No. 23-129

In the Supreme Court of the United States

EDDIE TARDY,

Petitioner,

v.

CORRECTIONS CORPORATION OF AMERICA, NKA CORECIVIC, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* FREE LAW PROJECT, FIRST AMENDMENT COALITION, CATO INSTITUTE, AND EUGENE VOLOKH IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether intervenors' interest in transparency is sufficient to confer standing to seek access to sealed or protected judicial records (as the First, Third, Fourth, and Eleventh Circuits hold); whether intervenors' standing turns on whether the underlying case is still pending (as the Fifth Circuit holds); or whether intervenors must show personalized "adverse effects" to seek document unsealing, beyond interference with their ability to access, review, and disseminate the information that is in the document (as the Sixth Circuit apparently concluded here).

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Interest of *Amici Curiae*[1]

Free Law Project is a nonprofit organization seeking to create a more just legal system. To accomplish that goal, Free Law Project provides free, public, and permanent access to primary legal materials on the Internet for educational, charitable, and scientific purposes. Its work empowers citizens to understand the laws that govern them by creating an open ecosystem for legal materials and research. It thus relies heavily on the legal right of the public to access court records, and seeks to turn it into a practically usable right.

The First Amendment Coalition is a nonprofit, nonpartisan organization committed to defending freedom of speech, freedom of the press, and the public's right to access information regarding the conduct of the people's business. FAC seeks to improve compliance with open government principles through education and public advocacy. FAC has advocated for access to judicial proceedings by initiating litigation, moving to unseal court records, and appearing as amicus curiae on behalf of parties opposing secrecy in the judicial process.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A.

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this *amici* brief, and had received notice of the planned filing at least 10 days before the deadline.

Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual Cato Supreme Court Review. Cato scholars often seek access to public records for use in research, scholarship, and public commentary.

Eugene Volokh is the Gary T. Schwartz Professor of Law at UCLA School of Law, and the author of a blog hosted at the *Reason* Magazine site, http://reason.com/volokh. He has moved on his own behalf, in more than a dozen cases, to unseal court records so that he could access them, review them, and disseminate information in them (both in his law review articles and on his blog).

Summary of Argument

Eddie Tardy moved to intervene in this case to assert his common-law right of access to judicial records. His goal was to be able to "access, review, and then disseminate the information that is in these sealed judicial records." Oral Arg. at 3:42, *Grae* v. *Corr. Corp. of Am.*, 57 F.4th 567 (6th Cir. 2023) (No. 22-5312), https://perma.cc/RNX2-4M5S. This is the same reason that many media outlets, academics, and others seek to unseal judicial records, or to assert their rights under the Freedom of Information Act, the Federal Advisory Committee Act, and other such statutes.

Yet the court below held that Tardy lacked Article III standing to assert these rights, on the grounds that he "hasn't suffered any adverse effects from the denial of documents." Pet. App. 3a. This decision thus casts doubt on the enforceability of long-established rights that all Americans possess, and that are central to

maintaining confidence in our legal system. It also, as the petition explains in detail, deepens a circuit split on the question, and contradicts this Court's past decisions. This Court should therefore grant review.

Argument

This Court has held that,

> It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. In contrast to the English practice, American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government.

Nixon v. *Warner Commc'ns, Inc.*, 435 U.S. 589, 597-98 (1978) (citations omitted). Yet under the view of the majority below, a person who is seeking to "access, review, and then disseminate . . . information" from judicial records—terms that encompass "keep[ing] a watchful eye on the workings of public agencies," and "publish[ing] information concerning the operation of government"—would lack Article III standing. And the same logic would apply to a person who seeks to "access, review, and then disseminate . . . information" via FOIA.

To be sure, the decision below might be read hypernarrowly, as simply requiring the would-be intervenor

to assert *some* adverse effect, including inability to publish information or even inability to review information. That may be suggested, for instance, by the decision's stating that "[a]t oral argument, Tardy told us he had not suffered any adverse effects. In fact, he admitted that if he were required to allege an adverse effect, he would lose." Pet. App. 7a. Likewise, the opinion below tries to distinguish this Court's decisions in *FEC* v. *Akins*, 524 U.S. 11, 21 (1998), and *Public Citizen* v. *U.S. Department of Justice*, 491 U.S. 440, 449 (1989), on the grounds that those cases involved "voters [being] denied information that would have helped them 'evaluate candidates for public office'" and "plaintiffs [being] denied information that would have helped them 'participate more effectively in the judicial selection process.'" Pet. App. 6a-7a.

But Tardy's counsel actual statement at oral argument simply disclaimed any *damages*, which in context appears to mean financial loss:

> Court: . . . So there's no . . . you, you have not—just so I understand it—you have not alleged any adverse consequences, correct?
>
> Horwitz: Not adverse consequences in terms of damages to Mr. Tardy, no, uh, the adverse…
>
> Court: So if that is a requirement you lose, correct?
>
> Horwitz: Uh, yes, your Honor I think that would be correct. . . . .

Oral Arg. at 6:47. And Tardy's counsel expressly stated that Tardy was seeking to "access, review, and then disseminate the information":

> Court: . . . So my question is, apart from being denied access to the documents, what adverse consequences have you alleged.
>
> Horwitz: So I don't believe we've alleged adverse consequences other than not being able to exercise a common law right to access, review, and then disseminate the information that is in these sealed judicial records.

Id. at 3:36. This is basically the same sort of activity involved in *Akins* (reviewing information, presumably with an eye towards evaluating the participants in the judicial process) and in *Public Citizen* (disseminating information, presumably to participate in the process of public analysis and critique of the judicial process). The denial of the ability to access, review, and disseminate the information was precisely the adverse effect that Tardy faced from the information being sealed.

Indeed, the potential breadth of the opinion below is evident from its treatment of this Court's decision in *Price* v. *Dunn*, 139 S. Ct. 2764 (2019) (mem.):

> Next, Tardy claims that in *Price* v. *Dunn* the Supreme Court permitted the intervenors to unseal documents even though they hadn't suffered adverse effects. Not so. In *Price,* National Public Radio and a reporters' association moved to intervene in a headline-grabbing death-penalty case. Why? Because the denial of documents adversely affected their ability to report. Thus, *Price* is fully consistent with the adverse-effects rule. And, in any event, *Price* predated *TransUnion.* So we cannot apply *Price* in a way that conflicts with *TransUnion.*

Pet. App. 8a (citations omitted). The opinion starts by trying to distinguish *Price* on the grounds that "the denial of documents adversely affected [the *Price* intervenors'] ability to report"—yet the denial of documents to Tardy equally affects his ability to "disseminate the information." Oral Arg. at 3:37. And then the opinion suggests that perhaps NPR and the reporters would not prevail after all on the opinion's theory, because "in any event, *Price* predated *TransUnion*" and "*TransUnion* specifically framed the adverse-effects rule as part of the constitutional inquiry that applies across all cases." Pet. App. 7a-8a (citing *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190 (2021)).

It thus seems likely that lower courts will assume that the opinion below requires more than just a bare assertion that the would-be intervenor seeks to review and disseminate the information. Even if the lower courts are unaware that Tardy actually made such an assertion, the desire to review and disseminate unsealed documents is the normal justification for unsealing. Presumably the opinion below means something, lower courts are likely to reason, and therefore it requires an adverse effect beyond just interference with the ability to read the documents and speak about them.

As a result, the decision below at the very least clouds the law on standing to seek access to government records—and may well lead to a sharp cutback on the right of access, at least in the Sixth Circuit. For this reason, this case is practically important to a wide range of intervenors.

Conclusion

> The public's exercise of its common law access right in civil cases promotes public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court. As with other branches of government, the bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness.

Littlejohn v. *BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988) (citations omitted); *see also, e.g.*, *June Med. Servs., L.L.C.* v. *Phillips*, 22 F.4th 512, 519 (5th Cir. 2022); *IDT Corp.* v. *eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013). This is just a sound adaptation to civil filings of this Court's condemnation of secrecy in criminal trials:

> [A]t the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial. Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial, it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.

Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555, 569 (1980) (plurality opinion); *id.* at 591-92 (Brennan, J., concurring in the judgment).

The decision below, though, risks stripping the media, scholars, and ordinary citizens of their ability to "exercise" their "access right," and thus undermines the benefits that the right of access provides. This Court should therefore agree to hear the case, and resolve the circuit split on the subject identified in the petition.

Respectfully submitted,

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