Sealed Files, First Amendment Right of Access, and the Supreme Court Sports Betting Case

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I. Introduction

The Supreme Court sports betting case was built on a foundation of sealed files—including expert reports and depositions—that remain shielded from public scrutiny over a year since the Supreme Court's ruling was released. This paper is motivated by such secrecy and has a three-pronged purpose. *First*, this paper provides a comprehensive accounting of the expert testimony, commissioned studies, depositions, and other sealed files within the broader context of the Supreme Court case that opened up legalized sports betting nationwide. To do so, this paper traces the case back to its origins on August 7, 2012 when a group of five sports leagues—the National Collegiate Athletic Association ("NCAA"), National Basketball Association ("NBA"), National Hockey League ("NHL"), National Football League ("NFL"), and Major League Baseball ("MLB")—sued then-New Jersey Governor Chris Christie and other state officials alleging a violation of the Professional and Amateur Sports Protection Act ("PASPA").

PASPA was enacted in 1992 and restricted sports betting to Nevada and a small number of other states. The five leagues alleged that they were 'injured' and 'irreparably harmed' by legalized sports wagering and that New Jersey's new sports betting law violated PASPA. New Jersey argued that PASPA was unconstitutional. The Supreme Court ruled in favor of New Jersey. *Second*, this paper outlines the contours of the right to access court documents derived from both the First Amendment and common law. *Third*, this paper anticipates what could be gleaned from the unsealing of the still-secret documents if a third party successfully intervenes in the case now.

II. Supreme Court Sports Betting Case

A. Supreme Court Ruling and Aftermath

On May 14, 2018, the Supreme Court released its ruling in the case formally captioned *Gov. Murphy, et al. v. NCAA, et al.*[1] PASPA's constitutionality vis-à-vis the Tenth Amendment's anti-commandeering rule was at issue. Justice Alito penned the Supreme Court's majority opinion: "[t]he PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anti-commandeering rule. That provision dictates what a state legislature may and may not do."[2] Stripped of legalese, Justice Alito concluded as follows: "Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not."[3]

Since the Supreme Court's ruling, legislative developments have taken place on Capitol Hill and in statehouses nationwide. On September 27, 2018, the House Judiciary Committee held a formal hearing about sports wagering.[4] On December 20, 2018, Senator Chuck Schumer and former Senator Orrin Hatch introduced a comprehensive sports betting bill in the waning days of Congress.[5]

1. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S.Ct. 1461 (2018). In ruling for New Jersey, the Supreme Court reversed a litany of lower-court decisions that favored the sports league plaintiffs.

2. *Id*. at 1478. Notably, not a single Supreme Court Justice agreed with the sports leagues' core argument that PASPA constituted a permissible exercise of Congressional power. The dissenters in the case—Justice Ginsburg and Justice Sotomayor in full and Justice Breyer in part—differed from the majority only on the issue of 'severability,' a legal principle about whether any portion of a law can preserved ('severed') from the portion deemed unconstitutional. *See Murphy*, 138 S.Ct. at 1489–90 (Ginsburg, J., dissenting).

3. *Id*. at 1484–85.

4. David Purdum, *Congressional Subcommittee to Review Sports Betting Landscape*, ESPN (Sep. 20, 2018), https://es.pn/2W7tVsJ.

5. David Purdum & Ryan Rodenberg, *What You Need to Know About the New Federal Sports Betting Bill*, ESPN (Dec. 20, 2018), https://bit.ly/2N9jxN9 . In September 2019, it was reported that Senator Chuck Schumer and Senator Mitt Romney were "collaborating" on a new federal sports betting bill. *See* Tony Batt, Former U.S. Presidential Nominee Mitt Romney Working on Sports Betting Bill, GAMBLING COMPLIANCE (Sep. 6, 2019), https://bit.ly/2P9MXxf*; see also* Tony Batt & Jim Myers, U.S. Senator Mitt Romney Confirms Alliance on Federal

Various entities, including four out of five of the sports leagues who lost the Supreme Court case, have taken to federal and state-level lobbying on the topic of sports betting.[6] All but a handful of states have considered sports betting legislation, with over a dozen states enacting bills to legalize the activity since the Supreme Court's ruling.[7]

B. Re-Opened Case Before the Third Circuit

Shortly after the five sports leagues initially sued Gov. Christie and other state officials under PASPA, a third-party private entity—the New Jersey Thoroughbred Horsemen's Association ("NJTHA")—successfully intervened as a co-defendant in the case. After the district court and Third Circuit stages, NJTHA's portion of the case was consolidated at the Supreme Court level. As such, NJTHA also prevailed by virtue of the Supreme Court's ruling against the plaintiff sports leagues. NJTHA did not rest following its Supreme Court win, however.

On May 24, 2018, NJTHA moved to file a motion in district court seeking payment under a $3.4 million bond posted by the sports leagues in 2014 and for damages incurred during the pendency of the litigation under a 'bad faith' argument.[8] The five leagues responded by letter on May 29, 2018, describing NJTHA's motion as "frivolous."[9] On November 16, 2018, District Court

Sports Betting Bill, GAMBLING COMPLIANCE (Sep. 11, 2019), https://bit.ly/2JfCUTn.

6. For examples of league-specific lobbying pertaining to sports betting, *see* Ryan Rodenberg, *Due Process, Private Nondelegation Doctrine, and the Regulation of Sports Betting*, 9 UNLV GAMING L. J. 99, 116–117 (2019). Some of the sports leagues involved in the Supreme Court case, most notably the NBA and MLB, started publicly lobbying *before* they lost the case. *Id.*

7. Ryan Rodenberg, *United States of Sports Betting, An Updated Map of Where Every State Stands*, ESPN (Aug. 2, 2019), https://es.pn/2OT5eAo.

8. Brief on Behalf of New Jersey Thoroughbred Horsemen's Ass'n for Judgment on Injunction Bond and Damages, Nat'l Collegiate Athletic Ass'n v. Christie, No. 14-6450 (D.N.J. Nov. 16, 2018), vacated and remanded sub nom. Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 939 F.3d 597 (3d Cir. 2019*); see also* Ryan Rodenberg & David Purdum, *NFL, NCAA, Other Leagues Respond to 'Meritless' Claim in Sports Betting Case*, ESPN (May 30, 2018), https://es.pn/32SD5M8.

9. Plaintiff's Memorandum of Law in Opposition to Defendant New Jersey Thoroughbred Horsemen's Ass'n's Motion for Judgment on Injunction Bond and

Judge Michael Shipp, the same judge who repeatedly ruled in favor of the leagues years earlier, concluded: "[t]he Court…finds NJTHA was not wrongfully enjoined. The Court, accordingly, finds good cause exists to deny NJTHA damages under the injunction bond."[10]

NJTHA filed an appeal with the Third Circuit. After extensive briefing by both sides, oral argument before a three-judge panel took place on July 2, 2019.[11] Relevant to this paper, NJTHA included the following in its May 24, 2018 motion to Judge Shipp:

> The NJTHA should be permitted to see all of the documents produced by the Leagues as well as the complete unredacted transcripts of the depositions taken in discovery in *Christie I*, much of which was designated 'confidential' by the Leagues. The NJTHA previously requested to see these documents and deposition transcripts after its motion for intervention was granted in *Christie I*. The Leagues objected to this request and refused to permit the NJTHA to see these materials.[12]

On September 26, 2019, a divided Third Circuit reversed Judge Shipp: "Because we conclude that NJTHA was 'wrongfully enjoined' within the meaning of Rule 65(c) and no good cause existed to deny bond damages in this case, we will vacate and remand."[13] In so ruling, the Third Circuit made a number of

Damages, Nat'l Collegiate Athletic Ass'n v. Murphy, No. 14-6450 (D.N.J. Jul. 16, 2018), ECF No. 91; *see also* Rodenberg & Purdum, *supra* note 8.

10. Nat'l Collegiate Athletic Ass'n v. Christie, No. CV146450MASLHG, 2018 WL 6026816 (D.N.J. Nov. 16, 2018), vacated and remanded sub nom. Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 939 F.3d 597 (3d Cir. 2019); *see also* Ryan Rodenberg, *NFL, NCAA, Other Leagues Prevail in Supreme Court Sports Betting Spin-Off Lawsuit*, ESPN (Nov. 17, 2018), https://es.pn/2WbsDgs.

11. Transcript of Oral Argument, Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 939 F.3d 597 (3d Cir. 2019) (No. 18-3550).

12. Brief on Behalf of New Jersey Thoroughbred Horsemen's Ass'n for Judgment on Injunction Bond and Damages, *supra* note 8, at 37.

13. Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 939 F.3d 597, 599 (3d Cir. 2019). For mainstream coverage of the Third Circuit's ruling, s*ee generally* Tony Batt, *Leagues Lose Another Sports-Betting Case To New Jersey*, GAMBLING COMPLIANCE (Sep. 25, 2019), https://bit.ly/2BKEnwS; Zach Zagger, *NJ Track Clears Hurdle In Long-Shot Bid for Betting Revenue*, LAW360 (Sep. 25, 2019), https://bit.ly/2pPNg5I; Eric Ramsey, *NCAA, Pro Sports Leagues Dealt Huge Loss in NJ Sports Betting Case, Likely Owe Millions*, PLAYNJ (Sep. 24, 2019), https://bit.ly/2MNxCRx; John Brennan, *NJ Horsemen*

observations relevant to the possible unsealing of documents filed during the early part of the litigation. First, the Third Circuit highlighted the fact the five sports leagues "filed their [injunction] request on both the *Christie I* and *Christie II* dockets."[14] Second, the Third Circuit specifically flagged NJTHA's argument "that the Leagues' assertion that sports gambling would harm them was false."[15] Third, the ruling noted that "[t]here was no discovery on the actual loss amount."[16] Fourth, the Third Circuit made clear that "[o]n remand, NJTHA will have the burden of showing provable damages."[17] To do so, NJTHA will likely move for discovery that would include gaining access to some or all of the sealed files dating back to as early as 2012.

III. Secret Civil Litigation

A. Legal Standard for Sealed Files

Judicial files "are presumptively available to the public."[18] Indeed, "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records."[19] Federal courts have the power to "loosen or eliminate any restrictions" on sealed documents even after "the case in which

Win Court Ruling Over Leagues—$150 Million Could Still be in Play, NJ ONLINE GAMBLING (Sep. 24, 2019). On October 8, 2019, the sports league quintet formally requested *en banc* review of the ruling. Petition for Rehearing and/or Rehearing *En Banc* of Plaintiff-Appellees…, NCAA, et al. v. 24, 2019), https://bit.ly/2omHQ1K. Governor of the State of New Jersey, et al., No. 18-3550 (3d Cir. Oct. 8, 2019) (on file with author). The five leagues' petition for rehearing included a two-pronged argument. First, the leagues posited that the Third Circuit's ruling "conflicts with this Court's Decision in [American Bible Society v. Blount, 446 F.2d 588 (3d Cir. 1971)] and the Supreme Court's decision in [Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940)]." *Id.* at 9. Second, the leagues argued that "[t]he decision raises a question of exceptional importance as to the scope of the district court's discretion to hold that a change in the law constitutes good reason to deny recovery against the bond." *Id.* at 13.

14. Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 939 F.3d 597, 601 (3d Cir. 2019)

15. *Id.*

16. *Id.* at 602.

17. *Id.* at n. 15.

18. Nixon v. Warner Commc'ns, 435 U.S. 589, 602 (1978).

19. *Id*. at 597.

the documents were sealed has ended."[20] While trade secrets have garnered some protection, commercial reputation is generally not considered an "exception to the common law presumption of open courtrooms and court records."[21]

Although there is considerable overlap, the majority of published decisions distinguish between access to court files based on the First Amendment *or* common law theories. Federal "[c]ourts have long recognized a common-law right of access to judicial records."[22] However, "[b]efore any such common-law right can attach…a court must first conclude that the documents at issue are indeed judicial documents."[23] One circuit found that a 'judicial document' must be "relevant to the performance of the judicial function and useful in the judicial process."[24] According to a recent district court ruling, "[t]he 'modern trend' among circuit courts is to classify pleadings in civil litigation as judicial records, except discovery motions and accompanying exhibits."[25] The same district court found dispositive whether the documents at issue were "central to the adjudication of the controversy."[26] During the early stages of the litigation that eventually landed at the Supreme Court, some of the sealed files were cited by the district court judge in his 2012 ruling about plaintiff's Article III standing.

Beyond the plaintiff or defendant, federal civil procedure rules allow non-parties to seek access to judicial records as an intervenor. In relevant part, Federal Rule of Civil Procedure 24(b)(1) provides that "[o]n timely motion, the court may permit anyone to intervene who…has a claim or defense that shares with

20. United States v. Pickard, 733 F.3d 1297, 1300 (10th Cir. 2013).

21. Sherry Jaffe Hanley, *Procedural and Substantive Prerequisites to Restricting the First Amendment Right of Access to Civil Hearings and Transcripts*, 58 TEMPLE L.Q. 159, 171 (1985); *see* Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982).

22. Mann v. Boatright, 477 F.3d 1140, 1149 (10th Cir. 2007) (citing Nixon v Warner Commc'ns, 435 U.S. 589, 597 (1978)).

23. Lugosch v. Pyramid Co. of Onandaga, 435 F.3d 110, 121 (2d Cir. 2006).

24. *Id*. at 119.

25. Parson v. Farley, 352 F. Supp. 3d 1141, 1152–53 (N.D. Ok. 2018) (citing Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 139 (2d Cir. 2016); IDT Crop. v. eBay, 709 F.3d 1222, 1223 (8th Cir. 2013); FTC v. Abbvie Productions, 713 F.3d 54, 62-63 (11th Cir. 2013)).

26. *Id*. In *SanMedica Int'l v. Amazon*, No. 2:13-cv-00169, 2015 U.S. Dist. LEXIS 148775 at *3 (D. Utah 2015), a federal judge ruled in favor of intervening Professor Rebecca Tushnet who argued that "she has an interest in the information that influenced the court's decision."

the main action a common question of law or fact." Indeed, "every circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders."[27] Further, "[a] party seeking to file court records under seal must overcome a presumption, long supported by courts, that the public has a common-law right of access to judicial records."[28] To hinder any First Amendment-derived access right, the Supreme Court concluded that "it must be shown that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest."[29]

B. Supreme Court Precedent

According to the Supreme Court, judicial files "are presumptively available to the public."[30] In the criminal context, the Supreme Court has definitively held that the First Amendment guarantees access to trials.[31] However, no Supreme Court ruling has directly addressed whether the First Amendment grants a right to access court documents in *civil* litigation, like the New Jersey sports betting case.[32] According to the Second Circuit, "[t]he Supreme Court has not yet considered whether the public right of access applies to civil trials, but 'six of the eight sitting Justices' in *Richmond Newspapers* 'clearly implied that the right applies to civil cases as well as criminal ones.'"[33]

27. EEOC v. Nat'l Children's Center, 146 F.3d 1042, 1045 (D.C. Cir. 1998).

28. Eugene S. v. Horizon Blue Cross Blue Shield of N.J., 663 F.3d 1124, 1135 (10th Cir. 2011).

29. Globe Newspaper v. Superior Ct., 457 U.S. 596, 607 (1982).

30. Nixon v. Warner Commc'ns, 435 U.S. 589, 602 (1978)

31. Richmond Newspapers v. Virginia, 448 U.S. 555, 580 (1980).

32. In a concurrence, Justice Stewart wrote: "[T]he First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." *Richmond Newspapers*, 448 U.S. at 599 (Stewart, J., concurring). Likewise, in a footnote, the Supreme Court wrote in dicta: "[H]istorically both civil and criminal trials have been presumptively open." *Id*. at 580 n. 17.

33. N.Y. Civil Liberties Union v. N.Y. City Transit Auth., 684 F.3d 286, 298 n. 9 (2d Cir. 2011) (citing Huminski v. Corsones, 396 F.3d 53, 82 n. 30 (2d Cir. 2005).)

Every appellate court to address the issue has found such a right to exist.[34] In addition, there is Supreme Court precedent suggestive of a similar conclusion if the Supreme Court directly tackles the issue. For example, in *Seattle Times v. Rhinehart*,[35] the Supreme Court specifically granted First Amendment protection to the right of public access pertaining to discovery materials in civil trials. A commentator concluded that the *Seattle Times v. Rhinehart* ruling "suggests that the Supreme Court will uphold the application of the [F]irst [A]mendment right of access to civil judicial proceedings and documents."[36]

Such a conclusion stems from a series of Supreme Court cases where a First Amendment right of access was found in the context of *criminal* trials. Examples include *Globe Newspaper v. Superior Court*[37] and *Richmond Newspapers v. Virginia*.[38] In a plurality opinion in which a majority of the other justices agreed, Chief Justice Burger cautioned: "[w]hether the public has a right to attend trials of civil cases is a question not raised by this case…"[39] Nevertheless, Chief Justice Burger mentioned "that historically both civil and criminal trials have been presumptively open."[40]

For First Amendment-based cases seeking access to sealed files, the Supreme Court has enunciated the so-called 'experience and logic' test. The test requires courts to consider "(1) whether the document is one which has historically been open to inspection by the press and the public and (2) whether public access plays a significant positive role in the functioning of the particular process in question."[41] When the First Amendment right of access attaches, the "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[42] To do otherwise, would represent "arbitrary interference with access to important information."[43]

34. *Id*. (collecting cases).

35. Seattle Times v. Rhinehart, 467 U.S. 20, 29–37 (1984).

36. Hanley, *supra* note 21, at 185 n. 186.

37. Globe Newspaper v. Superior Court, 457 U.S. 596 (1982).

38. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980).

39. *Id*. at 580 n. 17.

40. *Id*.

41. United States v. McVeigh, 119 F.3d 806, 812 (10th Cir. 1997) (citing Press-Enterprise v. Superior Ct., 478 U.S. 1, 8–9 (1986)).

42. Press-Enterprise v. Superior Court, 464 U.S. 501, 510 (1984).

43. *Richmond Newspapers*, 448 U.S. at 583 (Stevens, J., concurring).

According to the Supreme Court: "We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[44] Similarly, the Supreme Court found that "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit the government from limiting the stock of information which members of the public may draw."[45]

C. Third Circuit Precedent

Two Third Circuit cases—*Publicker Industries v. Cohen*[46] and *Leucadia v. Applied Extrusion Technologies*[47]—set the prevailing standard for sealing court documents for federal courts in New Jersey. Taken together, the two cases stand for the proposition that there is a qualified right of public access to documents in civil cases via the First Amendment, common law, or both. *Publicker*'s holding is unequivocal: "We hold that the First Amendment embraces a right of access to civil trials."[48] The Third Circuit explained that access rights in civil cases "enhances the quality and safeguards the integrity of the factfinding process," "fosters an appearance or fairness," and increases "public respect for the judicial process."[49] *Publicker* also found that the Supreme Court "recognized" that "the public's right of access to civil trials and records is as well established as that of criminal trials and proceedings."[50] Citing *Globe Newspaper Co. v. Superior Court*,[51] the Third Circuit explained that "to limit the public's access to civil trials there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest."[52] Beyond the Third Circuit, no

44. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

45. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978).

46. Publicker Industries v. Cohen, 733 F.2d 1059 (3d Cir. 1984).

47. Leucadia v. Applied Extrusion Technologies, 998 F.2d 157 (3d Cir. 1993).

48. *Publicker Industries*, 733 F.2d at 1070.

49. *Id*. at 1069–70.

50. *Id*. at 1066 (citing Gannett Co. v. DePasquale, 443 U.S. 368, 386 n. 15 (1979)).

51. Globe Newspaper Co. v. Superior Court, 457 U.S. 696, 606–07 (1982).

52. *Publicker Industries*, 733 F.2d at 1070.

fewer than five other circuits have found that the First Amendment's right of access extends to "civil trials and to their related proceedings and records."[53]

Leucadia explained the interplay between the First Amendment and common law in this regard: "we have stated that the First Amendment, independent of the common law, protects the public's right of access to the records of civil proceedings."[54] *Leucadia* is generally construed as extending access rights to materials tethered to pre-trial motions, with a carve-out for discovery motions.[55] At the outset, the Third Circuit in *Leucadia* described the common law right of public access to judicial records as "a right that is well-established in this circuit."[56] Among the "numerous salutary functions" served by a common law right for the public to inspect and copy judicial records included the "promot[ion of] public confidence in the judicial system" and "a more complete understanding of the judicial system and a better perception of its fairness."[57]

In *Leucadia*, the Third Circuit concluded: "there is a presumptive right of public access to pretrial motions of a nondiscovery nature, whether preliminary or dispositive, and the material filed in connection therewith."[58] In evaluating competing claims over whether files should remain sealed, "careful factfinding and balancing of competing interests is required before the strong presumption of openness can be overcome by the secrecy interests

53. N.Y. Civil Liberties Union v. N.Y. City Transit Auth., 684 F.3d 286, 298 (2d Cir. 2011) (citing Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253–54 (4th Cir. 1988); *In re* Continental III Secs. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984); *In re* Iowa Freedom of Info. Council, 724 F.2d 658, 661 (8th Cir. 1983); Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983)).

54. Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157, 161 n. 6 (3d Cir. 1993).

55. *Id*. at 161–68.

56. *Id*. at 158 (citing Republic of the Philippines v. Westinghouse, 949 F.2d 653, 661 (3d Cir. 1991); Littlejohn v. BIC Corp., 851 F.2d 673 (3d Cir. 1988); Bank of America Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Associates, 800 F.2d 339 (3d Cir. 1986)).

57. *Leucadia,* 998 F.2d at 161.

58. *Id*. at 164 ("We see no reason to distinguish between material submitted in connection with a motion for summary judgment and material submitted in connection with a motion for preliminary injunction, an exhibit to a complaint, and a motion to dismiss and for a more definite statement."). In a footnote, the Third Circuit explained: "discovery…which is ordinarily conducted in private, stands on a different footing than does a motion filed by a party seeking action by the court." *Id*. at 163 n. 9.

of private litigants."[59] The Third Circuit explained: "continued sealing must be based on 'current evidence to show how public dissemination of the pertinent materials now would cause the competitive harm [they] claim.'"[60]

The Third Circuit's *Leucadia* decision also directly addresses a key issue in the New Jersey sports betting litigation, a case where the district court judge cited a handful of sealed filed in his written decision about whether the five plaintiff sports leagues had standing to bring their PASPA lawsuit against New Jersey:

> In light of our holding, we need not rely on the possibility that some of the sealed documents would be presumptively public because they were referred to by the district court in its published opinion in *Leucadia,* 755 F.Supp. at 636-37. *See, e.g., Zenith Radio Corp. v. Matsushita Elec. Indus. Co.,* 529 F.Supp. 866, 901 (E.D.Pa. 1981) (Becker, J.) (right of access applies to sealed documents "on which the court relies in making a ruling and which the court discusses in a published opinion"); *In re "Agent Orange" Prod. Liab. Litig.,* 98 F.R.D. 539, 545 (E.D.N.Y. 1983) ("documents referred to by the court in its opinions become part of the public record and should be open to the public for inspection and copying").[61]

Publicker and *Leucadia* are buffered by three other Third Circuit cases. In *United States v. Criden*, the Third Circuit found the right of access to predate the Constitution.[62] In *Pansy v. Borough of Stroudsburg*, the appellate panel posited that including a document in the court file usually results in a public right of access.[63] Likewise, in *Republic of the Philippines v. Westinghouse*, the Third Circuit pinpointed the right of access to attach to all motions and court proceedings, with an exception for discovery motions.[64] A

59. *Id*. at 167.

60. *Id*. (citing *Westinghouse*, 949 F.2d at 663).

61. *Leucadia,* 998 F.2d at 164 n. 10.

62. United States v. Criden, 648 F.2d 814, 819 (3d Cir. 1981).

63. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 783 n. 11 (3d Cir. 1994) (holding that "whether the relevant document is in the court file is the critical inquiry.").

64. *Westinghouse*, 949 F.2d at 661.

commentator summed up the scope of openness in the Third Circuit as follows:

> [T]he right of access in the Third Circuit extends to both civil and criminal trials records, documents admitted into evidence in both types of trials, documents filed in conjuction with settlement agreements and summary judgment motions, and documents filed with all pre-trial motions except discovery motions.

In New Jersey federal courts, it follows that "[p]ublic access to court records is protected by both the common law and the First Amendment."[65] Proponents of continued sealing—in this case the sports league quintet or New Jersey—would likely have to "articulate a real and substantial interest that justifies depriving the public of access to the records that inform our decision-making process."[66]

D. Other Precedent

A recent federal case in Oklahoma is illustrative of how a third party can successfully intervene to access sealed files by furthering both a First Amendment and common law claim. In *Parson v. Farley*, Professor Eugene Volokh had filed a motion to, among other things, intervene and unseal certain documents.[67] Volokh sought to "have access to the full record in this case so that both he and members of the public may better understand' the issues."[68] Citing the three-part test in *City of Colorado Springs v. Climax Molybdenum*,[69] the district court found that Volokh "has established independent Article III standing to intervene for the limited purpose of seeking public access to judicial records.[70] The district court also found that Volokh satisfied Federal Rule of Civil

65. Republic of the Philippines v. Westinghouse Electric, 139 F.R.D. 50, 56 (D. N.J. 1991).

66. Helm v. Kansas, 656 F.3d 1277, 1292 (10th Cir. 2011).

67. Parson v. Farley, 352 F. Supp. 3d 1141, 1144-45 (N.D. Ok. 2018).

68. *Id*. at 1147.

69. City of Colorado Springs v. Climax Molybdenum, 587 F.3d 1071 (10th Cir. 2009).

70. *Parson,* 352 F. Supp. 3d at 1147–48.

Procedure 24(b)'s standard for permissive intervention, the "proper procedural mechanism for a non-party to seek access to judicial documents."[71] The district court resolved "the motion to unseal in Volokh's favor by applying the common-law right of access and [did] not reach Volokh's argument that he also has a First Amendment right of access."[72]

IV. Secrecy in the Supreme Court Sports Betting Case

Both the plaintiff and defendant moved to seal files in the lead-up to the Supreme Court sports betting case. The five sports leagues filed a brief that supported their own sealing efforts *and* supported New Jersey's motion to seal.[73] The leagues' brief broke down the various documents into four categories: (i) documents containing private, competitively sensitive market, or business research; (ii) documents containing confidential league policies; (iii) depositions, reports, and court submissions that discuss the confidential material addressed above; and (iv) documents for which sealing is unnecessary.[74] One month earlier, the New Jersey defendants filed their own motion to seal several documents, including: (i) an unredacted version of defendants' memorandum of law; (ii) an unredacted version of Defendants' Local Rule 56.1 Statement, and (iii) unredacted versions of about two dozen exhibits to a November 21, 2012 declaration by an attorney named Peter Slocum.[75]

71. *Id*. at 1149. Citing *NAACP v. New York*, 413 U.S. 345, 366 (1973), the district court also concluded that Volokh's motion was timely and non-prejudicial to the plaintiff. *Parson,* 352 F. Supp. 3d at 1149-50.

72. *Id*. at 1152 n. 5.

73. Plaintiff's Brief in Further Support of Defendant's Motion to Seal and in Support of Plaintiff's Cross-Motion to Seal Additional Documents, Nat'l Collegiate Athletic Ass'n v. Christie, No. 12-4947, 2012 U.S. Dist. LEXIS 183395 (D.N.J. Dec. 7, 2012), ECF No. 97.

74. *Id.*

75. Notice of Motion to Seal, Nat'l Collegiate Athletic Ass'n v. Christie, No. 12-4947, 2012 U.S. Dist. LEXIS 183395 (D.N.J. Nov. 21, 2012), ECF No. 77.

On October 11, 2012, the magistrate judge overseeing non-dispositive aspects of the case held a telephone hearing to address sealing-related issues.[76] According to Judge Goodman:

> Let's be clear, too. Our local rule 5.3 makes clear that there is a high burden placed on the parties to put something under seal, and when you file a motion for leave to seal something, while the document stays under seal until the motion is decided, there is no guarantee that that motion will be granted…Let's do this: I really don't like the idea of things being put under seal that don't need to be under seal. It clutters the record, it creates confusion, and, frankly, it flies in the face of the public's right to know what's in these pleadings if they're not—if they don't contain a confidential information.[77]

During the early stages of the litigation, each of the five sports leagues also filed 'certifications' by in-house lawyers in support of defendant New Jersey's motion to seal *and* their own cross-motion to seal. One such certification—filed by an in-house NBA attorney named Daniel J. Spillane—is illustrative as to the rationale underpinning the desire to seal certain documents among all five plaintiffs.[78] Spillane sought to seal a bevy of documents, including certain filings later cited by Judge Shipp.[79] According to Spillane:

> These documents are not publicly available and have not even been disclosed to the other Plaintiffs in this case. The Harris Interactive NBA Studies contain highly confidential and proprietary business and marketing research and information. Specifically, the studies—which were commissioned by the NBA—contain data and related analysis regarding

76. Transcript of Telephone Conference Before Hon. Lois H. Goodman, U.S. Magistrate Judge, Nat'l Collegiate Athletic Ass'n v. Christie, No. 12-4947, 2012 U.S. Dist. LEXIS 183395 (D.N.J. Oct. 11, 2012), ECF No. 45.

77. *Id*. at 46.

78. Certification of Daniel J. Spillane of the NBA in Further Support of Defendant's Motion to Seal Documents and in Support of Plaintiff's Cross-Motion to Seal, Nat'l Collegiate Athletic Ass'n v. Christie, No. 12-4947, 2012 U.S. Dist. LEXIS 183395 (D.N.J. Dec. 5, 2012), ECF No. 97.

79. *Id*. Spillane also sought to seal the deposition of NBA attorney Richard Buchanan and economist Robert Willig. *Id*.

> sports fans' perceptions of professional sports leagues, including comparisons between fans' perceptions of the NBA and other leagues. The public disclosure of the Harris Interactive NBA Studies would cause serious injury to the NBA because if other basketball leagues, other professional sports leagues, or other companies and entities that provide entertainment products and services were to gain access to the information contained within these Studies, those leagues, companies, or entities could gain a competitive advantage over the NBA and adversely affect the business operations of the NBA and its member teams. No less restrictive alternative to sealing the entirety of the Harris Interactive NBA Studies is available due to the entirety of each document containing highly sensitive information of which redaction is not pracical.[80]

The litigation strategy of the plaintiff sports leagues in the Supreme Court sports gambling case was by no means unique. For example, lead plaintiff NCAA also moved to seal a wide swath of documents—including the NCAA's opening statement during trial—in the on-going antitrust lawsuit in California pertaining to so-called 'grant-in-aid caps' imposed by the NCAA.[81] In contrast, the NCAA also recently filed a motion in a criminal case seeking "to intervene to vindicate the public's right to access exhibits that were discussed, debated, and subject to judicial ruling during a trial that was the subject of significant public attention."[82]

In a twist, the five plaintiff leagues also filed a joint letter on December 27, 2012 acknowledging that filings would not be subject

80. *Id*.

81. *See* Order on Defendant's Administrative Motion to Retain Under Seal Portions of Defendant's Opening Statement, *In re* Nat'l Collegiate Athletic Ass'n Grant-In-Aid Cap Antitrust Litigation, No. 14-md-02541 (N.D. Cal. Aug. 10, 2018), ECF No. 959.

82. Notice of Motion and Motion of the Nat'l Collegiate Athletic Ass'n to Intervene for the Limited Purpose of Obtaining Materials, United States v. Gatto, No. 17-cr-00686 (S.D.N.Y. Feb. 28, 2019), No. 289.

to sealing given that the case was of public import.[83] In relevant part:

> We…represent Plaintiffs in the above-referenced action. We write in accordance with the Court's direction prior to oral argument on December 18, 2012, that: (1) no documents will be sealed in this case due to the case being of public import, and (2) Plaintiffs may, no later than today, withdraw documents that they are not relying on and do not wish to be publicly filed.[84]

Judge Shipp cited and summarized still-secret documents filed by the NBA (and NCAA) in his December 21, 2012 ruling on the leagues' standing to pursue its case against New Jersey.[85] Likewise, Judge Shipp referenced the sealed expert report by academic economist Robert Willig on behalf of defendant New Jersey. Relying, at least in part, on the sealed studies and expert report, Judge Shipp ruled that the five leagues had standing to sue under PASPA.[86]

Specifically, Judge Shipp cited three categories of sealed files in "support of the Court's conclusion that the Leagues have demonstrated injury-in-fact."[87] The sealed files that were cited included: (i) a '2009 NBA Integrity Study;' (ii) '2003 and 2008 NCAA National Studies on Collegiate Sports Wagering and Associated Behaviors;' and (iii) '2007 NBA Las Vegas/Gambling

83. Letter by William J. O'Shaughnessy to Judge Shipp, Nat'l Collegiate Athletic Ass'n v. Christie, No. 12-4947, 2012 U.S. Dist. LEXIS 183395 (D.N.J. Dec. 27, 2012), ECF No. 115.

84. *Id*.

85. Nat'l Collegiate Athletic Ass'n v. Christie, No. 12-4947, 2012 U.S. Dist. LEXIS 183395, at *15–18 (D.N.J. 2012). Derived from Article III of the Constitution and its tethered 'cases or controversies' requirement, plaintiffs must show that they are injured to establish the requisite standing for furtherance of a federal lawsuit. *See generally* Spokeo v. Robins, 136 S.Ct. 1540 (2016).

86. *NCAA*, 2012 U.S. Dist. LEXIS 183395, at *19–20.

87. *Id* at *15–18. Judge Shipp did not cite any of the (redacted) depositions taken in the case. On the league side, such depositions were taken from the following individuals: Allan H. Selig, Daniel T. Mullin, Thomas Ostertag, David J. Stern, Richard W. Buchanan, Roger S. Goodell, Lawrence P. Ferazani, Gary Bettman, Mark Emmert, and Rachel Newman Baker. On the New Jersey side, Robert Willig was also deposed.

Survey.'[88] For example, Judge Shipp wrote: "[t]he 2007 NBA Las Vegas/Gambling Survey draws an undisputed direct link between legalized gambling and harm to the Leagues."[89]

Judge Shipp also quoted from the redacted Willig Report in his discussion of standing's 'injury-in-fact' requirement as follows: "As conceded by Defendants' expert, Mr. Willig, 'legalizing sports wagering in New Jersey…could stimulate a certain amount of sports wagering that would not otherwise occur. Such new (legal) wagering would result in an overall increase in total (legal plus illegal) sports wagering.'" On the standing topic of 'traceability of plaintiffs' injury to defendants,' Judge Shipp cited to the Willig Report again, as follows:

> Defendants' expert stated that the enactment of legal gambling in New Jersey will likely lead to an increase in illegal gambling. Therefore, the Sports Wagering Law will, at a minimum, likely increase the perception that the integrity of the Leagues' games is being negatively impacted by sports betting.

A heavily redacted 115-page report by Professor Willig was later included on the public-facing docket as an exhibit to another court filing.[90] Professor Willig explained his motivation for completing the report as follows: "I have been asked by Counsel for Defendants in this case to assess, from an economic perspective whether there is evidence to support claims made by the Plaintiffs—four major professional sports leagues in the United States plus the NCAA—that legalizing sports wagering in New Jersey would harm the Plaintiffs."[91] Professor Willig disclosed his affiliation with an "economic consulting firm" named Compass Lexecon, which billed his time at a rate of $1,300 per hour.[92] Professor Willig wrote that "[t]he basis for my opinions in this case is my experience, application of standard economic principles and analysis, and the

88. *Id*.

89. *Id*. at *17–18.

90. Expert Report of Professor Robert D. Willig, Nat'l Collegiate Athletic Ass'n v. Christie, No. 12-4947, 2012 U.S. Dist. LEXIS 183395 (D.N.J. Nov. 12, 2012).

91. *Id*. at 2.

92. *Id*. at 3.

documents and data listed in Appendix B."[93] Professor Willig's summary was straightforward:

> My overall conclusion is that the economic evidence does not support the Plaintiffs' contention that legalized sports wagering in New Jersey would harm the Leagues, under any of their theories or otherwise…The shifting of sports wagering from illegal to legal outles would likely not harm the Leagues—in fact, they would likely benefit from such a shift. And the economic evidence does not provide a basis for concluding that an increase in overall sports wagering would harm the Leagues under the Plaintiffs' (or other) theories of harm.[94]

V. Conclusion

Throughout the six years of litigation leading up to the U.S. Supreme Court ruling, the five sports league plaintiffs claimed that they were 'injured' and 'irreparably harmed' by legalized sports betting. To buttress their claims of injury and irreparable harm, the leagues filed numerous studies and documents under seal when faced with Gov. Christie's motion to dismiss arguing that plaintiffs lacked standing under Article III.[95] Following the Supreme Court's decision on May 14, 2018, four of the five sports leagues who had initiated the lawsuit shifted to lobby at both the state and federal level for legislative mandates requiring payments to the leagues for betting-related 'integrity fees,' 'royalties,' 'compensation,' and/or 'data fees.'

Some of the still-sealed documents—especially the ones cited by Judge Shipp in his 2012 ruling on standing—could be obtained via a motion to intervene for the limited purpose of accessing sealed files. Indeed, relevant precedent suggests that there would be a strong argument in favor of unsealing, at a minimum, the various documents Judge Shipp specifically cited in 2012. Narrowly, unsealing an unredacted version of the report completed

93. *Id*.

94. *Id*. Professor Willig cited five reasons for reaching such conclusion. *Id*. at 4–5.

95. Likewise, defendant New Jersey sought to have the expert report completed by its academic economist sealed.

by academic economist Robert Willig would clear up a lingering issue raised by Professor Willig himself in a widely-read ESPN.com article:

> Willig, who was hired by New Jersey to write the study on legalized sports betting used in the case, strongly disputes how the judges have construed his findings. Willig believes any increase in total gambling from legalization would likely come from amateur bettors, who don't have the desire or ability to compromise a game. 'The people who might pose such a criminal threat have had all the opportunity they desire to implement their sports betting in Nevada [directly or indirectly] or anywhere illegally,' Willig said. 'Thus legalization would not increase the threat of match fixing.'[96]

On a more general level, such unsealing would reveal the grounding, if any, for how the five sports league plaintiffs convinced Judge Shipp that such leagues were injured and irreparably harmed by legalized sports betting in New Jersey and beyond. Such a revelation would also assist in the determination of whether the Supreme Court sports betting case was a pecuniary ruse by one or more of the plaintiffs.

96. David Purdum, *More Gambling Doesn't Up Fixing*, ESPN (Nov. 14, 2014), https://es.pn/2Ws3gHs.