No. 23-

IN THE

Supreme Court of the United States

ELIZABETH STAFFORD,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented in this Petition is whether an arbitration agreement can be used to keep an arbitration award holding an employer liable for age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, secret, when it was filed in support of a petition to confirm the award under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*

Under Section 9 of the FAA, a prevailing party in arbitration "may apply to the court so specified for an order confirming the award." 9 U.S.C. § 9. Here, Petitioner Elizabeth Stafford petitioned the District Court for confirmation of an arbitration award and asked that the award be unsealed as a judicial document.

The Second Circuit below reversed the District Court and erroneously held that the confidentiality provision of an arbitration agreement overcomes the presumption of public access to judicial documents filed in federal court that is grounded in the First Amendment and common play predating the Constitution. *See United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995). In so doing, the Second Circuit has prevented other employees from being able to rely on that arbitration award in the pursuit of their own age discrimination claims in arbitration. The Second Circuit's decision also deepened a circuit split regarding whether a petition to confirm an arbitration award is rendered moot by the payment of the award, thereby creating confusion among litigants and lower courts.

Petitioner thus asks the Court to correct the Second Circuit's erroneous conclusion that a confidentiality provision in an arbitration agreement trumps the First Amendment and the common law presumption of public access.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Elizabeth Stafford was the petitioner in the district court and the appellee in the court of appeals.

Respondent International Business Machines Corp. ("IBM") was the respondent in the district court and the appellant in the court of appeals.

RELATED PROCEEDINGS

This case arises out of the following proceedings:

- *Stafford v. International Business Machines Corp.*, Civ. Act. No. 1:21-cv-06164-JPO (S.D.N.Y.) (judgment entered May 10, 2022, dismissed as moot on Oct. 13, 2023)

- *Stafford v. International Business Machines Corp.*, No. 22-1240 (2d Cir.) (judgment entered Aug. 14, 2023, petition for reh'g *en banc* denied Oct. 3, 2023)

There are no other related proceedings within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Page

Page

Page

Page

Statutes and Other Authorities

Page

INTRODUCTION

This case involves a critical issue concerning the right of public access to judicial documents – namely whether an employer who has been found liable for discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, can shield such a finding from public view in court—and hide it from other employees who could benefit from the decision—through use of a confidentiality provision in an arbitration agreement.

Petitioner is a former employee of IBM who was terminated in a layoff that she alleged violated the ADEA. Upon her termination, Petitioner entered into a severance agreement with IBM that specifically allowed her to pursue an ADEA claim in arbitration. Petitioner brought her ADEA claim in arbitration, and she won her case. After receiving her final award, she initiated this action under Section 9 of the Federal Arbitration Act ("FAA"), requesting that the award be confirmed and unsealed. IBM then paid the award. 9 U.S.C. §§ 1 *et seq.* Seemingly recognizing that the FAA creates a mandatory right to confirmation, and given that its arbitration agreement provides for the right to seek confirmation in court, IBM did not oppose confirmation. *See* 9 U.S.C. § 9; JA32.

As Petitioner requested, the District Court confirmed the award, and it ordered that the award be unsealed.[1]

1. This was not an unusual result. Other district courts have done the same. *See, e.g.*, *Eletson Holdings, Inc. v. Levona Holdings Ltd.*, 2023 WL 5956144, at *5 (S.D.N.Y. Sept. 13, 2023) (unsealing arbitration award); *Aioi Nissay Dowa Ins. Co. Ltd. v. ProSight Specialty Management Co., Inc.*, 2012 WL 3583176,

However, the District Court stayed the unsealing order at IBM's request in order to give IBM the opportunity to appeal. IBM appealed the unsealing order, and the Second Circuit reversed the District Court, holding that, in spite of the strong presumption of public access to judicial documents, the arbitration award had to remain sealed due to the arbitration agreement's confidentiality provision. As such, the award remains under seal.

However, a contractual confidentiality provision does not overcome the First Amendment presumption of public access. *See Park Avenue Life Insurance Co. v. Allianz Life Insurance Co. of North America*, 2019 WL 4688705, at *3 (S.D.N.Y. Sept. 25, 2019); *DXC Tech. Co. v. Hewlett Packard Enter. Co.*, 2019 WL 4621938, at *2 (S.D.N.Y. Sept. 11, 2019). As Judge Liman explained in another case ordering the unsealing of related records concerning ADEA claims against IBM in arbitration, "[t]he Supreme Court and Second Circuit have long held that there is a presumption of immediate public access to judicial documents under both the common law and the First Amendment." *Lohnn v. International Business Machines Corp.*, 2022 WL 36420, at *6 (S.D.N.Y. Jan. 4, 2022) (citing *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006)). Other courts have also granted requests to unseal awards in related ADEA litigation against IBM pursuant to the *same* contractual arbitration provision. *See Tenuta v. International*

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at *6 (S.D.N.Y. Aug. 21, 2012) ("Courts in this District have held that the mere existence of a confidentiality agreement covering judicial documents is insufficient to overcome the First Amendment presumption of access, and have consistently refused to seal the record of a petition to confirm an arbitration award, notwithstanding the existence of a such an agreement.").

Business Machines Corp., 2023 WL 5671665, at *6 (Aug. 31, 2023); *Laudig v. International Business Machines Corp.*, 2022 WL 18232706, at *6 (N.D. Ga. Dec. 16, 2022).

Here, the Second Circuit wrongly believed that an arbitration agreement can overcome the dictates of the First Amendment, concluding that the policy of confidentiality in arbitration overcomes all else. The decision to keep Petitioner's award confidential contradicts decades of precedent, including this Court's recent decision in *Morgan v. Sundance*, 142 S. Ct. 1708 (2022), which makes clear that arbitration agreements must be placed on even footing with other contracts, by erroneously elevating arbitral confidentiality over all other considerations. The decision also endorses this employer's strategy of using arbitral confidentiality to undermine the ability of its employees to share information with one another so as to allow them to advance their ADEA claims. As explained in greater detail *infra*, Petitioner is one among hundreds of former IBM employees who in recent years have sought to pursue age discrimination claims against IBM based on allegations of systemic discrimination at the company.

Petitioner had a legitimate interest in sharing her arbitration award with other IBM employees seeking to vindicate their own ADEA claims against IBM, and this right is protected by Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157. *See McLaren Macomb*, 372 NLRB No. 58, 2023 WL 2158775 (Feb. 21, 2023); *Cordua Rests., Inc.*, 368 NLRB No. 43, slip op. at 4 (2019), *enforced*, 985 F.2d 415 (5th Cir.).

This Court has often made clear, most recently in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022)

that arbitration contracts are not any more enforceable than any other contracts. While arbitration itself may often be confidential while court proceedings are not, once the case comes into court, court rules apply. In court, contractual confidentiality clauses (whether in arbitration agreements or any other type of contract) do not inherently outweigh the presumption of public access. This Court's review is necessary to address the important First Amendment implications of the Second Circuit's Opinion, which would enshrine arbitral confidentiality as inviolate, in contravention of this Court's clear precedent, and would effectively allow it to quash employees' Section 7 rights under the NLRA and their ability to vindicate meritorious ADEA claims.

The Second Circuit here went even further, holding that the petition to confirm the arbitration award itself was moot and should have been dismissed, meaning that the presumption of public access was weak. But IBM itself had never sought dismissal (or even opposed confirmation of the award). The Second Circuit's decision contradicts its own holding in *Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007). This arbitrary change served to deepen (and add confusion to) an already significant split among courts regarding whether standing exists to confirm arbitration awards if there is no "new dispute" as to the award. Compare *Teamsters Local 177 v. United Parcel Service*, 966 F.3d 245, 251-52 (3d Cir. July 16, 2020) (holding that "the dispute the parties went to arbitration to resolve is 'live' until the arbitration award is confirmed and the parties have an enforceable judgment in hand"), with *Derwin v. General Dynamics Corp.*, 719 F.2d 484, 491 (1st Cir. 1983) (holding that without a "new dispute", the court should not "put its imprimatur upon an arbitral award in a vacuum").

The Second Circuit's decision stands to impact Petitioner as well as the hundreds of former IBM employees who have pursued age discrimination claims against IBM, both in Court and in arbitration. The Court should grant *certiorari* to confirm that an employer facing discrimination claims cannot simply contract around the presumption of public access and the First Amendment through an arbitration agreement. Reviewing this matter would also allow the Court to shed light on a significant split between the Circuit Courts regarding when standing exists to confirm an arbitration award in court.

OPINIONS BELOW

The Second Circuit's opinion in *Stafford v. International Business Machines Corp.*, is reported at 78 F.4th 62 (2d Cir. 2023), and reproduced at App. 1a.

The district court's opinion and order in *Stafford v. International Business Machines Corp.*, 2022 WL 1486494 (S.D.N.Y. May 10, 2022), is reproduced at App. 18a.

JURISDICTION

The Second Circuit issued its opinion and judgment on August 14, 2023. App. 1a. It denied Petitioners' timely petition for rehearing *en banc* on October 4, 2023. App. 28a. On December 22, 2023, Justice Sotomayor extended the time within which to file a petition for a writ of *certiorari* to February 1, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend I.

Section 9 of the FAA, which states:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse

> party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 9.

STATEMENT

I. Legal Background

A. The Presumption of Public Access to Judicial Documents

Public access to judicial documents that have been filed with courts is a bedrock principle that has existed since the very inception of the United States. "The Supreme Court and Second Circuit have long held that there is a presumption of immediate public access to judicial documents under both the common law and the First Amendment." *Lohnn*, 2022 WL 36420, at *6 (citing *Lugosch*, 435 F.3d at 126).

This right of public access, which "is said to predate the Constitution," *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*"), 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," *Lugosch*, 435 F.3d at 119) (citing *U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*")).

The Second Circuit has developed a three-part framework to determine whether a document should be placed or remain under seal—and thereby protect the public's First Amendment right to access court filings. First, a court must determine whether the documents are "judicial documents," defined as "a filed item that is 'relevant to the performance of the judicial function and useful in the judicial process.'" *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016) (quoting *Lugosch*, 435 F.3d at 119).

Once the court makes this determination, it "must determine the weight" of the presumption in favor of public access, which is in turn "governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Lugosch*, 435 F.3d at 119 (quoting *Amodeo II*, 71 F.3d at 1049).

Finally, the court must weigh the public's right to access against "countervailing factors," including "the danger of impairing law enforcement or judicial efficiency and the privacy interests of those resisting disclosure." *Lugosch*, 435 F.3d at 120 (quoting *Amodeo II*, 71 F.3d at 1050).

B. Public Access to Documents Supporting Petitions to Confirm Arbitration Awards

Under Section 9 of the Federal Arbitration Act ("FAA"), "[i]f the parties in their agreement have agreed that a judgment of court shall be entered upon the award made pursuant to the arbitration . . . any party to the arbitration may apply to the court . . . for an order confirming the award . . . ." 9 U.S.C. § 9.

"[I]t is well settled [] that the petition, memoranda, and other supporting documents filed in connection with a petition to confirm an arbitration award (including the Final Award itself) are judicial documents that directly affect the Court's adjudication of that petition." *Clearwater Ins. Co. v. Granite State Ins. Co.*, 2015 WL 500184, at *3 (S.D.N.Y. Feb. 5, 2015) (collecting cases); *see also Redeemer Committee of Highland Credit Strategies Funds v. Highland Capital Management, L.P.*, 182 F. Supp. 3d 128, 133 (S.D.N.Y. 2016) ("This weighty interest in public access applies with full force to documents filed in connection with a motion to confirm an arbitration award, as in the instant case.").

Numerous courts have made clear that even in the context of arbitration, "parties cannot, by agreement, contract around the right of public access." *Laudig*, 2022 WL 18232706, at *6. Indeed, "the FAA itself does not require that arbitrations be conducted confidentially," and arbitration awards filed in court are routinely deemed to warrant disclosure to the public. *Id.* at *7; *see also Tenuta*, 2023 WL 5671665, at *6 ("[T]he confidentiality provision in the arbitration agreement between the parties does not justify secrecy here."); *Lohnn*, 2022 WL 36420, at *13 ("[N]either the fact that the arbitrations are governed by a confidentiality provision nor the strong federal interest in favor of arbitration is sufficient in itself or together to support IBM's broad proposition that everything disclosed in the arbitration must be kept under seal . . . ."); *Susquehanna Int'l Grp. Ltd. v. Hibernia Express (Ireland) Ltd.*, 2021 WL 3540221, at *2 (S.D.N.Y. Aug. 11, 2021) (rejecting argument that "presumption of public access is outweighed by the federal policy in favor of arbitration and interests of judicial efficiency"

where "a strong presumption of public access applies to the [documents] and the parties have not adequately demonstrated . . . competitive harm absent sealing and have not narrowly tailored their sealing request."); *Dentons US LLP v. Zhang*, 2021 WL 2187289, at *1 (S.D.N.Y. May 28, 2021) ("Here, Petitioner contends that sealing is appropriate because the parties agreed to file under seal any papers associated with an arbitration proceeding. Confidentiality agreements alone are not an adequate basis for sealing, however.") (citing cases); *Salerno v. Credit One Bank, N.A.*, 2020 WL 1558153, at *8 (W.D.N.Y. Mar. 31, 2020) ("Based on Defendant's submissions, the court therefore does not find any of the sealed Arbitration Materials contain any 'subject matter [. . .] traditionally considered private rather than public.'") (internal quotation omitted); *Robert Bosch GmbH v. Honewell Intern. Inc.*, 2015 WL 128154, at *1 (S.D.N.Y. Jan. 6, 2015) ("A party to an arbitration proceeding that is subject to confirmation proceedings in a federal court cannot have a legitimate expectation of privacy in all papers pertaining to the arbitration because the party should know of the presumption of public access to judicial proceedings."); *Global Reinsurance Corp.–U.S. Branch v. Argonaut Ins. Co.*, 2008 WL 1805459, at *2 (S.D.N.Y. Apr. 21, 2008) ("In circumstances where an arbitration award is confirmed, the public in the usual case has a right to know what the Court has done."); *Veleron Holding, B.V. v. Stanley*, 2014 WL 1569610, at *1 (S.D.N.Y. April 16, 2014) (noting that if an arbitration award were confirmed, that "would, at least in this country, expose it to the public.").

II. Factual and Procedural Background

Petitioner is a former employee of IBM, who was laid off from her position in June 2018. App. 2a; JA23. Prior to her termination, Petitioner entered into a Separation Agreement with IBM that, in exchange for a small amount of severance pay, included a release of various legal claims, but it expressly did not include a release of federal claims of age discrimination under the ADEA. App. 3a-4a; JA23. Rather, the agreement provided that if the terminated employee chose to pursue a claim of age discrimination under the ADEA, the claim would have to be filed in arbitration. JA23. Pursuant to this provision, Petitioner filed an arbitration demand against IBM on January 17, 2019. App. 4a; JA23. An arbitration hearing was held in March 2021, and, on July 12, 2021, the arbitrator entered a Final Award in Petitioner's favor. App. 4a; JA23.

Petitioner filed this case on July 19, 2021, requesting that the District Court confirm and unseal the arbitration award. App. 5a. IBM did not oppose Petitioner's request to confirm the award, but it did oppose Petitioner's request to unseal the award. App. 5a.

On May 10, 2022, the District Court entered an Order granting Petitioner's request to confirm and unseal the award. App 18a-27a. The District Court directed the parties to confer as to any redactions that needed to be made in order to preserve the legitimate privacy interests of non-litigants. App. 26a-27a. The parties filed, under seal, a proposed redacted version of the award.

IBM then appealed to the Second Circuit. App. 5a-6a.[2] The Second Circuit reversed and vacated the District Court's Opinion and Order. App. 6a-17a. First, the Second Circuit held that because IBM satisfied the arbitration award (after the Petition to Confirm had been filed), the Petition to Confirm was moot and should have been dismissed. App. 10a-12a. Second, the Second Circuit ruled that the District Court erred by granting Petitioner's motion to unseal the arbitration award. App. 12a-17a. The Second Circuit deemed Petitioner's motion an "improper effort to evade the confidentiality provision of the Agreement" and reasoned that the District Court failed to weigh the "FAA's strong policy in favor of confidentiality." App. 13a.

REASONS FOR GRANTING THE PETITION

A. The Second Circuit's Decision Flies in the Face of the First Amendment and the Presumption of Public Access

Certiorari is warranted in this matter so that this Court can reaffirm the primacy of the First Amendment and the principles of public access to judicial documents filed in a federal court. Courts should not be able to simply disregard the presumption of public access due to a confidentiality provision in an arbitration agreement. It is black letter law that "the mere existence of a confidentiality agreement . . . is insufficient to overcome the First Amendment presumption of access." *Park Avenue Life Insurance Co.*, 2019 WL 4688705, at *3; *see*

2. The District Court ordered that the unsealing order would be stayed pending IBM's appeal. App. 26a.

also Lohnn, 2022 WL 36420, at *13 ("[N]either the fact that the arbitrations are governed by a confidentiality provision nor the strong federal interest in favor of arbitration is sufficient in itself or together to support IBM's broad proposition that everything disclosed in the arbitration must be kept under seal, regardless of whether that information was confidential in the first place or its disclosure would otherwise cause harm.").[3] Indeed, the First Amendment presumption of access applies even when a petition to confirm an arbitration award is not contested because the act of filing the petition makes the award a judicial document. *See DXC Tech. Co. v. Hewlett Packard Enter. Co.*, 2019 WL 4621938, at *2

3. The plaintiff in *Lohnn* brought a declaratory judgment claim to challenge the enforceability of the confidentiality provision in IBM's arbitration agreement. *See Lohnn*, 2022 WL 36420, at *1. After the plaintiff in *Lohnn* filed a motion for summary judgment, the *Lohnn* court directed briefing on whether the allegedly confidential material in the summary judgment record and briefing should remain under seal. *See id.* IBM argued that the *Lohnn* plaintiff's decision to include the summary judgment record was a "ruse" to make public information that would otherwise be subject to the confidentiality provision. *See id.* at *12. The court in *Lohnn* rejected that argument, explaining that the plaintiff submitted a record as necessary to make out her claim. *See id.* Moreover, the court held that these documents were judicial documents subject to the presumption of public access and that they must be unsealed, subject to limited redactions. *See id.* at *17-18.

IBM then sought an emergency stay from the Second Circuit of the district court's order to unseal the documents at issue. The *New York Times Company* filed an amicus brief in favor of the plaintiff and the unsealing of the documents. *See Lohnn v. International Business Machines Corp.*, No. 22-23, Amicus Brief, Dkt. 58 (2d. Cir. Jan. 28, 2022). The Second Circuit declined to stay the district court's order (*Lohnn* 2d Cir. Dkt. 71), as well as IBM's petition for rehearing *en banc* (*Lohnn* 2d Cir. Dkt. 90).

(S.D.N.Y. Sept. 11, 2019) ("[T]he Court must reject the parties' repeated characterization of this proceeding as 'merely' one to confirm an arbitration award. A 'claim has been leveled,' 'state power has been invoked,' and 'public resources [have been] spent' because Petitioner elected to file the petition and the documents appended to it. That voluntary act has triggered a profound presumption of public access that cannot easily be overcome.").

The Second Circuit ignored these bedrock principles to allow IBM to litigate ADEA claims brought against the company in secret. While the Second Circuit correctly held that the arbitration award is a judicial document to which the presumption of public access attaches, it erred in holding that the presumption of public access was outweighed by the confidentiality provision of the arbitration agreement. App. 14a-15a. In other words, the Second Circuit believed that the interest in arbitral confidentiality trumps even the First Amendment, grounding its decision on the fact that IBM had satisfied the award and that Petitioner continued to seek confirmation even after it had been fully satisfied.[4]

Petitioner, however, had good reason to continue seeking confirmation even after IBM paid the award, and her reasons for doing so highlight why review of the Second Circuit's decision here is so important. Petitioner sought to confirm and unseal the award in order to aid other litigants pursuing age discrimination claims against IBM. The presumption of public access operates "with all

4. The Second Circuit also concluded that the presumption of access was weak here because IBM had mooted the petition to confirm the award by paying it. As explained in Section B *infra*, this decision is unsupported by law.

the more force" when it would "aid of collateral litigation on similar issues, for in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what otherwise might be a lengthy process." *Ashcraft v. Louisiana Coca-Cola Co.*, 1986 WL 14781, at *1 (E.D. La. Dec. 19, 1986) (quoting *American Tel. & Tel. Co v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978)).

Here, IBM has used its arbitration agreement to force its former employees to litigate their age discrimination claims in secrecy and isolation. Petitioner was one of many thousands of older employees to be laid off by IBM in recent years. She alleged – and proved in arbitration – that she was a victim of a companywide scheme of age discrimination perpetrated by IBM. App. 4a-5a. She was by no means IBM's only victim, and she has a strong interest in seeing IBM rectify its broader discriminatory practices. For instance, hundreds of individuals opted in to an ADEA collective action against IBM, *Rusis v. International Business Machines Corp.*, Civ. Act. No. 1:18-cv-08434-VEC-SLC (S.D.N.Y.). Moreover, the EEOC engaged in a wide-ranging multi-year investigation of age discrimination at IBM, which culminated in a determination issued on August 31, 2020, finding reasonable cause to believe that IBM engaged in classwide age discrimination, on the basis of "top-down messaging from [IBM's] highest ranks directing managers to engage in an aggressive approach to significantly reduce the headcount of older workers to make room for Early Professional Hires." Peter Gosselin, *The U.S. Equal Employment Opportunity Commission Confirms a Pattern of Age Discrimination at IBM*, ProPublica, (Sept. 11, 2020, 11:43 a.m. EDT), https://www.propublica.

org/article/the-u-s-equal-employment-opportunity-commission-confirms-a-pattern-of-age-discrimination-at-ibm.

The court in *Laudig* explained the importance of these circumstances, refusing to seal an arbitration award involving IBM in the context of a petition to vacate. The court acknowledged that the plaintiff's situation "was not a one-off case" as "[n]umerous other individuals have brought similar lawsuits against IBM for age discrimination both in federal court and in individual, private arbitration proceedings," the EEOC "issued a classwide determination finding reasonable cause to believe that IBM discriminated against older employees from 2013 to 2018," and "[t]here have now been multiple articles published regarding IBM's alleged efforts to rid itself of older employees in a number of national journals and publications." *Laudig*, 2022 WL 18232706, at *8. The court held that these developments highlighted that "the issues implicated in Plaintiff's petition are of genuine interest to the public," and that "[i]n connection with this evaluation of public interest, the fact that there are multiple parallel proceedings also weighs in favor of the disclosure of the underlying arbitration materials." *Id.*; *see also Billie v. Coverall North America, Inc.*, 2023 WL 2712781, at *8 (D. Conn. Mar. 30, 2023) (holding that public interest considerations supported unsealing an arbitration award where "keeping the arbitration decisions under seal impairs the ability of other similarly situated individuals to gain the information necessary to build their own case").[5]

5. *Billie* was decided before the Second Circuit's decision in this matter came down, and the Second Circuit has stayed *Billie* until this Court determines the instant Petition for Writ of

Petitioner's concern is especially salient given the fact that IBM has aggressively wielded the confidentiality provision in its arbitration agreement to prevent its former employees from sharing with one another information uncovered in the course of individual arbitration cases which would allow other employees to prove their ADEA claims in arbitration. Another group of former IBM employees challenged the enforceability of this confidentiality provision, submitting a substantial record showing the many ways in which IBM had used its confidentiality provision to hamper its former employees' efforts to build their cases. *See In Re: IBM Arbitration Agreement Litig.*, 76 F.4th 74, 80 (2d Cir. Aug. 4, 2023); *Lohnn*, 2022 WL 36420, at *1-3. [6] In *In Re: IBM*, the

Certiorari. *See Billie v. Coverall North America, Inc.*, No. 23-672, Order, Dkt. 62 (2d Cir. Oct. 30, 2023). *Billie* demonstrates that this Petition presents an issue that is likely to recur. The Second Circuit's erroneous decision in this case will be compounded unless this Court intervenes.

6. Despite IBM's efforts to use arbitral confidentiality to conceal its practices, it has become public, to a limited degree, that IBM has engaged in a systemic effort over a number of years to force out older workers in order to build a younger workforce. From the documents that became public in the *Lohnn* case, shocking evidence has come to light that high-level IBM executives openly fretted that "the percentage of millennials employed at IBM trailed that of competitor firms," *Lohnn*, 2022 WL 36420, at *12, and that executives used disparaging terms to describe IBM's older employers, such as "dinobabies" that needed to be made "extinct". *See* Noam Scheiber, *Making 'Dinobabies' Extinct: IBM's Push for a Younger Workforce*, N.Y. Times (Feb. 12, 2022), https://www.nytimes.com/2022/02/12/business/economy/ibm-age-discrimination.html. The EEOC also engaged in an investigation of IBM and found reasonable cause to believe that IBM had engaged in a systematic age discrimination effort over a number of years. *See Lohnn*, 2022 WL 36420, at *12.

Second Circuit declined to reach this argument, because it found the claim unripe.[7] Nevertheless, these cases have raised serious concerns about the misuse of arbitral confidentiality to stop employees from being able to effectively build their discrimination cases against their employers. Petitioner's case is just one example.

It is absolutely critical that employees be able to share evidence in cases challenging systematic discrimination – "[b]ecause employers rarely leave a paper trail – or 'smoking gun' – attesting to a discriminatory intent, disparate treatment plaintiffs must often build their cases from pieces of circumstantial evidence," which includes "[e]vidence relating to company-wide practices." *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 84-85 (2d Cir. 1990). IBM's former employees, including Petitioner here, thus have a strong interest in collecting and sharing evidence and decisions showing that IBM engaged in age discrimination on a companywide basis.

Moreover, the broad remedial purpose of the ADEA "of prohibiting age discrimination and of promoting the employment of older persons based on their ability rather

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However, the actual reasoning of an arbitrator finding an employee had succeeded in proving age discrimination, among this backdrop, would provide particular assistance to other employees pursuing such claims.

7. The plaintiffs in *In Re: IBM* submitted a Petition for Writ of *Certiorari* on January 22, 2024, seeking review of the Second Circuit's decision that IBM could use its arbitration agreement to bar its employees from pursuing ADEA claims in arbitration when those employees would have been able to pursue their claims in court. *See Abelar et al. v. International Business Machines Corp.*, No. 23-795.

than age," *Rodolico v. Unisys Corp.*, 199 F.R.D. 468, 482 (E.D.N.Y. Mar. 30, 2001) (internal citation omitted), cannot be hamstrung by the Second Circuit's conclusion that the FAA supports confidentiality.[8] In fact, the ADEA envisions companywide enforcement through inclusion of its collective action mechanism. *See* 29 U.S.C. §§ 216(b) and 623. As courts have recognized, the broad remedial purposes of the ADEA are served by allowing employees to join together in order to eradicate discrimination in the workplace. *See Rodolico*, 199 F.R.D. at 482 (internal citations omitted). While Petitioner and others were required to pursue their claims in individual arbitration, that itself should not give IBM the unbridled right to keep the results of those arbitrations shielded from other employees with similar claims.

Further, Petitioner's right to share her arbitration award to aid fellow employees is protected by Section 7 of the NLRA, which recognizes the right of an employee who has brought a legal claim to assist others in bringing their own cases, especially if those other workers claim to have suffered a similar harm. *See, e.g.*, *Cordua Rests., Inc.*, 368 NLRB No. 43, slip op. at 4 (employees have Section 7 right to discuss terms and conditions of employment in relation to taking legal action against employer). Recently, the NLRA concluded in *McLaren Macomb* that the type of confidentiality provision at issue here violates Section 7 of the NLRA, because it "precludes an employee from

8. There is nothing about arbitration in itself that requires confidentiality. *See Laudig*, 2022 WL 18232706, at *7. Indeed, some arbitration agreements do not even include confidentiality provisions, many arbitration awards become public through the court confirmation process, and there is nothing in the FAA that requires arbitrations to be confidential.

assisting coworkers with workplace issues concerning their employer, and from communication with others . . . about [her] employment." 2023 WL 2158775, at *10.

Petitioner's effort to make her arbitration award public so as to assist her co-workers in their claims of discrimination is in no way improper and in fact demonstrates why the presumption of public access applies here with all the more force. The Second Circuit paid lip service to these First Amendment concerns but ultimately elevated confidentiality in arbitration above the United States Constitution. The Opinion ran afoul of this Court's decision in *Morgan*, 142 S. Ct. at 1713, where the Court held that arbitration agreements cannot be elevated over other kinds of contracts.[9] While the arbitration may have been confidential, once the case was in court, the presumption of public access should have trumped the confidentiality provision. A confidentiality provision is not sacrosanct just because it is in an arbitration agreement. The First Amendment concerns raised by this case amply warrant granting *certiorari*.

B. The Second Circuit's Decision Deepened a Circuit Split Regarding Article III Standing to Pursue Confirmation of an Arbitration Award

Seemingly driven by its desire to give IBM *carte blanche* to force its employees to litigate their age discrimination claims in secret, the Second Circuit also

9. In *Morgan*, the Court explained that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules." *Morgan*, 142 S. Ct. at 1713. Indeed, the FAA contains "a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration." *Id.* at 1714.

contradicted its own long-held position that district courts have jurisdiction to confirm an arbitration award even in the absence of a new dispute about the award. *See, e.g.*, *Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007); *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987). In so doing, the Second Circuit widened a split between the courts, further justifying *certiorari* in this matter.

After Petitioner initiated her Petition to Confirm, IBM responded by paying the award. For that reason, the Second Circuit held that the Petition to Confirm was moot and should have been dismissed. App. 10a-12a.[10] From there, the Second Circuit reasoned that the "presumption of access to judicial documents . . . is weaker here because the petition to confirm the award was moot." App. 15a.

The Second Circuit's Opinion ignores that IBM itself

10. Notably, the Second Circuit was simply wrong in holding that Petitioner lacked Article III standing to pursue her Petition once IBM paid the arbitration award. The court relied on this Court's decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021), for the proposition that an "injury in law is not an injury in fact." As explained *supra*, Petitioner has a broader interest in seeing IBM rectify its companywide discriminatory practices. Her rights under Section 7 of the NLRA have been violated, an injury in fact. Moreover, IBM's arbitration agreement itself gave Petitioner a contractual right to confirmation that the Second Circuit has now denied her. JA32. On top of that, Petitioner has an interest in the confirmation of the arbitration award with respect to its *res judicata* impact. *See FleetBoston Financial Corp. v. Alt*, 638 F.3d 70, 80 (1st Cir. 2011) ("When a federal district court confirms an arbitration award, 'that judgment has res judicata effect as to all matters adjudicated by the arbitrators and embodied in their award.") (quoting *Apparel Art Intern., Inc. v. Amertex Enterprises Ltd.*, 48 F.3d 576, 585 (1st Cir. 1995)).

did not even oppose confirmation of the award or seek dismissal of the petition on mootness grounds. (JA48-49.) IBM's non-opposition is unsurprising, given that Petitioner had the *right* to seek confirmation by the express terms of the arbitration agreement ("Any judgment or award issued by an arbitrator may be entered in any court of competent jurisdiction" (JA31)) and under § 9 of the FAA, which states that a court presented with a request for an order confirming an arbitration award "*must grant* such an order unless the award is vacated, modified, or corrected . . . ." 9 U.S.C. § 9 (emphasis added).

More importantly for the purposes of this Petition, the Second Circuit's decision contradicted its own previous decisions and deepened a divide among lower courts. As explained in *Goins v. TitleMax of Virginia, Inc.*, 2021 WL 3856150, at *1 (M.D.N.C. Aug. 27, 2021), "[c]ourts are divided on whether a federal court may confirm an arbitration award where there is 'no live controversy between the parties regarding the award necessitating judicial enforcement.'" (quoting *Brown v. Pipkins, LLC v. Service Employees International Union*, 846 F.3d 716, 729 n.2 (4th Cir. 2017)); *see also International Union, United Mine Workers of America v. Consol Energy Inc.*, 2022 WL 2643531, at *4 (D.D.C. July 8, 2022) ("The Court acknowledges that courts have split on the question of whether 'a motion to confirm an arbitration award requires an active dispute over compliance.") (quoting *Sheet Metal Workers Int'l Ass'n Loc. 66 v. Northshore Exteriors Inc.*, 2020 WL 7641238 at *5 (W.D. Wash. Dec. 23, 2020) (noting that the Third and Second Circuits split from the First Circuit)). In *Goins*, the court ultimately recognized that confirmation was warranted because "'[a] confirmation proceeding under 9 U.S.C. § 9 is intended to be summary: confirmation can only be denied if an award has been

corrected, vacated, or modified in accordance with the Federal Arbitration Act.'" *Goins v. TitleMax of Virginia*, 2023 WL 3332146, at *1 (M.D.N.C. May 9, 2023) (quoting *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986)).

Prior to the Second Circuit's decision in this matter, the Second Circuit was firmly in the camp holding that petitions to confirm arbitration awards could be granted regardless of whether the award itself had been satisfied. For example, in *Zeiler*, 500 F.3d at 169, the Second Circuit rejected an argument that "the District Court could not have confirmed awards that had already been complied with." The Court reasoned that because a "district court confirming an arbitration award does little more than give the award the force of a court order . . . [a]t the confirmation stage, the court is not required to consider the subsequent question of compliance." *Id.*; *see also Ottley*, 819 F.2d at 376 (confirming award although it had been paid).

The Third Circuit held similarly in *Teamsters Local 177*, 966 F.3d at 251-52, reasoning that "[u]nder the FAA a party's injuries are only fully remedied by the entry of a confirmation order," and "the dispute the parties went to arbitration to resolve is 'live' until the arbitration award is confirmed and the parties have an enforceable judgment in hand." The Third Circuit relied on cases from the Second Circuit, explaining that the Second Circuit "has long held that district courts have jurisdiction to confirm arbitration awards even in the absence of a new dispute about them." *Id.* at 252 (citing *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984); *Zeiler*, 500 F.3d at 169).[11]

11. The Second Circuit in this matter discounted *Zeiler* because the award included prospective relief, *see* App. 11a, but *Zeiler* did not make such a distinction. *See Zeiler*, 500 F.3d at 169. In truth, this Second Circuit panel ignored the rule that

Numerous district courts around the country have followed suit and rejected arguments that motions to confirm arbitration awards are moot after they are paid. *See e.g., Good Funds Lending, LLC v. Westcor Land Title Ins. Co.*, 2020 WL 1514669, at *3 (D. Colo. Mar. 30, 2020) ("This Court concludes this action is not moot and denies the portion of [defendant's] Motion that seeks dismissal of the Amended Petition with prejudice on the grounds that there is no case or controversy under Article III as a result of its purported satisfaction of both the Final Award and the Sanction Order."); *Nat'l Cas. Co. v. Resolute Reins. Co.*, 2016 WL 1178779, at *3 (S.D.N.Y. Mar. 24, 2016) (holding that while the language of § 9 of the FAA "cannot override Article III's requirements, it does show that parties retain an undisputed right to § 9 confirmation whatever the nature of an award and the parties' degree of

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"[a] published panel decision is binding on future panels unless and until it is overruled by the Court *en banc* or by the Supreme Court." *Deem v. DiMella-Deem*, 941 F.3d 618, 623 (2d Cir. 2019).

The Second Circuit likewise attempted to distinguish the Third Circuit's decision in *Teamsters*, because there was a risk of future violations of the CBA, *see* App. 11a-12a. But the Third Circuit did not rely on that fact in its decision. *See Teamsters*, 966 F.3d at 251-52. While *Teamsters* limited its decision to awards for equitable rather than monetary damages, *see Teamsters Local 177*, 966 F.3d at 253 n.3, it did not opine on why an award for monetary awards would be any different. *Teamsters* explained "like the Second Circuit, we view the confirmation of an arbitration award as the final step in arbitration proceedings under the FAA where there is no dispute about the validity or accuracy of that award . . . ," and "[a]s a result, a party seeking to confirm an arbitration award continues to have a live stake in the proceeding, and thus it has standing to seek confirmation." *Id.* That reasoning holds true regardless of whether the award is for equitable relief or monetary relief.

compliance with it."); *Nat'l Football Leage Players Ass'n v. Nat'l Football League Mgm't Council*, 2009 WL 855946, at *2 (S.D.N.Y. Mar. 26, 2009) (where the defendant argued that an arbitration award could not be confirmed absent a "case or controversy", the court held those "objections are specious and have no sound basis in law"); *Arbordale Hedge Invs., Inc. v. Clinton Group, Inc.*, 1999 WL 1000939, at *1 n. 3 (S.D.N.Y. Nov. 4, 1999) (refusing to "create a new exception" to confirmation of an arbitration award where the award "has been paid in full."); *Am. Nursing Home v. Local 144 Hotel, Hosp., Nursing Home & Allied Servs. Union, SEIU, AFL-CIO*, 1992 WL 47553, at *2 (S.D.N.Y. Mar. 4, 1992) ("The issues of compliance and confirmation are distinct from each other. A court may confirm an arbitration award even in the absence of a showing of non-compliance.").

On the other hand, other circuit and district courts have held to the contrary – that courts cannot act on petitions to confirm arbitration awards in the absence of live controversies. The First Circuit in *Derwin v. General Dynamics Corp.*, 719 F.2d 484, 491 (1st Cir. 1983), for instance, held that in the absence of a "new dispute", the court should not "put its imprimatur upon an arbitral award in a vacuum." *See also International Union, United Mine Workers of America*, 2022 WL 2643531, at *4 ("After careful review, the Court disagrees with those courts that have concluded 'that confirmation is a summary proceeding designed as the final step in arbitration proceedings.'") (internal quotation omitted); *Loc. 2414 of United Mine Workers of Am. v. Consolidation Coal Co.*, 682 F. Supp. 399, 400 (S.D. Ill. 1988) ("Given the posture of this case regarding the absence of any dispute (except whether the awards are entitled to confirmation),

the Court finds confirmation would only add to the complications of litigation.").

In this matter, the Second Circuit arbitrarily abandoned its position in *Zeiler* and switched to the First Circuit's side in *Derwin*.[12] There is little justification for this switch (other than a desire to undermine the strength of the presumption of public access), and the Second Circuit's move only serves to introduce additional confusion to an already fraught issue that has split the courts. This Court's guidance is needed to shed light on this important divide. If employers can moot a petition to confirm an arbitration award by paying the award, arbitration awards that are of public interest and which will aid collateral litigation will never see the light of day.

CONCLUSION

This Court should grant the petition for *certiorari*. The Second Circuit's decision is a significant blow to the First Amendment and the presumption of public access. Employers should not be allowed to rely on the confidentiality provisions in their arbitration agreements for iron-clad secrecy of claims prosecuted against

12. Ironically, the cases that the Second Circuit relied on did not directly speak to this issue. In *Brown & Pipkins, LLC v. SEIU*, 846 F.3d 716, 729 n. 2 (4th Cir. 2017), the Fourth Circuit expressly noted that it did "not reach the question of whether a federal court may confirm a labor arbitration award where there is no live controversy between the parties regarding the award necessitating judicial enforcement." Similarly, in *Unite Here Loc. 1. v. Hyatt Group*, 862 F.3d 588, 599-60 (7th Cir. 2017), the Seventh Circuit did not say one way or the other whether there would have been a live case or controversy if the award in question had been paid.

them, even when arbitration awards have been filed as judicial documents and where the arbitrator's findings implicate systemic discrimination. This case presents an opportunity for the Court to reaffirm the vital principles of judicial transparency and accountability as well as to address an important split among the lower courts regarding when courts can act on petitions to confirm or vacate arbitration awards.

February 1, 2024 Respectfully Submitted,

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APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 14, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2022
June 16, 2023, Argued;
August 14, 2023, Decided

No. 22-1240

ELIZABETH STAFFORD,

Petitioner-Appellee,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

Before: PARK, NARDINI, and NATHAN, *Circuit Judges.*

Elizabeth Stafford is a former employee of International Business Machines Corporation ("IBM") who signed a separation agreement requiring confidential arbitration of any claims arising from her termination. Stafford arbitrated an age-discrimination claim against IBM and won. She then filed a petition in federal court under the Federal Arbitration Act ("FAA") to confirm the award,

attaching it to the petition under seal but simultaneously moving to unseal it. Shortly after she filed the petition, IBM paid the award in full. The district court (Oetken, *J.*) granted Stafford's petition to confirm the award and her motion to unseal.

On appeal, IBM argues that (1) the petition to confirm became moot once IBM paid the award, and (2) the district court erred in unsealing the confidential award. We agree. First, Stafford's petition to confirm her purely monetary award became moot when IBM paid the award in full because there remained no "concrete" interest in enforcement of the award to maintain a case or controversy under Article III. Second, any presumption of public access to judicial documents is outweighed by the importance of confidentiality under the FAA and the impropriety of Stafford's effort to evade the confidentiality provision in her arbitration agreement. We thus **VACATE** the district court's confirmation of the award and **REMAND** with instructions to dismiss the petition as moot. We **REVERSE** the district court's grant of the motion to unseal.

PARK, *Circuit Judge*:

Elizabeth Stafford is a former employee of International Business Machines Corporation ("IBM") who signed a separation agreement requiring confidential arbitration of any claims arising from her termination. Stafford arbitrated an age-discrimination claim against IBM and won. She then filed a petition in federal court under the Federal Arbitration Act ("FAA") to confirm the award, attaching it to the petition under seal but simultaneously moving to unseal it. Shortly after she filed the petition, IBM paid the award in full. The

district court (Oetken, *J.*) granted Stafford's petition to confirm the award and her motion to unseal.

On appeal, IBM argues that (1) the petition to confirm became moot once IBM paid the award, and (2) the district court erred in unsealing the confidential award. We agree. First, Stafford's petition to confirm her purely monetary award became moot when IBM paid the award in full because there remained no "concrete" interest in enforcement of the award to maintain a case or controversy under Article III. Second, any presumption of public access to judicial documents is outweighed by the importance of confidentiality under the FAA and the impropriety of Stafford's effort to evade the confidentiality provision in her arbitration agreement. We thus vacate the district court's confirmation of the award and remand with instructions to dismiss the petition as moot. We reverse the district court's grant of the motion to unseal.

I. BACKGROUND

A. Facts

In June 2018, IBM terminated Elizabeth Stafford.[1] Stafford signed a separation agreement (the "Agreement")

1. Stafford is one of many former employees who brought claims under the Age Discrimination in Employment Act of 1967 ("ADEA") against IBM. *See, e.g., In re IBM Arb. Agreement Litig.*, No. 22-1728, 2023 U.S. App. LEXIS 20154, 2023 WL 4982010, at *1 (2d Cir. Aug. 4, 2023); *Smith v. Int'l Bus. Machs. Corp.*, No. 22-11928, 2023 U.S. App. LEXIS 10957, 2023 WL 3244583, at *1 (11th Cir. May 4, 2023); *Estle v. Int'l Bus. Machs. Corp.*, 23 F.4th 210, 211 (2d Cir. 2022); *Rusis v. Int'l Bus. Machs. Corp.*, 529 F. Supp. 3d 178, 188-89 (S.D.N.Y. 2021).

in exchange for severance payments and other benefits. The Agreement included a class-and collective-action waiver requiring claims arising from her termination—including claims under the ADEA—to be resolved "by private, confidential, final and binding arbitration." J. App'x at JA28.

The Agreement included a "Privacy and Confidentiality" provision that stated:

> To protect the confidentiality of proprietary information, trade secrets or other sensitive information, the parties shall maintain the confidential nature of the arbitration proceeding and the award. The parties agree that any information related to the proceeding, such as documents produced, filings, witness statements or testimony, expert reports and hearing transcripts is confidential information which shall not be disclosed, . . . except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an award or its enforcement, or unless otherwise required by law or judicial decision by reason of this paragraph.

Id. at JA32.

B. Procedural History

In January 2019, Stafford filed a demand for arbitration, alleging age discrimination under the ADEA.

An arbitrator conducted a hearing in March 2021 and entered an award in favor of Stafford on July 12, 2021.

One week later, Stafford filed a petition to confirm her arbitration award under the FAA in the U.S. District Court for the Southern District of New York. She attached her confidential award to the petition, filing it under seal but simultaneously asking the district court to "exercise its inherent authority to unseal this award so that the public may access it." J. App'x at JA37. Stafford argued that the confidentiality provision in the Agreement was an "attempt to prevent employees from sharing information obtained in their cases with other employees . . . thus severely hampering the ability of individuals pursuing these claims to obtain the information needed to build a case." *Id.* at JA37 n.1 (cleaned up).

IBM made the final payments under the arbitration award to Stafford on September 17, 2021 and thereby "fully satisfied all the terms of the Final Award." *Id.* at JA65. That same day, IBM filed an opposition to Stafford's motion to unseal. IBM argued against unsealing based on Stafford's lack of standing and equitable estoppel.

The district court granted Stafford's petition to confirm the award and her motion to unseal. *Stafford v. Int'l Bus. Machs. Corp.*, No. 21-CV-6164, 2022 U.S. Dist. LEXIS 84746, 2022 WL 1486494, at *1 (S.D.N.Y. May 10, 2022). It rejected IBM's standing and equitable estoppel arguments against unsealing. Applying the common-law framework, the district court found that "numerous district court decisions" have found such confidential arbitration

awards to be "judicial documents" when attached to a petition to confirm. 2022 U.S. Dist. LEXIS 84746, [WL] at *2. The court observed that "IBM has failed to identify factors that overcome the strong presumption of public access." 2022 U.S. Dist. LEXIS 84746, [WL] at *3. In particular, it held that enforcement of the confidentiality provision did not "outweigh the presumption of public access to judicial documents," and that "IBM's vague and hypothetical statements that competitors may use this information . . . [are] not the sort of specific evidence required to overcome the presumption of public access." *Id.* IBM timely appealed. The district court stayed the unsealing of the award pending resolution of this appeal. *See id.*

II. DISCUSSION

On appeal, IBM argues that Stafford's petition to confirm became moot when IBM fully paid the award. We agree and hold that Stafford's right to confirm the arbitration award is by itself insufficient to establish a "concrete" injury to maintain a "live" case or controversy under Article III.

Moreover, the district court erred by failing to weigh the importance of confidentiality under the FAA and Stafford's improper effort to evade the confidentiality provision of the Agreement against a diminished presumption of access to judicial documents.

Appendix A

A. Mootness

Stafford's petition to confirm her award is now moot. Stafford claims that she will suffer a concrete injury unless her award is confirmed under the FAA. But the availability of a statutory action does not provide a "concrete" injury for Article III purposes.

1. *Legal Standards*

Article III of the Constitution provides that the "judicial power shall extend to all Cases" and "Controversies." U.S. Const. art. III, § 2. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S. Ct. 721, 184 L. Ed. 2d 553 (2013) (internal quotation marks omitted).

Mootness is "standing set in a time frame." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 68 n.22, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997). "The doctrine of standing generally assesses whether that interest exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796, 209 L. Ed. 2d 94 (2021). "[T]o establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v.*

Ramirez, 141 S. Ct. 2190, 2203, 210 L. Ed. 2d 568 (2021). A "concrete" injury is "real, and not abstract." *Id.* at 2204 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016)). While "Congress may elevate harms that exist in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence." *Id.* at 2205 (cleaned up).

"An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Alvarez v. Smith*, 558 U.S. 87, 92, 130 S. Ct. 576, 175 L. Ed. 2d 447 (2009) (cleaned up). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.'" *Already, LLC*, 568 U.S. at 91 (quoting *Alvarez*, 558 U.S. at 93). In other words, "no live controversy remains where a party has obtained all the relief she could receive on the claim through further litigation." *Ruesch v. Comm'r of Internal Revenue*, 25 F.4th 67, 70 (2d Cir. 2022) (internal quotation marks omitted).

The FAA provides that "at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected." 9 U.S.C. § 9. The "confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court."

Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d Cir. 1984); *see* 9 U.S.C. § 13.

Confirmation is a "mechanism[] for enforcing arbitration awards." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008). "A party, successful in arbitration, seeks confirmation by a court generally because he fears the losing party will not abide by the award." *Florasynth*, 750 F.2d at 176. Confirmation gives "the winning party . . . a variety of remedies" for enforcement. *Id.* This includes "plac[ing] the weight of a court's contempt power behind the award, giving the prevailing party a means of enforcement that an arbitrator would typically lack." *Unite Here Loc. 1 v. Hyatt Corp.*, 862 F.3d 588, 596 (7th Cir. 2017) (cleaned up). An arbitration award, however, "need not actually be confirmed by a court to be valid." *Florasynth*, 750 F.2d at 176. "An unconfirmed award is a contract right that may be used as the basis for a cause of action," and "in the majority of cases the parties to an arbitration do not obtain court confirmation." *Id.*

Article III's case-or-controversy requirement applies to actions governed by the FAA. The Supreme Court recently affirmed that the FAA's provisions authorizing "applications to confirm, vacate, or modify arbitral awards . . . do not themselves support federal jurisdiction." *Badgerow v. Walters*, 142 S. Ct. 1310, 1316, 212 L. Ed. 2d 355 (2022).

IBM did not argue that the petition to confirm was moot in the district court, but subject-matter jurisdiction

"can never be forfeited or waived," *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). We "have an independent obligation to satisfy ourselves of the jurisdiction of this court and the court below." *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 92 (2d Cir. 2019) (internal quotation marks omitted). We review questions of mootness de novo. *Conn. Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439, 444 (2d Cir. 2021).

2. *Application*

Although Stafford had standing when she filed her petition to confirm (before the award had been satisfied), the petition is moot because she now lacks any "concrete interest" in confirmation. *Knox v. SEIU*, 567 U.S. 298, 307, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012). IBM could have moved to vacate or modify the award under the FAA, but it did not do so. *See* 9 U.S.C. § 12. Indeed, it is undisputed that IBM has satisfied the award in full and that it does not entitle Stafford to any other relief. She has thus already "obtained all the relief she could receive on [her] claim," *Ruesch*, 25 F.4th at 70 (cleaned up), and no longer has any "concrete interest" in enforcement, *Knox*, 567 U.S. at 307.

Two of our sister courts of appeals, in determining whether petitions to confirm are moot, have similarly looked to whether the prevailing party has some concrete interest in enforcement of the award. *See Brown & Pipkins, LLC v. SEIU*, 846 F.3d 716, 728-29 (4th Cir. 2017) (dispute over payment); *Unite Here Loc. 1*, 862 F.3d at 598 (prospective relief). In *Brown & Pipkins*, the losing party in arbitration claimed that payment had been

made in full, but the prevailing party disagreed. *See* 846 F.3d at 729. This dispute over payment—a "monetary harm," *TransUnion*, 141 S. Ct. at 2204—rendered the petition to confirm not moot. *See Brown & Pipkins*, 846 F.3d at 729. Similarly, in *Unite Here Local 1*, there was "plainly a live dispute" about whether the losing party was "in fact acting in compliance with the awards" of prospective relief. 862 F.3d at 598. The parties' interests in the "ongoing controversy" over enforcement of the awards was sufficient for Article III purposes. *See id.* at 598-99; *cf. Teamsters Loc. 177 v. United Parcel Serv.*, 966 F.3d 245, 250, 253 (3d Cir. 2020) (finding Article III standing when there was a risk of "future violations" of the award). Under the logic of these cases, a petition to confirm an arbitration award is moot when there is no longer any issue over payment or ongoing compliance with a prospective award.

Stafford points to *Zeiler v. Deitsch*, 500 F.3d 157 (2d Cir. 2007), to argue that "confirmation does not require a 'live' dispute related to compliance with the award." Appellee's Br. at 12. But *Zeiler* involved an award of prospective relief, *see* 500 F.3d at 161, which is not at issue here. In any event, *Zeiler* did not address standing or mootness, and "drive-by jurisdictional rulings of this sort have no precedential effect." *Green v. Dep't of Educ. of City of N.Y.*, 16 F.4th 1070, 1076 n.1 (2d Cir. 2021) (cleaned up). Stafford also points to *Ottley v. Schwartzberg*, 819 F.2d 373 (2d Cir. 1987), for the same proposition. Appellee's Br. at 12. But in *Ottley*, there was a dispute as to compliance with the award. *See* 819 F.2d at 375. No such dispute exists here. And like *Zeiler, Ottley* did not directly address standing or mootness.

Stafford no longer has any concrete interest in enforcement of her award, so the only remaining question is whether her statutory right to seek confirmation under the FAA is itself enough to create a "live" controversy. It is not. The Supreme Court has clearly stated that "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 578 U.S. at 341; *see also TransUnion*, 141 S. Ct. at 2205 ("[U]nder Article III, an injury in law is not an injury in fact."). Stafford fails to show that holding an unconfirmed arbitration award is itself a concrete injury that "has a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts."[2] *TransUnion*, 141 S. Ct. at 2204 (cleaned up). The FAA's process for confirming an arbitration award still requires Article III injury, and § 9 of the FAA does not itself confer standing.

In sum, Stafford's petition to confirm her arbitration award became moot when IBM fully paid the award, and her petition should have been dismissed as moot.

B. Sealing

The district court erred by granting Stafford's motion to unseal the arbitration award because it failed to weigh

2. The Third Circuit's statement in *Teamsters Local 177 v. United Parcel Service*, 966 F.3d 245 (3d Cir. 2020), that "the dispute the parties went to arbitration to resolve is 'live' until the arbitration award is confirmed and the parties have an enforceable judgment in hand" is inapposite. *Id.* at 252. That case involved a petition to confirm an arbitration award conferring *prospective relief. See id.* at 249. Also, it was decided before the Supreme Court's decision in *TransUnion v. Ramirez*, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021).

the FAA's strong policy in favor of confidentiality and Stafford's improper effort to evade the confidentiality provision of the Agreement against the presumption of public access to judicial documents.

1. *Legal Standards*

"The common law right of public access to judicial documents is firmly rooted in our nation's history." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). "The presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice." *Id.* (quoting *United States v. Amodeo* ("*Amodeo II*"), 71 F.3d 1044, 1048 (2d Cir. 1995)). This Court's law regarding sealing is "largely settled." *Brown v. Maxwell*, 929 F.3d 41, 47 (2d Cir. 2019).

"First, the court determines whether the record at issue is a 'judicial document'—a document to which the presumption of public access attaches." *Mirlis v. Greer*, 952 F.3d 51, 59 (2d Cir. 2020). Second, "if the record sought is determined to be a judicial document, the court proceeds to determine the weight of the presumption of access to that document." *Id.* (internal quotation marks omitted). Third, "the court must identify all of the factors that legitimately counsel against disclosure of the judicial document, and balance those factors against the weight properly accorded the presumption of access." *Id.*

We have recently rejected similar attempts by Stafford's counsel to unseal confidential documents obtained in individual arbitrations by filing them in court. *See In re IBM Arb. Agreement Litig.*, 2023 U.S. App. LEXIS 20154, 2023 WL 4982010, at *7; *Chandler v. Int'l Bus. Machs. Corp.*, No. 22-1733, 2023 U.S. App. LEXIS 20147, 2023 WL 4987407, at *1 (2d Cir. Aug. 4, 2023); *Lodi v. Int'l Bus. Machs. Corp.*, No. 22-1737, 2023 U.S. App. LEXIS 20158, 2023 WL 4983125, at *1 (2d Cir. Aug. 4, 2023); *Tavenner v. Int'l Bus. Machs. Corp.*, No. 22-2318, 2023 U.S. App. LEXIS 20162, 2023 WL 4984758, at *1 (2d Cir. Aug. 4, 2023). In those cases, we affirmed the district courts' decisions to grant IBM's motions to seal. *See, e.g., In re IBM Arb. Agreement Litig.*, 2023 U.S. App. LEXIS 20154, 2023 WL 4982010, at *7. We reasoned that the "FAA's strong policy protecting the confidentiality of arbitral proceedings" and the "impropriety" of efforts "to evade the Agreement's Confidentiality Provision" outweighed the "presumption of public access." *Id.*

"When reviewing a district court's order to seal or unseal a document, we examine the court's factual findings for clear error, its legal determinations *de novo*, and its ultimate decision to seal or unseal for abuse of discretion." *Olson v. Major League Baseball*, 29 F.4th 59, 87 (2d Cir. 2022) (cleaned up).

2. *Application*

First, an arbitration award attached to a petition to confirm that award is ordinarily a judicial document. "In order to be designated a judicial document, the item

filed must be relevant to the performance of the judicial function and useful in the judicial process." *Lugosch*, 435 F.3d at 119 (internal quotation marks omitted). Here, the arbitration award attached to Stafford's petition to confirm is a judicial document because it is "relevant" to the court's decision to confirm that award. *Id.*

Second, the presumption of access to judicial documents, however, is weaker here because the petition to confirm the award was moot. The lack of jurisdiction over the underlying dispute does not, on its own, resolve the sealing issue. *See Gambale v. Deutsche Bank AG*, 377 F.3d 133, 139-40 (2d Cir. 2004). But the "weight of the presumption [of access] is a function of (1) the role of the material at issue in the exercise of Article III judicial power and (2) the resultant value of such information to those monitoring the federal courts." *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 142 (2d Cir. 2016) (internal quotation marks omitted). The confidential award played no "role in the exercise of Article III judicial power" because the petition should have been denied as moot. *See In re IBM Arb. Agreement Litig.*, 2023 U.S. App. LEXIS 20154, 2023 WL 4982010, at *7 (cleaned up).

Third, the district court erred in failing to consider and give appropriate weight to the "countervailing factors" at issue. *Lugosch*, 435 F.3d at 120. In weighing disclosure, courts must consider not only "the sensitivity of the information and the subject" but also "how the person seeking access intends to use the information." *Amodeo II*, 71 F.3d at 1051; *see also Brown*, 929 F.3d at 47

("[T]he Supreme Court [has] observed that, without vigilance, courts' files might 'become a vehicle for improper purposes.'" (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978))). "[C]ourts should consider personal motives . . . at the third[] balancing step of the inquiry, in connection with any asserted privacy interests, based on an anticipated injury as a result of disclosure." *Mirlis*, 952 F.3d at 62 (cleaned up).

Here, Stafford continued to seek confirmation and unsealing of her arbitration award even after it had been fully satisfied. Her stated purpose—as argued to the district court and to us—was to enable her counsel to use the award in the litigation of ADEA claims of other former IBM employees. Such efforts to evade the confidentiality provision to which Stafford agreed in her arbitration agreement are a strong countervailing consideration against unsealing. *See In re IBM Arb. Agreement Litig.*, 2023 U.S. App. LEXIS 20154, 2023 WL 4982010, at *7.

Confidentiality is "a paradigmatic aspect of arbitration." *Guyden v. Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir. 2008); *see also Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013) ("[C]ourts must rigorously enforce arbitration agreements according to their terms." (internal quotation marks omitted)). We have affirmed decisions to keep judicial documents subject to confidentiality provisions in arbitration or settlement agreements under seal. *See, e.g., Gambale*, 377 F.3d at 143-44 (confidential settlement); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 826 (2d Cir. 1997) (confidential arbitration award).

The district court's conclusion that "the enforcement of contracts . . . does not constitute a higher value that would outweigh the presumption of public access to judicial documents" did not fully account for the context of Stafford's unsealing motion. *Stafford*, 2022 U.S. Dist. LEXIS 84746, 2022 WL 1486494, at *3 (cleaned up). "[A]llowing unsealing under such circumstances would create a legal loophole allowing parties to evade confidentiality agreements simply by attaching documents to court filings." *In re IBM Arb. Agreement Litig.*, 2023 U.S. App. LEXIS 20154, 2023 WL 4982010, at *7. In short, the presumption of access to judicial documents is outweighed here by the interest in confidentiality and because Stafford's apparent purpose in filing the materials publicly is to launder their confidentiality through litigation. We conclude that the district court should not have granted Stafford's motion to unseal the award.

III. CONCLUSION

We have considered all of the parties' remaining arguments and have found them to be without merit. For the reasons set forth above, the judgment of the district court is vacated and remanded with instructions to dismiss as moot. The district court's grant of the motion to unseal is reversed.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MAY 10, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21-CV-6164 (JPO)

ELIZABETH STAFFORD,

Petitioner,

-v-

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

OPINION AND ORDER

J. PAUL OETKEN, District Judge:

Petitioner Elizabeth Stafford brings this action petitioning the Court to confirm an arbitration award she obtained on July 12, 2021, in connection with an arbitration demand she filed against Respondent International Business Machines Corporation ("IBM"). (Dkt. Nos. 1, 13.) IBM does not oppose the motion to confirm the arbitration award but does oppose Stafford's simultaneous motion to unseal the award. (*See* Dkt. No. 16.) It additionally requests that if the Court grants Stafford's request to unseal the award, the Court stay the ruling for thirty days to provide IBM an opportunity to decide whether to appeal. (Dkt. No. 21.)

For the following reasons, Stafford's motions to confirm the arbitration award and unseal the award are granted. IBM's motion to stay the ruling is also granted.

I. Factual Background

In June 2018, Stafford and IBM signed a separation agreement. (Dkt. No. 13-2.) The separation agreement confirmed that Stafford was releasing IBM from all claims she may have had against it, with the exception of a few, including the one that was at issue in the arbitration. (Dkt. No. 13-2 ¶¶ 2-3.) The agreement contained an arbitration provision requiring any claims or disputes between IBM and Stafford to be resolved in "private, confidential, final and binding arbitration." (Dkt. No. 13-2 ¶ 5.) The agreement also included an attachment with a separate "Privacy and Confidentiality" section that provided: "[T]he parties shall maintain the confidential nature of the arbitration proceeding and the award. The parties agree that any information related to the proceeding, such as documents produced, filings, witness statements or testimony, expert reports and hearing transcripts is confidential information which shall not be disclosed . . . unless otherwise required by law or judicial decision." (Dkt. No. 13-2 at 7.)

In January 2019, Stafford filed an arbitration demand against IBM, and in July 2021, the arbitrator entered an arbitration award (the "Final Award") in favor of Stafford. (Dkt. No. 1 ¶¶ 9, 12.) Pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9, Stafford filed a petition to confirm the Final Award that same month. (Dkt. No. 1

¶ 13.) Stafford provisionally moved to file the Final Award under seal pursuant to the separation agreement. (Dkt. No. 4 at 2.)

According to a declaration filed by IBM, following the arbitrator's ruling, IBM began processing payment of all amounts owed to Stafford and her counsel under the Final Award and IBM has now fully satisfied all the terms of the Final Award. (Dkt. No. 17 ¶¶ 7-8.)

II. Discussion

A. Petition to Confirm the Arbitration Award

"Under the terms of [9 U.S.C. § 9], a court must confirm an arbitration award unless it is vacated, modified, or corrected as prescribed by §§ 10 and 11." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008) (internal quotation marks omitted). "The arbitrator's rationale for an award need not be explained, and the award should be confirmed if a ground for the arbitrator's decision can be inferred from the facts of the case." *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) (internal quotation marks omitted). Courts in this District are clear that "even where the petition is unopposed, a court must still treat the petition as akin to a motion for summary judgment." *Church Ins. Co. v. Ace Prop. & Cas. Ins. Co.*, No. 10 Civ. 698, 2010 U.S. Dist. LEXIS 109774, 2010 WL 3958791, at *2 (S.D.N.Y. Sept. 23, 2010) (internal quotation marks omitted); *see also Clearwater Ins. Co. v. Granite State Ins. Co.*, No. 15 Civ. 165, 2015 U.S. Dist. LEXIS 13792,

2015 WL 500184, at *2 (S.D.N.Y. Feb. 5, 2015) (even where a petition is unopposed, "the facts must show that the petitioner is entitled to judgment as a matter of law"); *Alexandria Real Est. Equities, Inc. v. Fair*, No. 11 Civ. 3694, 2011 U.S. Dist. LEXIS 138455, 2011 WL 6015646, at *2 (S.D.N.Y. Nov. 30, 2011) (even if the arbitration award is uncontested, the court must "independently appl[y] the facts of the case to the legal standard for award confirmation").

The FAA provides the limited grounds for vacating or modifying an award. It allows for vacatur only where the award was procured by fraud or corruption, there is evidence of corruption or partiality on the part of the arbitrator, the arbitrator is found to be guilty of misconduct, or the arbitrator exceeds his power. 9 U.S.C. § 10. It allows for modification when there is an evident miscalculation or material mistake in the award, where the arbitrator has exceeded his power, or where the award is imperfect in a manner not affecting the merits. 9 U.S.C. § 11.

Here, having carefully reviewed the Final Award, the Court concludes there is no basis for vacating, modifying, or correcting it and the petition to confirm the Final Award is granted.

B. Motion to Unseal

IBM opposes Stafford's motion to unseal the arbitration award on three grounds. First, it argues that Stafford lacks standing to seek unsealing because she

has no personal interest at stake. The Court disagrees with IBM's position that Stafford must "articulate [a] concrete interest in whether the award remains sealed from public view." (Dkt. No. 16 at 5.) Indeed, the right to the public's access to judicial documents is a common law right "firmly rooted in our nation's history." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). "The presumption of 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." *Id.* (internal quotation marks omitted). *Lugosch* and its progeny make clear that it is the public that benefits from access to judicial documents, *see id.*, and it is the court's responsibility to "make specific, rigorous findings before sealing the document or otherwise denying public access." *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 141 (2d Cir. 2016) (internal quotation marks omitted). That is why courts routinely unseal judicial documents even against the opposition of *both* parties. *See, e.g., id.* The Court therefore concludes that it has an independent obligation to determine whether sealing is justified, irrespective of IBM's argument as to standing.

Second, IBM contends that Stafford is equitably estopped from seeking to unseal because she agreed in the separation agreement to maintain confidentiality. (Dkt. No. 16 at 7-9.) IBM argues that "having secured [] benefits from IBM . . . she cannot abandon her promise of confidentiality." (Dkt. No. 16 at 8.) However, as Stafford points out, this argument fails because the separation agreement contains a provision that allows for unsealing

if "required by law or judicial decision." (Dkt. No. 13-2 at 7.) Furthermore, it can hardly be said by the terms of the separation agreement that IBM provided Stafford with "valuable severance benefits" *solely* in exchange for her promise of confidentiality. (Dkt. No. 16 at 8.) While confidentiality was undoubtedly important to IBM, IBM also received other benefits from the separation agreement, including Stafford's agreement to release certain potential claims against IBM. (Dkt. No. 13-2 ¶¶ 2-3.)

Finally, IBM argues that Stafford's request to unseal should be denied because the harm that IBM would suffer from public disclosure outweighs the public's right of access to it. (Dkt. No. 16 at 9-16.) To determine whether the presumptive right of public access attaches to a particular record, courts in this District must engage in a two-step inquiry.

The first step is determining whether the record at issue is a "judicial document." *See Mirlis v. Greer*, 952 F.3d 51, 59 (2d Cir. 2020). "Not all documents filed with the court are judicial documents. Rather, a judicial document is one that has been placed before the court by the parties and that is relevant to the performance of the judicial function and useful in the judicial process." *Id.* at 59 (internal quotation marks omitted). IBM contends that the Final Award is not a judicial document because IBM does not oppose confirmation and has fully complied with the Final Award. (Dkt. No. 16 at 10.) Therefore, IBM suggests, the Court does not need to consult the contents of the Final Award in award to confirm it. (Dkt. No. 16 at 11.) This argument has been previously raised by parties

and has been rejected by several courts in this District. *See, e.g., Susquehanna Int'l Grp. Ltd. v. Hibernia Express (Ireland) Ltd.*, No. 21 Civ. 207, 2021 U.S. Dist. LEXIS 151075, 2021 WL 3540221, at *2 (S.D.N.Y. Aug. 11, 2021) (collecting cases); *Clearwater*, 2015 U.S. Dist. LEXIS 13792, 2015 WL 500184, at *3. In accordance with numerous district court decisions, this Court holds that the Final Award is a judicial document.

Once a court determines that the document at hand is a judicial document, the party moving to maintain sealing "must overcome the strong presumption of public access to judicial documents and, in particular, adjudication of substantive rights." *Clearwater*, 2015 U.S. Dist. LEXIS 13792, 2015 WL 500194, at *3. "In circumstances where an arbitration award is confirmed, the public in the usual case has a right to know what the Court has done." *Global Reinsurance Corp. v. Argonaut Ins. Co.*, No. 07 Civ. 8196, 2008 U.S. Dist. LEXIS 32419, 2008 WL 1805459, at *1 (S.D.N.Y. Aug. 12, 2010). IBM, as the party moving to maintain the Final Award under seal, "bears the burden of demonstrating what 'higher values' overcome the presumption of public access." *Alexandria Real Estate*, 2011 U.S. Dist. LEXIS 138455, 2011 WL 6015646, at *3 (quoting *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 826 (2d Cir. 1997)). IBM proposes several factors that it argues weigh against the presumption of access: (1) the Final Award contains specific proposed headcount reduction numbers and hiring targets, as well as the decision-making processes behind those numbers, which could be used by competitors to understand the areas in which IBM is hiring or downsizing and for recruitment

purposes; (2) the Final Award contains a discussion of a performance evaluation of a current executive, and disclosure could harm employee morale; (3) the Final Award contains information about Stafford's salary, which competitors could use for recruitment purposes; (4) IBM is facing several lawsuits and arbitrations by other IBM employees represented by Stafford's counsel, and unsealing the Final Award could provide benefits to those employees and disadvantage IBM; (5) allowing unsealing would violate the strong federal policy in favor of protecting arbitral confidentiality; and (6) the parties specifically agreed to keep the arbitration proceedings, including any award, confidential. (Dkt. No. 16 at 10-16.)

IBM has failed to identify factors that overcome the strong presumption of public access and weigh in favor of sealing the entire Final Award. As recognized by the Second Circuit and other district courts, a "higher value" has been considered to include the protection of attorney-client privilege, *Lugosch*, 435 F.3d at 125; "the danger of impairing law enforcement or judicial efficiency," *SEC v. TheStreet.Com*, 273 F.3d 222, 232 (2d Cir. 2001); "the privacy interests of those resisting disclosure, such as trade secrets," *Dodona I, LLC v. Goldman, Sachs & Co.*, 119 F. Supp. 3d 152, 154 (S.D.N.Y. 2014); and the public disclosure of sensitive medical information, *see Pal v. New York Univ.*, No. 06 Civ. 5892, 2010 U.S. Dist. LEXIS 53353, 2010 WL 2158283, at *1 (S.D.N.Y. May 27, 2010). While the enforcement of contracts is an important role of the courts, "it does not constitute a higher value that would outweigh the presumption of public access to judicial documents." *Aioi Nissay Dowa Ins. Co. v. ProSight Specialty Mgmt.*

Co., No. 12 Civ. 3274, 2012 U.S. Dist. LEXIS 118233, 2012 WL 3583176, at *6 (S.D.N.Y. Aug. 21, 2012)

A risk of competitive harm may, in certain cases, serve as a basis for sealing judicial documents, but IBM's vague and hypothetical statements that competitors may use this information, much of which is already available to the public (*see* Dkt. No. 17 at 10-11) or outdated, is not the sort of specific evidence required to overcome the presumption of public access. The Court, however, agrees that any sensitive information, such as the name or other identifying information, of the non-party IBM employee whose performance evaluation is discussed should be redacted.

C. Motion to Stay

Given the unique circumstances of this case — where the parties explicitly agreed to maintain the confidentiality of the arbitration proceedings, the Final Award is unopposed *and* has been fully satisfied, and IBM provided some reasons to maintain the sealing — the Court grants IBM's motion to stay the unsealing order for thirty days.

III. Conclusion

For the foregoing reasons, Stafford's motion to confirm the Final Award is GRANTED and her motion to unseal the Final Award is GRANTED. IBM's motion to stay an order unsealing the Final Award is GRANTED. The parties are directed to confer on any sensitive

information about the non-party IBM employee and file proposed redactions under seal within two weeks after the issuance of this Opinion & Order, regardless of whether IBM plans to appeal.

The Clerk of Court is directed to unseal Docket Number 7 thirty days after the date of this Opinion and Order, except that Docket Number 7 should remain sealed if IBM files a timely Notice of Appeal. The Clerk of Court is also respectfully directed to close the motions at Docket Numbers 14 and 21.

SO ORDERED.

Dated: May 10, 2022
New York, New York

/s/ J. Paul Oetken
J. PAUL OETKEN
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 4, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 22-1240

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of October, two thousand twenty-three.

ELIZABETH STAFFORD,

Petitioner-Appellee,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Respondent-Appellant.

ORDER

Appellee, Elizabeth Stafford, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

Appendix B

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/Catherine O'Hagan Wolfe