secrecy Betrays Justice: ATLA's*

greater transparency, ATLA—pointing to a few high-profile scandals—insisted that the information uncovered in litigation sometimes pertained to serious public health hazards and that, in such cases, courts that rubber-stamped expansive POs were complicit in perpetuating consumer harm.⁸⁴

Responding to ATLA’s concerns, in 1989, Congress called to order its first hearing on the matter, followed soon after by the introduction of a federal “Sunshine in Litigation” bill on the House floor.⁸⁵ That initial bill sought to allow parties to share evidence pertaining to public health and safety with regulators even if that information was subject to a PO.⁸⁶ Yet, even though the bill was quite narrow, opposition to it was broad. Rallied, in part, by Alfred Cortese, a hard boiled corporate lobbyist, and buoyed by the prolific writing of Professor Arthur Miller, who was then at Harvard, corporate interests parried back “pro-sunshine” arguments. Cortese, in all this, took quite a crabbed view of court transparency: “What is the public right to observe the legal system? What is it? . . . The right of the public to observe the court system means that they have a right to show up in court when there is

President’s Opinion, NAT’L L.J., July 24, 1989, at 1, 4 (recounting examples of POs harming public health and describing ATLA’s efforts to “encourage[] attorneys to resist” POs).

⁸⁴ Miller, *supra* note 32, at 442 (“According to ATLA, protective orders . . . are being used with increasing frequency to hide deadly product defects or other ‘public hazards’ from the public.”); Lawyers for Civil Justice and the National Chamber Litigation Center, Comments to the Committee on Rules of Practice and Procedure on the Need for Amendment of Federal Rule of Civil Procedure 26(c) (Apr. 18, 1994), at 3, available at https://www.uscourts.gov/sites/default/files/fr_import/CV1994-04.pdf [hereinafter Comments for LCJ] (explaining that early efforts were based on the claim “that information produced in litigation revealed serious defects in consumer products or public exposures to toxic materials” and that the courts that issued these expansive POs were “unwitting co-conspirators” in perpetuating harm); see also Russ M. Herman, *Secrecy, Discovery Abuse Breed Unethical Conduct*, NAT’L L.J. Aug. 1, 1988, at 18-21 (voicing early opposition to widespread use of POs).

Others, however, charged that the PO reform movement wasn’t really motivated by the public interest and was, instead, “a camouflaged effort to get marketable information.” See Tripp Baltz, *Shhhh Confidentiality in the Courts*, CHI. LAW., Jan. 1991, at 50–51.

⁸⁵ Comments for LCJ, *supra* note 84, at 5.

⁸⁶ Spector et al., *supra* note 1.

a public trial. That is the extent of the public's right to observe.”⁸⁷

In the ensuing decades, although a few in Congress (most notably, the indefatigable Senator Herb Kohl of Wisconsin) continued to champion reform, the tug-of-war between sunlight and secrecy reached something of a stalemate.⁸⁸ Thus, in a slow-motion Groundhog Day, between the late 1980s and the late 2010s, every few years, a version of a Sunshine in Litigation Act popped up in the House or Senate. Every few years, the Act kicked off heated rounds of discussion. And, every few years, the Act was defeated.⁸⁹

State efforts have mostly followed the same trajectory. At roughly the same time as the first Sunshine in Litigation Act was introduced in Congress, a wave of similar reforms made their way through state legislatures. In fact, between 1990 and 1994, state legislators introduced some ninety-three discrete proposals to limit POs.⁹⁰ Most of these bills died quick deaths.⁹¹ Yet, a smattering squeaked through.

In one of the first reforms, promulgated in 1990, the Texas Rules Committee revised Rule 76a to make it far more

⁸⁷ Michelle Conlin, Dan Levine & Lisa Girion, *Why Big Business Can Count on Courts to Keep its Deadly Secrets*, REUTERS (Dec. 19, 2019), <https://www.reuters.com/investigates/special-report/usa-courts-secrecy-lobbyist/>. For more on the defense bar's efforts, see Baltz, *supra* note 84, at 51 (noting that the president of the International Association of Defense Counsel “declared that one goal during his term would be to preserve civil defendants’ rights to protective orders”).

⁸⁸ Corporate lawyers referred to the Sunshine in Litigation Act as the “perennial Kohl bill.” *Id.*

⁸⁹ Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439, 441 (2006). More recently, in 2019, during a congressional hearing on court transparency, Rep. Jerrold Nadler indicated he planned to reintroduce the Sunshine in Litigation Act, although it does not appear that such an Act was introduced. *See The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts, Hearing Before the H. Subcomm. on Courts, Intellectual Property, and the Internet of the Comm. on the Judiciary*, 116th Cong. 5 (2019) (Rep. Jerrold Nadler).

⁹⁰ Comments for LCJ, *supra* note 84, at 6. For a comprehensive compilation, see Miller, *supra* note 35, 429–31, n.7.

⁹¹ Comments for LCJ, *supra* note 84, at 6 (“[N]otwithstanding the broad media coverage and legislative fervor used to promote such legislation and rules, only three such restrictive proposals out of 93 were ever adopted.”).

difficult for courts to issue POs or to seal documents pertaining to “public health and safety, or the administration of public office or the operation of government.”⁹² The same year, Florida enacted the Sunshine State’s version of the Sunshine in Litigation Act. It forbids POs that conceal “a public hazard or any information concerning a public hazard” or “information which may be useful to . . . the public in protecting themselves from injury which may result from public hazard.”⁹³ Around the same time, Virginia enacted a statute specifying that, in lawsuits involving personal injury or wrongful death, no PO shall “prohibit an attorney from voluntarily sharing such materials or information with an attorney involved in a similar or related matter,” subject to a few restrictions.⁹⁴ In 1994, Washington enacted a provision subjecting POs to a balancing test that considers the risk of public hazards.⁹⁵ And in 1995, Louisiana joined the budding movement, restricting the entry of POs and orders to seal “if

⁹² See TEX. R. CIV. P. 76a (allowing courts to issue protective and sealing orders covering documents pertaining to “general public health and safety” only after determining that private interests outweigh public health risks and that the order is the least restrictive means of protecting private interests). For further discussion, see generally Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991). In enacting the Rule, reformers overcame stiff opposition from business interests. E.g., David E. Chamberlain, *Proposed Rule 76(a): An Elaborate Time-Consuming, Cumbersome Procedure*, 53 TEX. B.J. 348 (1990) (insisting that 76(a)’s enactment would impair settlement, delay the resolution of conflict, and imperil private information); Letter from Jack C. Goldstein to Charles Herring, Jr. (Dec. 26, 1989), in PROPOSED RULE 76A AND COMPANION AMENDMENTS TO RULE 166B(5) 170, 170 (1990) (threatening that, if Texas courts made it harder to access POs, “legitimate businesses . . . [would] locate outside Texas” and that “thieves and pirates [would] look to Texas for ‘political asylum’ from traditional principles of business ethics and morals”).

⁹³ FLA. STAT. ANN. § 69.081. A “public hazard” is defined as “an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury.” *Id.* § 69.081(2). For more on the Act’s contemporary application, see *Goodyear Tire & Rubber Co. v. Schalmo*, 987 So. 2d 142, 145 (Fla. Dist. Ct. App. 2008).

⁹⁴ VA. CODE ANN. § 8.01-420(A). For more on the law’s 1989 enactment, see Alan B. Morrison, *Protective Orders, Plaintiffs, Defendants and the Public Interest in Disclosure: Where Does the Balance Lie?*, 24 U. RICH. L. REV. 109, 122–23 (1989).

⁹⁵ WASH. REV. CODE ANN. § 4.24.611.

the information or material sought to be protected relates to a public hazard.”⁹⁶

After a very long hiatus—and catalyzed in part by the #MeToo movement—transparency efforts may be seeing a tentative resurgence. In 2022, Washington, D.C. Councilmember Mary Cheh introduced the Sunshine in Litigation Act. The legislation would require D.C. judges to consider public health and safety before granting a PO or sealing court records. Cheh cited the opioid epidemic as an impetus for her bill, noting, “[c]ourt-sanctioned secrecy in such cases can be a matter of life and death.”⁹⁷ Also in 2022, California state Senator Connie Leyva introduced the “Public Right to Know Act.”⁹⁸ The bill would create a presumption against court orders concealing information about defective products or environmental hazards unless the court finds that the public interest in disclosure is outweighed by a substantial need for secrecy.⁹⁹ Yet, like so many predecessors, both bills were defeated.¹⁰⁰

B. Political and Policy Debates Over Protective Orders

As suggested above, thirty years’ worth of reform efforts have generated heated arguments for and against change. This is so despite the modesty of many of the proposals. Reformers have never sought (and, indeed, virtually no one has ever advocated) an outright ban on POs.

⁹⁶ LA C.C.P. ART. 1426(C). The provision also prevents courts from issuing POs where the information *may* be useful to members of the public in protecting themselves from injury that might result from a public hazard. *Id.* The provision, however, has less bite than it may first appear. For discussion, see Dustin B. Benham, *Tangled Incentives: Proportionality and the Market for Reputation Harm*, 90 TEMP. L. REV. 427, 450–52 (2018); Roma Perez, *Two Steps Forward, Two Steps Back: Lessons to Be Learned from How Florida’s Initiatives to Curtail Confidentiality in Litigation Have Missed Their Mark*, 10 FLA. COASTAL L. REV. 163, 218 (2009).

⁹⁷ Sally Greenberg, *Sunshine in Litigation Act introduced in the District of Columbia*, NAT’L CONSUMERS LEAGUE (Nov. 2, 2022), <https://nclnet.org/dc-sunshine-in-litigation-act/>.

⁹⁸ SB-1149, 2021-2022., Cal. Leg. Reg. Sess. (2022).

⁹⁹ *Id.*

¹⁰⁰ The California Senate passed the legislation, but the effort died in the Assembly. *Id.* A public hearing was held on the D.C. legislation in January 2023, but the bill progressed no further. Greenberg, *supra* note 97.

Everyone seems to agree that trade secrets and the protection of personal privacy justify POs in some circumstances.¹⁰¹ Instead, the fight over POs has been protracted and bitter. But it's been waged on markedly narrow terrain. Reformers have tended to focus on POs (regardless of whether they are the product of party contestation or consent) that conceal health and safety hazards. And reformers have sought, not to outlaw such POs, but merely to subject those—and only those—to exacting judicial scrutiny.¹⁰² Opponents have tended to resist these reforms. Below, we rehearse the two sides' now-familiar positions.

1. Reformers' Arguments in Favor of Greater Transparency

Arguments in favor of greater transparency tend to focus on harm, cost, and institutional legitimacy. First, reformers highlight harm—and, in particular, POs' well-documented role in concealing and thus perpetuating catastrophic injury. POs, in reformers' telling, prevent consumers and regulators from learning of defective products and allow those products to circulate unabated.¹⁰³ They cause people to associate with abusers.¹⁰⁴ And they make it harder for litigants to hold bad actors, including violent police

¹⁰¹ Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 487 (1991) (explaining that reformers “accept broad confidentiality interests in commercial litigation and to protect personal privacy”).

¹⁰² *E.g.*, S. REP. NO. 110-439 110th Cong., 2d Sess. 10 (2008) (explaining that the Sunshine in Litigation Act “merely requires an additional step—consideration of public health and safety”). *Sunshine in Litigation Act of 2008: Hearings on H.R. 5884 Before the H. Comm. on the Judiciary, Subcomm. On Commercial and Administrative Law*, 110th Cong. 2 (2008) (statement of Rep. Linda T. Sanchez) (“H.R. 5884 is modest in its scope. Its key provision would require courts to do what some Federal Judges already do: consider the public’s interest in health and safety before entering certain confidentiality orders that would conceal information from the public . . .”).

¹⁰³ Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781, 1785–86 (2014); Richard Zitrin, *The Judicial Function: Justice between the Parties, or a Broader Public Interest*, 32 HOFSTRA L. REV. 1565, 1565–66 (2004); *see also* Egilman et al., *supra* note 9, at 295 (collecting pharmaceutical examples).

¹⁰⁴ *See* Johnson & Gabler, *supra* note 21 (explaining that information about abusive catholic priests was hidden behind a “broad protective order”).

departments¹⁰⁵ and discriminatory employers,¹⁰⁶ to account. As one reformer summarized in an early Senate hearing: “Men, women, and children in this country are unwittingly buying and using dangerous products, inhaling and drinking toxic pollutants, [and] being treated by incompetent doctors . . . because of unnecessary secrecy in the courts.”¹⁰⁷

Second, and relatedly, some argue that reform is needed because the status quo is not working. Left to their own devices, judges are not adequately safeguarding the public interest. POs, reformers insist, have become commonplace; they are “routinely requested in virtually every product liability, automobile design, toxic tort, environmental, medical malpractice, pharmaceutical, and consumer fraud case in the country.”¹⁰⁸ And, rather than scrutinizing POs for good cause, judges too often simply offer a stamp of approval on the parties’ say-so. As one commentator put it: “[S]tipulated protective orders are often approved pro-forma by overburdened courts anxious to avoid time consuming inquiries into discovery disputes.”¹⁰⁹ As another explained in

¹⁰⁵ See Hanlock, *supra* note 22, at 1558–59 (concluding that POs prevent plaintiffs’ firms from building “a database of problem officers or collect[ing] misconduct and training materials that show systemic disciplinary failures”).

¹⁰⁶ See Jamillah Bowman Williams, *Diversity as a Trade Secret*, 107 GEO. L.J. 1685, 1727 (2019) (arguing that POs may soon be used to safeguard companies’ diversity data, “making it impossible for other potential litigants to determine whether they also have a related [employment discrimination] claim” and derailing “systemic discrimination claims”).

¹⁰⁷ *Examining the Use of Secrecy and Confidentiality of Documents by Courts in Civil Litigation*, Hearing Before the S. Comm. on the Judiciary, Subcomm. on Courts and Administrative Practice, 101st Cong. 66 (1990) (statement of Arthur H. Bryant of Trial Lawyers for Public Justice) [hereinafter Bryant Testimony].

¹⁰⁸ *Id.*; see also Lori E. Andrus, *Fighting Protective and Secrecy Orders: Sunshine is the Best Disinfectant*, PLAINTIFF MAG. (2014), at 1, <https://plaintiffmagazine.com/recent-issues/item/fighting-protective-and-secrecy-orders-2> (“Protective orders have become routine, particularly in complex cases.”).

¹⁰⁹ Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938-2006*, 78 U. Colo. L. Rev. 817, 826 (2007); see also Andrus, *supra* note 108, at 1 (asserting that “with courts overburdened and understaffed, judges are all too often content to sign off on blanket protective orders without any showing of good cause”); Dustin B. Benham, *Foundational and Contemporary Court Confidentiality*, 86 MO. L. REV. 211, 222 (2021)

Senate testimony when asked what factors judges consider when deciding whether to issue a PO: “I think the truth is that judges rarely weigh these orders at all.”¹¹⁰ Instead, “what happens is that the parties agree to them and the judges, faced with the parties agreeing and no one objecting, simply sign off.”¹¹¹ Too often, adds Judge Joe Anderson of South Carolina, he and his colleagues merely “rubber-stamp confidentiality orders presented to them, sometimes altogether ignoring or merely giving lip service to the body of law and existing court rules that are supposed to apply.”¹¹²

Third, unbridled POs, reformers allege, raise the cost of litigation. POs stymie plaintiff cooperation across actions involving overlapping issues or defendants, requiring each plaintiffs’ lawyer to build cases in isolation and from scratch.¹¹³ To quote a lawyer for Public Citizen’s Litigation Group, “[e]ssentially [a PO] makes every plaintiff’s lawyer

(“The parties often agree to protective orders supported by thin or non-existent proof of good cause. Courts enter them because the parties have agreed.”); Conlin et al., *supra* note 87 (stating that the entry of a PO is a “pro forma exercise[]”).

¹¹⁰ Bryant Testimony, *supra* note 107, at 162.

¹¹¹ *Id.*; see also *Federal Sunshine in Litigation Act and Federal Court Settlements Sunshine Act, Hearings on H.R. 2017 and H.R. 3803 Before the H. Comm. on the Judiciary, Subcomm. on Intellectual Property and Judicial Administration*, 102nd Cong. 85 (1992) (statement of Rep. William J. Hughes) (“Unfortunately, I have the perception, as do a number of my colleagues, that the courts are, just as a matter of course, approving secrecy orders when submitted without making the independent determination as to whether they serve the public good.”).

¹¹² Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: The Case against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 715 (2004). In the article, Judge Anderson quoted another judge who confessed, in a moment of candor, that she “would sign an order that stipulated that the moon was made out of cheese if the lawyers came in and asked me to sign it.” *Id.* at 729 (quoting Judge Judith McConnell of the San Diego, California, Superior Court).

¹¹³ See, e.g., Francis H. Hare Jr., James L. Gilbert & Matthew S. Ellenberger, *Confidentiality Orders in Products Liability Cases*, 13 AM. J. TRIAL ADVOC. 597, 602 (1989) (“By prohibiting the disclosure of information gleaned from discovery, a confidentiality order forces each attorney to develop his client’s case in a vacuum.”). Plaintiffs can always attempt to gain access to prior discovery by intervening to modify POs. But there is no guarantee that courts will grant their modification request, and, even if the request is granted, there is no guarantee that discovery will be forthcoming. For discussion, see Benham, *supra* note 7, at 2211–12.

reinvent the wheel in every case.”¹¹⁴ This silo-ing can, in turn, impair litigation efficiency and may systematically slant (or, some suggest, further slant) the litigation playing field toward well-heeled players.¹¹⁵ Not merely theoretical, these dynamics were on vivid display in early tobacco litigation. In early battles, cigarette company disclosures were subject to expansive POs, and such orders prevented plaintiffs’ counsel (who were typically cash strapped “lone wolf” solo practitioners) from sharing discovery with one another.¹¹⁶ Unable to divulge what they learned, plaintiffs’ lawyers battling the cigarette companies were condemned to build each case alone and from scratch, which dramatically—but asymmetrically—increased the cost and burden of litigation.¹¹⁷

Fourth, reformers argue that overbroad POs inhibit transparent judicial decision-making—and that transparency

¹¹⁴ Paul M. Barrett, *Protective Orders Come Under Attack—Plaintiffs Get Judges to Open Court Files*, WALL ST. J., Aug. 31, 1988 (quoting C.F. Hitchcock).

¹¹⁵ See Erichson, *supra* note 54, at 367 (explaining that, when it is not stymied by a PO, “[c]oordination among counsel in related cases not only promotes litigation efficiency, but also enhances the quality of legal work and tends to level the field in asymmetrical multiparty litigation”); see also HARE, ET AL., *supra* note 54, at 15–19 (similar). For the classic account of why litigation may be slanted toward certain “repeat” players, see generally Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974).

¹¹⁶ Nora Freeman Engstrom & Robert L. Rabin, *Pursuing the Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 292, 298 (2021).

¹¹⁷ See Marc Z. Edell, *Cigarette Litigation: The Second Wave*, 22 TORT & INS. L.J. 90, 91 (1986) (“[P]rotective orders, obtained by the defendants in almost every instance, prohibited the dissemination of discovery to either the public or to other lawyers who were involved in similar litigation. This required plaintiffs’ lawyers to initiate discovery anew in each case.”); Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 860 (1992) (explaining that, in the early tobacco litigation, POs prevented plaintiffs’ lawyers from “collaborat[ing] or realiz[ing] economies of work-product”); Karen E. Meade, Commentary, *Breaking Through the Tobacco Industry’s Smoke Screen*, 17 J. LEGAL MED. 113, 119 (1996) (explaining that, in the first wave of the tobacco litigation, cigarette companies imposed massive costs on their under-resourced adversaries by obtaining POs “to prevent the release of information to other potential plaintiffs”—and asserting that, due to these POs, in each new case, “new discovery had to be undertaken”).

is a good unto itself, important to the promotion of judicial accountability and essential to democratic processes.¹¹⁸ As Senator Herb Kohl of Wisconsin once put it, “the courts are charged with doing the public’s business and pursuing the public interest—not just the interests of individual litigants before the courts.”¹¹⁹ As vindicators of the public interest, courts should meaningfully interrogate all efforts to restrict public access—including not just judicial procedures but also the fruits of discovery processes.¹²⁰

Fifth and finally, in what is perhaps less an argument than an anti-argument, reformers cast doubt on critics’ claims that the reforms they champion, if enacted, would cause the sky to fall. An example: As we detail below, critics warn that, if reforms were to be enacted, limits on POs would intensify acrimony, complicate and prolong the discovery process, and ultimately clog courts.¹²¹ Reformers do not buy these or other dark predictions. Illustrating: Legendary jurist Abner Mikva

¹¹⁸ See Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure* at 75, 162 U. PA. L. REV. 1793, 1835–36 (2014) (explaining that courts serve—and must serve—“as a site of democratic practices”).

¹¹⁹ *The Sunshine in Litigation Act, Hearing on S.1404 Before the S. Comm. on the Judiciary, Subcomm. on Courts and Administrative Practice*, 103rd Cong. 5 (1994) (statement of Sen. Herbert Kohl); see also Bryant Testimony, *supra* note 107, at 56 (“I think the bottom-line question here is whether the courts are designed simply to resolve private disputes without regard for their effect on the public, or whether the public is the one that not only funds the system, but should determine what happens in it.”); *The Sunshine in Litigation Act, Hearing on S.1404 Before the S. Comm. on the Judiciary, Subcomm. on Courts and Administrative Practice*, 103rd Cong. 40–41 (1994) (statement of Hon. Abner J. Mikva) [hereinafter Mikva Testimony] (“I think that many scholars, and lawyers, and even judges forget that the courts are public institutions. They talk about privacy interests and the importance of respecting consensual positions as if the only two parties in interest in the court system are the parties to the lawsuit. I have never been able to understand how we could justify the heavy expenditure of public funds and resources on the courts if the only interest to be served is that of the litigants.”).

¹²⁰ See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2657 (1995) (articulating a “public-life conception” of the courts and describing information-generation as “a fundamental public interest” of litigation, not a side effect); Owen Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979) (“[C]ourts exist to give meaning to our public values, not to resolve disputes”).

¹²¹ See *infra* notes 132–133 and accompanying text.

has argued in Senate testimony that restrictions on POs could accelerate (rather than complicate) litigation because, if a defendant cannot count on an expansive PO, the defendant may be more likely to proffer a generous settlement right out of the gates, even prior to the start of discovery.¹²²

2. Critics' Arguments Opposing Reform Efforts

Numerous scholars, practitioners, and policymakers see matters differently—and vehemently oppose state and federal reform activity. Critics' arguments tend to fall into one of five buckets.

First, critics have consistently and powerfully voiced an “if it ain't broke, don't fix it,” argument.¹²³ This argument has a few flavors. In its first guise, opponents challenge reformers' claim that overbroad POs have concealed health hazards from public attention. Seizing this baton, Arthur Miller, for instance, wrote in a classic 1991 Harvard Law Review piece: “The allegation that protective orders are concealing information important to public health and safety obviously should arouse concern, but its validity is doubtful,” and, later in the piece doubled down, concluding that “no evidence has been presented that the current [PO] practice has created significant risks to public health or safety.”¹²⁴ Likewise, in 1994, in a Senate Hearing to assess a Sunshine in Litigation Act, a witness from Lawyers for Civil Justice reassured the Committee: “[P]rotective orders are not preventing the public from obtaining information needed to protect[] public health or safety, as has been alleged.”¹²⁵

¹²² See Mikva Testimony, *supra* note 119, at 76. For similar analyses, see Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 874 (2007).

¹²³ Robert Weiner, *Being Sued Doesn't Mean Being Stripped of Privacy: Some Plaintiffs' Lawyers Want the Right not only to Delver into Defendants' Files, But Also to Publicize Whatever they Find*, THE RECORDER (Feb. 8, 1990).

¹²⁴ Miller, *supra* note 35, at 478, 501. See also Arthur R. Miller, *Private Lives or Public Access: The Debate Over Courthouse Confidentiality*, 77 A.B.A. J. 65, 67 (1991) (“There is simply no reason to believe that current court rules and practices create any risks to public health or safety. Indeed, all indications are that the current system works rather well.”).

¹²⁵ *The Sunshine in Litigation Act, Hearing on S.1404 Before the S. Comm. on the Judiciary, Subcomm. on Courts and Administrative Practice*, 103rd Cong. 92 (1994) (statement of Alfred W. Cortese on Behalf of Lawyers for Civil Justice); see also Richard J. Vangelisti,

Piling on, defense lawyer Robert N. Weiner, a longtime Sunshine in Litigation Act critic, has likewise gone on record dismissing reformers' argument that POs have "conceal[ed] information critical to public safety" as "contrived."¹²⁶

Second, in another spin on the "if it ain't broke" theme, critics maintain that reformers' concerns about judicial rubber-stamping are also overstated—even chimerical. In critics' view, the PO status quo is working as intended: POs are rarely issued, and, when they are issued, they reflect carefully exercised judicial discretion. On the former, Rep. Chris Cannon of Utah argued when opposing the Sunshine in Litigation Act of 2008: "This bill is unnecessary because discovery protective orders are rare."¹²⁷ On the latter, Professor Richard Marcus has argued that, under the law, judges must apply Rule 26(c)'s "principles with care" and that "[j]udges generally seem to be doing just that."¹²⁸ Arthur Miller has likewise insisted: "The 'good cause' requirement is [already] strict. Federal courts have interpreted the rule to mean that the party seeking confidentiality must make a particularized factual showing of the harm that would be sustained if the court did not grant a protective order."¹²⁹

Proposed Amendment to Federal Rule of Civil Procedure 26(c) Concerning Protective Orders: A Critical Analysis of What It Means and How It Operates, 48 BAYLOR L. REV. 163, 175–76 (1996) ("[E]mpirical data does not support the conclusion that protective orders are a threat to public health and safety."); Marcus, *supra* note 101, at 464 ("Despite the widely publicized instances of supposed cover-ups of hazards, hard data is generally lacking and the critics' broader assertions about widespread harm may be validly questioned.").

¹²⁶ Weiner, *supra* note 123.

¹²⁷ *Sunshine in Litigation Act of 2008: Hearings on H.R. 5884 Before the H. Comm. on the Judiciary, Subcomm. on Commercial and Administrative Law*, 110th Cong. 35 (2008) (statement of Rep. Chris Cannon).

¹²⁸ Marcus, *supra* note 101, at 506.

¹²⁹ Miller, *supra* note 35, at 433. *See also, e.g.*, LAWYERS FOR CIVIL JUSTICE, SEALING FATE: THE PROPOSAL TO RESTRICT JUDICIAL DISCRETION OVER SEALING CONFIDENTIAL INFORMATION WOULD IMPOSE UNWORKABLE STANDARDS ON THE COURTS, CONFLICT WITH STATUTORY PRIVACY RIGHTS, AND STOKE UNPRECEDENTED SATELLITE LITIGATION 1, 4 (2021) (insisting that judges do not rubber-stamp motions for POs); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 n.40 (E.D. Pa. 1981) ("[W]e doubt that any judge would approve a consent order not demonstrably rooted in Rule 26(c)"); Doré, *supra* note 113, at 302 (questioning "claims that

Later, Miller asserted that, “[u]nder existing law, the courts have discretion to accept or reject” POs, and, in operation, “they exercise” this discretion responsibly “on a case-by-case basis.”¹³⁰

Third, those who oppose reform predict that limiting POs would impose high litigation costs on parties and the public. In particular, critics argue that broad protections on the disclosure of discovery material facilitate the free flow of information—and, in so doing, reduce inter-party acrimony and promote the efficient resolution of disputes.¹³¹ The converse is also true; without POs, critics reason, discovery would grind to a halt.¹³² In the words of one defense lawyer

federal district courts have perfunctorily acceded to a plethora of stipulated requests for discovery protective orders”).

¹³⁰ Miller, *supra* note 35, at 436. In another publication, Miller asserted:

When information possibly implicating public health and safety surfaces in documents produced in litigation, the decision about whether it should be released to the public should rest where it always has—within the sound discretion of the court. Only the trial judge has no axe to grind and no prospect of pecuniary gain. Existing rules and procedures are more than adequate to accomplish this end.

Arthur R. Miller, *Private Lives or Public Access: The Debate Over Courthouse Confidentiality*, 77 A.B.A. J. 65, 67 (1991).

¹³¹ See, e.g., Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 21–23 (1983) (suggesting that greater access to POs reduces resistance to discovery); Benham, *supra* note 96, at 430 (“The reasoning goes that without some confidentiality, litigants would zealously resist producing relevant information and settle fewer cases.”).

¹³² Vangelisti, *supra* note 125, at 178 (“[R]ather than facilitating the plaintiffs’ cases, the lack of protective orders would grind discovery to a halt and increase the costs of litigation.”); Miller, *supra* note 35, at 483 (“Limiting the availability of protective orders makes the discovery process more contentious, protracted, and expensive.”); *Sunshine in Litigation Act of 2008: Hearings on H.R. 5884 Before the H. Comm. on the Judiciary, Subcomm. on Commercial and Administrative Law*, 110th Cong. 38 (2008) (statement of Prof. Arthur Miller) (“Confidentiality is of paramount importance during discovery because the willingness of the parties to produce information voluntarily often hinges on a guarantee that it will be preserved. Remove this guarantee and discovery will become more contentious, requiring frequent court intervention.”); *Examining the Use of Secrecy and Confidentiality of Documents by Courts in Civil Litigation, Hearing Before the S. Comm. on the Judiciary, Subcomm. on Courts and Administrative Practice*,

at a Senate Hearing: “[I]f the defendant is not sure that its secret formula is going to be protected in discovery, then what’s going to happen? It’s going to fight. It’s going to fight producing it, and that takes time and resources of the court and the parties.”¹³³

Fourth, some critics argue that any effort to cut down on litigation secrecy (via beefed-up restrictions on POs) will predictably backfire. There are, again, two flavors to this critique. First, in an age when arbitration is seemingly ascendant, some fret that, without blanket POs, litigants will simply opt out; they will privatize their disputes, avoiding courts altogether. Giving voice to this concern, Professor Richard Marcus has written: “[O]pening up the discovery process could have the ironic effect of deterring claimants from seeking relief in court in order to avoid the resulting publicity.”¹³⁴ On this thinking, some secrecy (in the form of a PO) is perhaps less than ideal, but it’s better than a sharper turn away from judicial administration. Relatedly, some others argue that, particularly in the current age of Federal Rule of Civil Procedure 26(b)(1)’s proportionality review, without

101st Cong. 186 (1990) (written responses from The Hon. Joseph F. Weis Jr.) (“Without the availability of protective orders, the time for disposing of litigation would unquestionably increase, and the public would be poorly served by the additional delay.”); *Examining the Use of Secrecy and Confidentiality of Documents by Courts in Civil Litigation, Hearing Before the S. Comm. on the Judiciary, Subcomm. on Courts and Administrative Practice*, 101st Cong. 190–91 (1990) (statement of Prof. Arthur R. Miller) (“If people couldn’t voluntarily agree on confidentiality . . . litigants would then be given an incentive to engage in trench warfare not to reveal the propriety, the important, the private.”); Marcus, *supra* note 128, at 484–85 (contending that “presumptive public access would disrupt orderly pretrial preparation by fomenting opposition to broad discovery” and “disrupt the cooperative exchange of information between the parties”).

¹³³ See, e.g., *The Sunshine in Litigation Act: Does Court Secrecy Undermine Public Health and Safety, Hearing Before the S. Comm. of the Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights*, 110th Cong. 10 (2007) (statement of Robert N. Weiner).

¹³⁴ See Marcus, *supra* note 101, at 486; see also *The Sunshine in Litigation Act, Hearing on S.1404 Before the S. Comm. on the Judiciary, Subcomm. on Courts and Administrative Practice*, 103rd Cong. 29 (1994) (statement of Hon. Patrick E. Higginbotham) (explaining that, if POs were sharply cabined, “the increased discovery contests would . . . add to the pressures that encourage some parties to pursue nonpublic means of dispute resolution”).

POs, some courts might be more inclined to short-circuit discovery and deny a party the right to information, full stop.¹³⁵ If that's right—and the choice is between more discovery (but subject to a PO) versus less discovery (but not subject to a PO)—it's not obvious, if you value transparency, that the latter is a better bet.¹³⁶

Fifth and finally, critics argue that any effort to restrict POs in order to further the public interest is fundamentally misguided because courts simply do not exist to advance the public interest; they exist exclusively to resolve private interparty disputes.¹³⁷ And any extra review of POs, particularly when those orders are jointly requested, diverts courts' attention from this fundamental purpose.¹³⁸ On this

¹³⁵ *In re Halkin*, 598 F.2d 176, 195 (D.C. Cir. 1979) (“The only plausible alternative to a protective order may be the denial of discovery altogether.”); Miller, *supra* note 35, at 476 (“[I]f judges’ discretion to issue protective orders is undercut, the courts’ only means of maintaining privacy might be to deny discovery altogether.”); *id.* at 484 (“[C]ontrary to the hopes of the proponents of public access, the net effect of banning protective orders might well be a constriction in the flow of litigation information, not an expansion.”); Jack H. Friedenthal, *Secrecy and Civil Litigation: Discovery and Party Agreements*, 9 J.L. & POL’Y 67, 97 (2000) (predicting that if courts “cannot avoid problems through the use of protective orders, they are more likely to do so by curtailing discovery at the outset”); *cf.* *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (noting that “it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c)” to offset the “liberality of pretrial discovery”).

As an aside but an important one: We are skeptical of the assumption that underlies this argument. If the Rule 26(b)(1) proportionality standard would warrant the declination of discovery due to disclosure concerns, surely that fact alone establishes good cause for a PO to prevent disclosure—meaning that, even if Rule 26(c) were fortified in line with reformers’ desires, the “problem” opponents worry about *still wouldn’t materialize*. For a discussion of the proportionality standard and the many normative judgments that its application embeds, see generally Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093 (2016).

¹³⁶ Again, as we explain at note 135, we believe that this argument relies on a misapplication of Rules 26(b)(1) and 26(c).

¹³⁷ *E.g.*, Weiner, *supra* note 34 (“The courts’ job in civil cases is to resolve disputes between private parties.”).

¹³⁸ Miller, *supra* note 35, at 431 (noting that a focus on public access would divert courts “from their primary mission” of resolving disputes among litigants); Marcus, *supra* note 101, at 470 (“The primary purpose for which courts were created . . . is to decide cases according

view, any discussion of POs and the public interest simply misses the point. If there is no dispute over POs, “then courts should readily accede to the parties’ mutual desire for confidentiality.”¹³⁹

C. Why Debate Has Stalled: Dueling Anecdotes and Anemic Empirics

As noted, the debate about POs has raged for more than thirty years, although, in that time, the arguments themselves have remained static. Reformers and traditionalists are covering essentially the same territory now as they covered in the early 1990s.

One reason the debate has fizzled is entirely explicable. Reformers and critics sharply disagree about first principles—and about the proper role of civil litigation. Does private civil litigation exist merely to solve parties’ discrete disputes?¹⁴⁰ If so, POs, which advance and perhaps streamline private dispute resolution, are entirely unobjectionable. Or should private litigation advance broader, public-regarding aims?¹⁴¹ If so, POs subvert those aims and should be curtailed. That debate, which strikes right at the heart of what litigation does and is, won’t be advanced by empirics.

Another big reason the PO debate has stalled is also fairly explicable. The debate is running aground on the shoals of warring—but unresolved—predictions about how a restriction on POs would ripple through the broader litigation landscape. Reformers and opponents disagree concerning whether tighter limits on POs’ entry would lead to greater

to the substantive law. The collateral effects of litigation should not be allowed to supplant this primary purpose.”).

In addition to all the above, some add a procedural critique: that any change to Rule 26 ought to come from the Rulemaking process, rather than from Congress. For a discussion, see Vangelisti, *supra* note 125, at 172–73.

¹³⁹ Doré, *supra* note 113, at 289; *cf.* Erichson, *supra* note 54, at 360 (“A light standard of good cause for discovery confidentiality reduces the burden on the court . . .”).

¹⁴⁰ See *supra* notes 137–139 and accompanying text (advancing this conception).

¹⁴¹ See *supra* notes 118–120 and accompanying text (advancing this conception).

efficiency and more disclosure or, instead, would backfire and have (on balance) the opposite effect.¹⁴²

A third fundamental reason the debate has stalled, however, is harder to explain. The debate has sputtered because there is not only a dispute about the fundamental role of civil courts, or about what would happen if Rule 26(c) were to be fortified. There is also a dispute about what *is happening*, in the courts, today. As the above accounting demonstrates, there exists a sharp and persistent disagreement about the status quo—and it is very hard to know whether a system should be reformed, or how reforms should be designed or implemented, without first understanding how that system currently operates. On this score, there are, and there have long been, striking disagreements about basic facts that go right to the heart of the PO debate. These include: (1) how often POs are issued, (2) whether POs have actually shielded public health hazards from scrutiny, (3) the prevalence of stipulated (rather than opposed or contested) POs, and (4) arguably most importantly, whether courts currently subject stipulated POs to any meaningful scrutiny.

Fueling this uncertainty is a striking lack of empirical research assessing these basic how, when, and why questions. Thus, as Professor Seth Endo recently observed, “[n]either the academic literature nor the jurisprudence grapples much with the on-the-ground practice of stipulated protective orders.”¹⁴³ Indeed, we know of only three studies that address these matters. None completely answers the critical question of how Rule 26(c) is (or more often, isn’t) appropriately applied. And each is limited by data hurdles that we are able to surmount. We describe each below.

To start, in 2020, Seth Katsuya Endo of the Seattle University School of Law published a piece in which he evaluated 100 proposed stipulated POs presented to district courts across the country in the single month of January 2018. Endo calculated how many of the proposed orders were granted, and among granted orders, he analyzed whether the judge modified the proposed order before its entry. Ultimately, Endo found that only 5 of the 100 proposed POs in his dataset were denied, and, studying the text of the 95 approved orders, that only 32 “described specific types of

¹⁴² Compare *supra* notes 114–117 and accompanying text, with *supra* notes 131–54 and accompanying text.

¹⁴³ See Endo, *supra* note 33, at 1275.

information to be protected or harms that would follow from public disclosure.”¹⁴⁴ Many of the others merely copied model orders or parroted the list of confidential information from Rule 26(c).¹⁴⁵ Surprisingly too, Endo found that 15 of the 95 motions for POs that were ultimately granted contained a significant mistake of law—including that the parties confused the legal burden for obtaining a PO and for filing material under seal—and that judges only rarely corrected this (elementary) mistake.¹⁴⁶ And, “in none of the cases did the docket reflect that any entity actually intervened to . . . challenge a confidentiality designation.”¹⁴⁷ Further, while it is not the core contribution of his paper, Endo’s analysis implicitly estimated that stipulated POs were requested in, at most, 1.15% of all civil cases, or fewer than 4,000 cases per year.¹⁴⁸

Endo’s analysis offers a significant contribution and suggests that courts too readily rubber-stamp half-baked stipulated POs. But his limited sample size (of only 100 motions for POs) limits the force of his findings. And, as we explain below, we believe that estimating the number of stipulated POs based on searching Bloomberg for a single month leads to a substantial undercount of their general incidence.¹⁴⁹

More recently, in a student note, Chelsea Hanlock analyzed 595 cases brought against New York City Police officers in the Eastern and Southern Districts of New York between 2014 and 2018.¹⁵⁰ In her sample, 139 cases had stipulated POs.¹⁵¹ Evaluating the text of proposed and granted stipulated POs and the thoroughness of judges’ analysis, Hanlock, like Endo, found that denials were rare; she found a

¹⁴⁴ *Id.* at 1277, 1286.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1288–89. For how the two mechanisms differ, see notes 36 through 46 and accompanying text.

¹⁴⁷ See Endo, *supra* note 33, at 1279.

¹⁴⁸ See *id.* at 1276 n.161 (inferring that there are roughly 330 stipulated POs each month (or approximately 4,000 stipulated POs each year) because that is how often relevant search terms appear in available dockets).

¹⁴⁹ See *infra* Subpart III.B and accompanying text.

¹⁵⁰ Hanlock, *supra* note 22, at 1532–34.

¹⁵¹ *Id.* at 1538.

denied-in-full rate of less than 1% and a denied-in-part rate of 2.9%.¹⁵² Like Endo, she also found that most judges' review was cursory. In her words, most judges did not "engage in a rigorous good cause analysis."¹⁵³ For example, most orders justified confidentiality, at least in part, because "the City . . . would not produce requested documents" unless a PO was entered; only one submission made a particularized showing.¹⁵⁴ Thus, Hanlock's study, like Endo's, supports the rubber-stamping idea. But, given its small sample size, its findings are suggestive, rather than firm—and, although Hanlock zooms in on the important issue of police misconduct in New York, she cannot speak to other types of claims, defendants, or locations.

A third and final study, conducted for the Advisory Committee on Civil Rules, is bigger, but its data are also more than thirty years old.¹⁵⁵ In this study, Elizabeth Wiggins and co-authors evaluated a random assortment of roughly 40,000 civil cases involving POs in three federal district courts from 1990 to 1992.¹⁵⁶ The prevalence of civil cases with PO activity varied from 5% to 10% across the three districts and years studied.¹⁵⁷ Of cases with PO activity, a strong majority of motions for POs were contested; only 17% to 26% of cases with POs had motions for stipulated POs (with variation across districts).¹⁵⁸ Crunching Wiggins et al.'s numbers yields the conclusion that 1.3% of federal cases involve motions for stipulated POs—i.e., that stipulated POs are very rare.¹⁵⁹

¹⁵² *Id.* at 1542.

¹⁵³ *Id.* at 1540–42.

¹⁵⁴ *Id.* at 1540–41.

¹⁵⁵ ELIZABETH C. WIGGINS, MELISSA J. PECHERSKI, & GEORGE CORT, PROTECTIVE ORDER ACTIVITY IN THREE FEDERAL JUDICIAL DISTRICTS: REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 3 (1996).

¹⁵⁶ *Id.* at 1, 3.

¹⁵⁷ *Id.* at 3.

¹⁵⁸ *Id.* at 4–5. About 75% came by opposed motions, with the residual initiated *sua sponte* by the court. *Id.*

¹⁵⁹ Their Table 1 reports the total number of cases studied for each district and year in the study, as well as the percentage of these that had PO activity; from these data we were able to calculate that 6% of all cases had PO activity. *Id.* at 3. Numbers reported in their Table 3 indicate that of 927 cases the authors studied more closely, there were 207 stipulated agreements by the parties, which is 22%. Together, the

Wiggins et al. further found that courts denied 30% to 45% of POs, although courts only rarely denied stipulated POs.¹⁶⁰ Soon after this study was issued, its core findings—that courts frequently deny POs and that parties rarely file joint motions for POs—were enthusiastically trumpeted by critics of PO reform.¹⁶¹

While the above efforts contribute to the debate, their limitations soften their empirical punch. The academic studies each evaluate only a small sample of POs in a sample restricted by court or year, gaining analytic granularity at the expense of generalizability. Similarly, the Wiggins study covers only three courts—and is, bluntly, old.¹⁶²

6% and 22% figures imply an estimate that 1.3% of cases considered by Wiggins et al. had stipulated protected orders.

¹⁶⁰ *Id.* at 6. Courts rejected, on the record, only 1% of the stipulated POs in the study. *Id.* at 4, 6. The researchers proffered an explanation for these infrequent denials: “[P]arties [may] discuss with the court whether a protective order is warranted and what provisions should be included before a formal agreement is presented.” *Id.* at 6. Only as an “alternate explanation” did the researchers consider that “judges are reluctant to reject an agreement between opposing parties.” *Id.*

¹⁶¹ *E.g.*, Doré, *supra* note 113, at 302 (stating that the Wiggins “study does not support claims that federal district courts have perfunctorily acceded to a plethora of stipulated requests for discovery protective orders or that such orders create significant hazards to public health and safety”); *Sunshine in Litigation Act of 2009: Hearing Before the Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary*, 111th Cong. 59 (2009) (statement of Hon. Mark R. Kravitz for the Judicial Conference of the United States) (pointing to the Wiggins study to support the notion that reform is not necessary because, as it is, “judges den[y] or modif[y] a substantial proportion of motions for protective orders”). Indeed, those opposed to reform continue to cite the Wiggins study, despite its advanced age. *E.g.*, Lawyers for Civil Justice Comment to the Advisory Comm. on Civil Rules, Mar. 24, 2021, at 4 [hereinafter LCJ 2021 Comment] (citing the Wiggins study and declaring that “[t]he FJC’s report also shows that the number of orders protecting . . . documents . . . is also small”).

¹⁶² Also, potentially of note is a recent study involving orders to seal (POs’ close cousin). In particular, Reuters recently analyzed Westlaw data from 3.2 million civil suits filed in federal courts between 2006 and 2016 and also conducted a more detailed review of the 115 largest “mass product-liability actions from the past 20 years.” REUTERS, *How We Did the Data Analysis*, <https://www.reuters.com/investigates/special-report/usa-courts-secrecy-how/> (last visited Jan. 5, 2023). The authors found that “judges allowed litigants to seal material in at least 65 percent of product-liability actions.” *Id.* This study is useful but sheds little light on POs

In sum: For more than thirty years, the propriety of POs has been hotly debated. But the debate has stalled—in large part, because even basic questions concerning the entry of POs have defied resolution. Without these facts, the debate has devolved into warring rhetoric, punctuated by confident but unsupported claims concerning, among other things, the prevalence of POs, the prevalence of stipulated POs, and the rigor of judicial review.

Below, drawing on docket reports from over 2.2 million cases, we present robust empirical evidence to reset the empirical terrain.

III. DATA: NEW EVIDENCE ON STIPULATED PROTECTIVE ORDERS

The above discussion shows that PO practice is frequently debated but rarely studied. In this Part, we apply sophisticated text-based machine learning tools to analyze an original dataset of more than 2 million federal dockets in civil cases filed from 2005 to 2012 in order to bridge persistent empirical gaps.¹⁶³

Subpart A begins with a brief note on methodology. It discusses our dataset and outlines how we used machine learning and natural language processing tools to identify POs within federal dockets. For those interested, our Appendix offers additional methodological detail. Those uninterested in any discussion of methodology may choose to skip directly to the meat of our analysis.

Subparts B, C, and D present our results. In particular, Subpart B provides information on trends and prevalence. It reveals that the fraction of cases with joint motions for POs more than doubles previous estimates. By our study period's end in 2012, joint motions for POs were present in more than 8% of cases in which an answer was filed. Subpart C then considers judicial decisionmaking and estimates how often

and also focuses on judicial decisionmaking in the largest product liability MDLs.

¹⁶³ With respect to text-based tools, we extensively use natural language processing, the branch of machine learning that performs text analytics. While no data extraction technique is perfect, our strategies yield high accuracy rates, particularly when compared to the standard keyword approaches used in existing literature. For further details concerning both our data and methodology, see the Appendix.

judges deny litigants' joint PO requests. Here, consistent with Endo and Hanlock, we find that judicial denials are rare. But, more than that, our judge-level statistics reveal something astonishing: A majority of federal district court judges in our sample—all of whom considered at least twenty-five stipulated motions for POs—never rejected a stipulated PO during the period of inquiry. This fact undermines the oft-repeated claim that federal judges individually scrutinize each PO that they enter and suggests that the entry of stipulated POs is not careful but, rather, cavalier.¹⁶⁴ Finally, in Subpart D we supplement our quantitative investigation with a qualitative assessment of 300 granted and 100 denied stipulated POs. Analyzing these orders, we find that the high rate of denials unearthed in our big data analysis appears to reflect rubber-stamping on the ground, lending still further support to reformers' concerns.

A. A Note About Methodology

Before turning to our analyses, we briefly describe our dataset and how we leveraged machine learning and natural language processing tools to sift through millions of docket sheets.

Our dataset includes docket-sheet information on case activity between January 1, 2005 and December 31, 2014, and includes more than 2.2 million cases filed between 2005 and 2012. These data were acquired from Thomson Reuters roughly a decade ago and have been used in several other studies.¹⁶⁵ The dataset contains docket-level information on virtually all civil actions filed in the federal district courts between January 1, 2005 and December 31, 2014. To our knowledge, it is the most up-to-date, and easily the most comprehensive, federal district court dataset available for research currently in existence.¹⁶⁶

¹⁶⁴ See *supra* note 128–130 (repeating that claim).

¹⁶⁵ See, e.g., Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 STAN. L. REV. 369, 389–93 (2016); Jonah B. Gelbach, *Rethinking Summary Judgment Empirics: The Life of the Parties*, 162 U. PA. L. REV. 1663 (2014); Jonah B. Gelbach, *Beyond Transsubstantivity* (working paper). More details about the data appear in the Appendix.

¹⁶⁶ Comprehensive district court dockets are notoriously hard to amass. This difficulty stems, in part, from the fact that most dockets sit behind a paywall. See David Freeman Engstrom & Jonah Gelbach, *Legal*

The sheer size of our docket dataset allowed us to overcome the challenges that other researchers have faced; our data is more recent and has nationwide geographic coverage.¹⁶⁷ Our dataset is also the only one that contains virtually all civil cases filed during the period. That said, one limitation of our data is that we study only those cases that were filed between 2005 and 2012. While we are unaware of any work suggesting there was a dynamic shift in PO activity in the past twelve years, our data would not shed light on such patterns.

Yet the dataset's enormity also presents its own difficulty. Given the size of our dataset, when locating motions for contested or stipulated POs, we faced a massive "needle in a haystack" problem: Among nearly 80 million docket entries in our possession, only a small fraction addressed POs, creating the question of how to find what we were looking for. We overcame that challenge using a four-step procedure that included both simple text processing and machine learning methods.

First, we retrieved the full text of all docket entries that contained the string "PROTECTIVE ORDER" (text was all capitalized in our underlying data); we refer to the full set of all such entries as the "matching set." We suspect that virtually all POs in our dataset contain this phrase. However, this query produced a high number of false positives—docket entries in our matching set that included "PROTECTIVE ORDER" but did not directly involve the docketing or requesting of a PO.¹⁶⁸

Tech, Civil Procedure, and the Future of Adversarialism, 169 U. PA. L. REV. 1001, 1063 (recounting difficulties in creating large datasets of federal dockets because of PACER fees); Jonah B. Gelbach, *Free PACER in LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE* (David Freeman Engstrom ed., 2023) (similar).

¹⁶⁷ As described elsewhere, the (CM/ECF) software used by district courts went into use at different times, and entries docketed in a district before that time may be less reliable. See Jonah B. Gelbach, *Beyond Transsubstantivity*, forthcoming in *NYU Journal of Legislation & Public Policy*. In our dataset, for instance, 4.08% of cases occur before the relevant district adopted the CM/ECF system. We treated these cases as missing data and used imputation methods to predict whether they have a stipulated protective order or not. Such methods leverage non-missing data to make educated guesses about missing data, and are conventional in social science literature. See Appendix at 5–6.

¹⁶⁸ For example, a scheduling order could use the phrase "PROTECTIVE ORDER" by directing the parties that any requests for such orders are due by a certain date.

We then coded a random sample of 2,250 docket entries from the first step's matching set. A docket entry was relevant to this coding if it was either (a) created by one or more parties to docket a motion for a PO, or (b) created to docket a court order resolving a motion for a PO. We labeled each docket entry text string to designate whether it concerned a PO. We categorized an order as a *stipulated* protective order (SPO) if either the motion seeking the PO or the order granting it had docket entry text calling it "stipulated," "consented," "agreed," or "joint." We coded all other POs as *general* protective orders (GPOs).

Third, we trained a series of supervised machine learning models to predict which entries in our matching set involved SPOs or GPOs. This approach is typical of supervised machine learning, with humans correctly coding a random sample of text and a computer algorithm then applied to this coded sample to "learn" which textual elements predict that a textual string represents a PO request. We used our supervised learning models to identify docket entries that involved (1) motions for stipulated or general POs, and (2) judicial orders about stipulated and general POs.¹⁶⁹ Compared to benchmarks in the law and data science literature, our models performed with high accuracy.¹⁷⁰

Fourth, we used textual pattern matching to identify when judges deny requests for stipulated or general POs.¹⁷¹

¹⁶⁹ For details, including the pre-processing steps we took to clean the data, see Appendix at 3.

¹⁷⁰ For instance, our classifier predicting stipulated PO achieves 98% accuracy and has an F1 score = .94. When compared to the common F1 = .7 referenced in existing legal research using similar methods, our method achieves a high level of accuracy. *See also* Briand D. Feinstein & Jennifer Nou, *Strategic Subdelegation*, 20 J. EMPIRICAL LEGAL STUD. 746 (2023) (discussing classifier performance); Julian Nyarko, *Stickiness and Incomplete Contracts*, 88 U. CHI. L. REV. 1, 32 n.10 (2021) (discussing F1 = .7 benchmark). For more details about classifier performance, see Appendix at 4.

¹⁷¹ Our approach to pattern matching used regular expressions, which involves matching any combination of a chosen string of text and other text. For example, one regular expression is "DECLIN+*", which matches all of "DECLINE," "DECLINES," and "DECLINED" (the plus sign means "one or more characters," and the asterisk character means "any character," so "+*" means "at least one of any character," and "DECLIN+*" means "the string 'DECLIN' followed by at least one more character). Regular expression searches are a common form of searching in text-as-data research. JUSTIN GRIMMER, MARGARET E.

This approach looked for sentences that contained a variant of the term “protective order” and some version of either “declines,” “denied” or “unable to adopt.” Taken together, these steps produced a comprehensive dataset of stipulated and non-stipulated motions for POs—and the judicial grant or (far less frequently) denial of each.

A key advantage of the process just described is that can be done using only the text of each case’s docket entries, which allows large-scale *quantitative* analysis. To conduct our *qualitative* review of granted and denied SPOs, we needed to review the resolving orders filed in cases’ dockets. We took a random sample of 300 granted SPOs and 100 denied SPOs. And, after cleaning the data,¹⁷² a team of trained researchers retrieved the text of the underlying district court orders from PACER, manually reviewed each order against a set of agreed-on criteria and tracked results in a shared spreadsheet. After data collection, a trained researcher performed random spot checks on 10% of the sample (30 grants and 10 denials) to ensure that orders were tagged consistently. Finally, for denied stipulated POs, we manually searched docket reports for other references to POs to determine whether a PO was ever entered in the case.

As a final methodological note, we considered two phenomena that would undermine our conclusions. First, we assessed whether our results are likely driven by the use of model POs created by district courts. If so, one might think our results would capture district-level, rather than case- and judge-level, features of stipulated PO practice.¹⁷³ But we

ROBERTS & BRANDON STEWART, TEXT AS DATA: A NEW FRAMEWORK FOR MACHINE LEARNING AND THE SOCIAL SCIENCES 178–83 (2022) (discussing dictionary methods).

¹⁷² We excluded, for example, HIPAA protective orders which are granted pursuant to a statutory scheme. *See* 45 C.F.R. § 164.512(e). We also excluded dockets that were outside of our observation period (*e.g.*, orders entered before 2005), those that did not have an attached order, or (in the rare circumstance) those that were false positives (*e.g.*, non-stipulated).

¹⁷³ Some district courts publish model POs for parties appearing before the court. *See, e.g.*, U.S. Dist. Ct., N. Dist. Cal., *Model Stipulated Protective Order* 6, https://www.cand.uscourts.gov/wp-content/uploads/forms/model-protective-orders/CAND_StandardProtOrd.Feb2022.pdf. *See also infra* Subpart III.D (surveying model POs).

found little evidence to support such a proposition.¹⁷⁴ Second, we considered the possibility that judicial analysis related to the good cause standard might be present in judicial opinions filed alongside the granted orders themselves, because our main empirical approach does not address such opinions. We searched for the word “opinion” in docket entries that mentioned stipulated POs and found that the fraction of entries that included this word was only a small fraction of 1%. We conclude that neither the presence of model orders nor the possibility that judicial analysis appears in separate opinions is a plausible threat to our conclusions.

We now present the novel descriptive insights generated by this massive empirical effort.

B. Motions for Stipulated Protective Orders: Time Trends and Prevalence

We first consider a key, but heretofore unanswered question: Are motions for stipulated POs a common feature of contemporary federal litigation? As discussed in Part II, no prior study answers this question using comprehensive data. With some back-of-the-envelope calculations, Endo estimated that stipulated POs featured in roughly 1% of federal civil litigation, fewer than 4,000 federal cases a year.¹⁷⁵ The

¹⁷⁴ This question is difficult to test systematically because: (1) model orders might not describe themselves as such, and (2) districts’ model orders, where they exist, might have changed over our study period. We used two parallel approaches to test model orders’ prevalence. First, we searched all text-searchable (roughly 80% of the orders were searchable) stipulated PO grants collected in our qualitative review for the term “model.” No orders used that word in connection with a model PO, although a handful of cases used the phrase “standing protective order” or “standing order” in a context that suggested they were model orders. All in all, our search of the text-searchable orders showed little reason to think model orders are prevalent enough to play an important role in our results. Second, we selected nine district-year combinations that appeared in our set of 300 granted stipulated POs (there were 2-4 orders in each of the nine district combinations). We looked for indicia of model orders, such as identical terminology, consistent formatting, or similar internal structure but did not find such evidence. Although it is difficult to draw definitive conclusions given the nature of the orders at issue, the results of these investigations strongly suggest that model orders are unlikely to constitute a substantial portion of the POs in our dataset.

¹⁷⁵ Endo, *supra* note 33, at 1277 n.161. To arrive at this estimate, Endo used Bloomberg Law searches to track the number of times that the

Wiggins et al. research, performed under the auspices of the Federal Judicial Center and often touted by critics of reform, offered a similar estimate.¹⁷⁶ Ultimately, as discussed below and shown in Figures 1, 2, and 3, we find that joint motions for POs, though relatively uncommon overall, are considerably more common than these earlier studies indicate.

Figure 1 plots our estimates for the number of POs requested within two years of filing, by year.¹⁷⁷ Figure 1 is notable in three respects. First, our results suggest that there are an average of 9,000 stipulated PO requests in the federal civil courts per year—with stipulated POs requested in 2.8% of all civil cases over our full study period. That figure may seem small, but it is more than double what others have previously suggested.¹⁷⁸ Equally notable: The trend lines

term “stipulated protective orders” was mentioned in federal dockets and found it was mentioned in 0.8% to 2.3% of cases (depending on the year). *Id.* at 1273. Because dockets typically will reflect both the filing and the court’s resolution of a motion for a PO, a count of all instances in which text related to a PO appears in a case’s docket will overstate the prevalence of PO requests—Endo suggests by a factor of 100 to 200%. *Id.* at 1273 n.150. This all means that stipulated POs appear, in Endo’s telling, in *at most*, 1.15% of civil cases in federal courts.

¹⁷⁶ *See supra* notes 161–165. In those footnotes we explain that the Wiggins research suggested that stipulated POs were present in approximately 1.3% of civil cases.

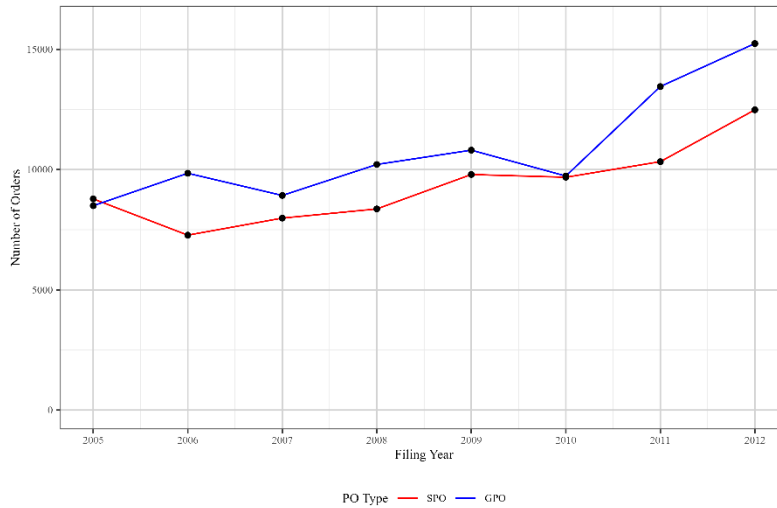
¹⁷⁷ We limit all our analyses to two years after filing date to account for the fact that our access to docket entry text extends only through December 31, 2014. For cases that terminate by that date, we observe all docketed activity. But for all other cases, we see only whatever docket activity happens before the end of 2014. To understand the problem, take, for example, a case filed on January 1, 2014. For that case, we observe exactly one year of activity, so if a stipulated PO were requested in the case’s second year, we would miss it. Comparing this 2014 case with only one year of docket activity to cases filed in earlier years would introduce measurement error due to the difference in the observable portions of the two cases’ life cycles. (Statisticians call this problem “right-censoring.”) To correct for this source of bias, we (1) analyze only POs requested within two years of filing and (2) therefore limit our analysis window to cases filed during calendar years 2005 and 2012. By doing so, we can make an “apples to apples” comparison across the years. Finally, all of our plots below discussing “requests” count only those instances in which *judges*, rather than parties, create a docket entry relating to a determination about parties’ request for a stipulated PO. This measure is methodologically conservative, because it excludes requests for POs that are mooted because of case termination or for other reasons (such as settlement).

¹⁷⁸ *See supra* notes 175–176 and accompanying text.

show a steady increase over time. For cases filed in 2005, we estimate that roughly 8,500 stipulated motions for POs were filed. By 2012, this number had grown to nearly 12,500.¹⁷⁹ Overall, this represents a roughly 50% increase during this period.

Figure 1: Total Number of Requests for POs, by Filing Year of Case (2005-2012)

Note: This figure counts requests, not cases with requests, e.g., if two requests are made in the same case, then each is counted in this figure.



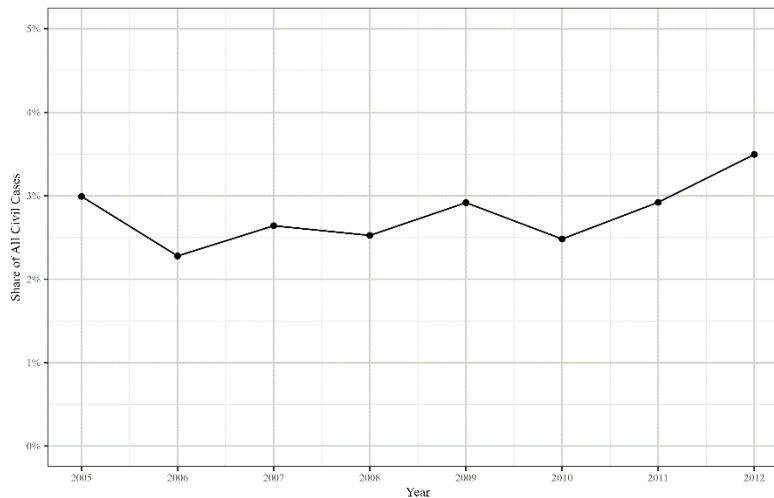
One explanation for this observed uptick in joint Rule 26(c) motions is a possible uptick in the number of cases filed per year: if more cases were filed per year during this period, we would expect the number of joint Rule 26(c) motions to increase in rough lockstep. To a large extent, that is what we find. Figure 2 plots the percentage of civil cases with a joint motion for a PO filed within two years of the case’s initiation.¹⁸⁰ The percentage bounces around over time, with a slight upward trend over the seven-year period between the filing of 2005-vintage and 2012-vintage cases in the percentage of cases with a joint motion for a PO. We regard this evidence as being at most weakly suggestive of a slight

¹⁷⁹ Although it’s not the core contribution of this Article, we also find that general (non-stipulated) PO activity increased during this period.

¹⁸⁰ We note that the unit of analysis in Figure 2 is the case, rather than the order. Thus, case A with one stipulated PO and case B with two stipulated POs both add one to the numerator of the data plot in Figure 2.

increase in the overall prevalence of SPOs.¹⁸¹ Still, even the lowest plotted percentage in Figure 2 more than doubles previous estimates.¹⁸²

Figure 2: Percentage of Civil Cases with at Least One Stipulated PO Requested, by Filing Year of Case (2005-2012)



While the estimates offered thus far suggest that motions for stipulated POs are more prevalent in contemporary litigation than previously understood, our findings still might not fully capture the force of stipulated POs, nor the key trends. Why? The figures presented above look at all civil cases. But many civil cases in federal court—by some estimates, one-third or more—never reach discovery.¹⁸³ And, discovery, of course, is the critical stage of litigation where concerns about POs kick in.

To get a sense of how prevalent stipulated POs are in cases that reach the discovery phase (*i.e.*, cases where POs possibly matter), Figure 3 plots the percentage of cases with a

¹⁸¹ The slope of a trend line fit using ordinary least squares is 0.0008, reflecting that the fitted value of the SPO percentage increased roughly half a percentage point (0.0008 times 7 is 0.0056—or 0.56 percentage points). The trend line is not very precisely estimated, though, which suggests that the evidence of an increase in the rate of stipulated POs during our study period is relatively weak.

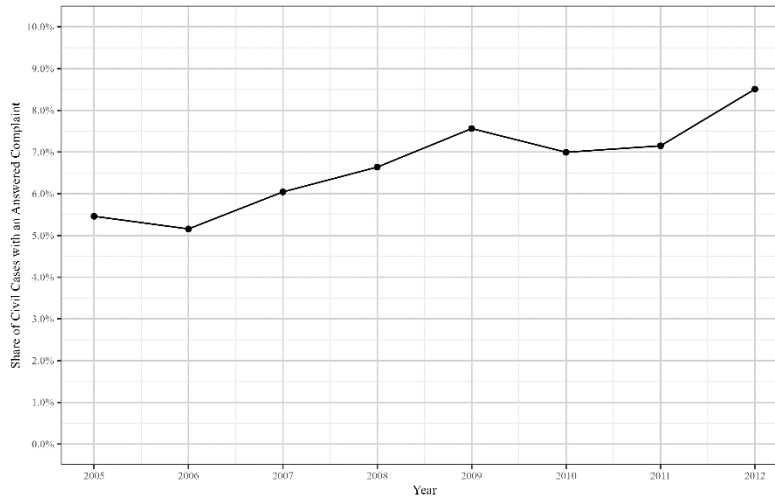
¹⁸² See *supra* notes 175–176 and accompanying text.

¹⁸³ See Jay Tidmarsh, *Opting Out of Discovery*, 71 VAND. L. REV. 1801, 1803 (2018) (“In a third or more of federal cases, no discovery occurs . . .”).

joint Rule 26(c) motion (within two years of filing) in cases where a defendant has answered a plaintiff’s complaint. To be sure, discovery can start before the defendant answers the complaint. But in most cases, discovery battles do not commence until after the answer is filed.¹⁸⁴

Figure 3 indicates, not surprisingly, that joint motions for POs are even more common in cases where a defendant answers the plaintiff’s complaint. And the share is growing over the study period. In 2005, 5.5% of such “post-answer” cases featured a joint motion for a PO. By 2012, that figure grew to 8.5%. This growth represents over a 60% increase—and several times the overall rate among all civil cases.

Figure 3: Percentage of Cases with a Stipulated PO Request, Among Civil Cases with an Answered Complaint, by Filing Year of Case (2005-2012)

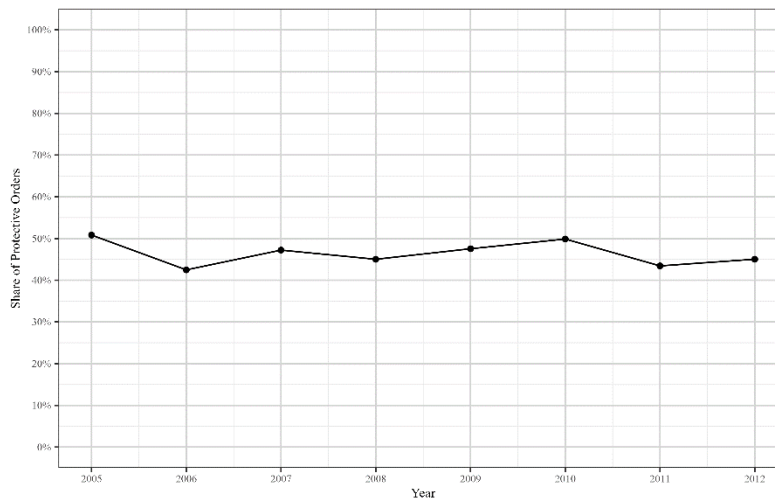


Finally, Figure 4 shows the proportion of POs requested that were stipulated POs. These data show that stipulated PO requests, once thought to account for 17 to 26% of protection motions,¹⁸⁵ account for a much larger share. On average, we estimate stipulated POs accounted for a whopping 45% of all PO motions filed per year—a two to three times larger proportion than previously thought.

¹⁸⁴ See Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 872 (2018) (describing the “textbook order of civil procedure” as proceeding sequentially from “filing, [to] motion to dismiss or answer, [to] discovery”); see also FED. R. CIV. P. 26(d)(1) (clarifying that “[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f),” subject to certain requirements).

¹⁸⁵ See *supra* note 158.

Figure 4: Percentage of Requested POs that Involved a Stipulated Request, by Filing Year of Case (2005-2012)



C. Rule 26(c) Motions: Grants and Denials

We now assess how judges respond to these Rule 26(c) motions. As noted, reformers have long argued that stipulated POs are granted, pro forma, without adequate judicial scrutiny.¹⁸⁶ Critics, meanwhile, have insisted the opposite. As the Judicial Conference of the United States put it when opposing reform efforts: When motions for POs are filed, “courts review such motions carefully and often deny or modify them to grant only the protective orders needed, recognizing the importance of public access to court filings.”¹⁸⁷ Our data permit us to adjudicate this debate.

Figure 5 reports the average denial rate for stipulated PO requests. In this plot (and all analyses that follow), we take a conservative view. We classify a motion for a stipulated PO as “denied”: (i) even if the motion is partly denied (i.e., even if the motion is granted in part), or (ii) even if the judge denies the parties’ motion not on the merits, but rather as moot. In so doing, we err on the side of reporting PO denials.

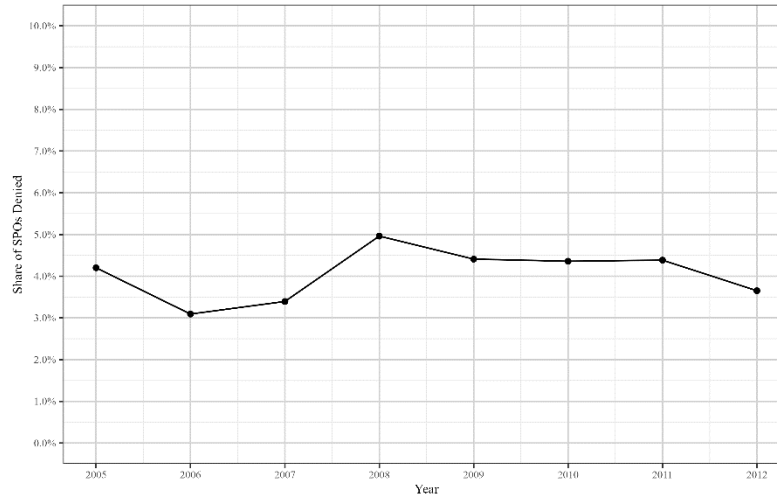
Particularly given our generous definition of “denials,” the primary fact that stands out in Figure 5 is just how low the

¹⁸⁶ See *supra* notes 108–111 and accompanying text.

¹⁸⁷ *Sunshine in Litigation Act of 2008: Hearings on H.R. 5884 Before the H. Comm. on the Judiciary, Subcomm. on Commercial and Administrative Law*, 110th Cong. 74 (2008) (statement of Hon. Mark R. Kravitz for the Judicial Conference of the United States). For similar assurances, see *supra* notes 128–130 and accompanying text.

denial rate for stipulated POs is. For our entire sample, we find that judges deny, on average, only 4.1% of stipulated PO requests. In other words, roughly 96% of the time, when the parties file a joint motion for a PO, such a PO is granted.

Figure 5: Share of Stipulated PO Requests Denied Per Year

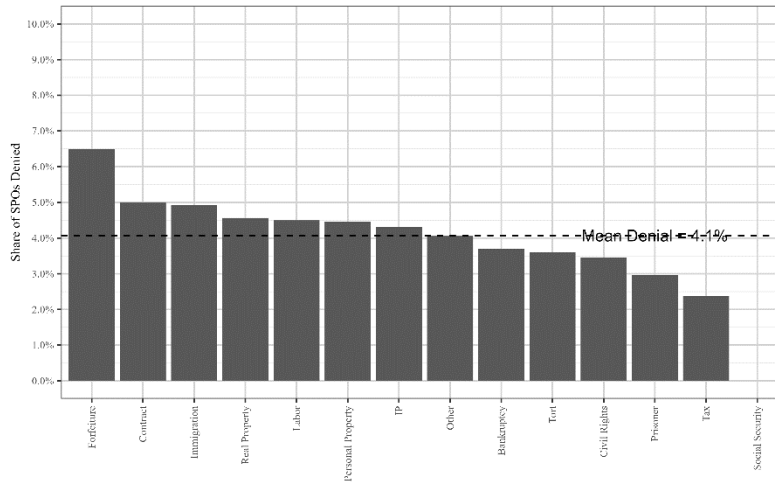


What case types feature higher and lower denial rates? Parsing PO denials by case type, Figure 6 reveals modest variation. The highest denial rates (north of 6%) are in forfeiture cases.¹⁸⁸ IP cases—where many believe POs are justified—have a slightly higher than average denial rate.¹⁸⁹ Intriguingly, civil rights cases and tort cases produce some of the lower denial rates (on the order of 3.4 and 3.6%, respectively). This result is notable because both cases can involve facts and disputes with high levels of public interest.

¹⁸⁸ Because forfeiture cases make up a small share of the set of cases with a stipulated PO, it is possible that their especially high denial rate may be attributable to statistical variation—essentially noise.

¹⁸⁹ We caution that these analyses speak only to denial rates for stipulated POs. They are not necessarily a proxy for a judge's willingness to permit secrecy writ large.

Figure 6: Percent of Stipulated POs Denied by Case Type

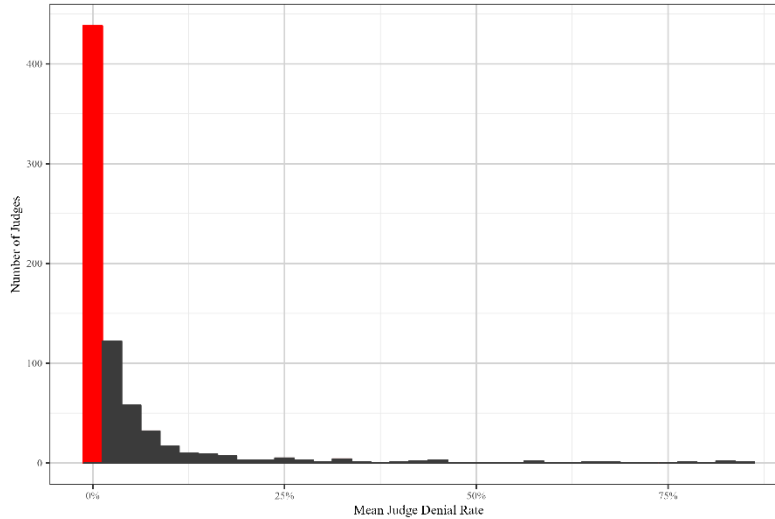


Next, we evaluate judicial behavior, and here we find something truly remarkable. We zeroed in on individual judges—but, to avoid judges who have considered too few stipulated POs which would create unreliable (i.e., “noisy”) estimates, we restricted our focus only to judges with substantial Rule 26(c) activity, which we defined as those who had ruled upon at least twenty-five motions for stipulated POs during the period of study.¹⁹⁰ Evaluating only that subset of 727 district and magistrate judges, we found that fully 392 judges—54%—never once denied a stipulated PO request.¹⁹¹ Figure 8 makes the point graphically.

¹⁹⁰ Because both district court judges and magistrate judges render decisions about stipulated POs, we couldn’t simply assign a given order to the district court judge presiding over the entire case. Instead, we built a nuanced regular expression to extract the judge’s name from the individual docket entry. Evaluating our extraction method via random samples of stipulated POs, we found that the method correctly identified 98 to 99% of judges issuing the stipulated POs.

¹⁹¹ Also remarkable, it appears that, in their PO-granting and -denial behavior, district court and magistrate judges don’t stay on script. Trial court opinions display sharp (and seemingly inexplicable) intra-circuit variation, and the opinions do not resemble what one might expect if trial courts were following circuit court precedent with fidelity. That is, some circuit court precedent is strict when it comes to POs, and some circuit court precedent is lax when it comes to POs, but trial judges in “strict” circuits do not appear to scrutinize POs more carefully than do trial judges in “lax” circuits. For further discussion of this dynamic, which raises serious questions about decisional consistency, adherence to precedent, and judges’ basic fidelity to law, see generally Peters et al., *supra* note 47.

Figure 7: Distribution of Judge-Level Stipulated PO Denial Rate



Notes: The bin size for the x-axis is 2.5 percent. The analysis is limited to judges who have decided at least twenty-five stipulated POs.

The fact that over half of the judges in this analysis never denied parties’ joint request for a PO is remarkable. Opponents of PO reform have long argued that trial judges are in the best position to exercise ground-level discretion in determining whether a PO is warranted and, if so, what shape that PO should take—and they have long assured policymakers that, on a day-to-day basis, district court judges exercise this discretion with care and fidelity.¹⁹² To have so many judges with a zero percent denial rate raises questions about that assertion and implies that searching case-by-case scrutiny is not the norm.¹⁹³

¹⁹² See *supra* notes 128–130 and accompanying text.

¹⁹³ To be sure, although grant rates—in isolation—are probative of rubber-stamping, they aren’t necessarily *proof* of it. Caution is warranted, in part, because strategic litigation effects make it notoriously difficult for researchers to map the grant rate to how judges apply the law. See, e.g., Gelbach, *Material Facts*, *supra* note 165, at 389–93. Further, as Wiggins et al. notes, it is possible that part of what might drive the results is that “parties [may] discuss with the court whether a protective order is warranted and what provisions should be included before a formal agreement is presented.” WIGGINS ET AL., *supra* note 155, at 6. If judges and parties are regularly engaged in this kind of informal, invisible, undocketed exchange, then our review of the docket would show rubber stamping where there has been more consideration.

D. Qualitative Assessments

To fortify our analysis, we supplemented our quantitative assessment with a qualitative evaluation of 300 granted and 100 denied stipulated POs randomly drawn from our docket dataset. Although these 400 cases represent a relatively small sample of orders, the sample is large enough to give us a helpful peek at what, if any, standards judges actually apply when ruling on requests for stipulated POs. The sample, from a range of district courts and civil case types, contains stipulated PO rulings entered between 2005 and 2014 in cases that were filed between 2005 and 2012.¹⁹⁴ In performing this review, we were inspired by earlier work, including by Endo.¹⁹⁵

Although we cannot rule out either effect, there are two reasons we are skeptical that informal channels explain our findings. First, our detailed qualitative review did not surface substantial evidence of such iterative collaboration. *See infra* Subpart III.D.

Second, if informal discussions were an important factor in our results, we would expect to find sharply different denial rates in cases where there was only one docketed entry reflecting a stipulated PO request than in cases with multiple such docketed entries. Our reasoning is that, after parties heard from chambers that their initial joint PO request did not pass muster, and how to fix it, they would be expected to file a superseding, second request that *would* pass muster. So, if the informal-discussion hypothesis is importantly correct, we ought to see an especially low denial rate in cases where we identify two docketed motions for stipulated POs and one docketed order adjudicating those requests. In such cases, we found a denial rate of 7.7%—higher, not lower, than the overall average. Of course, there might be differences in cases with one versus multiple joint PO requests, so we do not wish to push the statistics in this footnote too far. Nevertheless, this pattern is inconsistent with the simple informal-discussion story detailed above.

¹⁹⁴ One other prefatory note: Eighteen orders in our random sample (6.0% of the draw) happened to be identical orders entered on the same day and by the same judge as part of an MDL. Given our commitment to the random draw, we included all eighteen orders in our analysis.

¹⁹⁵ *See generally* Endo, *supra* note 33 (conducting a qualitative review of 100 granted stipulated POs).

Figure 8: Count of Tagged Stipulated PO Grants, by Year Filed and Circuit¹⁹⁶

<i>Count by Year Filed</i>			<i>Count by Circuit</i>		
Year	PO Count	Percent	Circuit	PO Count	Percent
2005	6	2.0%	1st Circuit	6	2.0%
2006	23	7.7%	2nd Circuit	30	10.0%
2007	19	6.3%	3rd Circuit	16	5.3%
2008	28	9.3%	4th Circuit	7	2.3%
2009	25	8.3%	5th Circuit	50	16.7%
2010	32	10.7%	6th Circuit	33	11.0%
2011	30	10.0%	7th Circuit	34	11.3%
2012	44	14.7%	8th Circuit	15	5.0%
2013	63	21.0%	9th Circuit	60	20.0%
2014	30	10.0%	10th Circuit	28	9.3%
Sum	300	100%	11th Circuit	21	7.0%
			D.C. Circuit	0	0.0%
			Sum	300	100%

Figure 9: Count of Tagged Stipulated PO Denials, by Year Filed and Circuit

<i>Count by Year Filed</i>			<i>Count by Circuit</i>		
Year	PO Count	Percent	Circuit	PO Count	Percent
2005	1	1.0%	1st Circuit	0	0.0%
2006	10	10.0%	2nd Circuit	2	2.0%
2007	10	10.0%	3rd Circuit	0	0.0%
2008	11	11.0%	4th Circuit	4	4.0%
2009	15	15.0%	5th Circuit	1	1.0%
2010	8	8.0%	6th Circuit	2	2.0%
2011	15	15.0%	7th Circuit	12	12.0%
2012	15	15.0%	8th Circuit	2	2.0%
2013	5	5.0%	9th Circuit	57	57.0%
2014	10	10.0%	10th Circuit	13	13.0%
Sum	100	100%	11th Circuit	7	7.0%
			D.C. Circuit	0	0.0%
			Sum	100	100%

1. Qualitative Review of 300 Granted POs

Evaluating each of these 300 stipulated POs, we first assessed how the PO applied Rule 26(c)'s good cause standard—and, as an initial matter, whether the PO actually used the term “good cause” when granting the order. In other words: Did the court’s order make any mention of the formal

¹⁹⁶ The random pull did not include any cases from the D.C. Circuit because the D.C. district court (1) has a low caseload relative to other districts and (2) adjudicates very few stipulated POs.

requirement for granting a PO?¹⁹⁷ A mere 32% of stipulated POs referred to “good cause” explicitly.¹⁹⁸ Roughly two-thirds of the orders failed to so much as mention the relevant legal standard.¹⁹⁹

However, these figures do not on their face establish that judges abandoned their legal duties. For one, recall that two circuits explicitly permit judges to grant stipulated POs without finding good cause.²⁰⁰ In addition, when a judge signs a stipulated PO that makes a particularized good cause inquiry, that provides good evidence that the order satisfied 26(c) obligations in even the strictest of circuits. But the absence of discussion of the good cause standard, on the order itself, is merely probative, rather than conclusive, as to whether Rule 26(c) was followed. It remains possible that the judge carefully engaged with the Rule 26(c) standard in a way that our empirical analysis fails to discern. Perhaps, for example, the judge did so in a hearing, where no transcript was ever made, or via informal communication via clerks. Or parties might have justified their PO in other briefing to the court which would not show up in the requested or approved PO. Yet, with that caveat, it is highly curious that, in the three circuits that require judges to make a good cause finding even when the PO request is stipulated, only 24% of PO grants so

¹⁹⁷ FED. R. CIV. P. 26(c).

¹⁹⁸ *See, e.g.*, Stipulation and Ord. Protecting Confidential Information; Granting Motion for Protective Order at 1, *United States v. Arg Co.*, Civil Action No. 10-cv-311 (N.D. Ind. Apr. 1, 2013), ECF No. 47 (“In view of this stipulation, the Court finds that good cause exists . . .”).

¹⁹⁹ *See, e.g.*, Stipulated PO at 1, *Whitfield v. PEP Boys – Manny, Moe, & Jack*, No. 13-cv-11070 (E.D. Mich. Oct. 23, 2013), ECF No. 23 (offering no justification for issuance of PO). Note, however, that a small number of orders (5.7%) mentioned possible injury stemming from disclosure without explicitly referencing “good cause.” *E.g.*, Order Granting Motion to Enter Proposed Agreed PO, at 1, *Humphrey v. Burgos*, No. 2:06-cv-00045-APR (N.D. Ind. July 12, 2007), ECF No. 58 (specifying that “[party] contends that said documents . . . contain sensitive and proprietary information relating to its operations as a local government” and, if distributed, would disrupt “its ability to effectively carry out its police powers and activities”).

²⁰⁰ *See* Subpart I.C. (describing case law).

much as mentioned good cause.²⁰¹ This is an even *lower* proportion than our full sample.

Next, we explored whether the Rule 26(c) order justified the grant based on individualized facts or, in contrast, merely by recycling boilerplate language. Recall that, in at least some circuits, a “district court abuses its discretion where it makes neither factual findings nor legal arguments supporting the need for” a stipulated PO.²⁰² Here, out of 300 stipulated POs, only 17% provided a 26(c) good cause determination tailored to the facts of the case.²⁰³ The remaining orders offered no analysis to support a good cause finding or included boilerplate language.²⁰⁴ This finding is

²⁰¹ *Id.* This figure is based on analysis of 83 stipulated PO grants. An additional 9.6% of the orders had a particularized good cause statement but did not include the term “good cause.”

²⁰² *In re Nat’l Prescription Opiate Litig.*, 927 F.3d 919, 929 (6th Cir. 2019) (quotation marks, citation, and alteration omitted).

²⁰³ For example, one order noted that a PO was justified because litigants would be discovering employees’ personnel files, and that discovery of those files would constitute an “unnecessary invasion of their privacy interests.” Agreed PO/As Modified at 1, *Socite v. Steak ‘N Shake Operations, Inc.*, No. 1:06-cv-03888 (N.D. Ill. Jan. 23, 2007), ECF No. 41. Another noted that parties sought marketing and financial strategy documents that derive value from “not being generally known to other parties,” and would cause damage to the parties if revealed. Amended Stipulated PO at 2–3, *Sparknet Commc’ns, L.P. v. Bonneville Int’l Corp.*, No. 1:05-cv-02677 (N.D. Ill. July 5, 2005), ECF No. 95.

²⁰⁴ For example, one order noted that “[d]isclosure and discovery in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation would be warranted.” Ord. by Magistrate Judge Granting Motion for Stipulated PO (as Modified) at 1, *Navarrette v. TD Banknorth, N.A.*, No. 5:07-cv-02767-JW (N.D. Cal. Dec. 12, 2007), ECF No. 19. And at least one order, after offering a boilerplate good cause statement, emphasized that “[t]he *Parties* believe that good cause exists.” Order Pursuant to Stipulation: Discovery PO at 1–2, *First Serv. Networks, Inc. v. First Serv. Maint. Grp., Inc.*, No. 2:11-cv-01897-LOA (D. Ariz. May 21, 2012), ECF No. 28 (emphasis added). This example hearkens back to the analogy comparing stipulated POs to proposed class action settlements that have support from all named parties—wherein both the Seventh Circuit and Arthur Miller agree that, as in the Rule 23(e) context, when it comes to Rule 26(c), party consent does not suffice. *See supra* notes 65 and 75 and accompanying text.

consistent with others' research.²⁰⁵ And, as above, an even *lower* proportion of POs (12%) included an individualized good cause justification in the three circuits that explicitly require good cause findings when granting stipulated POs.²⁰⁶

Third, we considered the extent to which courts modified the POs proposed by the parties. Litigants seeking stipulated POs generally submit detailed proposed orders. Upon receipt, a judge may sign a proposed order as written, manually modify the proposal, or draft and sign her own version. For our purposes, this is relevant because if a judge modifies a PO, there is at least some clear evidence that the judge has scrutinized the order.

In assessing whether judges modify, we used a very generous definition of "modification." To be sure, we did not credit as modifications any situations like the one displayed in Figure 10, in which judges simply (1) added prefatory language noting that the court was granting the proposed order, (2) removed the word "proposed" from the order, (3) dated the document, or (4) signed the document. But we counted all other changes to the text of a proposed PO, even minor changes to grammar, as a modification.²⁰⁷

Still, even under this capacious definition, courts modified the text of less than 22% of all proposed stipulated POs.²⁰⁸ Judges did not modify any element of the party's

²⁰⁵ Seth Endo, for example, found that 34% of sampled orders granting a stipulated PO described either (i) "specific types of information to be protected or [(ii)] harms that would follow from public disclosure" while the remaining 66% used "generic language." Endo, *supra* note 33, at 1286. Our results differ from Endo's, likely because we only counted the second of Endo's two categories of orders: orders that explained what harms would befall litigants if documents were made public. For similar results, see Hanlock, *supra* note 22, at 1540 (noting that orders in her study "recognized good cause as the standard" but generally "did not engage in a rigorous good cause analysis").

²⁰⁶ In other words, 12% of our 83 sampled stipulated PO grants from the Third, Sixth, and Seventh Circuits had an individualized justification.

²⁰⁷ To determine if a PO was modified, we looked for handwritten notes, text in a different font, and other indicia of modification in the entered order. Where the order was ambiguous on its face, we downloaded the original PO request from PACER and compared the two orders (requested and granted) side-by-side.

²⁰⁸ More specifically, we found evidence of judicial modification in 14.7% of orders. But we could not tag a further 6.7% of all orders

proposed stipulated PO in at least 78% of cases. In many cases, the court merely crossed out the word “proposed,” signed, and dated the order proposed by litigants. And, where courts did modify a PO, they often did so to clarify an unrelated issue: the standard for sealing court records.²⁰⁹

Figure 10: Example Unmodified PO²¹⁰



To recap, our qualitative assessment of 300 stipulated POs reveals that most stipulated POs fail to mention Rule 26(c)’s “good cause” standard. Fewer offer an individualized assessment of the facts justifying the judge’s (implicit or explicit) finding that the standard has been satisfied. And, generally, as exemplified by the proposed-cum-actual order depicted in Figure 10, when judges grant the parties’ joint motion, the judge merely strikes out the word “proposed” and signs his or her name.

Finally, we surveyed model POs promulgated by district courts—and, in so doing, found yet more evidence of rote and relaxed Rule 26(c) review. We initially identified eighteen federal district courts (out of the ninety-four districts) that have adopted district-wide model POs.²¹¹ Of those

(often because the party’s initial proposal was not available on PACER), meaning that the modification rate could be as high as 21.3%.

²⁰⁹ See *supra* note 41–46 and accompanying text. In the sample, 59% of all modified POs were modified to, at least in part, clarify the standards for sealing documents.

²¹⁰ The judge made no other changes to the proposed order. Amended Stipulated PO, Sparknet Commc’ns, L.P. v. Bonneville Int’l Corp., No. 1:05-cv-02677 (N.D. Ill. July 5, 2005), ECF No. 95. At least 79% of all stipulated PO grants were functionally identical to Figure 10.

²¹¹ Those courts are the Northern District of California, the Southern District of California, the District of Idaho, the Southern District of Indiana, the Northern District of Iowa, the District of Kansas, the District of Minnesota, the District of Nebraska, the District of New Hampshire, the Northern District of Ohio, the Southern District of Ohio, the Northern District of Oklahoma, the District of Oregon, the Northern District of Texas, the District of Utah, the Western District of Washington, the Northern District of West Virginia, and the Southern District of West Virginia. Citations follow in the ensuing footnotes.

eighteen models, only two facially require a judicial finding of good cause based on the circumstances of the case.²¹² Another two mention that the court found “good cause” in entering the order but do not require particularized justifications.²¹³ The remaining fourteen do not even purport to make a good cause determination—and, indeed, seven do not mention the standard at all.²¹⁴ Once again, these results are not dispositive.

²¹² Both model orders ask litigants to explain why the litigation calls for a PO. U.S. Dist. Ct., Dist. Kan., *Protective Order* 3, <https://www.ksd.uscourts.gov/civil-forms>; U.S. Dist. Ct., Dist. Ore., *Model Two-Tier Protective Order* 1 (2018), <https://ord.uscourts.gov/index.php/164-attorneys/forms>.

²¹³ U.S. Dist. Ct., Dist. Idaho., *Model Protective Order* 8, https://id.uscourts.gov/district/forms_fees_rules/Civil_Forms.cfm (to locate, scroll down to “Litigation and Discovery Plan”); U.S. Dist. Ct., Dist. Utah, *Standard Protective Order for Cases Filed Before December 1, 2023*, at 1, <https://www.utd.uscourts.gov/usdc-forms>.

²¹⁴U.S. Dist. Ct., S. Dist. Ind., *Uniform Protective Order* (“Good cause” appears in instructions accompanying the model order but not in the order itself), <https://www.insd.uscourts.gov/forms/uniform-protective-order>; U.S. Dist. Ct., N. Dist. Iowa, *Stipulated Protective Order*, <https://www.iand.uscourts.gov/forms-0> (to locate, scroll down to “Civil”); U.S. Dist. Ct., Dist. Minn., *Stipulation for Protective Order Form*, <https://www.mnd.uscourts.gov/sites/mnd/files/forms/Stipulation-for-Protective-Order-Form.pdf>; U.S. Dist. Ct., Dist. Neb., *Protective Order: No AEO, no HIPPA*, <https://www.ned.uscourts.gov/internetDocs/forms/Protective%20Order--no%20AEO%20no%20HIPAA.pdf>; U.S. Dist. Ct., S. Dist. Ohio, *One-Tier Protective Order*, https://www.cand.uscourts.gov/wp-content/uploads/forms/model-protective-orders/CAND_StandardProtOrd.Feb2022.pdf; U.S. Dist. Ct., W. Dist. Wash., *Model Stipulated Protective Order*, https://www.wawd.uscourts.gov/sites/wawd/files/ModelStipulatedProtectiveOrder%20CLEAN_2.1.23.pdf; U.S. Dist. Ct., S. Dist. W.V., *Agreed Protective Order*, <https://www.wvwd.uscourts.gov/forms/agreed-protective-order>.

Five use the term “good cause” only when discussing other procedures, including procedures for subsequent challenges to individual confidentiality designations. U.S. Dist. Ct., N. Dist. Cal., *Model Stipulated Protective Order* 6, https://www.cand.uscourts.gov/wp-content/uploads/forms/model-protective-orders/CAND_StandardProtOrd.Feb2022.pdf; U.S. Dist. Ct., S. Dist. Cal., *Model Protective Order*, <https://www.casd.uscourts.gov/forms.aspx?list=miscellaneousforms>; U.S. Dist. Ct., N. Dist. Okla., *CV-29 Form (Confidential Protective Order)* 8, <https://www.oknd.uscourts.gov/protective-orders>; U.S. Dist. Ct., N. Dist. Tex., *Protective Order* 4, 9, <https://www.txnd.uscourts.gov/sites/default/files/forms/MO62A-ProtectiveOrder.pdf>; U.S. Dist. Ct., N. Dist. W.V., *Sample Protective Order* 3, 6,

But they nonetheless bolster our findings and suggest that district courts do not routinely evaluate parties' good cause justifications.

2. Qualitative Review of 100 Denied POs

To round out our empirical assessment, we evaluated 100 denials of stipulated POs, roughly 3.5% of all stipulated PO denials in our study.²¹⁵ Of these, 91 orders fully denied the parties' joint motion, while 9 denied it only in part.²¹⁶ Notably, despite our random sampling, forty-four of our stipulated PO denials were from the Central District of California, a product of the district's large caseload and comparatively high denial rate. Just three judges (district and magistrate) from the Central District of California accounted for 23% of the PO denials in our entire random sample.

So, why did courts reject stipulated POs? We found that there were several reasons—and, in many instances, judges' denials highlighted numerous deficiencies. As Figure 11 demonstrates, over half (54%) of all stipulated PO merits-based denials were traceable to the fact that the parties tried to smuggle in provisions that committed the court to automatically seal court filings. (As explained previously, the sealing determination and the entry of a PO are often confused, but the two concepts should be kept distinct.²¹⁷) A similar share (50%) of rejected stipulated POs centered on good cause. Often, parties either made no good cause statement at all, or made it with insufficient particularity. The last large category of rejections, accounting for 45% of denials, were proposed POs that sought protection for an overly broad, or poorly

<https://www.wvnd.uscourts.gov/sites/wvnd/files/Proposed%20Draft%20Protective%20Order%20For%20Form.pdf>.

Two mention the good cause standard for entering a PO but do not *make* a good cause determination. U.S. Dist. Ct., Dist. N.H., *Civil Form 5: Protective Order Form* 1, 9, <https://www.nhd.uscourts.gov/pdf/Civil%20Form%205.pdf> (stating that the order applies only to “materials which may be subject to restrictions on disclosure for good cause”); *see also* U.S. Dist. Ct., N. Dist. Ohio, *Form Protective Order* 1, 9, https://www.ohnd.uscourts.gov/sites/ohnd/files/CivilRules_AppendixL.pdf (same)

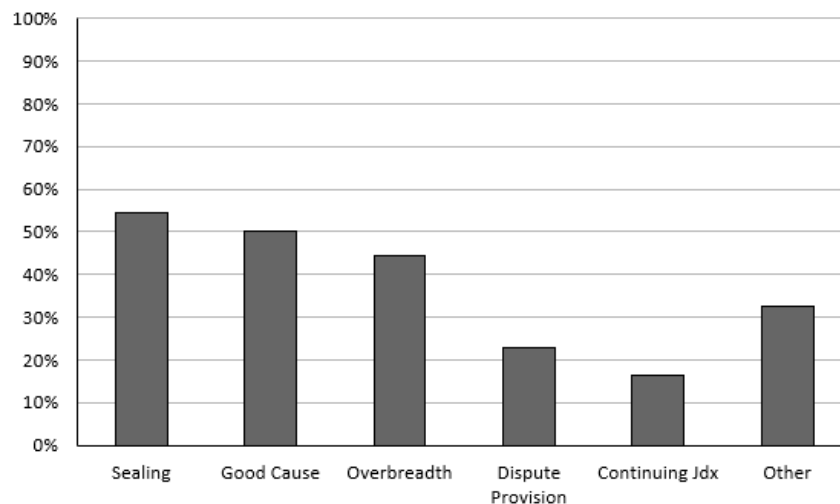
²¹⁵ More precisely, we analyzed 113 stipulated POs but excluded thirteen denials because they did not explain the reason for denial.

²¹⁶ As noted above, in our analyses, we counted a PO as “denied” if it was denied in any part.

²¹⁷ *See supra* notes 41–46 and accompanying text.

described, category of documents. Together, at least one of these three errors was mentioned in 84% of all merit-denials.²¹⁸ Beyond that, around one-quarter (23%) of denials included improper provisions for resolving disputes between parties, such as provisions that did not adequately describe mechanisms for contesting the confidentiality of a document. And a further 16% of orders were denied because they implied that the court had jurisdiction after the conclusion of the case. All other reasons for rejection accounted for 33% of denials.²¹⁹

Figure 11: Stated Reasons for Denying a Stipulated PO



Second, and with more normative force, we consider whether POs were ever entered after an initial denial of a request for a stipulated PO. If a PO is not entered following a denial, the court’s initial denial ensured that discovery occurred without judicially imposed privacy, and parties were free to reveal information to others. We might also reason that, where a PO is never entered, (i) the PO was of little value to parties to begin with, (ii) satisfying the court’s objection(s) would have devalued the PO, or (iii) the parties could not meet the good cause requirement. Where a PO is later entered, we might reason that the PO was of comparatively higher value to litigants, who must have done additional work to convince the court to grant the order. Ultimately, we found that following

²¹⁸ Notably, we identified many of these same errors in granted POs.

²¹⁹ Most frequently, POs in this category were rejected because they: (1) failed to say that members of the public had a right to challenge confidential designations (9%), or (2) purported to bind the court, court employees, or the jury (8%).

denial in full of stipulated PO requests,²²⁰ 40% of cases had no subsequent entry of a PO.

IV. IMPLICATIONS

In this final Part, we step back and assess the implications of our work. Starting at ground level, Subpart A argues that our findings should, at a minimum, discipline future debate surrounding Rule 26(c). During decades of heated back-and-forth, many reform proposals have been short-circuited by claims that stipulated POs are (1) very rare and (2) when filed, are carefully scrutinized by courts.²²¹ Our data powerfully undercut both those claims, especially the second.

Moving back slightly, Subpart B addresses the implications of our findings for tort law in particular. As Subpart B explains, there is a dawning recognition among many tort law scholars that a significant—and perhaps the most significant—function of tort litigation is to generate information. Tort law’s *raison d’être* is not to provide compensation, corrective justice, or even old-style deterrence, these scholars argue; it is, rather, to bring “stubborn information to light.”²²² Through this lens, the Article’s implications are clear. If tort law’s principal function is to bring “stubborn information to light,” when it comes to tort law, POs, which prevent the public disclosure of surfaced information, have a significant—and heretofore radically underestimated—antisocial effect.

Subparts C and D assess our results through a wider-angle lens. Subpart C addresses the implications of our findings when it comes to the relative role of rulemaking versus discretion in American procedure. Subpart D then considers how our analysis contributes to a brewing debate about the future of the American civil justice system. Indeed, the debate about POs both reflects and sheds light on a slew of vitally important questions, including the nature of adversarialism and whether and how to adapt the “open

²²⁰ When a court partially grants a PO request, it enters the PO with some modification, and litigants need not file additional requests to enter a PO. Partial grants are therefore excluded from this analysis.

²²¹ See *supra* notes 123–130 and accompanying text.

²²² Wendy Wagner, *Stubborn Information Problems & the Regulatory Benefits of Gun Litigation*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL & MASS TORTS* 271, 271, 275–76 (Timothy D. Lytton ed., 2006).

courts” principle, as the American civil justice system enters a new and challenging chapter.

A. Rebooting the Rule 26(c) Debate

First, our empirical discoveries can and should reboot the perennial debate surrounding Rule 26(c). As noted previously, opposition to Rule 26(c) reform proposals has long anchored on two arguments. First, that POs are rare; and second, that trial judges exercise careful, considered judgment when entering them. These core claims, moreover, have issued from prestigious quarters, lending heft to their frequent airing. For instance, District Judge Mark R. Kravitz, testifying in Congress in 2008 on behalf of the Judicial Conference in opposition to the Sunshine in Litigation Act, directly asserted that “there is no empirical evidence to suggest that protective orders . . . are substantially abused in the Federal courts.”²²³ Or, as he put it at the same hearing: “[C]ourts review [PO] motions carefully and often deny or modify them to grant only the protective orders needed, recognizing the importance of public access to court filings.”²²⁴ Some twenty years earlier, another defender of the Rule 26(c) status quo, Professor Arthur Miller—himself a former Reporter and Advisory Committee member—reassured readers in an influential Harvard Law Review article: “No one is advocating the automatic or cavalier issuance of protective orders . . . let alone that they be granted without regard for substantially deleterious effects on public health and safety.”²²⁵ “The key,” Miller continued, “is retaining judicial discretion.”²²⁶ Because judges already “take their Rule 26(c) obligations very seriously,”²²⁷ Miller argued

²²³ *Sunshine in Litigation Act of 2008: Hearings on H.R. 5884 Before the H. Comm. on the Judiciary, Subcomm. on Commercial and Administrative Law*, 110th Cong. 74 (2008) (testimony of The Hon. Mark R. Kravitz for the Judicial Conference of the United States).

²²⁴ *Id.* at 81 (statement of The Hon. Mark R. Kravitz for the Judicial Conference of the United States).

²²⁵ Miller, *supra* note 35, at 491. Extending the thought, Miller advised: “Judges must guard against any notion that the issuance of protective orders is routine, let alone automatic, even when the application is supported by all the parties.” *Id.* at 492.

²²⁶ *Id.* at 491.

²²⁷ *Federal Sunshine in Litigation Act and Federal Court Settlements Sunshine Act, Hearings on H.R. 2017 and H.R. 3803 Before the H. Comm. on the Judiciary, Subcomm. on Intellectual Property and Judicial Administration*, 102nd Cong. 15 (1992) (statement of Prof. Arthur R. Miller).

to Congress soon after, and because “proponents of reform have not demonstrated that significant modification of the present framework is necessary, the existing pragmatic and discretionary balancing technique should be retained.”²²⁸ And, Judge Edward Becker has also publicly expressed “doubt [that] any judge would approve a consent order not demonstrably rooted in Rule 26(c).”²²⁹

Finally, consider a colloquy between Rep. William Hughes—a supporter of the 1990s-era Sunshine in Litigation Act—and Stephen C. Bransdorfer, Deputy Assistant Attorney General, who opposed reform:

Mr. Hughes: Mr. Bransdorfer, let me ask you a question—just by way of a threshold question. Is it important for judges to make an independent determination that serves the public interest to sign a protective order?

Mr. Bransdorfer: Yes, it is.

Mr. Hughes: Is that policy being followed throughout our system today?

Mr. Bransdorfer: I think it is. . . . I think, by and large, a fair study of the system would indicate that . . . the use of protective orders does involve a showing of cause.²³⁰

Our findings, drawn from a “fair” study of the system—indeed, a comprehensive study of more than 2.2 million dockets spanning nearly a decade of filings—run directly contrary to these claims. Stipulated POs are quite common, perhaps increasingly so, and most judges do not appear to be carefully exercising discretion in entering them. Rather, the majority of judges in our data apparently never—not even once—saw a stipulated PO they wouldn’t sign. Approval of POs appears to be “automatic or cavalier”—

²²⁸ Miller, *supra* note 35, at 491.

²²⁹ Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 889 n.40 (E.D. Pa. 1981).

²³⁰ *Federal Sunshine in Litigation Act and Federal Court Settlements Sunshine Act, Hearings on H.R. 2017 and H.R. 3803 Before the H. Comm. on the Judiciary, Subcomm. on Intellectual Property and Judicial Administration*, 102nd Cong. 105 (1992) (testimony of Stephen C. Bransdorfer, Deputy Assistant Attorney General, U.S. Department of Justice) (emphasis added).

exactly the situation Professor Miller, alongside many others, have long said doesn't exist, should not be countenanced, and, if proven, would impel serious reform consideration.²³¹

Of course, our results do not necessarily mean that arguments about the prevalence of POs or the level of judicial care in entering them are the only ones to be considered in a renewed debate about whether or how to revise Rule 26(c). It could be that policymakers could still decide that, particularly in an increasingly digital age, Rule 26(c)'s anemic implementation strikes the right balance between transparency and privacy and that the rule's text should merely be brought into alignment with the rule's on-the-ground implementation.²³² What is clear, however, is that, so far, the decades-long debate about POs has been deeply impoverished. Defenders of the Rule 26(c) status quo have fended off reform attempts by relying on dusty empirics and reassuring but, it turns out, inaccurate claims that the system is functioning as intended. By sweeping away these claims around stipulated POs' prevalence and judicial care in entering them, this Article can and should prompt renewed debate. And, just as critically, it ought to reorient the debate to more squarely focus on substantive questions, including the role of private civil litigation in a well-ordered society and the relative importance

²³¹ Miller, *supra* note 35, at 491.

²³² For instance, reform champions and opponents, we noted previously, have also long clashed over first principles, such as whether the primary purpose of adjudication is the resolution of private disputes or the public elaboration of legal norms—a fundamental tension we return to below. *See infra* Subpart IV.D. A robust, revived debate about the future of Rule 26(c) should also consider the ways the world, including civil litigation, has changed in recent decades. As just one example, those who oppose Rule 26(c) reforms could plausibly argue that tectonic shifts in the political economy of information—for instance, the increasing velocity, virality, and permanence of information in a digital world—justifies a more privacy-protective approach, particularly early in litigation, in order to balance transparency values against the need to protect parties, and particularly defendants, from undue reputation-ruining publicity before a court has fairly and finally adjudicated the allegations made against them. For seminal works on virality, see KARINE NAHON & JEFF HEMSLEY, *GOING VIRAL* (2013); JONAH BERGER, *CONTAGIOUS: HOW TO BUILD WORD OF MOUTH IN THE DIGITAL AGE* (2013). For more discussion of privacy concerns and court data, see *infra* note 285 and accompanying text.

of transparency and secrecy as against competing values in the resolution of disputes.

B. Stunting the Information-Forcing Function of Tort Law

Second, our findings have deep implications for the aims—and limits—of the tort system. Here, an increasingly popular view among tort law scholars is that an important benefit—perhaps the primary benefit—of the tort system is its “information-forcing function.” This information-forcing theory posits that tort law indeed promotes safety. But it does so not exclusively, and perhaps not even mostly, via the much-discussed path of cost internalization that law-and-economics scholars such as Richard Posner, Mitch Polinsky, and Steven Shavell have long championed.²³³ Rather, according to this new view, tort law operates in large part through its informational effect.²³⁴ The idea is that plucky plaintiffs’ lawyers—decentralized and well incentivized by the contingency fee—are uniquely positioned to connect dots, follow leads, depose insiders, and pry damning documents out of company vaults.²³⁵ And these lawyers’ persistent efforts yield vital information that promotes sensible regulatory activity and also ensures that reputations reflect reality and steer consumers toward safer goods, services, and

²³³ See Nora Freeman Engstrom, *Facilitating the Information-Forcing Function of Tort Law*, JOTWELL (Mar. 22, 2022), <https://torts.jotwell.com/facilitating-the-information-forcing-function-of-tort-law/>.

²³⁴ See Nora Freeman Engstrom & Michael D. Green, *Tort Theory and Restatements: Of Immanence and Lizard Lips*, 14 J. TORT L. 333, 372 n.5 (2021).

²³⁵ See Engstrom, *supra* note 2, at 333–35 (describing these dynamics); Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 700 (2007) (explaining that, compared “to their agency counterparts, litigants in tort cases are generally both more eager and more able to access asymmetric information held by manufacturers and industrial polluters”).

workplaces.²³⁶ Information, these scholars believe, is not ancillary. It is tort law’s beating heart.²³⁷

The notion isn’t merely theoretical. Over recent decades, examples of instances where the tort system has generated critical information concerning public safety have accumulated.²³⁸ Litigation against gun manufacturers and sellers has generated significant policy-relevant information, including that gun executives have long known how guns are diverted into illegal secondary markets.²³⁹ Litigation addressing clergy sexual abuse has surfaced a mountain of information, including how Church officials sought to conceal the misconduct of various priests.²⁴⁰ Litigation involving polychlorinated biphenyls (PCBs) has uncovered startling new evidence concerning the danger and prevalence of these industrial chemicals.²⁴¹ Litigation against cigarette companies

²³⁶ Burch & Lahav, *supra* note 8, at 356 (“When made public, information produced in discovery allows the press and researchers to study the documents, connect the dots, unmask health risks, shed light on regulatory failures, and pressure companies to make safer products.”); Jacob Asaf & Roy Shapira, *An Information-Production Theory of Liability Rules*, 89 U. CHI. L. REV. 1113, 1148 (2022) (arguing that “the process of litigation propels regulators to act. . . because it provides them with valuable information on the regulated industry to which they were not privy” and also because it “makes available information more salient, thereby facilitating more intense media scrutiny of the regulator”).

²³⁷ Wagner, *supra* note 235, at 696 (highlighting the “indispensable role of tort litigation in lowering information-related barriers to regulating risky products”); Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 375 (2011) (explaining that “the tort system is a vital source of information gathering and intragovernmental feedback”).

²³⁸ Wagner, *supra* note 235, at 711–17 (collecting examples); *see also* Abbe R. Gluck, Elizabeth Chamblee Burch & Adam S. Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 YALE L.J. FORUM 525, 556–57 (2024) (same); Joanna C. Schwartz, *The Cost of Suing Business*, 65 DEPAUL. L. REV. 655, 680–83 (2016) (same).

²³⁹ Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1845–46 (2008).

²⁴⁰ *Id.* at 1852–53. *See also* Wagner, *supra* note 235, at 725–27 (describing various revelations).

²⁴¹ Gerald Markowitz & David Rosner, *Monsanto, PCBs, and the Creation of a World-Wide Ecological Problem*, 39 J. PUB. HEALTH POL’Y 463, 463 (2018) (explaining that “an enormous trove of previously private Monsanto

has uncovered information to show who knew what when about the danger of smoking.²⁴² And, litigation against opioid manufacturers, sellers, and distributors has—likewise—generated stunning information concerning the breadth, depth, causes, and character of that continuing epidemic.²⁴³

Seen through this conceptual lens, the problem of POs is plain. If it is true, as some scholars claim, that tort law exists chiefly to bring “stubborn information to light,” then the automatic and unreflective entry of POs stunts this vital informational exchange and stymies tort law’s core utility.²⁴⁴

C. Rule Fidelity, Judicial Hierarchy, and Judge Discretion

A third set of implications sounds in judicial decision-making: Our findings raise deep concerns about fidelity to procedural rules and the complex interplay of rulemaking, judicial hierarchy, and trial judge discretion in the creation of American procedure.

Viewed from one angle, widespread rubber-stamping of POs despite Rule 26(c)’s clear command, as supported by the stunning fact that more than half the federal judges in our data never denied a joint request for a PO during the study period, indicates an especially sharp disjunction between the law on the books and the law in action. Rule 26(c) states plainly that POs are to be granted only upon a showing of good cause. As the Eleventh Circuit has explained: “The plain text of [Rule 26(c)] suggests that a district court must find good cause to issue a protective order.”²⁴⁵ Or, to quote the Third: “[T]he burden of justifying the confidentiality of each and every document sought to be covered by a protective order

reports, papers, memos, letters, and studies” concerning PCBs has been made available to researchers, as a result of litigation).

²⁴² Engstrom & Rabin, *supra* note 117, at 355–57.

²⁴³ *Id.*

²⁴⁴ Engstrom, *supra* note 2, at 333–35 (quotation marks omitted); *cf.* Egilman et al., *supra* note 9, at 295 (collecting pharmaceutical examples of POs shielding information relevant to public health from disclosure).

²⁴⁵ *In re Chiquita Brands Int’l, Inc.*, 965 F.3d 1238, 1249 (11th Cir. 2020) (*per curiam*).

remains on the party seeking the protective order; any other conclusion would turn Rule 26(c) on its head.”²⁴⁶

Supporting this authority, as noted previously, the Federal Judicial Center has unambiguously stated: “It is common for parties to present to the court a stipulated protective order for the court to sign. . . . It is only proper for the court to issue the order upon the court’s finding that the order is supported by good cause.”²⁴⁷ The Wright and Miller treatise concurs.²⁴⁸ And leading scholars, too, have resisted the notion that party agreement suffices, under Rule 26(c). Steve Gensler, for example, cautions that, even when parties stipulate “it is the court that ultimately must enter the [protective] order, and the court may do so only in compliance with Rule 26(c)’s good cause requirement.”²⁴⁹ Gustavo Ribeiro concurs. “Even if the parties agree to proposed stipulated protective orders,” cautions Ribeiro, “the court must still determine whether good cause for issuing the order exists.”²⁵⁰

Yet, even before our study, there were hints that this command was often honored in the breach. As one district court recently acknowledged: “It has become common practice for district courts to enter broad, stipulated protective orders without strict compliance with Rule 26(c).”²⁵¹ And, more than a quarter-century ago, the influential Defense Research Institute also seemed to own this fact, instructing its members to “routinely seek a protective order limiting dissemination of documents, even though defense counsel can make no special claim of confidentiality.”²⁵²

²⁴⁶ *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986).

²⁴⁷ REAGAN, *supra* note 72, at 6.

²⁴⁸ Recall, it provides that “[e]ven when the parties consent, the court may not enter an order unless Rule 26(c) is satisfied.” MARCUS, *supra* note 48, at § 2035.

²⁴⁹ GENSLER, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY, Rule 26 (2021 ed.).

²⁵⁰ Ribeiro, *supra* note 30, at 190.

²⁵¹ *Fant v. City of Ferguson*, 2019 WL 4221515, at *3 (E.D. Mo. 2019).

²⁵² Kerry A. Kearney & Tracy G. Benson, *Preventing Non-Party Access to Discovery Materials in Product Liability Actions: A Defendant’s Primer*, in CURRENT ISSUES IN LAW AND MEDICINE 36, 40 (1987).

There is, the above suggests, a glaring mismatch. The plain language in Rule 26(c), most appellate courts, and the Federal Judicial Center say that trial courts need to do one thing. But it appears that trial courts, instead, are doing quite another. In a companion paper we more fully explore this disconcerting disconnect between the law on the books and law in action.²⁵³ But for now, this basic mismatch—trial courts’ basic disobedience—contributes to at least two broader debates about American procedure-making.

First, our findings raise important questions about the relative roles played by rulemaking, appellate oversight, and judicial discretion in American civil litigation. In recent decades, one of the signal developments in American civil procedure has been the steady deepening of the reservoirs of discretion within which trial judges operate.²⁵⁴ From the rise of “plausibility” pleading,²⁵⁵ to the centering of summary judgment,²⁵⁶ to increased attention to case management,²⁵⁷ to new controls and limits on trial,²⁵⁸ to the “Wild West” and often ad hoc administration of mammoth multidistrict

²⁵³ See *supra* note 191. As a spoiler, we find that, even in circuits that appear to have strict (written) standards for the review and approval of Rule 26(c) motions, trial courts quite freely grant parties’ jointly filed Rule 26(c) motions. See Peters et al., *supra* note 47.

²⁵⁴ See David Freeman Engstrom, *Digital Civil Procedure*, 169 U. PA. L. REV. 2243, 2246–52 (2022).

²⁵⁵ In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565 (2007), the Court conferred substantial discretion on trial judges in instructing them to assess the plausibility of allegations “in light of common economic experience.” That the discretion conferred was not limited to *Twombly*’s antitrust setting became clear two years later in *Ashcroft v. Iqbal*, 556 U.S. 662, 663–64 (2009).

²⁵⁶ For the radical growth of summary judgment, see Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 67 n.293 (2019).

²⁵⁷ Considered in tandem, Rules 16 and 26 grant enormous discretion to trial judges to control the breadth and pace of discovery. See Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 679 (1997). For the classic discussion of the growth of, and tradeoffs surrounding, trial-judge discretion, see generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

²⁵⁸ Nora Freeman Engstrom, *The Trouble with Trial Time Limits*, 106 GEO. L.J. 933, 941–46 (2018).

litigations,²⁵⁹ American trial judges increasingly call their own tune and are, simultaneously, increasingly able to shield their day-to-day conduct from meaningful appellate scrutiny.²⁶⁰ Indeed, large swaths of contemporary civil procedure can be seen as a deliberate conferral of discretion on trial judges to tailor procedural rulings to individual cases or even to make procedure out of whole cloth.²⁶¹

Against this broader backdrop, our striking findings concerning district court disobedience when granting stipulated POs is doubly provocative. Enriching—and complicating—current discussion of judicial discretion, our findings reveal that, even on those seemingly rare occasions when we all think trial judges’ discretion is cabined, in fact, trial judges are, instead, free agents, untethered to formal commands.

Second, our findings raise vital questions about other pathways through which American procedure is made, particularly the role of rulemaking under the Rules Enabling Act. The Rules Enabling Act, supposedly, is the cornerstone of the system.²⁶² But we show that, whether or not rulemakers formally choose to revisit Rule 26(c), trial judges have already effected substantial, sub rosa changes to its core operation, particularly the “good cause” standard.

That startling insight is important in its own right—and it also connects to wider concerns about the process of American procedure-making. A rich empirical literature

²⁵⁹ See Engstrom, *supra* note 256, at 6–7 (discussing the ascendance of MDLs and MDL judges’ persistent and potentially lawless “ad hocery”).

²⁶⁰ Engstrom, *supra* note 254, at 2246–52.

²⁶¹ Engstrom, *supra* note 256, at 8–10 (discussing judicial ad hocery and the growth of “DIY procedures”). For a classic discussion of discretion and the Federal Rules of Civil Procedure, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

²⁶² See 28 U.S.C. § 2072; see also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1025 (1982) (offering the fullest account of the REA’s origins and purposes); Engstrom, *supra* note 254, at 2246–58 (cataloging increasing pressure on the REA’s rulemaking process as a result of the felt need for judicial discretion over rule implementation, separation-of-powers tensions, and the unmasking of the distributive consequences of rules via increasingly sophisticated empiricism).

examines efforts to shape American procedure. One key finding is that some of the most impactful procedural reforms have come not by way of legislation or rulemaking, but rather through court decisions, precisely because these decisions tend to fall below the public radar.²⁶³ Technical and turgid court decisions, the theory goes, flunk the “Dan Rather” test, named after the news anchor of old. A tweak to Rule 8, 12, or 56, buried deep in paragraph nineteen of a decision issued sometime in June can be hugely impactful, but it does not mobilize constituencies and, indeed, does not register with the public at all.²⁶⁴

Our findings enrich that idea. Recall, in the mid 1990s, the Judicial Conference considered a package of amendments to Rule 26(c). Among them was a proposal that would have allowed courts to issue a PO “for good cause shown *or on stipulation of the parties*.”²⁶⁵ The proposal, then, would have formally allowed a PO to be issued simply on the parties’ say-so.²⁶⁶

Yet, the proposed amendment sent shockwaves through the legal world—and ultimately, in a highly unusual

²⁶³ STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 22–23 (2017).

²⁶⁴ *Id.* As just one example, the Court in *Twombly* achieved important changes to the pleading standard where Congress and the Advisory Committee had failed—and it did so just five years after the Supreme Court *unanimously* insisted, for the second time in less than a decade, that only the rulemaking process could change the very same pleading standard. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515, (2002) (“A requirement of greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.” (quotation marks omitted)).

²⁶⁵ Letter of June 2, 1995, *supra* note 78, at 1–2.

²⁶⁶ Some felt that the move would merely “confirm the common practice of entering protective orders on stipulation by the parties.” Advisory Comm. on Civil Rules, October Meeting, Meeting Minutes 8 (Oct. 20, 1994) https://www.uscourts.gov/sites/default/files/fr_import/CV10-1994.pdf; Others disagreed. *E.g.*, Richard B. Schmitt, *Judges’ Group Kills Protective Order Rule*, WALL ST. J., Mar. 15, 1995, at B4 (quoting the chairman of the executive committee, Judge Gilbert Merritt, as stating that the stipulation rule departs from long-standing practice); Letter of June 2, 1995, *supra* note 78, at 1–2 (“express[ing] concern that the proposed rule would change existing practice by allowing entry of protective orders without a showing of good cause”).

move, the Judicial Conference rejected the amendment in the face of blistering criticism.²⁶⁷ In particular, opponents lodged two core objections. Their first was procedural—that the proposal was added in the eleventh hour.²⁶⁸ Second, opponents argued that the rule, which would represent a “dramatic shift” from the status quo,²⁶⁹ would facilitate unbridled secrecy, which would harm public health.²⁷⁰ This was, at least in part, because “individual plaintiffs suing large corporations . . . have little choice but to agree” to POs “as the price for avoiding prolonged, expensive pretrial discovery.”²⁷¹

Following the vote, Linda Greenhouse wrote a *New York Times* story summarizing the debate and its stakes. The story quoted Judge Gilbert S. Merritt who described his opposition to the amendment: “Federal courts shouldn’t do anything without just cause.”²⁷² Secrecy “should not just be left to the option of the parties.”²⁷³

Yet, we show that, although a formal effort to rewrite Rule 26(c) failed, somehow, through a drip, drip, drip of district court discretion, Rule 26(c) was nevertheless rewritten. Secrecy has been left to the option of the parties. This startling insight connects to a broader set of concerns about procedure-

²⁶⁷ Letter of June 2, 1995, *supra* note 78, at 2; *see also* Arthur R. Miller, *Effective Rulemaking Damaged by Politics*, NAT’L L.J. May 1, 1995, at A19 (“Media and special interest group lawyers successfully mounted a last-minute, high-visibility protest against the proposal. . . .”). For representative criticism, *see, e.g.*, Arthur Bryant, *A Sneak Attack on Open Justice*, NAT’L L.J., July 10, 1995, at A19; Jane Kirtley, *Keeping the Public in the Dark*, AM. JOURNALISM REV., July 1995, at 50. Indeed, the stipulation proposal proved so contentious that the Judicial Conference rejected the *entire* package of Rule 26(c) amendments—including provisions that would have clarified the standard for modification and dissolution of POs—without discussing the other reforms. *See* Letter of June 2, 1995, *supra* note 78, at 2.

²⁶⁸ While the other amendments in the 26(c) package had been circulated months in advance and had been the subject of extensive public comment, the stipulation provision was added at the eleventh hour. *See* Schmitt, *supra* note 266, at B4; Bryant, *supra* note 267, at A19.

²⁶⁹ Bryant, *supra* note 267, at A19. As noted, not everyone agreed with this characterization. *See supra* note 266.

²⁷⁰ *See e.g.*, Bryant, *supra* note 267, at A19.

²⁷¹ *See* Greenhouse, *supra* note 80, at A9.

²⁷² *Id.* at B9.

²⁷³ *Id.*

making's pathways and adds fuel to a growing critique about a derogation of the rulemaking process.²⁷⁴

D. Open Courts, Adversarialism, and Access to Justice

Finally, evidence concerning the actual operation of Rule 26(c) contributes to a swirling debate about whether two cornerstones of the American civil justice system—the “open courts” principle and the American commitment to adversarialism—should be adapted to new legal realities.²⁷⁵ Indeed, our Rule 26(c) empirical findings both reflect and shed light on debate about whether and how to revise both mainstays of the American system.

Debate about the meaning and wisdom of the “open courts” principle is not exactly new. It has come, first and foremost, in disputes around how best to interpret the array of constitutional, statutory, and procedural provisions from which the principle emanates.²⁷⁶ Debate has also come in

²⁷⁴ See Engstrom, *Digital*, *supra* note 254, at 2246–58 (tracing heated debate about the place of rulemaking in the American civil justice system). For further discussion, see Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 (2004) (considering the constitutional dimension); BURBANK & FARHANG, *supra* note 263 (offering a wide array of empirics on the operation and public perception of the rulemaking process); ROBERT BONE, JUSTIFYING LITIGATION REFORM (forthcoming 2024) (offering a full theory of procedure-making, including the REA rulemaking process); David Marcus, *The Collapse of the Federal Rules System*, 169 U. PA. L. REV. 2485 (2021) (examining rulemaking through the lens of core procedural values of trans-substantivity and neutrality).

²⁷⁵ “Open courts” is a longstanding principle within the American constitutional tradition and legal system, with doctrinal roots in privileges and immunities, free speech, due process, and equal protection and finding further expression in a large body of statutes, common-law rules, and procedural rules. See *infra* note 276. The traditional American commitment to adversarialism holds that a party-driven clash of proof in a structured, forensic setting before a passive, neutral decision-maker is the best way to resolve disputes. See STEPHAN LANDSMAN, THE ADVERSARY SYSTEM 2 (1984). For a further discussion of the U.S.’s commitment to the adversarial resolution of disputes, see generally ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2d ed. 2019). For rich historical perspective, see generally AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877 (2017).

²⁷⁶ A large body of constitutional provisions, statutes, common-law rules, and procedural rules extolls the virtues of “open courts” and grants the public broad rights of access to civil court proceedings. See,

more academic forms, about the core purposes of adjudication. According to some, courts exist to resolve private disputes²⁷⁷—and any consideration of the public interest blurs and blunts that core purpose. Courts, it follows, should “readily accede to the parties’ mutual desire for confidentiality,”²⁷⁸ lest they turn courts into “information ombudsmen,” distracted from their core function of

e.g., *Press-Enterprise Co. v. Superior Ct. (Press-Enterprise I)*, 464 U.S. 501, 508–09 (1984) (lauding the “community therapeutic value” of open proceedings); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) (“An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.”); *In re Union Leader Corp.*, 147 809 A.2d 752, 753 (N.H. 2002) (affirming that open courtrooms and access to court records are “critical to ensure that court proceedings are conducted fairly and impartially”); *see also* *Landmark Commc’ns v. Virginia*, 435 U.S. 829, 839 (1978) (“The operations of the courts and the judicial conduct of judges are matters of utmost public concern.”); FED. R. CIV. P. 43(a) (“At trial, the witnesses’ testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise.”); 28 U.S.C. § 452 (“All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.”). *See generally* Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1279 (1995) (canvassing state constitutional provisions).

²⁷⁷ *See* Miller, *supra* note 35, at 431 (noting that a focus on public access would divert courts “from their primary mission” of resolving disputes among litigants); *id.* at 441 (“[T]he function of the judicial system is to resolve private disputes, not to generate information for the public.”); Marcus, *supra* note 101, at 468 (“[C]ourts exist to resolve disputes that are brought to them by litigants”); *id.* at 470 (“The primary purpose for which courts were created, distinguishing them from other organs of government, is to decide cases according to the substantive law. The collateral effects of litigation should not be allowed to supplant this primary purpose.”); *see also supra* notes 137–139 and accompanying text (rehearsing these arguments).

²⁷⁸ Doré, *supra* note 113, at 289; *see* David S. Sanson, *The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency of National Reform*, 43 DUKE L.J. 807, 810 (2003) (“Jurisprudentially, the prosecretcy argument insists that the judicial system is a forum for private parties to resolve private disputes and is not an instrument for social justice.”); *id.* (“[T]he prosecretcy argument typically bases its logic on the premise that courts exist to assist private litigants in resolving their disputes in the most efficient way possible.”); *cf.* Erichson, *supra* note 54, at 360 (“A light standard of good cause for discovery confidentiality reduces the burden on the court”).

adjudicating private disputes.²⁷⁹ Others take the opposite view. Courts, Professor Owen Fiss has told us, “exist to give meaning to our public values, not to resolve disputes.”²⁸⁰ They should be no less open and transparent than other democratic institutions—perhaps even more so.²⁸¹

What is different in the current moment is that the “open courts” principle is facing significant pressure and even something of a reckoning. For starters, and as noted previously, numerous high-profile scandals and public health crises have revitalized the debate about the core purposes of adjudication by shining unflattering light on the ways society’s “haves” are able to hide wrongdoing—and perpetuate it. Horrified by these revelations, at last count, more than a dozen states have enacted new laws limiting secret settlements or NDAs for certain claims.²⁸² And, the federal government has also gotten in the act, by, for example, amending the tax laws to establish that defendants cannot deduct payments incurred to settle sexual harassment cases where an NDA shields the settlement from scrutiny.²⁸³

But that is only the beginning. A fast-digitizing legal system is also raising important questions about the terms on which courts make available their mountains of case data. Some argue that open data is essential if a growing legal tech industry is to serve impecunious clients (as well as their wealthy corporate counterparts).²⁸⁴ Others worry that, if made

²⁷⁹ See Miller, *supra* note 35, at 488.

²⁸⁰ Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979). Others have said much the same. See Luban, *supra* note 120, at 2657 (describing information-generation as “a fundamental public interest” of litigation, not a side effect); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1313–16 (1976) (“In my view, judicial action only achieves such legitimacy by responding to, indeed by stirring, the deep and durable demand for justice in our society.”).

²⁸¹ For further articulations, see *supra* notes 118–120 and accompanying text (rehearsing these arguments).

²⁸² Engstrom et al., *supra* note 6.

²⁸³ *Id.* (collecting this and other recent federal efforts).

²⁸⁴ Gelbach, *supra* note 166, at 133–54 (advocating the liberation of PACER); David Freeman Engstrom & Nora Freeman Engstrom, *Legal Tech and the Litigation Playing Field*, in *LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE* 133–54 (David Freeman Engstrom ed., 2023) (explaining that, currently, the “have’s” have disproportionate access to proprietary court data and that, over time, this disparity is apt to skew

easily available, court data could be downloaded in bulk and used for dubious (and perhaps discriminatory) ends.²⁸⁵ Add in legitimate privacy concerns, leavened with the velocity, virality, and permanence of information in the digital age, and it is clear that Rule 26(c) is part of a wider reckoning about how information flows into and, perhaps more importantly, out of America’s courts.²⁸⁶

The traditional American commitment to adversarial process is likewise under significant scrutiny and possible rethinking. Adversarialism—the notion that key procedural values such as accuracy, efficiency, and fairness are best optimized where opposing litigants compete by placing arguments before a neutral and passive judge—has long been a core tenet of the American the civil justice system. As Roscoe Pound told the ABA in his now-famous 1906 address: “[I]n America we take it as a matter of course that a judge should be a mere umpire . . . and that the parties should fight out their own game in their own way without judicial interference.”²⁸⁷

the development of substantive law); David Freeman Engstrom & R.J. Vogt, *The New Judicial Governance: Courts, Data, and the Future of Civil Justice*, 72 DEPAUL L. REV. 171, 198–224 (2023) (offering a wide-angle assessment of courts’ role as “data dispensers”); Aziz Z. Huz & Zachary D. Clopton, *The Necessary and Proper Stewardship of Judicial Data*, 76 STAN. L. REV. (forthcoming 2024) (offering a “normative evaluation of how Congress should regulate the production and dissemination of judicial data, in light of the capabilities and incentives of relevant actors”).

²⁸⁵ Among the more worrying and demoralizing uses of court data is the practice of landlord associations in most major cities of scraping housing court dockets in order to construct blacklists of renters who should not be rented to because they dared to try to vindicate rights in housing court. See Ronda Kaysen, *How to Escape the Dreaded ‘Tenant Blacklist’*, N.Y. TIMES (Apr. 13, 2019) (“There are hundreds of tenant screening bureaus, collecting names from courthouses around the country and selling the information to landlords.”).

²⁸⁶ See generally David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807 (2015) (cataloging the types of sensitive information contained in court records, including locational, identity, health, and financial information as well as past involvement in criminal or civil proceedings).

²⁸⁷ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. AM. BAR ASS’N 395, 405 (1906).

But the American commitment has long shown cracks in its foundation—and here again, the debate over Rule 26(c) both reflects and sheds light on that broader assessment. Many observers have long expressed doubt about whether an adversarial process, as opposed to an inquisitorial approach in which judges actively steer the course of litigation, is the better bet.²⁸⁸ Critics have long argued that adversarialism may not optimize the system’s truth-seeking function. Judge Henry Friendly famously observed that the role of counsel “is not to make sure the truth is ascertained,” and then suggested that we should wonder about a system in which “causing delay and sowing confusion not only are [counsel’s] right but may be his duty.”²⁸⁹ Revelations that a stunning three-quarters of civil cases filed in American courts feature at least one side without a lawyer deepen the critique and make continued adherence to unmediated adversarialism hard to defend under any reasonable theory of due process or procedural fairness.²⁹⁰

Our findings add another example of how adversarialism may systematically fail to achieve key systemic ends. After all, there is no constituency for disclosure in a system in which parties interested in confidentiality place arguments before a passive judge who does not consider the public interest. In economic terms, there is a negative externality—a harm borne by persons whose interests the stipulating parties can freely ignore.²⁹¹ And that externality is accumulating. Put differently: The adversarial structure of the American civil justice system might leave it ill-equipped to promote anything resembling an optimal level of openness.²⁹²

²⁸⁸ *E.g.*, John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 (1985).

²⁸⁹ Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1288 (1975).

²⁹⁰ *E.g.*, Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 B.Y.U. L. REV. 899 (2016) (coining the phrase “adversary breakdown” to describe the millions of cases pitting institutional plaintiffs with lawyers against individuals without lawyers in debt, eviction, home-foreclosure, and family law, particularly child support, matters); Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183 (2022) (same); Marcus, *Collapse*, *supra* note 274, at 2504–07 (cataloging the ways debt collection litigation makes a “mockery . . . of the adversarial assumption” that underpins American procedure).

²⁹¹ Ribeiro, *supra* note 30, at 174.

²⁹² *See* Burch & Lahav, *supra* note 8, at 350 & 394 (explaining that, “[i]nformation revealed in lawsuits adjudicated in taxpayer-funded

Indeed, when a stipulated PO is at play, the plaintiff is not pitted against the defendant. By definition, the plaintiff and defendant, jointly, are pitted against the rest of us.

CONCLUSION

On an unseasonably hot afternoon in Washington, D.C., on May 17, 1990, the late Senator Herb Kohl, a perennial sponsor of the Sunshine in Litigation Act and perhaps the most steadfast champion of transparency in civil litigation, called to order one of the first hearings ever to discuss the matter. In so doing, he observed: “We must ask whether we have struck the proper balance between disclosure and secrecy.”²⁹³ Senator Kohl proceeded to highlight a few questions that needed to be answered in order to assess that broader inquiry. These included: “Is there a growing use of court secrecy in civil litigation, and if so, does it prevent disclosure of information that raises safety concerns?” And: “Do the demands of the court system encourage indiscriminate use of secrecy, and how can these competing interests best be resolved?”²⁹⁴

For more than a quarter-century, Senator Kohl’s simple questions have been much discussed, but they have remained stubbornly unanswered. Offering overdue clarity, this Article shows that, in fact, in contemporary federal civil litigation, the balance has tipped more sharply in favor of secrecy than has been previously recognized. Indeed, in opposing Sunshine in Litigation Acts and similar reforms, critics have, for decades, insisted that courts are “very circumspect about entering protective orders.”²⁹⁵ No reform

courts often benefits society as a whole, but there is no incentive for private parties to reveal it” and arguing that, given this mis-match, courts ought to work harder to promote the public interest).

²⁹³ *Examining the Use of Secrecy and Confidentiality of Documents by Courts in Civil Litigation, Hearing Before the S. Comm. on the Judiciary, Subcomm. on Courts and Administrative Practice*, 101st Cong. 1 (1990) (statement of Sen. Herb Kohl) [hereinafter Kohl Statement]. For the weather that May afternoon, see Washington D.C. Weather in 1990, *EXTREME WEATHER WATCH*, <https://www.extremeweatherwatch.com/cities/washington-dc/year-1990>.

²⁹⁴ Kohl Statement, *supra* note 293, at 1.

²⁹⁵ *The Federal Judiciary in the 21st Century: Ensuring the Public’s Right of Access to the Courts, Hearing Before the H. Subcomm. on Courts, Intellectual Property, and the Internet of the Comm. on the Judiciary*, 116th Cong. 32 (2019) (The Hon. Richard Story).

is needed, some have maintained, because judges “take their Rule 26(c) obligations very seriously.”²⁹⁶ Yet, as we have shown, the data suggest otherwise. Judges do not appear to cast a discerning eye on POs. They reject, on average, just 4.1% of stipulated PO requests. In fact, some judges never seem to be circumspect in entering POs. Of those federal court judges that were asked to sign more than twenty-five POs, the majority of judges’ grant rate is a bracing 100%.

Beyond concerns of fidelity to law and binding precedent, these findings suggest that infamous cases—such as Beth and Ken Melton’s wrongful death lawsuit against GM, or others, such as that involving Zyprexa, Zomax, or the Dalkon Shield—are not a bug of the legal system, but rather a feature. They show how the legal system typically operates. What’s perhaps unusual about those infamous cases is that they were the rare instances when the truth was ever, belatedly, revealed.

²⁹⁶ *Federal Sunshine in Litigation Act and Federal Court Settlements Sunshine Act, Hearings on H.R. 2017 and H.R. 3803 Before the H. Comm. on the Judiciary, Subcomm. on Intellectual Property and Judicial Administration*, 102nd Cong. 15 (1992) (statement of Prof. Arthur R. Miller).