

# First Amendment Presumption of Access to Summary Judgment Filings Attaches Upon Filing

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The Fourth Circuit [has clarified](#) the standard for evaluating a nonparty's attempt to access sealed summary judgment filings under the First Amendment. In *United States ex rel. Oberg v. Nelnet, Inc.*, — F.4th —, No. 23-1808, 2024 U.S. App. LEXIS 14786 (4th Cir. June 18, 2024) (Op.), the Fourth Circuit examined a nonparty's ability to obtain documents filed under seal in connection with dispositive summary judgment motions. The Fourth Circuit concluded that "irrespective of whether a district court ever resolves a summary judgment motion, the public has a presumptive First Amendment right to access documents submitted in connection with it." Op. at 18. But, the presumption is not insurmountable. *Id.* at 14 n.8. Parties seeking to maintain under seal documents filed in connection with summary judgment motions must show that continued sealing is necessitated by a compelling government interest, narrowly tailored to serve that interest. That the district court never ruled on the summary judgment motions or did not rely on the sealed material in resolving the motion is insufficient to overcome the First Amendment access presumption.

The underlying litigation began in 2007 as a False Claims Act suit against various student loan companies.<sup>[1]</sup> Op. at 3. Relator alleged the defendants submitted false claims to the Department of Education to inflate loan portfolios eligible for interest subsidies, in violation of the False Claims Act. *Id.* Several parties were dismissed at the preliminary pleading stage. After the remaining parties consented to magistrate judge jurisdiction, pursuant to 28 U.S.C. § 636(c), litigation ensued, including the submission of an agreed discovery protective order and joint motion for leave to file confidential summary judgment materials under seal. *Id.* at 3-4. The magistrate judge authorized temporary sealing of the confidential summary judgment material and directed the parties to file any motions regarding sealing of the summary judgment materials by August 20, 2020. *Id.* at 4. Prior to the August 20 sealing motion deadline, the parties engaged in settlement discussions. *Id.* at 5. To facilitate those discussions, on August 13, the magistrate judge stayed all proceedings. *Id.* While the matter was stayed, no pleading was to be filed by any party other than those related to the resolution of the case. *Id.* None of the parties moved to seal the summary judgment materials by the August 20 deadline. *Id.* Eventually, the remaining parties resolved the dispute and stipulations of dismissal were filed in October 2010.<sup>[2]</sup> *Id.* The magistrate judge never ruled on the summary judgment motions. *Id.*

In March and April 2023, nonparty Michael Camoin, a documentary filmmaker covering the student loan industry, sought access to the summary judgment materials that had been filed under temporary seal. *Id.* at 5-6. Camoin argued that because no sealing motion had been filed by the August 20 deadline, the materials were no longer subject to sealing. *Id.* at 6. Several of the defendants filed responses to Camoin's request. *Id.* at 6. In July 2023, the magistrate judge [denied](#) Camoin's request, concluding that Camoin had no right of access, under either the

common law or First Amendment, to the requested documents because they were not “judicial records” and played no role in the litigation, given that the case settled before any ruling on the summary judgment motions was made. *Id.* at 7. Because the magistrate judge concluded the requested documents did not qualify as judicial records, the magistrate judge did not evaluate whether the common law or First Amendment right of access presumptions were outweighed.

Camoin took his challenge to the July 2023 order to the Fourth Circuit. *Id.* at 7. The Fourth Circuit reversed, finding that the documents requested by Camoin were protected by a First Amendment right of access. *Id.* at 7-8. The Fourth Circuit remanded to the district court for a determination as to whether maintaining the seal was necessitated by a compelling government interest and narrowly tailored to serve that interest, *i.e.*, the questions not examined by the magistrate judge in the July 2023 order. *Id.* at 8, 19.

Before addressing the merits of the sealing dispute, the Fourth Circuit examined Camoin’s standing to challenge the July 2023 order. *Id.* at 8-12. Camoin was not a party to the underlying litigation and had not been granted leave to intervene. Finding he lacked standing to appeal, the Fourth Circuit nonetheless concluded he could challenge the July 2023 order through a petition for mandamus, and treated his appeal as such. *Id.* at 12.

Moving to the merits of Camoin’s challenge, the Fourth Circuit reviewed the contours of the public’s right to access materials sought to be filed under seal under both the common law and First Amendment. *Id.* at 13-18. The common law “presumes a right of public to inspect and copy all judicial records and documents.” *Id.* at 13. “Documents filed with the court are judicial records if they play a role in the adjudicative process or adjudicate substantive rights.” *Id.* But the common law right of access may be rebutted by showing “countervailing interests heavily outweigh the public interests in access.” *Id.* These countervailing interests include: [(i)] whether the records are sought for improper purposes, such as promoting public scandals or unfairly gaining a business advantage; [(ii)] whether release would enhance the public’s understanding of an important historical event; and [(iii)] whether the public has already had access to the information contained in the records.” *Id.* at 13. In contrast, the First Amendment right of access extends only to certain judicial proceedings and records: (i) those that have historically been open to the press and general public; and, (ii) where public access plays a significant positive role in the functioning of the particular process in question. *Id.* at 13-14. When a proceeding or document is protected by the First Amendment right of access, “access may be restricted only if closure is necessitated by a compelling government interest and the denial of access is narrowly tailored to serve that interest.” *Id.* at 14. Thus, “common-law protections” for “judicial records” “are broad but shallow, [while] First Amendment protections are narrower but deeper.” *Id.* Importantly, access to documents protected by either the common law or the First Amendment may be restricted under appropriate circumstances. *Id.* at 13-14.

In the case of the summary judgment materials sought by Camoin, the Fourth Circuit concluded that the First Amendment right of access to the summary judgment materials did not depend on judicial resolution of the motion or the district court’s reliance on those documents to resolve the summary judgment motion. *Id.* at 16. Instead, the First Amendment right of access attaches once the documents are made part of the summary judgment motion, meaning once they are filed in connection with the summary judgment motion. *Id.* Because the July 2023 order had not addressed whether the First Amendment access presumption might be overcome, the Fourth Circuit remanded for consideration of whether continued sealing may be justified under First Amendment scrutiny, *i.e.*, whether maintaining the seal is necessitated by a compelling government interest and narrowly tailored to serve that interest.

The *Camoin* decision highlights the need for parties seeking to maintain under seal documents filed in connection with summary judgment motions (and to prevent access to those materials by others, including nonparties), to substantiate their sealing requests with the proper showing that continued sealing is necessitated by a compelling government interest and the denial of access is narrowly tailored to serve that interest. That a district court never ruled on the summary judgment motion or did not rely on the sealed material in resolving the motion will be insufficient to overcome the First Amendment access presumption. The *Camoin* decision leaves open whether, for motions other than summary judgment, the district court (i) not ruling on the underlying motion or (ii) not relying on the sealed material in resolving the motion, would be sufficient to rebut the presumption of access under the common law.

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[1] The complaint was under seal between 2007 and 2009. The United States filed notice of its decision not to intervene in August 2009.

[2] Litigation continued against several companies and defendants dismissed earlier in the action. See *U.S. ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575 (4th Cir. 2012); *U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131 (4th Cir. 2014); *U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 804 F.3d 646 (4th Cir. 2015); *U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 912 F.3d 731 (4th Cir. 2019).

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