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A FUTILE ENDEAVOR: DEFINING "SCANDALOUS" IN THE BANKRUPTCY CODE

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> "I shall not today attempt . . . to define [scandalous] . . . . But I know it when I see it."[1]

INTRODUCTION

Debtors often seek the special protections offered in bankruptcy due to the detrimental impacts of potentially scandalous matters, which are often outside the debtor's control. Some file for bankruptcy after being accused of tortious or criminal conduct,[2] while others may file their bankruptcy petitions after losing their jobs for allegedly scandalous reasons.[3]

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[1] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (referring to obscenity, the counsin of scandalous).

[2] *See In re* Roman Catholic Archbishop, 661 F.3d 417, 421 (9th Cir. 2011) (filing of the bankruptcy petition came after Archdiocese became "the subject of multiple lawsuits seeking millions of dollars in compensatory and punitive damages for sexual abuse of children by specific clergy members"); Gitto v. Worcester Telegram & Gazette Corp. (*In re* Gitto Glob. Corp.), 422 F.3d 1, 5 (1st Cir. 2005) (filing for corporate bankruptcy "amid allegations of financial distress and accounting irregularities"); *In re* Phar-Mor, Inc., 191 B.R. 675, 677 (Bankr. N.D. Ohio 1995) (filing of the company's bankruptcy petition came shortly after former president was "convicted and sentenced on 109 separate criminal counts involving his activities as president of the Debtor entities"). *But see* SYDNEY RUTBERG, TEN CENTS ON THE DOLLAR: THE BANKRUPTCY GAME 151 (1973) (hypothesizing that the majority of "individual bankruptcies arise from shopping sprees at Bloomingdale's or similar abuses of easy credit," but providing no support for this blanket assertion).

[3] Neal v. Kan. City Star (*In re* Neal), 461 F.3d 1048, 1050–51 (8th Cir. 2006).

Struggling parents may file for bankruptcy to halt embarrassing foreclosure proceedings.[4] Regardless of the circumstances, debtors frequently file to avail themselves of the automatic stay, a powerful tool only available in bankruptcy, which ceases collection efforts and most pending state and federal litigation.[5] As a result, many nonbankruptcy related "scandalous" issues find their way into the confines of bankruptcy court.[6]

The common law,[7] the First Amendment,[8] and United States Supreme Court precedent[9] all presage a broad presumption in favor of transparency of public records and judicial records. The United States Congress adopted 11 U.S.C. § 107 of the Bankruptcy Code (the "Code") to guide bankruptcy courts in analyzing this right-to-access,[10] which predates the United States Constitution itself.[11] Section 107 codifies the common law and places parameters on what is available to the public.[12] However,

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[4] *See, e.g.*, *In re* Nicfur-Cruz Realty Corp., 50 B.R. 162, 168 (Bankr. S.D.N.Y 1985) (filing bankruptcy petition "to halt the continuation of a foreclosure action"); Coletta v. Rubber2Gold, Inc. (*In re* Coletta), No. 05-88753-ast., 2011 WL 501825, at *13 (Bankr. E.D.N.Y. Feb. 10, 2011) (using bankruptcy petition to "temporarily halt the sale" of real property).

[5] *See* 11 U.S.C. § 362(a) (2012). However, some matters are exempt from the automatic stay. *See id.* § 362(b).

[6] For example, in *In re Roman Catholic Archbishop*, tort claimants filed allegations of sexual abuse in bankruptcy court. 661 F.3d at 421–22. Moreover, in *In re Phar-Mor, Inc.*, complaints were filed in bankruptcy court for "several strategic reasons which would not be apparent, on its face, to a reasonable lay person: a need to preserve some cause of action or be barred by a statute of limitations." 191 B.R. at 679–80.

[7] *See, e.g.*, *In re* Caswell, 29 A. 259, 259 (R.I. 1893); State *ex rel.* Colescott v. King, 57 N.E. 535, 537 (Ind. 1900); State *ex rel.* Ferry v. Williams, 41 N.J.L. 332, 334 (N.J. 1879).

[8] *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982); Press-Enter. Co. v. Superior Court (Press-Enter. I), 464 U.S. 501, 509–10 (1984).

[9] *See, e.g.*, Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978); Gannett Co. v. DePasquale, 443 U.S. 368, 389 (1979); Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984).

[10] 11 U.S.C. § 107(a) (2012).

[11] United States v. Criden, 648 F.2d 814, 819 (3d Cir. 1981) (determining that the right to access court records "antedates the Constitution").

[12] *In re* Phar-Mor, Inc., 191 B.R. 675, 679 (Bankr. N.D. Ohio 1995) ("Section 107 codified the Supreme Court's *Nixon* decision in the bankruptcy setting by recognizing the common-law right of public access, subject to the limited exceptions of confidential commercial information and scandalous or defamatory material."); *see also In re* Nunn, 49 B.R. 963, 964 (Bankr. E.D. Va. 1985).

numerous courts differ widely on how to interpret § 107(b)(2), which states that "scandalous" or "defamatory" matters should not be publicly available.[13]

Interpretive approaches to § 107 are a matter of great debate, as courts lack a uniformed approach. Even more challenging is the fact that Congress requires courts to give objective meaning to subjective terminology, such as the term scandalous.[14] Scandals, much like beauty, often depend on the beholder, as scandals are often fact specific. The parties involved and the surrounding circumstances are crucial to any analysis of "scandalous matters." For example, allegations that a United States President engaged in an adulterous relationship with a young intern would surely qualify as scandalous. Yet these same allegations may not be scandalous to someone in the entertainment industry. Many courts have defined the word scandalous differently; some have defined it broadly[15] and some narrowly,[16] while some have conflated scandalous with "defamatory," which implies falsity.[17] The allegations of an adulterous President would constitute as scandalous regardless of truthfulness. Similarly, allegations that a law firm's partner engaged in an adulterous affair with a junior associate are certainly scandalous, but hardly defamatory—if true.[18]

This Note addresses the various, sometimes contradictory, approaches courts have taken in interpreting what constitutes scandalous material under § 107(b)(2) of the Code. Part I traces the right of public access to documents and records in bankruptcy courts to its common-law and First Amendment origins and

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[13] 11 U.S.C.A. § 107(b)(2).

[14] *See* Helen Silving, *A Plea for a Law of Interpretation*, 98 U. PA. L. REV. 499, 504 (1950).

[15] *In re* Roman Catholic Archbishop, 661 F.3d 417, 432 (9th Cir. 2011) (defining scandalous matters as those which are "disgraceful, offensive, shameful and the like").

[16] Gitto v. Worcester Telegram & Gazette Corp. (*In re* Gitto Glob. Corp.), 422 F.3d 1, 14 (1st Cir. 2005) (defining scandalous matters to be those which are "untrue, or . . . potentially untrue and irrelevant or included within a bankruptcy filing for an improper end"); Anthracite Capital, Inc. v. Bank of Am. (*In re* Anthracite Capital, Inc.), 492 B.R. 162, 174–75 (Bankr. S.D.N.Y. 2013) (requiring scandalous matters to be "grossly offensive, irrelevant to the proceeding, and submitted for an improper use").

[17] *Gitto*, 422 F.3d at 14.

[18] Isabel Vincent & Melissa Klein, *Affair and Vengeful Wife Rips Apart 9/11 Law Firm*, N.Y. POST, (Nov. 9, 2014, 5:05 AM), http://nypost.com/2014/11/09/affair-and-vengeful-wife-rips-apart-911-law-firm.

discusses why transparency is particularly important in the bankruptcy context. Part II addresses the split of authority among the circuit courts regarding the appropriate way to define scandalous, focusing on the United States Court of Appeals for the First Circuit's "truthfulness and relevance" approach,[19] the Eighth Circuit's "context-sensitive" approach,[20] and the Ninth Circuit's "plain-meaning" approach.[21] Part III explores the pros and cons of these approaches and formulates a new rule to resolve this interpretive split. This rule fuses the context-sensitive and plain-meaning approaches to create a hybrid rule where courts first look at the purpose of a filed document before analyzing whether it is "disgraceful, offensive, shameful and the like."[22] Under this approach, commonly filed papers are less likely to be sealed under § 107(b)(2) while rare, strategic filings are more likely to be withheld from the public.

I. THE HISTORY AND BACKGROUND OF THE RIGHT TO VIEW AND INSPECT COURT RECORDS

A. The Common Law

Common-law courts in this country have long recognized a "strong presumption in favor of public access to judicial records."[23] This presumption extended to many public records as well, including titles to land and documents recorded in public offices.[24] However, persons requesting to inspect records had to show a real interest in the document.[25] Mere curiosity was generally insufficient.[26]

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[19] *Gitto*, 422 F.3d at 14.

[20] Neal v. Kan. City Star (*In re* Neal), 461 F.3d 1048, 1054 (8th Cir. 2006).

[21] *In re* Roman Catholic Archbishop, 661 F.3d 417, 432 (9th Cir. 2011).

[22] *Id.*

[23] Robbins v. Tripp, 510 B.R. 61, 65 (Bankr. E.D. Va. 2014).

[24] State *ex rel*. Colescott v. King, 57 N.E. 535, 538 (Ind. 1900).

[25] *Id.* at 537 ("The general rule which obtained at common law was that every person was entitled to an inspection of public records . . . provided he had an interest in the matters to which such records related."); State *ex rel*. Ferry v. Williams, 41 N.J.L. 332, 336 (N.J. 1879) (permitting persons to inspect police misconduct reports when the "documents will furnish competent evidence or necessary information"); C v. C., 320 A.2d 717, 723 (Del. 1974) (holding that "member[s] of the public ha[ve] a right to access judicial records . . . if [they have] an interest therein for some useful purpose").

[26] *C.*, 320 A.2d at 723.

Not all judicial records were publicly available at common law,[27] as courts refused to make documents accessible for improper purposes,[28] such as "to gratify private spite or promote public scandal."[29] In determining whether to limit a document's availability, common-law courts examined and balanced various and competing factors, such as the harm that would occur by making a document available against the public's interest in the document.[30] This common-law public availability right did not extend to certain documents, such as "[d]ocumentary evidence in the hands of a district attorney, minutes of a grand jury, [and] evidence in a divorce action."[31]

In 1978, the United States Supreme Court addressed the common-law right to access court materials in *Nixon v. Warner Communications, Inc.*[32] In *Nixon*, members of the media sought access to taped recordings that were used in the "Watergate" criminal prosecution of Richard Nixon, the former President of the United States.[33] However, based on the circumstances surrounding the case, the Court held that "the common-law right of access to judicial records" did not extend to the tapes in question.[34]

The *Nixon* court held that "courts of this country recognize a general right to inspect and copy . . . judicial records and documents,"[35] and that "[e]very court has supervisory power over its own records and files."[36] The Supreme Court followed this common-law right fairly closely, holding that the public-availability presumption "is not absolute."[37] The Court referenced multiple examples of when access to court records may be denied, such as when documents are filed for "improper

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[27] State *ex rel*. Youmans v. Owens, 137 N.W.2d 470, 474 (Wis. 1966) ("[T]he right to inspect public documents and records at common law is not absolute.").

[28] *In re* Caswell, 29 A. 259, 259 (R.I. 1893) ("The judicial records of the state should always be accessible to the people for all proper purposes.").

[29] *Id.* (denying access to court records because publishing "the painful, and sometimes disgusting, details of a divorce case . . . fails to serve any useful purpose . . . [and leads to] demoralization and corruption . . . by catering to a morbid craving for that which is sensational and impure").

[30] *Owens*, 137 N.W.2d at 474.

[31] *Id.*

[32] 435 U.S. 589, 607 (1978).

[33] *Id.* at 589.

[34] *Id.* at 608.

[35] *Id.* at 597.

[36] *Id.* at 598.

[37] *Id.*

purposes" and to expose confidential business data.[38] Shortly after *Nixon*, the Supreme Court added that courts maintain "equitable powers . . . over their own processes, to prevent abuses, oppression, and injustices,"[39] which is consistent with the ideals of the common law.[40]

B. The First Amendment Right to Know About the Administration of Justice

The right to view court records is "rooted in the public's First Amendment right to know about the administration of justice."[41] The Supreme Court acknowledges a First Amendment presumption favoring transparency in criminal trials,[42] while other courts hold that "the constitutional right of access applies to civil as well as criminal trials."[43] Much like the common law, the constitutional right to inspect court records is not without limitation.[44] To determine whether a certain type of proceeding should be made open to the public, the Supreme Court evaluates two separate issues. First, the Court evaluates whether the proceeding has traditionally been open to the public.[45] Next, the Court inquires whether public access would promote the

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[38] *Id.*

[39] Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984) (internal quotation marks omitted) (quoting Gumbel v. Pitkin, 124 U.S. 131, 144 (1888)).

[40] *See Nixon*, 435 U.S. at 598; Park v. Detroit Free Press Co., 40 N.W. 731, 734–35 (Mich. 1888); *In re* Caswell, 29 A. 259, 259 (R.I. 1893) (finding that judicial records should not be made available "to gratify private spite or promote public scandal").

[41] Video Software Dealers Ass'n v. Orion Pictures Corp. (*In re* Orion Pictures Corp.), 21 F.3d 24, 26 (2d. Cir 1994).

[42] William T. Bodoh & Michelle M. Morgan, *Protective Orders in the Bankruptcy Court: The Congressional Mandate of Bankruptcy Code Section 107 and Its Constitutional Implications*, 24 HASTINGS CONST. L.Q. 67, 70 (1996); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (plurality opinion) ("[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice.").

[43] NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 358 (Cal. 1999). *See also* Associated Press v. District Court, 705 F.2d 1143, 1145 (9th Cir. 1983) ("the public and press have a first amendment right of access to pretrial documents."); Bodoh & Morgan, *supra* note 42, at 73 ("[T]he First Amendment presumption of public access [extends] to criminal records, civil trials, and civil records.").

[44] Bodoh & Morgan, *supra* note 42, at 71.

[45] *See* Press-Enter. Co. v. Superior Court (Press-Enter. I), 464 U.S. 501, 510 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

democratic process.[46] Thus, proceedings are generally made open to the public when they have been historically publicly accessible and when accessibility benefits and furthers the democratic system. Further, accessibility to documents or to proceedings may be denied based on "a defendant's right to a fair trial, the protection of privileged information, and privacy interests of the parties."[47] However, nondisclosure is not generally granted, as courts must find "the denial [of public access] is necessitated by a compelling governmental interest, and [the remedy must be] narrowly tailored to serve that interest."[48]

It is important to have transparency in the courts because such transparency attempts to maintain the public's confidence in the administration of justice.[49] Granting persons the ability to inspect records upholds "the integrity, quality, and respect in our judicial system,"[50] as transparency in the courts "is an essential feature of democratic control."[51] Broad access to court records assures "judges perform their duties in an honest and informed manner."[52] After all, the judiciary is merely one branch of a government established "by the people, and answerable to the people,"[53] and making records available allows society "to keep a watchful eye on the workings of public agencies."[54] Limiting or outright denying the availability of court records is an extreme

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[46] Press-Enter. Co. v. Superior Court (Press-Enter. II), 478 U.S. 1, 8 (1985); *Globe Newspaper Co.*, 457 U.S. at 604.

[47] Bodoh & Morgan, *supra* note 42, at 72 (footnotes omitted).

[48] *Globe Newspaper Co.*, 457 U.S. at 607. When the Supreme Court evaluates "cases under the First Amendment presumption of public access, the standard of review . . . is one of strict scrutiny." Bodoh & Morgan, *supra* note 42, at 71.

[49] Allowing public access "is based on the need for federal courts . . . to have a measure of accountability and for the public to have confidence in the administration of justice." Geltzer v. Andersen Worldwide, S.C., No. 05 Civ. 3339(GEL), 2007 WL 273526, at *2 (S.D.N.Y. Jan. 30, 2007) (alteration in original).

[50] Video Software Dealers Ass'n v. Orion Picutres Corp. (*In re* Orion Pictures Corp.), 21 F.3d 24, 26 (2d Cir. 1994) (quoting *In re* Analytical Sys., Inc., 83 B.R. 833, 835 (Bankr. N.D. Ga. 1987)).

[51] Anthracite Capital, Inc. v. Deutsche Bank AG (*In re* Anthracite Capital, Inc.), 492 B.R. 162, 171 (Bankr. S.D.N.Y. 2013).

[52] Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938–2006*, 78 U. COLO. L. REV. 817, 820 (2007).

[53] Bodoh & Morgan, *supra* note 42, at 68.

[54] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978).

measure, and nondisclosure should be "the exception rather than the rule,"[55] especially because keeping records private imposes great costs to the judiciary system.[56]

C. The Importance of Transparency in Bankruptcy

Maintaining transparency is especially important in bankruptcy court. Rather than forcing delinquent debtors into slavery[57] or prison,[58] bankruptcy offers families and corporations the opportunity to obtain a fresh financial start either by reorganizing debts over a set period of time[59] or by liquidating nonexempt assets and property in return for a discharge of certain debts.[60]

Extending this common-law and constitutional right to make records available in bankruptcy "fosters confidence among creditors regarding the fairness of the bankruptcy system."[61]

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[55] Hope *ex rel.* Clark v. Pearson, 38 B.R. 423, 425 (Bankr. M.D. Ga. 1984); *see Anthracite Capital, Inc.*, 492 B.R. at 171 (stating that nondisclosure is "an extraordinary measure that is warranted only under rare circumstances").

[56] City of Hartford v. Chase, 942 F.2d 130, 137 (2d Cir. 1991) (Pratt, J., concurring) (limiting public access "entails great costs" because courts must use valuable resources to keep files private).

[57] *See, e.g.*, Becky A. Vogt, State v. Allison*: Imprisonment for Debt in South Dakota*, 46 S.D. L. REV. 334, 334–35 (2001) (explaining that creditors in England who secured judgments against debtors could have the debtor "sold into slavery"); John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 SEATTLE J. SOC. JUST. 439, 445 (2005) (tracing the history of debtor slavery to early Rome and to American colonies).

[58] *See, e.g.*, Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 8 (1986) (explaining that English creditors would commonly force debtors into prisons if they could not pay their debts); Richard E. James, *Putting Fear Back Into the Law and Debtors Back Into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J. 143, 145 (2002) (tracing debtor's prisons' existence back to the fifth century B.C.E.); *see also* CHARLES DICKENS, DAVID COPPERFIELD 120–22 (Project Gutenberg) (describing the horrors of debtor's prisons).

[59] Consumer reorganization plans may not exceed "3 years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than 5 years." 11 U.S.C. § 1322(d)(2) (2012).

[60] *See, e.g.*, 11 U.S.C. § 727(a) (2012) (discharging individual debts following liquidation); *id.* § 944(b) (discharging debts of municipalities in bankruptcy); *id.* § 1141(d)(1)(A) (discharging debts following a Chapter 11 plan). However, not all debts are dischargeable in bankruptcy. For example, debts incurred from fraudulent acts or by breach of fiduciary duties are exempt from being discharged. *Id.* § 523.

[61] Gitto v. Worcester Telegram & Gazette Corp. (*In re* Gitto Glob. Corp.), 422 F.3d 1, 7 (1st Cir. 2005). Trials and hearings in adversarial proceedings commenced in bankruptcy court must be conducted in an open court. FED. R. BANKR. P. 9014(b). Federal Rule of Civil Procedure 43(a), which is made applicable by Federal Rule of

Debtors in bankruptcy can access extraordinary remedies not otherwise available in state courts, such as the ability to reject detrimental contracts.[62] At the moment a bankruptcy petition is filed, debtors are also shielded by the automatic stay, which ceases collection efforts and most litigation.[63] To maintain accountability, it is especially important that bankruptcy records be publicly obtainable.

Section 107(b) was created to maintain the status quo of a debtor's bankruptcy estate, as the dissemination of "defamatory" or "scandalous" information could harm the estate's value.[64] Detrimental effects of such dissemination could lead to job loss or business regression, impairing what creditors could collect from the debtor.[65]

D. The Supreme Court, the Bankruptcy Reform Act of 1978, and § 107

In November 1978, just seven months after the *Nixon* decision, Congress codified and expanded on the right to view judicial records in 11 U.S.C. § 107 of the Bankruptcy Reform Act of 1978.[66] Adopting § 107 indicated Congress's "strong desire to preserve the public's right of access to judicial records in bankruptcy proceedings."[67] One notable scholar has stated that "it is possible to conclude that [§] 107 was intended to complement and implement the *Nixon* decision," since the statute's enactment came shortly after the *Nixon* decision.[68] Section 107(a) states, in pertinent part, that all papers "filed in [a bankruptcy case] and the dockets of a bankruptcy court are

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Bankruptcy Procedure 9017, states that a witness' "testimony must be taken in open court unless" otherwise provided. FED. R. CIV. P. 43(a); *see* FED R. BANKR. P. 9017.

[62] 11 U.S.C. § 365(a) (2012) (stating that a trustee or a debtor-in-possession "may assume or reject any executory contract or unexpired lease of the debtor").

[63] *Id.*

[64] David I. Cisar & Christopher J. Stroebel, *A Private Moment in the Fishbowl: Filings Under Seal in Bankruptcy Court*, 31 AM. BANKR. INST. J 38, 38 (2012).

[65] *In re* Phar-Mor, Inc., 191 B.R. 675, 680 (Bankr. N.D. Ohio 1995) (limiting public access to maintain interested party's "positive reputation in the local business community").

[66] 11 U.S.C. § 107(a) (2012).

[67] Video Software Dealers Ass'n v. Orion Pictures Corp. (*In re* Orion Pictures Corp.), 31 F.3d 24, 26 (2d Cir. 1994).

[68] Bodoh & Morgan, *supra* note 42, at 77; *see also* Keith Sharfman, *Derivative Suits in Bankruptcy*, 10 STAN. J.L. BUS. & FIN. 1, 11 (2004) (arguing that pre-Code holdings and procedure indicate congressional intent).

public records and open to examination by an entity at reasonable times without charge."[69] The exceptions to § 107(a) are listed in § 107(b).[70] The first exception provides that "trade secret[s] or confidential research, development, or commercial information" is nonaccessible.[71] The second exception states that nondisclosure of a document filed in bankruptcy is appropriate to "protect a person with respect to scandalous or defamatory matter."[72] The Code does not define the term scandalous.

There are several differences between § 107 and the common-law right to inspect judicial records. Common-law courts only made "judicial records" available to the public,[73] while § 107(a) covers "all papers filed in a [bankruptcy] case."[74] Courts have applied § 107 to many types of documents, including discovery documents,[75] creditor lists,[76] investigative reports,[77] and court-ordered memoranda.[78] After determining a document was a "judicial record," common-law courts would "balance[] the

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[69] 11 U.S.C. § 107(a) (2012).

[70] *Id.* § 107(b).

[71] *Id.* § 107(b)(1).

[72] *Id.* § 107(b)(2).

[73] Gitto v. Worcester Telegram & Gazette Corp. (*In re* Gitto Glob. Corp.), 422 F.3d 1, 9–10 (1st Cir. 2005); United States v. Boston Herald, Inc., 321 F.3d 174, 180 (1st Cir. 2003) ("Not all documents filed with a court are considered 'judicial documents.' " (quoting United States v. Gonzales, 150 F.3d 1246, 1255 (10th Cir. 1988)); *In re* Roman Catholic Archbishop, 661 F.3d 417, 430 (9th Cir. 2011) ("[T]he common-law rule distinguishes between dispositive and non-dispositive motions, while § 107 covers all papers filed in a bankruptcy case."); *see* Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178, 180 (4th Cir. 1988) (holding that the First Amendment right to inspect documents "has been extended only to particular judicial records and documents").

[74] H.R. REP. NO. 95-595, at 317 (1977). Section 107 (a) covers all papers filed in the bankruptcy docket, and "the term ' "docket" includes the claims docket, the proceedings docket, and all papers filed in a case.' " Bodoh & Morgan, *supra* note 42, at 81–82 (quoting H.R. REP. NO. 95-595, at 317–18 (1977)); *see Gitto*, 422 F.3d at 9–10 ("[Section 107 does away] with the [common law] need to determine whether the document at issue is a 'judicial record' by clarifying that, in the bankruptcy context, the presumption of public access applies to *any* paper filed in a bankruptcy case, not only to the narrower category of papers that would be considered judicial records under the common law."). *But see* Alec Ostrow, *My Lips Are Sealed: Sealing Files, Closing Courtrooms and in Camera Inspections in Bankruptcy Cases*, *in* ANNUAL SURVEY OF BANKRUPTCY LAW 203, 206 (2004 ed.) ("[T]hings that are filed that are not 'paper[s],' such as an audio or video recording of a hearing . . . are not statutorily required to be publicly available.").

[75] *In re Roman Catholic Archbishop*, 661 F.3d at 424.

[76] Neal v. Kan. City Star (*In re* Neal), 461 F.3d 1048, 1051 (8th Cir. 2006).

[77] *Gitto*, 422 F.3d at 5.

[78] Robbins v. Tripp, 510 B.R. 61, 64 (Bankr. E.D. Va. 2014).

public interest in the information against privacy interests."[79] Section 107 does not require bankruptcy courts to balance such factors.[80] Rather, when one of the § 107(b) exceptions is met, protection must be offered.[81] Further, common-law courts had discretion to formulate exceptions to the general rule of disclosing court documents.[82] Bankruptcy courts, however, do not have such broad discretion, as § 107(b) has only a few, specific exceptions.[83] Because § 107 addresses and resolves a problem formerly dealt with at common law, the statute "supplants the common law for purposes of determining public access to papers filed in a bankruptcy case."[84] Statutes abrogate common-law doctrines when the statute addresses and resolves the same issue that the common law dealt with. Therefore, "issues concerning public disclosure of documents in bankruptcy cases should be resolved under § 107."[85]

II. A SPLIT OF AUTHORITY: THE VARIOUS APPROACHES TO INTERPRETING § 107

A. The First Circuit's "Truthfulness and Relevance" Approach

A document's truthfulness and relevance plays a major role for courts analyzing § 107(b)(2) under the United States Court of Appeals for the First Circuit's jurisdiction. To qualify as a

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[79] United States v. Connolly, 321 F.3d 174, 190 (1st Cir. 2003).

[80] *Gitto*, 422 F.3d at 10. Bankruptcy courts analyzing public-access issues under § 107(b)(2) "need not balance the equities of [a] case, as Congress has already performed that task." Bodoh & Morgan, *supra* note 42, at 85. Additionally, "[t]he mandatory language of § 107(b) negates the need for [common-law or First Amendment balancing]." *In re* Phar-Mor, Inc., 191 B.R. 675, 679 (Bankr. N.D. Ohio 1995).

[81] When one of the § 107(b) exceptions are satisfied, a court must "protect a requesting interested party and has no discretion to deny" such motions. Video Software Dealers Ass'n v. Orion Pictures Corp. (*In re* Orion Pictures Corp.), 21 F.3d 24, 27 (2d Cir. 1994).

[82] *In re* Roman Catholic Archbishop, 661 F.3d 417, 430 (9th Cir. 2011); Cisar & Stroebel, *supra* note 64, at 38 (explaining that "courts have held that the exceptions [to § 107(a)] are few and are narrowly construed" because of the importance of transparency in bankruptcy).

[83] *In re Roman Catholic Archbishop*, 661 F.3d at 430.

[84] *Gitto*, 422 F.3d at 8; *In re Roman Catholic Archbishop*, 661 F. 3d at 430 ("[Section] 107 displaces the common law right of access in the bankruptcy context."). It is also worth noting that statutes abrogate common-law principles when "the statute . . . 'speak[s] directly' to the question addressed by the common law." United States v. Tex., 507 U.S. 529, 534 (1993).

[85] *In re* Phar-Mor, Inc., 191 B.R. 675, 679 (Bankr. N.D. Ohio 1995).

§ 107(b)(2) exception, a paper must be completely false, possibly false and irrelevant, or filed for an improper purpose.[86] This approach narrows scandalous matters significantly, as a showing of truthfulness eliminates material from the protections of § 107(b)(2).

In *Gitto v. Worcester Telegram & Gazette Corp.*, the First Circuit confronted § 107(b)(2) after a corporation filed for bankruptcy "amid allegations of financial distress and accounting irregularities."[87] The bankruptcy court appointed an examiner to investigate and prepare a report regarding "the existence of any prepetition fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management and business affairs of the Debtor."[88] A part owner and the chairman of the corporation motioned to make the investigative report publicly unavailable for containing "scandalous and defamatory material within the meaning of 11 U.S.C. § 107(b)(2)."[89] Members of the media opposed the motions to inhibit the report's availability.[90]

The First Circuit held that material is only worthy of "the protections of § 107(b)(2) based on a showing that either (1) the material is untrue, or (2) the material is potentially untrue and irrelevant or included within a bankruptcy filing for an improper end."[91] The court believed such an approach would make nondisclosure "the exception rather than the rule."[92] In formulating this rule, the First Circuit compared § 107(b)(2) with Federal Rule of Civil Procedure 12(f), reasoning that the two rules "share a common premise."[93] Like § 107(b)(2), Rule 12(f) allows federal courts to "strike from a pleading . . . scandalous matter."[94] Thus, both § 107(b)(2) and Rule 12(f) protect persons and corporations from "scandalous or defamatory material submitted under the guise of a properly pleaded [complaint]."[95]

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[86] *Gitto*, 422 F.3d at 5.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 14.

[92] *Id.* at 9 (quoting Hope *ex rel.* Clark v. Pearson, 38 B.R. 423, 425 (Bankr. M.D. Ga. 1984)).

[93] *Id.* at 12.

[94] FED. R. CIV. P. 12(f).

[95] *Gitto*, 422 F.3d at 12 (quoting In re Phar-Mor, Inc., 191 B.R. 675, 679 (Bankr. N.D. Ohio 1995)).

The motions to limit the availability of the investigative report were denied by the First Circuit.[96] Though the report contained potentially untrue matters, the First Circuit found these matters to be relevant to the underlying bankruptcy proceeding.[97] Further support for denying the motion was found in § 1104(c) of the Code, which allows bankruptcy courts to investigate "allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the" debtor's business.[98] The First Circuit further held that harm to the corporation's reputation is insufficient to be protected by § 107(b)(2).[99]

B. The "Context-Sensitive" Approach

The Eighth Circuit's approach to § 107(b)(2) focuses primarily on the reason the allegedly scandalous document was filed. This approach allows courts to employ common sense when determining if documents should be withheld from the public by looking into why it appears in the bankruptcy dockets.[100] Other courts have employed a similar approach, holding that the purpose a paper was filed "should inform the inquiry into whether that material falls within the § 107(b)(2) exception."[101]

The Eighth Circuit employed this "context-sensitive" approach after former municipal judge Deborah Neal filed for bankruptcy.[102] Neal's life began to fall apart after she was found in the early hours of morning gambling at a casino.[103] She would later lose her job and be brought up on federal criminal charges after authorities learned she received loans from attorneys.[104] In the midst of the turmoil, Neal filed for bankruptcy and was

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[96] *Id.* at 16.
[97] *Id.* at 16–17.
[98] 11 U.S.C. § 1104(c) (2012).
[99] *Gitto*, 422 F.3d at 16.
[100] Neal v. Kan. City Star (*In re* Neal), 461 F.3d 1048, 1054 (8th Cir. 2006).
[101] *Gitto*, 422 F.3d at 13.
[102] *Neal*, 461 F.3d at 1050–51.
[103] *Id.* at 1050.
[104] *Id.* at 1051.

required to submit a creditor list—a list of all parties she owed money to.[105] The names of many practicing attorneys appeared on that list.[106]

Neal and the attorneys named on the creditor list moved to have the list be made inaccessible to the public, and a local newspaper opposed the motion.[107] The bankruptcy court granted Neal's motion, but the district court overruled the bankruptcy court and held that "there is nothing 'scandalous' about the [creditor list]."[108] Neal and the attoney-creditors appealed.

In ruling that the creditor list was not scandalous, and thus not deserving of protection, the Eighth Circuit evaluated the primary purpose the creditor list appeared in the bankruptcy docket.[109] The creditor list was ultimately made available because its "filing had a valid purpose."[110] Submitting a creditor list is a mandatory step debtors must abide by to receive the "bankruptcy discharge."[111] The creditor list did not contain any additional "information other than [that] required by law," and the list would only become potentially scandalous with knowledge of the identities of the creditors and the debtor.[112] Although the creditor list could impair the reputations of the attorney-creditors, the Eighth Circuit did not believe it rose to the level of being "[a] reservoir[] of libelous statements for press consumption."[113]

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[105] *Id.* at 1051. A creditors list is "a list of person or entities to whom [the debtor] owes money." *Id.* at 1054.

[106] *Id.* at 1051 ("[Neal] maintained that she did not give favorable rulings in exchange for loans. However . . . the Assistant United States Attorney . . . mentioned that Neal may have provided favorable treatment to some of the attorney's who made loans to her."). For example, a defense attorney that appeared on the creditor list had traffic citations dismissed by the debtor-judge. *Neal*, 461 F.3d at 1051. A different attorney obtained a "favorable ruling" after loaning the debtor thousands of dollars. *Id.* at 1051 n.2.

[107] *Id.* at 1050.

[108] *Id.* at 1051.

[109] *Id.* at 1054.

[110] Cisar & Stroebel, *supra* note 64, at 71.

[111] *Neal*, 461 F.3d at 1054.

[112] *Id.* Both the debtor and creditors agreed that neither the document itself nor its material contents were scandalous. *Id.*

[113] *Id.* (alteration in original) (internal quotation mark omitted) (quoting *In re* Phar-Mor, Inc., 191 B.R. 675, 679 (Bankr. N.D. Ohio 1995)).

C. The Ninth Circuit's "Plain-Meaning" Approach

Unlike the First and Eighth Circuits, the Ninth Circuit employs a "strict textual approach," which gives bankruptcy judges discretion to limit the availability of court papers.[114] The Ninth Circuit does not analyze why a paper was filed, its truthfulness, or relevance when deciding whether it is to be protected by § 107(b)(2). Rather, papers may be sealed when they are "disgraceful, offensive, shameful and the like."[115]

In 2004, the Portland Archdiocese (the "Archdiocese") filed for bankruptcy while facing numerous allegations of clergy members sexually abusing children.[116] Upon filing for bankruptcy, the litigation being conducted ceased pursuant to the automatic stay, and the bankruptcy docket became "the forum for . . . the tort claims."[117] Various personnel files of clergy members were produced during discovery, even though many of those clergymen had never been charged with sexual abuse.[118] After the bankruptcy case was complete, the tort claimants wished to release the documents containing the names of the clergy members.[119] The Archdiocese and various priests objected to this request, claiming that § 107(b)(2) of the Code "precluded the release" of those documents.[120] In rejecting the Archdiocese's argument, the bankruptcy court did not believe the documents were filed in the bankruptcy case for an "improper purpose."[121] Additionally, much like the First Circuit did in *Gitto*, the bankruptcy court analyzed whether the documents were relevant and "untrue" or "potentially untrue."[122] The district court affirmed the bankruptcy court's interpretation, and two priests appealed.[123]

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[114] Cisar & Stroebel, *supra* note 64, at 38.

[115] *In re* Roman Catholic Archbishop, 661 F.3d 417, 432 (9th Cir. 2011).

[116] *Id.* at 421.

[117] *Id.*

[118] *Id.* Various personnel files were produced because certain clergy members were mentioned in the John Jay Study, "a national study of clergy abuse commissioned by the United States Conference of Catholic Bishops." *Id.*

[119] *Id.* at 422.

[120] *Id.* at 422–23.

[121] *Id.* at 423.

[122] *Id.* at 431.

[123] *Id.* at 423. Circuit courts review district court rulings originating from bankruptcy court de novo, meaning that circuit courts "do not give deference to the district court's determinations." Mantz v. Cal. State Bd. of Equalization (*In re* Mantz), 343 F.3d 1207, 1211 (9th Cir. 2003).

On appeal, the Ninth Circuit acknowledged that "the public is permitted 'access to litigation documents and information produced during discovery,' "[124] but rejected the bankruptcy court's analysis of § 107(b)(2).[125] The Ninth Circuit began its analysis by examining the language of § 107(b)(2) and found it to be "unambiguous."[126] Therefore, it was not necessary to go beyond the plain meaning of the statue like the First and Eighth Circuits had previously done. Because § 107(b)(2) does not define scandalous,[127] and because § 107 lacks significant legislative history,[128] the court turned to secondary sources to define the term. After consulting with the dictionary definition of scandalous,[129] the court concluded that matters qualify as scandalous when they are "disgraceful, offensive, shameful and the like."[130] Much like accusations of the President engaging in an extramarital affair, allegations of priests engaging in sexual relations with "children are most assuredly 'scandalous' because they bring discredit onto the alleged perpetrators," regardless of their truthfulness.[131] The Ninth Circuit concluded that "the

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[124] *In re Roman Catholic Archbishop*, 661 F.3d at 424 (quoting Phillips v. Gen. Motors Corp., 307 F.3d 1206, 1210 (9th Cir. 2002)).

[125] The Ninth Circuit traced the bankruptcy court's interpretation to First and Eighth Circuit cases, but found neither approach persuasive. *Id.* at 431–32.

[126] *Id.* at 432; *see* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous . . . 'judicial inquiry is complete.' " (quoting Rubin v. United States, 449 U.S. 424, 430 (1981))).

[127] *In re Roman Catholic Archbishop*, 661 F.3d at 432.

[128] Section 107 contains hardly any legislative history, and the miniscule amount of legislative history that exists "does little more than parrot the language of the statute." Bodoh & Morgan, *supra* note 42, at 76 n.47. "The legislative history of [§] 107 of the Bankruptcy Code provides little insight into its meaning." Bodoh & Morgan, *supra* note 42, at 76; *see* Gitto v. Worcester Telegram & Gazette Corp. (*In re* Gitto Glob. Corp.), 422 F.3d 1, 8 (1st Cir. 2005) ("[T]here is virtually no legislative history for § 107."). Further, Congress failed to define scandalous in whatever existing legislative history that exists. *In re* Food Mgmt. Grp., LLC, 359 B.R. 543, 555 (Bankr. S.D.N.Y. 2007).

[129] *In re Roman Catholic Archbishop*, 661 F.3d at 432 ("The Oxford English Dictionary defines 'scandalous' as, among other things, 'bringing discredit on one's class or position' or 'grossly disgraceful.' " (quoting OXFORD ENGLISH DICTIONARY 575 (2d ed. 2001)). *But see scandalous matter*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining such information to be improper because "it is both grossly disgraceful (or defamatory) and irrelevant to an action or defense").

[130] *In re Roman Catholic Archbishop*, 661 F.3d at 432.

[131] *Id*. at 433.

bankruptcy court erred in not granting [the clergy members'] motion" and ordered that the names of the clergymen be sealed pursuant to § 107(b)(2).[132]

III. COMPARING AND CONTRASTING THE APPROACHES

A. The Major Flaw With the First Circuit's Approach

The United States Court of Appeals for the First Circuit's approach to § 107(b)(2), requiring courts to examine a matter's truthfulness and relevancy, is misleading, overly broad, and unworkable. Because the automatic stay halts the majority of litigation when the bankruptcy petition is filed,[133] many potentially "scandalous" matters are filed for strategic purposes or out of necessity.[134] Further, many documents containing possibly scandalous matters are mere allegations. Therefore, a matter's truthfulness or untruthfulness is irrelevant to qualify as scandalous.

The First Circuit's "truthfulness and relevance" approach will cripple judicial economy and efficiency while further burdening debtors. Under the First Circuit's approach, debtors would seemingly be forced to entertain a series of sub-trials to prove a matter or allegation untrue or potentially untrue and irrelevant to the underlying bankruptcy. To entertain such matters would place a significant burden on the already heavy dockets of those courts. Further, the "clear and unambiguous usage of 'or' " in § 107(b) indicates Congress's intent to have

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[132] *Id.* However, the court only sealed the names of one of the two clergy members. The clergyman that received protection was, at the time, in his mideighties and had retired nearly twenty years earlier. Conversely, the clergyman whose identity was released to the public continued on as a clergyman, "where his clerical duties may bring him into contact with children." *Id.* at 428. The court released his name because of the compelling and "weighty interest in public safety and in knowing who might sexually abuse children." *Id.* at 428; *see* New York v. Ferber, 458 U.S. 747, 756–57 (1982) (holding that protecting the "physical and psychological well-being of a minor" is a compelling state interest).

[133] 11 U.S.C. § 362 (2012).

[134] *See, e.g.*, *In re* Phar-Mor, Inc., 191 B.R. 675, 678 (Bankr. N.D. Ohio 1995) (filing document in bankruptcy court to maintain a cause of action); Roye Zur, *Preserving Estate Causes of Action for Post-Confirmation Litigation*, 32 CAL. BANKR. J. 427, 427 (2013) (failing to assert causes of action that "could or should have been raised pre-confirmation . . . are forever barred as a result of plan confirmation").

defamatory and scandalous matters treated differently.[135] While truthfulness is a defense to defamatory allegations,[136] false accusations may still be scandalous.

The First Circuit's holding is further erroneous as it is contrary to United States Supreme Court precedent. A court's duty, according to the Supreme Court, is "to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation."[137] Requiring a finding of truthfulness or relevancy to qualify as scandalous is a "forced construction" the Supreme Court explicitly prohibits. Relevancy and truthfulness are inappropriate to analyze whether a matter is scandalous and any such anaylsis results in an unnecessary waste of judicial resources.

B. The Benefits of the "Context-Sensitive" Approach

Employing a context-sensitive approach is crucial to an analysis of § 107(b)(2), as commonly filed papers are often less deserving of protection. Case law indicates that documents are worthy of protection when they are filed for rare and unusual purposes.[138] However, when the document is one typically filed in bankruptcy court, it should be made available to the public.

Many decisions lend support to a "context-sensitive" approach. For example, in *Robbins v. Tripp*, a lawyer's court-ordered memorandum, which was to detail problems with his bankruptcy practice, was protected by § 107(b)(2) because it was not part of a traditional adversarial proceeding.[139] The *Robbins* court held that the document was deserving of protection because

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[135] Video Software Dealers Ass'n v. Orion Pictures Corp. (*In re* Orion Pictures Corp.), 21 F.3d 24, 28 (2d Cir. 1994) (holding that under § 107(b)(1), the placement of "or" between "trade secret" and "commercial information" indicates different requirements for the two terms).

[136] *See* RESTATEMENT (SECOND) OF TORTS § 581A (1977).

[137] United States v. Temple, 105 U.S. 97, 99 (1881); *see also* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then . . . 'judicial inquiry is complete.' "(quoting Rubin v. United States, 449 U.S. 424, 430 (1981))).

[138] Robbins v. Tripp, 510 B.R. 61, 69 (Bankr. E.D. Va. 2014).

[139] *Id.* at 68. The court-ordered report included "details concerning how [the lawyer] supervised his staff . . . organized files . . . communicated with his clients . . . and [included] impressions of the US [Trustee] regarding [the lawyer's] legal practice." *Id.* at 64 n.1.

the court was acting "to ensure . . . that a member of its bar was performing at an appropriate level."[140] The report was filed for a rare, unusual purpose, and the court ordered the lawyer to write candidly and openly.[141] Based on the extreme and unusual purposes surrounding the report, the court ordered the entire document be filed under seal.[142] Conversely, the bankruptcy court in *In re Creighton* denied the debtor-teacher's motion to redact her name from her bankruptcy documents, even though she was being teased and humiliated at work.[143] Although public knowledge of the teacher's bankruptcy filing was undeniably embarrassing, she reaped various benefits of the bankruptcy system, such as obtaining a discharge of certain debts.[144] This is similar to *Neal v. Kansas City Star*, where the former-judge's creditor list needed to be filed to facilitate her bankruptcy discharge.[145]

C. The Proposed Rule: Combining the "Context-Sensitive" and "Plain-Meaning" Approach

Combining the "context-sensitive" approach with the "plain-meaning" approach would produce a hybrid rule to resolve the current circuit split. While the plain-meaning approach is most consistent with Supreme Court precedent, it is overly broad and could lead to mandatory documents being protected by being potentially scandalous. Adding a context-sensitive approach, however, will narrow what is considered worthy of § 107(b)(2)'s protection. The teacher and former judge wishing to have documents made publicly inaccessible to shield themselves from embarrassment or humiliation will have their motions denied by adding the context-sensitive gloss. The policy this rule promotes is that debtors that benefitted from a document being filed cannot retroactively seek to have documents made confidential to shield themselves from the possibility of shame or embarrassment.

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[140] *Id.* at 69. Bankruptcy courts have "the power to regulate the members of its bar." *Id.* at 68 n.4.

[141] *Id.* at 69.

[142] *Id.*

[143] 490 B.R. 240, 243–44 (Bankr. N.D. Ohio 2013).

[144] *Id.* at 249.

[145] 461 F.3d 1048, 1054 (8th Cir. 2006).

1. Why the "Plain-Meaning" Approach Is the Most Logical, But Overly Broad

The Ninth Circuit's "plain-meaning" approach to § 107 is the most logical approach to § 107(b)(2) and consistent with Supreme Court precedent. When the Supreme Court interprets a statute containing clear and unambiguous language, "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' "[146] Further, the Supreme Court has held that allowing the plain meaning to control is the most logical and sensible way to interpret a statute.[147]

Similar to the Ninth Circuit's approach in *In re Roman*, the Supreme Court "customarily turn[s] to dictionaries for help in determining whether a word in a statute has a plain or common meaning."[148] None of the dictionary definitions of scandalous even hint at a truthfulness or relevancy requirement.[149] Requiring a showing of either is inappropriate, as courts must presume Congress "says . . . what it means and means . . . what it says" in a statute.[150] The language used in § 107(b)(2) indicates Congress's intent to have scandalous matters treated differently from defamatory ones.

However, the Ninth Circuit's "plain-meaning approach" to define scandalous is overly broad because it would lead to nondisclosure of documents that should be publicly available. The high school teacher in *In re Creighton* and the former judge in *In re Neal* could successfully argue that the information contained in their bankruptcy dockets are disgraceful or

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[146] United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (alteration in original) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

[147] Browder v. United States, 312 U.S. 335, 338 (1941).

[148] Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen, 152 F.3d 283, 289 (4th Cir. 1998); *see* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) (relying on the Oxford English Dictionary and Random House Dictionary of English to define "because of"); Am. Fruit Growers, Inc. v. Brogdex Co., 283 U.S. 1, 11 (1931) (turning to the Century Dictionary to define "manufacture"); Williams v. Taylor, 529 U.S. 420, 431–32 (2000) (using Webster's New International Dictionary and Black's Law Dictionary to define "fail").

[149] *See supra* text accompanying note 129.

[150] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992); *see* DR. SEUSS, HORTON HATCHES THE EGG (1940) ("I meant what I said [a]nd I said what I meant. . . . An elephant's faithful [o]ne hundred per cent!").

shameful. High school students would lose respect for their business teacher upon learning she filed for bankruptcy, and the former-judge's name and reputation would be further taininted if her history of accepting loans from attorneys was made public. Adding a context-sensitive approach to this analysis would ensure that commonly filed documents, such as bankruptcy petitions and creditor lists, are made available to the public.

2. Narrowing the Plain-Meaning Approach with the Context-Sensitive Approach

If a matter is "disgraceful, offensive, shameful and the like," a court must next analyze why the document was filed in the bankruptcy docket.[151] Under this categorical approach, the more common the paper is to bankruptcy, the less likely it is to be protected by § 107(b)(2). Under the proposed rule, there are four categories a paper could be classified as: (1) commonly filed documents that are necessary to file for bankruptcy; (2) documents that the Bankruptcy Code allows; (3) litigation documents for disputed or contested matters; and (4) documents filed for rare, unique, or strategic purposes. Courts would scrutinize the documents based on several factors, including how often this type of document appears in a bankruptcy proceeding, whether it was necessary or mandatory to obtain a bankruptcy benefit, and whether the type of document is expressly provided for by the Code.

Commonly filed documents, such as creditor lists, and documents that the Code specifically permits, such as investigative-reports, are less deserving of the protections of § 107(b)(2). In other words, if the document filed was one that the Code allows or if it was necessary to obtain a bankruptcy benefit, such as the bankruptcy discharge, then the document should be publicly available. While necessary documents would virtually always be made available, court-ordered investigative reports would be subjected to a slightly higher level of scrutiny, and only compelling reasons would warrant nondisclosure. For example, if the investigative report in *Gitto Global Corporation* contained allegations of employing child laborers in sweatshops, the report would need to be filed under seal for multiple reasons.

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[151] *In re* Roman Catholic Archbishop, 661 F.3d 417, 432 (9th Cir. 2011).

First, those details stretch beyond the scope of § 1104(c).[152] Second, the allegations would detrimentally impact the corporation's ability to do business, thus impairing its ability to repay debts.

Allegations of employing child laborers in a sweatshop in the hypothetical investigative report would classify as litigation documents for disputed matters, and under the proposed rule, these types of documents would be generally withheld from the public. Documents of this nature would be subjected to heavy scrutiny from a court, and matters would only be made available based on either a compelling reason or if the matter had previously been adjudicated.[153] The last category—documents filed for rare, unique, or strategic purposes—would presumptively never be made publicly accessible. The court-ordered reflection report in *Robbins v. Tripp* is an example of this fourth category, as the lawyer's *mea culpa* report regarding his poor practice was filed for a purpose wholly distinguishable from the lawyer's debtor-client's bankruptcy proceeding.

D. Policy Favoring the Proposed Rule

The proposed rule is consistent with the common-law, First Amendment, and with Supreme Court precedent. Like the common-law and Supreme Court precedent, documents filed for improper purposes will be withheld from the public.[154] Moreover, just as in First Amendment cases, courts may prevent public access to the record when compelling reasons exist.[155]

The proposed rule's two-step approach is consistent with the Supreme Court's approach to First Amendment public-access cases. In accessibility issues cases under the First Amendment, the Supreme Court generally allows public access when proceedings were historically open to the public and if the public's presence would further the democratic process.[156] The proposed rule embraces these same principles, as bankruptcy

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[152] 11 U.S.C. § 1104(c) (2012).

[153] Under the proposed rule, the hypothetical investigative report would be made publicly available if the corporation had filed for bankruptcy after being sued for hiring child laborers or if the corporation was already found guilty of employing child laborers.

[154] *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597–98 (1978).

[155] *See* Press-Enter. Co. v. Superior Court (Press-Enter. I), 464 U.S. 501, 510 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

[156] Bodoh & Morgan, *supra* note 42, at 71.

courts analyzing § 107(b)(2) would analyze whether the document is traditionally filed in bankruptcy cases. Next, the court would see if the filing was beneficial to the debtor. Commonly filed documents that benefit debtors will always be made publicly available. Further, just as the Supreme Court impedes public availability for compelling governmental interests,[157] the proposed rule grants judges discretion to withhold documents from public consumption for compelling reasons.

The proposed rule is also consistent with Supreme Court precedent, as the Court would likely take a plain-meaning approach to interpret § 107(b)(2).[158] Bankruptcy courts operating under the proposed rule would still have "supervisory power over its own records and files" and access to documents could be denied when the documents will be "a vehicle for improper purposes."[159] Just like common-law courts, the proposed rule would impede public access to documents that "gratify private spite or promote public scandal."[160] Documents would also be made inaccessible under the proposed rule if they would impair a business's competitive standing.[161] Giving bankruptcy judges broad discretion to define scandalous benefits debtors hoping to reorganize and payback debts, and thus also benefits creditors. Scandalous allegations could impair a debtor's ability to do business, which would detrimentally impact creditors that are owed money.

CONCLUSION

The proposed rule attempts to resolve the circuit split, but much like Justice Potter Stewart's problem with obscenity, it may be impossible to precisely define the term "scandalous." In *Jacobellis v. Ohio*,[162] the United States Supreme Court held that

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[157] *See supra* note 155 and accompanying text.

[158] *See supra* Part I.

[159] *Nixon*, 435 U.S. at 598.

[160] *In re* Caswell, 29 A. 259, 259 (R.I. 1893) (denying access to court records because publishing "the painful, and sometimes disgusting, details of a divorce case . . . fails to serve any useful purpose . . . [and leads to] demoralization and corruption . . . by catering to a morbid craving for that which is sensational and impure").

[161] *Nixon*, 435 U.S. at 598; Schmedding v. May, 85 N.W. 201, 202 (Mich. 1891); Flexmir, Inc. v. Herman, 40 A.2d 799, 800 (N.J. Ch. 1945).

[162] 378 U.S. 184 (1964).

a motion picture containing "an explicit love scene" was not obscene pursuant to the Court's precedent.[163] Justice Stewart concurred with the majority's opinion, but chose not to reaffirm the Court's *Roth* obscenity test.[164] Rather, Justice Stewart famously proclaimed he would not "attempt . . . to define [obscenity] . . . and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."[165]

Although the United States Court of Appeals for the Ninth Circuit's definition is instructive, determinations of scandalous will, of necessity, always be somewhat subjective. Adding the "context-sensitive" categorical approach lends objectivity to the § 107(b)(2) analysis, but completely banishing subjectivity is impossible.

While it may be impossible to come up with an ironclad definition of scandalous, § 107(b) is nevertheless important. It furthers the goals of judicial transparency and benefits debtors and creditors alike.[166] The common law, First Amendment, and Supreme Court cases support "robust public access to court records,"[167] and § 107 was created to protect persons and corporations from unwarranted publication of scandalous matters.

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[163] *Id.* at 196.

[164] *Id.* at 197 (Stewart, J., concurring).

[165] *Id.*

[166] Bodoh & Morgan, *supra* note 42, at 98.

[167] Frank Volk, *What Do Scandal and Defamation Have To Do with the Code? The Law Governing Sealing Orders Under 11 U.S.C. § 107*, 26-Nov. AM. BANKR. INST. J. 12, 68 (2007).