No. 141, Original

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and

STATE OF COLORADO,

Defendants.

OFFICE OF THE SPECIAL MASTER

RESPONSE OF THE COMPACTING STATES IN PARTIAL OPPOSITION TO THE UNITED STATES' MOTION FOR LEAVE TO FILE UNDER SEAL

November 21, 2022

The State of Texas, State of New Mexico, and State of Colorado (collectively, "Compacting States"), each through their respective and undersigned counsel, respond in partial opposition to the *United States of America's Motion for Leave to File Under Seal* (filed Nov. 18, 2022) ("Motion for Leave").

In the Motion for Leave, the United States reiterates its intention to file a motion on November 23, 2022 alleging unauthorized disclosures of confidential settlement information belonging to the federal government ("November 23rd Motion"). It further requests that access to its November 23rd Motion be strictly limited to its preferred parties (the Compacting States, Elephant Butte Irrigation District ("EBID") and El Paso County Water Irrigation District No. 1 ("EPCWID")). As discussed below, the Compacting States take no position on whether the United States' November 23rd Motion should be sealed. However, the Special Master should (1) evaluate whether to unseal the Compacting States' Joint Motion and accompanying documents (previously filed under seal on Nov. 14, 2022), (2) specify that the United States is not authorized to disclose confidential settlement information belonging to the Compacting States, and (3) deny the request to prevent all *Amici* from reviewing the November 23rd Motion.

I. STANDARD FOR SEALING AND UNSEALING DOCUMENTS

"Judicial records belong to the American people; they are public, not private, documents." *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417 (5th Cir. 2021). "The public's right of access to judicial records is a fundamental element of the rule of law." *Leopold v. United States (In re Matter of the Application of Leopold to Unseal Certain Elec. Surveillance Applications & Orders)*, 964 F.3d 1121, 1123 (D.C. Cir. 2020). The public has an interest in transparent court proceedings that is independent of the parties' interests. This right "serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public

with a more complete understanding of the judicial system, including a better perception of its fairness." *BP Expl. & Prod., Inc. v. Claimant ID 100246928*, 920 F.3d 209, 210 (5th Cir. 2019) (internal quotation omitted). Therefore, sealing information placed in the judicial record is heavily disfavored, *see Vantage Health Plan, Inc. v. Willis-Knighton Medical Center*, 913 F.3d 443, 450–51 (5th Cir. 2019), and "[o]nly the most compelling reasons can justify non-disclosure of judicial records." *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.,* 825 F.3d 299, 305 (6th Cir. 2016) (internal quotation marks and citation omitted).

Moreover, "the rationale for public access is even greater" where, as here, the case "involve[s] matters of particularly public interest." *Bradley on behalf of AJW v. Ackal*, 954 F.3d 216, 233 (5th Cir. 2020) (citation omitted); *see also Shane Grp.*, 825 F.3d at 305 ("[T]he greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access."). The presumption of access to judicial filings, however, "can be rebutted if countervailing interests heavily outweigh the public interests in access." *Rushford v. New Yorker Magazine, Inc.,* 846 F.2d 249, 253 (4th Cir. 1988). "The party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption." *Id*.

II. THE UNITED STATES' REQUEST TO SEAL ITS NOVEMBER 23RD MOTION

The United States claims the November 23rd Motion should be sealed because it "will address sealed documents and disclose confidential settlement information." Motion for Leave at 1. Each rationale is addressed below.

First, the United States attempts to justify sealing its November 23rd Motion because the Joint Motion, Consent Decree, and the supporting declarations themselves were initially sealed by the Special Master. It is true that out of an abundance of caution, the Special Master sealed the

Joint Motion as a protective measure until he had reviewed the filing and could evaluate whether it satisfied the high threshold to be sealed from public disclosure. But the United States' argument for sealing its November 23rd Motion ultimately turns on whether the Joint Motion and Consent Decree should be sealed in the first place, and in the light of day it is unmistakable that the Joint Motion should be public.

To be clear, the Joint Motion, Consent Decree, and supporting documents were drafted and presented by the Compacting States, and the Compacting States urge the Special Master to unseal those documents as soon as possible. Although not an author of the Joint Motion, the United States has repeatedly claimed that the Joint Motion contains confidential settlement communications that represent the position of the federal government. That is incorrect.

Rule 408 and the confidentiality orders in this case are "designed to encourage settlements by fostering free and full discussion of the issues." *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1106 (5th Cir. 1981). Consequently, they extend protection to "legal conclusions, factual statements, internal memoranda, and the work of non-lawyers and lawyers alike so long as the communications were intended to be part of . . . *negotiations toward compromise*." *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 294 (5th Cir. 2010) (emphasis added; internal quotation omitted). It is black letter law, however, that protection for confidential settlement communications extends only to discussions made during settlement negotiations and not to the terms of the settlement agreement itself. *E.g. Bradley*, 954 F.3d at 225 ("The presumption in favor of the public's common law right of access to court records therefore applies to settlement agreements that are filed and submitted to the district court for approval."); *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 685 (D. Kan. 2004) (confidentiality protection extends only to

"discussions made during negotiations" and not to "the terms of the settlement or the settlement agreement itself").

Here, the Joint Motion, Consent Decree, and supporting documents contain no information that is confidential or otherwise protected. The Compacting States have made no representations about the participation or communications of the United States whatsoever. Nor have the Compacting States identified the positions of the United States during the negotiations or characterized those positions in any way. Instead, the Consent Decree represents nothing more than the agreement of the Compacting States.

The second rationale articulated by the United States for sealing the November 23rd Motion is that the United States intends to "disclose confidential settlement information." The proponent of sealing a document must "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations." *Shane Grp.,* 825 F.3d at 305-06 (internal quotation marks and citation omitted). The United States has failed to fulfill this requirement. The Motion for Leave provides no legal or factual citations to overcome and satisfy its burden for sealing the November 23rd Motion. As in *Shane Group,* the United States' justification for sealing its November 23rd Motion is "brief" and "perfunctory," and thus does not meet the heavy burden to justify sealing an entire set of documents at the adjudication stage. *Id* at 306. While the confidential negotiating positions of the United States belong to the federal government, and it is the government's prerogative to disclose that information if it wishes, it does not necessarily follow that the filing should be shielded from the public view. Indeed, if the United States elects to affirmatively place its confidential negotiating positions at issue, it waives the right to prevent others from seeing those positions.

In sum, the Compacting States have a strong interest in ensuring that their citizens have full access to critical aspects of this litigation. Nonetheless, the Compacting States are mindful of the Special Master's previous orders, and that neither the Special Master nor the Compacting States have seen the November 23rd Motion. Therefore, the Compacting States take no position on whether the November 23rd Motion should be sealed and are willing to accept the judgment of the Special Master. The Compacting States wish to be on record, however, that they strongly oppose any future filings being ordered under seal, including any briefing on the underlying motion for entry of the Consent Decree.

No matter what the Special Master decides on sealing the November 23rd Motion, however, it should be clear that the United States is treading into perilous waters by attempting to put at issue the negotiating positions of the parties during the mediation. While the United States is entitled to disclose its own positions and analysis if it so chooses, it has no right to disclose the confidential settlement positions or statements of the Compacting States. Sealed or not, the Special Master should make it abundantly clear that any disclosures made by the United States in its November 23rd Motion should be limited to its own confidential settlement information.

III. THE SPECIAL MASTER SHOULD DENY THE REQUEST TO LIMIT ACCESS TO THE NOVEMBER 23RD MOTION

In a further attempt to litigate this case in the shadows, the United States seeks to exclude most, but not all, *Amici* from reviewing its November 23rd Motion. Specifically, the United States asks that the City of El Paso, the City of Las Cruces, Hudspeth County Conservation and Reclamation District, New Mexico Pecan Growers, New Mexico State University, Southern Rio Grande Diversified Crop Farmers Association and the Albuquerque Bernalillo County Water Utility Authority be prevented from viewing its November 23rd Motion. Only EBID and EPCWID would be spared from this exclusion. This request should be denied.

As the Special Master is aware, the *Amici* that the United States seeks to exclude represent the water users that have a continuing interest in any decision on the Joint Motion. They have been allowed to participate as *Amici* precisely because they have distinct interests in the waters of the Rio Grande and can provide helpful perspective to the Special Master. The *Amici* are entitled to understand the arguments presented by the United States so that they can fully evaluate their respective interests.

As the United States concedes, all *Amici* have already been allowed to review and discuss confidential settlement materials. Motion for Leave at 2. The United States attempts to distinguish the information that was disclosed based on when access was granted, but that distinction is artificial. The *Amici* have been permitted to view, discuss, and understand confidential settlement materials for several months, so nothing presented by the United States will be unfamiliar to the *Amici*. Again, the United States is free to put its own confidential settlement information at issue in a pleading, but it should not be allowed to control who can view those pleadings.

If the United States is allowed to file its November 23rd Motion under seal, all parties and *Amici* should be given access to that filing.

WHEREFORE, the Compacting States respectfully request that the Special Master (1) consider the applicable standard in issuing an order on the Motion for Leave (2) evaluate whether to unseal the Joint Motion and accompanying documents at the earliest convenience, (3) make clear that future requests to seal filings will be disfavored, (4) specify that the United States is not authorized to disclose confidential settlement information belonging to the Compacting States, and (5) deny the request to prevent all *Amici* from reviewing the November 23rd Motion.

Dated: November 21, 2022

Respectfully submitted,

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♦

OFFICE OF THE SPECIAL MASTER

♦

CERTIFICATE OF SERVICE

♦

This is to certify that on this 21st day of November, 2022, I caused a true and correct copy of the **RESPONSE OF THE COMPACTING STATES IN PARTIAL OPPOSITION TO THE UNITED STATES' MOTION FOR LEAVE TO FILE UNDER SEAL** to be served upon all parties and *amici curaie,* by and through the attorneys of record or designated representatives for each party and *amicus curiae* in this original action. As permitted by order of the Special Master, and agreement among the parties, service was accomplished by electronic mail to those individuals listed on the attached service list, which reflects all updates through the current date.

Respectfully submitted,

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