No. 22-40707

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, EX REL CALEB HERNANDEZ AND JASON WHALEY, RELATORS, ET AL

Plaintiff

v.

TEAM FINANCE, L.L.C.; TEAM HEALTH, INCORPORATED; TEAM HEALTH HOLDINGS, INCORPORATED; AMERITEAM SERVICES, L.L.C.; HCFS HEALTH CARE FINANCIAL SERVICES, L.L.C.; QUANTUM PLUS, L.L.C., DOING BUSINESS AS TEAMHEALTH WEST,

Defendants-Appellees

v.

LOREN ADLER,

Movant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS,
No. 2:16-cv-00432-JRG

[PROPOSED] BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 18 MEDIA ORGANIZATIONS IN SUPPORT OF MOVANT-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the persons and entities listed in Movant-Appellant's Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification.

Amici Curiae:

Reporters Committee for Freedom of the Press. The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock

The Atlantic Monthly Group LLC. The Atlantic Monthly Group LLC is a privately-held media company, owned by Emerson Collective and Atlantic Media, Inc. No publicly held corporation owns 10% or more of its stock.

BuzzFeed Inc. BuzzFeed Inc. is a privately owned company, and National Broadcasting Company (NBC) owns 10% or more of its stock.

First Amendment Coalition. First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The Freedom of Information Foundation of Texas. The Freedom of Information Foundation of Texas ("FOIFT") is a 501(c)(3) organization. It has

no parent corporation, no affiliates, and no publicly held company owns 10 percent or more of its stock.

Freedom of the Press Foundation. Freedom of the Press Foundation does not have a parent corporation, and no publicly held corporation owns 10% or more of the stock of the organization.

The Institute for Nonprofit News. The Institute for Nonprofit News is a 501(c)(3) non-stock corporation with no parent corporation.

The Media Institute. The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

The Foundation for National Progress, dba Mother Jones. The Foundation for National Progress, dba Mother Jones, is a nonprofit, public benefit corporation. It has no publicly-held shares.

National Newspaper Association. National Newspaper Association is a non-stock nonprofit Florida corporation. It has no parent corporation and no subsidiaries.

National Press Photographers Association. National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The New York Times Company. The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

News/Media Alliance. News/Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

Pro Publica, Inc. Pro Publica, Inc. ("ProPublica") is a Delaware nonprofit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

The Society of Environmental Journalists. The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists. Society of Professional Journalists is a non-stock corporation with no parent company.

The Texas Association of Broadcasters. The Texas Association of Broadcasters has no parent corporation and issues no stock.

The Texas Press Association. The Texas Press Association is a 501(c)(6) non-profit trade association with no parent corporation and no stock.

The Tully Center for Free Speech. The Tully Center for Free Speech is a subsidiary of Syracuse University.

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IDENTITY AND INTERESTS OF AMICI CURIAE, AND THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF

Pursuant to Federal Rules of Appellate Procedure 27 and 29, amici have filed a motion for leave to file this amici curiae brief in support of Movant-Appellant Loren Adler ("Adler").

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), amici state that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or any other person, other than the amici curiae, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

Amici are the Reporters Committee for Freedom of the Press ("Reporters Committee"), The Atlantic Monthly Group LLC, BuzzFeed Inc., First Amendment Coalition, Freedom of Information Foundation of Texas, Freedom of the Press Foundation, Institute for Nonprofit News, The Media Institute, Mother Jones, National Newspaper Association, National Press Photographers Association, The New York Times Company, News/Media Alliance, Pro Publica, Inc., Society of Environmental Journalists, Society of Professional Journalists, Texas Association of Broadcasters, Texas Press Association, and Tully Center for Free Speech. Lead amicus the Reporters Committee was founded by journalists and media lawyers in 1970, when the nation's press faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys

provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

As members of the news media and organizations that advocate for the First Amendment and newsgathering rights of the press, amici have a strong interest in ensuring that members of the press and public are able to intervene in court proceedings for the limited purpose of asserting their presumptive right of access to judicial records guaranteed by the First Amendment and common law. The district court's denial of Adler's limited-purpose motion to intervene contravenes well-settled law in this Circuit and, if permitted to stand, would jeopardize the openness long recognized to be a critical component of our judicial system.

SUMMARY OF ARGUMENT

Intervention is a key means by which members of the press and public seek to vindicate their presumptive right to inspect judicial records and attend judicial proceedings—a right that is not only "fundamental" to our nation's legal system, but one that has significant salutary effects. *See Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417 (5th Cir. 2021). Our nation's long tradition of open courts facilitates accountability for judges and participants in litigation, ensures public trust in the judicial process, and promotes more accurate fact-finding. Access to judicial records in this case and others like it—which could shed light on factors

impacting U.S. healthcare costs—enables journalists and news organizations to produce timely, informative reporting for the benefit of the public.

This Court and other appellate courts across the country have repeatedly recognized that "news agencies have standing to challenge" court closures, *Davis v. E. Baton Rouge Par. Sch. Bd.*, 78 F.3d 920, 927 (5th Cir. 1996), as do members of the public, like Adler. Intervention under Federal Rule of Civil Procedure 24 is "the procedurally correct course" for doing so. *In re Beef Indus. Antitrust Litig.*, 589 F.2d 786, 789 (5th Cir. 1979). Indeed, every federal circuit court of appeals, including this Court, has held that Rule 24 accommodates motions to intervene for this limited purpose.[1] *See* Section II, *infra*. And courts have found that such access-based intervention is timely long after the entry of judgment. *See, e.g.*, *Comm'r, Ala. Dep't of Corr. v. Advance Loc. Media, LLC*, 918 F.3d 1161, 1170–73 (11th Cir. 2019); *Flynt v. Lombardi*, 782 F.3d 963, 966–67 (8th Cir. 2015); *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998).

Here, the district court's decision to deny Adler's motion to intervene ignored this Court's precedent and relied on inapposite legal standards, overlooking the unique nature of motions to intervene for the limited purpose of asserting the public's presumptive right of access to judicial proceedings and

[1] Unless otherwise stated, all references to the "Rules" are to the Federal Rules of Civil Procedure.

records. *United States ex rel. Hernandez v. Team Fin., L.L.C.*, No. 16-CV-432, 2022 WL 16550318, at *2–4 (E.D. Tex. Sept. 28, 2022). Not only is the district court's decision incorrect as a matter of law, but also, if permitted to stand, it would set a dangerous precedent that would hinder the news media's ability to inform the public about judicial proceedings of public interest. For these reasons, amici respectfully urge the Court to reverse.[2]

ARGUMENT

I. Intervention to challenge restrictions on public access is a necessary and well-established component of our open judicial system.

Openness is "one of the essential qualities of a court of justice." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567 (1980) (quoting *Daubney v. Cooper*, 109 Eng. Rep. 438, 440 (K.B. 1829)). Said to predate the Constitution itself, the public's right to observe judicial proceedings and inspect judicial records is deeply rooted in American history and is "an indispensable attribute" of our judicial system. *Id.* at 564–68, 569, 580 n.17; *see also Bradley ex rel. AJW v.*

[2] Amici agree with Adler that this Court has jurisdiction over this appeal under the collateral order doctrine. *See Newby v. Enron Corp.*, 443 F.3d 416, 423 (5th Cir. 2006) (reviewing district court's grant of motion to intervene); *Ford v. City of Huntsville*, 242 F.3d 235, 240 (5th Cir. 2001) (reviewing denial of motion to intervene); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977) ("[W]e are authorized to decide whether the petitions for leave to intervene were properly denied.").

Ackal, 954 F.3d 216, 225 (5th Cir. 2020) (recognizing the presumptive common law right of access to court records, including after the case has settled).

Openness is not just "Law 101"; "[o]penness is also Civics 101." *Binh Hoa Le*, 990 F.3d at 417. Access "enhances both the basic fairness of [a] trial and the appearance of fairness so essential to public confidence in the system." *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984). Put simply, "[h]ow can the public know that courts are deciding cases fairly and impartially if it doesn't know what is being decided?" *BP Expl. & Prod., Inc. v. Claimant ID 100246928*, 920 F.3d 209, 210 (5th Cir. 2019); *see also United States v. Holy Land Found. for Relief & Dev.*, 624 F.3d 685, 690 (5th Cir. 2010).

Access is also essential for members of the press, who act as "surrogates for the public" when they gather and disseminate information about court cases of public interest. *Richmond Newspapers*, 448 U.S. at 573. By reporting on such newsworthy matters, journalists help "the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) . When courts seal records or close proceedings, such "[g]overnment-imposed secrecy denies the free flow of information and ideas not only to the press but also to the public." *In re Express-News Corp.*, 695 F.2d 807, 809 (5th Cir. 1982). Given the harms secrecy causes, members of the press and public need an effective

mechanism to challenge that secrecy. Without one, the presumptive right of access would be meaningless.

Intervention pursuant to Rule 24—typically permissive intervention under Rule 24(b)—is the "procedurally correct course" for members of the press and public to challenge access restrictions violative of their presumptive right to inspect court records and attend judicial proceedings. *In re Beef Indus. Antitrust Litig.*, 589 F.2d at 789. "The right to intervene to challenge a closure order" is an important corollary of the "right to be heard in a manner that gives full protection to the asserted right" of access. *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000) (citation and internal quotation marks omitted). It also "affords the court an opportunity for due deliberation," *id.* (citation and internal quotation marks omitted), and promotes judicial efficiency by avoiding the filing of a separate action, *Flynt*, 782 F.3d at 966–67. Because "increasingly, courts are sealing documents in run-of-the-mill cases where the parties simply prefer to keep things under wraps," *Binh Hoa Le*, 990 F.3d at 417, intervention by journalists, news organizations, and other members of the public—including scholars like Adler—increasingly is necessary to ensure that essential issues pertaining to public access are considered.

II. Journalists and other members of the public have standing to intervene for the limited purpose of seeking to unseal judicial records.

Here, the district court erred in holding that Adler's "'general interest' in sealed information" was insufficient to demonstrate Article III standing. *Team Fin., L.L.C.*, 2022 WL 16550318, at *3. "[B]ecause it is the rights of the public, an absent third party, that are at stake, any member of the public has standing . . . to move the court to unseal the court file." *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992). Indeed, every federal court of appeals,[3] including this Court,[4] has held that non-parties have standing to intervene for the purpose of

[3] *See Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 783 (1st Cir. 1988); *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 294–95 (2d Cir. 1979); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994); *Doe v. Pub. Citizen*, 749 F.3d 246, 262 (4th Cir. 2014); *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162 (6th Cir. 1987); *Jessup*, 227 F.3d at 997–99; *Flynt*, 782 F.3d at 966–67; *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990); *Comm'r, Ala. Dep't of Corr.*, 918 F.3d at 1170–73; *Nat'l Children's Ctr.*, 146 F.3d at 1045–46.

[4] *See, e.g.*, *United States v. Aldawsari*, 683 F.3d 660, 664–65 (5th Cir. 2012); *Holy Land Found.*, 624 F.3d at 690; *Newby*, 443 F.3d at 423; *Davis*, 78 F.3d at 927; *In re Express-News Corp.*, 695 F.2d at 808 n.1; *United States v. Gurney*, 558 F.2d 1202, 1206 (5th Cir. 1977); *In re Beef Indus. Antitrust Litig.*, 589 F.2d at 789. District courts in the Fifth Circuit likewise routinely permit third parties to intervene to seek access. *See, e.g.*, *Blue Spike, LLC v. Audible Magic Corp.*, No. 15-CV-584, 2016 WL 3870069, at *1–2 (E.D. Tex. Apr. 18, 2016); *State Farm Fire & Cas. Co. v. Hood*, 266 F.R.D. 135, 143 (S.D. Miss. 2010); *Weiss v. Allstate Ins. Co.*, No. 06-CV-3774, 2007 WL 2377116, at *2–3 (E.D. La. Aug. 16, 2007); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 229 F.R.D. 126, 131 (S.D. Tex. 2005); *see also Est. of Baker ex rel. Baker v. Castro*, No. 15-CV-3495, 2020 WL 2235179, at *5 (S.D. Tex. May 7, 2020) (holding that "Movants have standing and are eligible to permissively intervene under Rule 24(b)," but denying intervention because movants could obtain requested documents through discovery in separate action).

asserting the public's presumptive right of access to judicial records and proceedings. "To hold otherwise would raise First Amendment concerns" because, as the Supreme Court has made clear, the press and public have a "general right to inspect and copy judicial records" and "must be given an opportunity to be heard" when challenging court closures. *Carlson v. United States*, 837 F.3d 753, 759 (7th Cir. 2016).

Alleged violations of the right to access judicial records and proceedings, to gather news, and to receive information are cognizable injuries-in-fact. "[T]he right of access is widely shared among the press and the general public alike, such that anyone who seeks and is denied access to judicial records sustains an injury." *Doe*, 749 F.3d at 263; *see also Binh Hoa Le*, 990 F.3d at 417 ("Judicial records belong to the American people; they are public, not private, documents.")Courts "generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). Additionally, denials of the right to gather news are cognizable injuries. *See Davis*, 78 F.3d at 926 (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)); *Gurney*, 558 F.2d at 1206. So, too, are denials of the right to receive speech and information. *See Davis*, 78 F.3d at 926. In such cases, individuals' "informational interests, though shared by a large segment of the citizenry, became sufficiently concrete to confer Article III standing

when they sought and were denied access to the information that they claimed a right to inspect." *Doe*, 749 F.3d at 264.

The district court correctly identified Adler's injury: "he cannot access the sealed documents in this case." *Team Fin., L.L.C.*, 2022 WL 16550318, at *3. But it erroneously held that "Adler cannot demonstrate standing by his 'general interest' in sealed information he merely believes would be highly informative to his research and likely to be of public interest." *Id.* To the contrary, Adler has precisely the type of injury that confers standing: he invoked his presumptive right to inspect sealed judicial records that he cannot access. *See* Decl. of Loren Adler ("Adler Decl.") ECF No. 443-1 ¶¶ 5–6. This is a legally cognizable injury; he need not also "show that he has any particular connection to the" case beyond his motion to unseal the sealed judicial records. *Carlson*, 837 F.3d at 759. On the contrary, as "the direct target[] of the district court's rulings" denying his "claimed right of access to the various trial documents," Adler has "a claim of injury in fact." *Gurney*, 558 F.2d at 1206[5] Indeed, if a "general interest" in unsealing "highly informative" court records were not a cognizable injury for purposes of Article III standing, *Team Fin., L.L.C.*, 2022 WL 16550318, at *3, virtually no

[5] "That his petition is not guaranteed to be granted, because a court may find a valid justification for denying him access, in no way destroys his standing to seek the documents. To hold otherwise would amount to denying standing to everyone who cannot prevail on the merits, an outcome that fundamentally misunderstands what standing is." *Carlson*, 837 F.3d at 759 (citations omitted).

member of the press or public could intervene for that limited purpose—leaving innumerable cases shrouded in secrecy in violation of the First Amendment and common law presumptions of openness.[6]

The district court's decision incorrectly relied on two distinguishable cases: *Deus v. Allstate Insurance Co*., 15 F.3d 506, 525 (5th Cir. 1994) and the unpublished *Allen-Pieroni v. White*, 694 F. App'x 339 (5th Cir. 2017). In *Allen-Pieroni*, the "[m]ovants ha[d] not attempted to allege that they have standing to intervene in this action," and "ma[de] clear that they only seek to intervene . . . to allow use of the confidential discovery in a related case against virtually the same defendants." *Allen-Pieroni v. Sw. Corr. LLC*, No. 13-CV-4089, 2017 WL 722200, at *4 (N.D. Tex. Jan. 26, 2017), *report and recommendation adopted*, 2017 WL 728235 (N.D. Tex. Feb. 23, 2017), *aff'd*, 694 F. App'x at 339. In *Deus*, the Court held that "[i]ntervention generally is not appropriate where the applicant can protect its interests and/or recover on its claim through some other means." 15 F.3d at 526. Because the would-be intervenor in *Deus* was engaged in a lawsuit against the same defendant and could access the sealed documents through discovery in that case, the Court denied his motion to intervene. *Id.*; *see also id.* at

[6] Further, it is uncontested that Adler meets the remaining requirements for Article III standing: his injury is traceable to the district court's closure orders and would be redressed by granting his unsealing motion. *See Davis*, 78 F.3d at 927; *Carlson*, 837 F.3d at 760.

525 (citing with approval *Cunningham v. Rolfe*, 131 F.R.D. 587 (D. Kan. 1990), where court denied intervention motion filed by individuals seeking access to discovery materials for use in their own case against same defendant). This Court in *Deus* expressly limited that portion of its decision "to intervention as of right." *Newby*, 443 F.3d at 422 (citing *Deus*, 15 F.3d at 526). And it explicitly rejected the notion "that *Deus* establishes that, as a matter of law, it is an abuse of discretion to allow intervention merely to obtain access to discovery." *Id.* at 421. Instead, this Court has construed *Deus* as requiring intervenors to have standing "[i]n the absence of a live controversy in a pending case." *Id.* at 422.

Adler is not engaged in litigation against Defendants-Appellees and does not seek to obtain access to discovery merely exchanged between the parties; he seeks access to sealed judicial records filed with the court and has no other means of obtaining them. He is thus attempting to vindicate his and the public's presumptive right to inspect judicial records—a right not addressed in either *Deus* or *Allen-Pieroni*. Adler requested permissive intervention under Rule 24(b). He has—correctly—alleged that sealing is a live controversy which the court has jurisdiction to review after dismissal of the underlying action and that he has standing because the sealing injures his right to access judicial records. *See* Reply Br. in Further Supp. of Mot. to Intervene, ECF No. 456 at 6–7. Adler is, accordingly, just like the numerous other movants this Court has found to have

standing to intervene to assert and vindicate their access rights, rather than the uniquely positioned movants in *Deus* and *Allen-Pieroni*. *See Aldawsari*, 683 F.3d at 664–65; *Holy Land Found.*, 624 F.3d at 690; *Ford*, 242 F.3d at 240; *Davis*, 78 F.3d at 924; *Gurney*, 558 F.2d at 1206.

III. The district court's decision misinterprets and misapplies Rule 24(b)'s requirements for permissive intervention in the context of a motion seeking access to sealed judicial records.

The district court further erred in holding that Adler's motion for permissive intervention failed to satisfy the requirements of Rule 24(b). Rule 24 intervention is "the procedurally correct course" for members of the press and public to challenge access restrictions,[7] *In re Beef Indus. Antitrust Litig.*, 589 F.2d at 789, and an appropriate means by which members of the public can challenge the sealing of judicial records.

"Normally, parties seeking permissive intervention pursuant to Rule 24(b) must show: (1) an independent ground for jurisdiction,[8] (2) timeliness of the

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[7] Although intervention to challenge access restrictions is more frequently sought under Rule 24(b), it also is proper under Rule 24(a), which provides for intervention as of right, *see, e.g.*, *Ford*, 242 F.3d at 241; *Hood*, 266 F.R.D. at 143. As the Supreme Court has explained, "representatives of the press and general public '*must* be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper Co.*, 457 U.S. at 609 n.25 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979)) (Powell, J., concurring) (emphasis added).

[8] Courts have repeatedly held that "[a]n independent jurisdictional basis is simply unnecessary when the movant seeks to intervene only for the limited purpose of obtaining access to documents covered by seal or by a protective order, because the third party does not ask the court to rule on the merits of a claim or

motion, and (3) that the applicant's claim or defense and the main action have a question of law or fact in common," *Flynt*, 782 F.3d at 966. Although limited intervention for access purposes "does not fit neatly within the literal language of" the rule, *Jessup*, 227 F.3d at 997, all federal courts of appeals, including this Court, "have been willing to adopt generous interpretations of Rule 24(b) because of the need for 'an effective mechanism for third-party claims of access to information generated through judicial proceedings,'" *Nat'l Children's Ctr.*, 146 F.3d at 1045 (quoting *Pub. Citizen*, 858 F.2d at 783); *see also Flynt*, 782 F.3d at 966–67. Adler's motion to intervene satisfies Rule 24(b), and the district court's decision to the contrary, should be reversed. *See Aldawsari*, 683 F.3d at 664–65; *Holy Land Found.*, 624 F.3d at 690; *Ford*, 242 F.3d at 240; *Davis*, 78 F.3d at 924; *Gurney*, 558 F.2d at 1206; *In re Beef Indus. Antitrust Litig.*, 589 F.2d at 789.

A. Adler's motion to intervene was timely.

Courts have routinely recognized that "intervention to challenge confidentiality orders may take place long after a case has been terminated." *Pansy*, 23 F.3d at 779; *see also Comm'r, Ala. Dep't of Corr.*, 918 F.3d at 1170–

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defense," "but rather to exercise a power that it already has, namely the power to modify a previously entered confidentiality order." *Nat'l Children's Ctr.*, 146 F.3d at 1047; *see also Flynt*, 782 F.3d at 967; *Pansy*, 23 F.3d at 778 n.3. After a case concludes, "[c]ourts retain jurisdiction to unseal judicial records and may allow parties to intervene" to seek unsealing "well after judgment in a dispute." *Comm'r, Ala. Dep't of Corr.*, 918 F.3d at 1166 n.5; *see also Beckman Indus.*, 966 F.2d at 473 (collecting cases).

73; *Meyer Goldberg*, 823 F.2d at 162. Rule 24(b) "sets down no bright line standard for determining what constitutes timeliness." *Pub. Citizen*, 858 F.2d at 784. This is because "Rule 24(b)'s timeliness requirement is to prevent prejudice in the adjudication of the rights of the existing parties, a concern not present when the existing parties have settled their dispute and intervention is for a collateral purpose"—namely to challenge restrictions on public access to judicial records. *United Nuclear Corp*., 905 F.2d at 1427.

Recognizing that "timeliness is not limited to chronological considerations but is to be determined from all the circumstances," this Court in *Stallworth v. Monsanto Co.* set out four factors to guide district courts. 558 F.2d at 263 (citations and internal quotation marks omitted). They are: (1) how long the movant knew or reasonably should have known of his interest in the case before he moved to intervene; (2) the extent of prejudice to the parties due to the movant's failure to file the motion as soon as he knew or should have known of his interest; (3) the extent of prejudice to the movant if intervention is denied; and (4) whether unusual circumstances militate for or against finding the motion timely. *Id.* at 264–66. The focus is on "the issue of prejudice, which is the essence of the timeliness inquiry." *Meek v. Metro. Dade Cnty.*, 985 F.2d 1471, 1479 (11th Cir. 1993). Here, the district court incorrectly relied on the *Stallworth* factors to conclude that Adler's motion was untimely. Because limited

intervention for access purposes is ancillary and does not prejudice the parties, courts need not address the *Stallworth* factors at all to find such motions timely. Indeed, no decision of this Court has done so. In any event, other courts that have applied the *Stallworth* factors in this context have deemed intervention timely, including years after judgment.[9] *None* of the cases the district court relied upon in finding Adler's motion untimely involved a motion to intervene for the limited purpose of challenging restrictions on public access. *Team Fin., L.L.C.*, 2022 WL 16550318, at *3–4.

Assuming, *arguendo*, that the district court was correct to consider the *Stallworth* factors, it erred finding that Adler's motion was not timely for the following reasons.

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[9] *See, e.g.*, *Pub. Citizen*, 858 F.2d at 784–87; *Wave Length Hair Salons of Fla., Inc. v. CBL & Assocs. Props., Inc.*, No. 16-CV-206, 2020 WL 10897933, at *2 (M.D. Fla. May 7, 2020); *Est. of Baker*, 2020 WL 2235179, at *3; *Angilau v. United States*, No. 16-CV-992, 2017 WL 9496068, at *4 (D. Utah July 27, 2017); *Blue Spike*, 2016 WL 3870069, at *1–2; *Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp.*, 271 F.R.D. 530, 535 (S.D. Fla. 2010); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, No. 03-MD-1532, 2009 WL 861485, at *4 (D. Me. Mar. 26, 2009); *Marshall v. Planz*, 347 F. Supp. 2d 1198, 1206 (M.D. Ala. 2004); *Sunbelt Veterinary Supply, Inc. v. Int'l Bus. Sys. United States, Inc.*, 200 F.R.D. 463, 466 (M.D. Ala. 2001); *Van Etten v. Bridgestone/Firestone, Inc.*, 117 F. Supp. 2d 1375, 1380 (S.D. Ga. 2000), *rev'd on other grounds sub nom.*, *Chi. Trib. Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001); *In re Akron Beacon J.*, No. 94-CV-1402, 1995 WL 234710, at *6–8 (S.D.N.Y. Apr. 20, 1995); *State ex rel. Butterworth v. Jones Chems., Inc.*, 148 F.R.D. 282, 286 (M.D. Fla. 1993).

1. Because the need for a motion to intervene may not be immediately apparent, timeliness must be construed in light of the unique nature of challenges to access restrictions.

Adler moved to intervene and unseal on December 14, 2021. ECF Nos. 440–43. The district court incorrectly found this factor weighed against Adler because he moved to intervene "nearly six months after the case was closed" on June 25, 2021 and "anywhere from 1.5 to 2.5 years" after the protective order was entered in 2019 and the case was unsealed in 2018. *Team Fin., L.L.C.*, 2022 WL 16550318, at *3–4. But "[n]umerous courts have allowed third parties to intervene" after a case is closed—"many involving delays measured in years" post-judgment. *Pub. Citizen*, 858 F.2d at 784–85.

Journalists, news organizations, scholars like Adler, and other members of the public frequently seek to intervene in cases well after final judgment in order to assert the public's right of access to judicial documents. Even when such third-party intervenors know of a case during its pendency (or immediately thereafter), the newsworthiness or the public's specific interest in unsealing records in a particular case may change over time. Thus, a court giving weight to when an intervenor knew or should have known of her interest in the matter does not fit neatly with third-party interventions brought solely to unseal judicial records and any such temporal limitation should be construed in light of the unique nature of access-based motions. *See In re Pineapple Antitrust Litig.*, No. 04-MD-1628, 2015

WL 5439090, at *2 (S.D.N.Y. Aug. 10, 2015) ("The decision whether a potential investigatory story is newsworthy is ultimately for the journalist to make . . . .").

Journalists may intervene in a long-closed matter because it has become more newsworthy based on present-day events. For example, in 2016, the Reporters Committee and Time Inc. moved to intervene and unseal judicial documents from the 1999 settlement of a class-action lawsuit related to the construction of Trump Tower in New York City. There was, at the time, increased public interest in the settlement because one of the named parties to the suit, Donald J. Trump, was running for president of the United States. *See Hardy v. Equitable Life Assurance Soc'y of U.S.*, 697 F. App'x 723, 724–25 (2d Cir. 2017).

In addition, investigative reporters and historians may dig deeper into a years-old case to provide a richer perspective on prior newsworthy events. For example, the Reporters Committee, along with journalist and historian Elliot Carlson and a coalition of historical organizations, successfully petitioned the Northern District of Illinois in 2014 to unseal transcripts of witness testimony given before a 1942 grand jury. *See Carlson*, 837 F.3d at 756–57. The grand jury testimony was part of the government's attempted prosecution of a *Chicago Tribune* reporter for alleged violations of the Espionage Act at the height of World War II, based on a front-page story that some believed revealed that the Navy had secretly cracked the code used by Japanese forces to encrypt their communications.

Id. Carlson used the transcripts—unsealed in 2016, seventy-four years after the grand jury was convened—in his book about the incident, to explain why the grand jury did not indict the *Tribune* reporter. *See* Katherine Rosenberg-Douglas, *1942 Tribune Story Implied Americans Cracked Japanese Code. Documents Show Why Reporter Not Indicted*, Chi. Trib. (Oct. 28, 2017), https://perma.cc/WG5X-RCAU.

Moreover, journalists and news organizations cannot immediately move to intervene and unseal judicial records in all sealed matters; the costs of litigation and the economics of the news industry mean they must be selective about which matters they pursue. As professor and veteran journalist Toni Locy tells journalists in her textbook on legal news reporting, "The reality is that the news media cannot afford to question every move made by a judge. A legal challenge can drag on for months, if not years, and few news organizations can afford to cover the cost." Toni Locy, *Covering America's Courts* 149 (2013). This is particularly true given the financial challenges faced by the news industry today. In a survey of top news editors of print and online news organizations across the country in 2015, almost two-thirds of respondents (65%) said their newsroom's ability to pursue legal action was less than it was a decade before. Knight Foundation, *In Defense of the First Amendment: U.S. News Leaders Feel Less Able to Confront Issues in Court in the Digital Age* (2016), https://perma.cc/NWT8-YXKY. Thus, it is often necessary for news organizations to wait to pursue litigation until they are certain

of the newsworthiness of the specific documents at issue. *See also Pansy*, 23 F.3d at 780 ("[I]n cases dealing with access to information, the public and third parties may often have no way of knowing at the time a confidentiality order is granted what relevance the settling case has to their interests.").

A rigid time limit for intervention would require journalists to move immediately to unseal anything that *could* possibly be newsworthy or risk losing the right to do so forever. Without the time and context to fully understand the scope and depth of their interests in a particular sealed case, such a rule risks journalists misjudging the news value of a specific case. If journalists seek to intervene in a case they later determine is of less pressing interest to the public, they burden courts with motions to intervene they might not otherwise file, increase costs on parties, and use their own limited resources at the expense of later pursuing other records that are ultimately of much greater interest. Conversely, if they decide not to seek the records immediately, they could be foreclosed from doing so in the future, when their (and the public's) interests in them become more apparent. *See Stallworth*, 558 F.2d at 264–65 (finding that, in a Rule 24 timeliness analysis, considering the time when a would-be intervenor first became aware of a case "would induce both too much and too little intervention," contrary to the Rule's purposes of fostering judicial efficiency and protecting interested non-parties). Additionally, in many cases, even when materials are properly sealed in

the first instance, the justifications for sealing frequently—if not always—diminish or disappear over time, making it necessary to be able to bring motions to unseal at a later date. For example, prejudicial pretrial publicity is no longer a concern after a case concludes, and "the interests in privacy fade when" concealed information subsequently comes to light. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494–95 (1975).

Here, even under a strict reading of *Stallworth*, Adler could not have known in 2018 that the extensive sealing in the case would persist; the district court stated in 2020 that it would review confidentiality designations before an "open trial," ECF No. 360 at 2, and filings had been ordered sealed as recently as June 7, 2021. ECF No. 435. The district court's holding that Adler's motion was untimely runs contrary to case law interpreting access-based motions to intervene and undermines public policy supporting the right of access to judicial records.

2. Adler's motion seeks to vindicate the public's presumptive right of access to judicial records and does not prejudice the parties to the litigation.

The district court further erred in finding that the remaining *Stallworth* factors also weighed against a finding of timeliness. First, the district court incorrectly credited Defendants-Appellees' claims that they would be prejudiced by Adler's motion because 1) litigating sealing post-judgment would result in "duplication, inefficiency, and increased costs," and 2) they "reasonably expected

the Court's orders regarding confidentiality and sealing to remain in place" when litigating and settling the case. Resp. in Opp'n to Loren Adler's Mot. to Intervene, ECF No. 450 at 5; *Team Fin., L.L.C.*, 2022 WL 16550318, at *4 (citation and internal quotation marks omitted). In doing so, the district court ignored *Stallworth*'s directive to consider "only that prejudice which would result from the would-be intervenor's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action," not "any prejudice that would result by virtue of intervention." 558 F.2d at 265. Defendants-Appellees would have spent time and money responding to Adler's motion whenever he filed it. *See Marshall*, 347 F. Supp. 2d at 1206. Further, "the continued closure of court records in perpetuity is an unrealistic expectation." *Van Etten*, 117 F. Supp. 2d at 1379–80. An unreasonable expectation of indefinite sealing cannot be the basis for an assertion of prejudice, given that records are presumptively public and courts retain an independent duty to review sealing orders long after a case settles. *BP Expl.*, 920 F.3d at 211.

The district court then erroneously concluded that Adler would suffer "little, if any, prejudice" if his motion to intervene was denied because his "interests related to sealing and confidentiality were adequately represented earlier in this case by Relators" and because the "'general' information[] . . . could be sought elsewhere, without unsealing." *Team Fin., L.L.C.*, 2022 WL 16550318, at

*4. Not only does the district court's conclusion fail to consider the public's presumptive right of access to judicial records, but also it is unsupported by the facts of the case. The parties, including Relators, agreed to a settlement that left the protective order in place and barred Relators from publicly discussing the case. ECF No. 442-1. The parties, including Relators, filed *dozens* of unopposed sealing motions, and none that support Adler's motion to unseal. ECF Nos. 448–49. Clearly, "prior to [Adler's] action," the public's interest in access "was not being pursued by any of the parties to the case." *Pub. Citizen*, 858 F.2d at 787. To the contrary, this case illustrates this Court's observation that "[m]ost litigants have no incentive to protect the public's right of access" and agreed-upon sealing is a "tradeoff [] common in settlement agreements." *BP Expl.*, 920 F.3d at 211–12.

Intervention is the only way that Adler, or any member of the press or public, can obtain access to the numerous sealed records in this case, which are of significant public interest. *See* Adler Decl. ¶ 5. Neither Defendants-Appellees' submissions nor the district court's decision indicate that the sealed records and the information they contain can be found elsewhere. *Cf. Wave Length Hair Salons of Fla.*, 2020 WL 10897933, at *2 (finding *Stallworth* supports intervention where "Movants would have no other vehicle by which to seek the unsealing of the documents at issue"). As such, the circumstances of this case

militate in favor of finding Adler's motion timely, particularly given the "strong public interest in the documents at issue, which concern an important public health issue." *Pub. Citizen*, 858 F.2d at 787; *see also Van Etten*, 117 F. Supp. 2d at 1380 (finding, under fourth *Stallworth* factor, that "[t]he public has a strong and legitimate interest in accessing the documents filed in this case because those documents may cast light upon" a matter "that profoundly impacts public health and safety"). As Adler's declaration stated, "the cost of medical care in the United States is of high public interest" and unsealing would help the public "be better informed about how health care billing works and how it can be improved." Adler Decl. ¶ 6. Additionally, the sealing and protective orders shield an extensive number of records in this case with little to no justification, making clear the need for a member of the public to raise, and the district court to address, the public's right of access.

If Adler's "motion is found to be untimely, future intervention attempts will almost certainly also be found to be untimely, and the public's right of access will go untested" and unprotected. *Pub. Citizen*, 858 F.2d at 787. Instead, parties would be able to "contract that right away" by agreeing to sealing and protective orders that would go unchallenged. *BP Expl.*, 920 F.3d at 211.

B. Motions to intervene for the limited purpose of vindicating the public's presumptive right of access to judicial records share a common question of law with the main action.

When, as here, a non-party member of the press or public moves to intervene for the limited purpose of seeking access to judicial records, whether such access should be granted serves as the common legal question between the parties and intervenors for purposes of Rule 24(b). *See Comm'r, Ala. Dep't of Corr.*, 918 F.3d at 1173 n.12; *Flynt*, 782 F.3d at 967; *Jessup*, 227 F.3d at 998–99; *Nat'l Children's Ctr.*, 146 F.3d at 1047; *Pansy*, 23 F.3d at 778; *Beckman Indus.*, 966 F.2d at 474 (finding that, because movant will not become a party, "[t]here is no reason to require such a strong nexus of fact or law" in access-related motions to intervene); *United Nuclear Corp*., 905 F.2d at 1427; *Meyer Goldberg*, 823 F.2d at 164. "The original parties' claim to secrecy is the obverse of the intervenors' claim of the right to know." *In re Franklin Nat'l Bank Sec. Litig*., 92 F.R.D. 468, 471 (E.D.N.Y. 1981), *aff'd sub nom.*, *F.D.I.C. v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982).

In holding otherwise, the district court erroneously relied on this Court's inapposite decision in *Deus* to find that "[t]he desire to intervene to pursue the vacating of the protective order and/or the unsealing of the record is not a justiciable controversy or claim." *Deus*, 15 F.3d at 525. However, as discussed above, *see* Section II, *supra*, the would-be intervenor in *Deus* did not seek to

assert the public's right of access to judicial records; rather, he sought access to sealed materials for use in another case against the same defendants—records he could obtain through discovery in that lawsuit.

Here, Adler seeks intervention to assert and vindicate the public's presumptive right of access to sealed judicial records that the parties requested be sealed in the first place—a common legal question under Rule 24(b). If Adler does not satisfy this element of Rule 24(b), no member of the press or public can do so, rendering the essential tool of intervention "otherwise unavailable" to the detriment of "the public's right to know," and the press's right to inform them. *In re Franklin Nat'l Bank*, 92 F.R.D. at 471 (citation and internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, amici urge the Court to reverse the district court's order denying Adler's motion to intervene.

Dated: February 14, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7) because it contains 6,473 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2.

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Dated: February 14, 2023

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CERTIFICATE OF SERVICE

I, Katie Townsend, hereby certify that I have filed the foregoing Brief of Amici Curiae electronically with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. I certify that all participants in this case are registered as CM/ECF Filers and that they will be served by the CM/ECF system.

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