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.

Appeal from the United States District Court for the Eastern District of Texas, No. 2:16-CV-432

REPLY BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. R. 28.2.1, the number and style of the case are as follows: *United States, ex rel. Caleb Hernandez & Jason Whaley v. Team Finance, L.L.C.*, 5th Cir. No. 22-40707.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

1. **Plaintiffs**

United States of America

State of Connecticut

State of Florida

State of Georgia

State of Indiana

State of Louisiana

Commonwealth of Massachusetts

State of Tennessee

State of Texas

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Jason Whaley, Relator

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3. Defendants-Appellees

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Team Health, Inc.

Team Health Holdings, Inc.

Ameriteam Services, LLC

HCFS Health Care Financial Services, LLC

Quantum Plus, LLC (d/b/a TeamHealth West)

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7. Other Interested Parties

Atlantic Monthly Group, L.L.C.

BuzzFeed, Incorporated

First Amendment Coalition

Foundation for National Progress

Freedom of Information Foundation of Texas

Freedom of the Press Foundation

Institute for Nonprofit News

Media Institute National Newspaper Association

National Press Photographers Association

New York Times Company

News/Media Alliance

Pro Publica, Incorporated

Reporters Committee for Freedom of the Press

Society of Environmental Journalists

Society of Professional Journalists

Texas Association of Broadcasters

Texas Press Association

Tully Center for Free Speech

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Date: April 19, 2023

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INTRODUCTION

Team Health fails to grapple with the Fifth Circuit jurisprudence recognizing the fundamental and *continuous* public right of access to court records, as well as the Supreme Court's admonition that "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion'" from judicial proceedings. *Globe Newspaper Co. v. Super. Ct. for Norfolk Cty.*, 457 U.S. 596, 609 n.25 (1982).

Much of the court record in this case, including parts of the complaint, summary judgment briefing, and even the court's order on summary judgment, remain sealed without explanation, much less "a case-by-case, 'document-by-document,' 'line-by-line' balancing of 'the public's common law right of access against the interests favoring nondisclosure.'" *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 418 (5th Cir. 2021). Team Health's position is, effectively, "too bad, the case closed." But this Court, and every other circuit court, has recognized that the public's common law and First Amendment right of access to court records does not disappear just because a case closes.

Team Health's arguments to the contrary are unconvincing. First, Team Health hardly defends the district court's Article III standing analysis. It does not meaningfully respond to Adler's argument that courts have an inherent supervisory power to unseal court records after a case has closed, and that under the Fifth Circuit's decision in *Ruiz v. Estelle*, intervenors do not need to establish Article III standing if the court already has authority to grant the requested relief.

Second, Team Health's argument that Adler did not raise a "claim" as required by Rule 24(b) is inconsistent with the plain meaning of the text as well as the case law in this circuit and every other circuit holding that permissive intervention under Rule 24(b) is the proper mechanism for third parties to move to unseal court records.

Finally, Team Health cannot fallback on the district court's timeliness holding. Every other circuit court to address the issue has recognized that motions to intervene to unseal court records do not raise the same timeliness concerns as motions to intervene on the merits. And even if timeliness was a concern, the district court miscalculated Adler's purported delay and erred in assessing prejudice. The district court hearing transcript reveals Team Health's argument to the lower court

was that it should *temporarily* seal the documents pending trial. The district court did just that, stating it would revisit questions of confidentiality later. Thus, no proper sealing analysis has ever been conducted and Team Health could not justifiably rely on the court's provisional sealing orders pending trial.

JURISDICTION

The parties agree that this Court has "provisional jurisdiction" to review the district court's order denying permissive intervention as well as the district court's determination that Adler lacked Article III standing. *See* Response Br. at 5. This Court is "authorized to decide whether the petition[] for leave to intervene [was] properly denied." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977). If this Court "find[s] that the district court was mistaken or clearly abused its discretion, then [it] retain[s] jurisdiction and must reverse." *Id.*

ARGUMENT

I. Team Health Continues to Misconstrue Fifth Circuit Law on Standing.

A. Adler Does Not Need Article III Standing Because the Court Already Has Authority to Unseal the Court Records.

Team Health fails to meaningfully respond to Adler's argument that the district court erred in denying his motion to intervene for lack of Article III standing. The Opening Brief outlined a simple, two-step argument: (1) courts have inherent supervisory power to unseal court records even after a case is closed and (2) under Fifth Circuit law, intervenors need not establish Article III standing if the court already has authority to grant the requested relief. Because the district court already has authority to grant the relief requested in this case, the unsealing of court records, Adler does not need to establish that the court has subject matter jurisdiction by way of Article III standing.

Team Health does not refute the first premise. Nor could it. *See* Opening Br. at 21-23. The U.S. Supreme Court has held that "[e]very court has supervisory power over its own records and files." *SEC v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)). And it is well

established that "[e]ven if a court loses jurisdiction over the litigation, it maintains its 'inherent supervisory powers.'" *Zimmerman v. City of Austin*, 969 F.3d 564, 569 (5th Cir. 2020). Accordingly, the Fifth Circuit has held that courts may unseal court records after a case closes. *See* Opening Br. at 22 (citing cases).

This leaves only the second premise: That under binding Fifth Circuit precedent, movants seeking to intervene in a case need not establish Article III standing if the court already has authority to grant the relief that is sought. This principle was established in *Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998), a case that Team Health fails to discuss in its brief. In *Ruiz*, this Court considered whether Article III standing is needed to intervene on the merits of an action. The Court explained that because Article III standing requirements exist "to guarantee the existence of a 'case' or 'controversy' appropriate for judicial determination," ensuring the court does not overstep its jurisdiction, intervenors need not establish Article III standing if the relief they seek is already being sought by a party with standing to do so. *Id.* In other words, because the court already had jurisdiction to grant the relief that

the intervenors were seeking, it was superfluous for the intervenors to satisfy Article III standing.

The Court's analysis in *Ruiz* applies with equal force in this case. *Ruiz* outlines a framework for when the court should require a party to establish Article III standing to intervene; the appropriate inquiry under that framework is not about the status of the intervenor party, but whether the Court itself would be overstepping if it granted the requested relief. In *Ruiz*, there was no need for the intervenor to have Article III standing because there was already an Article III case or controversy before the Court that gave it the authority to grant the relief the intervenor requested. Similarly here, no intervenor standing is required because the Court has supervisory power that gives it authority to grant the relief Adler requests.

Instead of engaging with this argument, Team Health claims that Adler forfeited it because he didn't ask the court to exercise its inherent authority. Response Br. at 65. But Team Health cites no authority that a party needs to expressly invoke a court's inherent authority as some sort of heightened pleading requirement. Regardless, Adler *did* ask the court to exercise its inherent authority over the court records. *See* Mot. to

Intervene, ROA.2926 ("The Court has continuing jurisdiction over this matter for the purpose of . . . managing its own docket"); *Id.*, ROA.2931 ("There is no Article III concern here because the court has retained jurisdiction, and it has the power to regulate its own docket" and "because document unsealing is collateral to the main action"); *see also* Reply Br., ROA.3055 ("Unsealing is a matter of the court's inherent supervisory power, not the standing of the would-be intervenor.").

Team Health also asserts—with no supporting legal authority—that exercises of inherent authority are discretionary. Response Br. at 65-66. This contention is irrelevant. The degree of discretion a court has in deciding to unseal court records has no bearing on Adler's argument that the district court erred, as a matter of law, in dismissing his motion to intervene for lack of Article III standing.

Because courts have supervisory authority to unseal court records after a case is closed, and the Fifth Circuit only requires intervenors to establish Article III standing when the court does not already have the power to grant the intervenors' requested relief, this Court should hold that the district court erred in dismissing Adler's motion for lack of Article III standing.

B. Team Health's Reliance on *Newby* and *Deus* is Misplaced.

Without engaging in the two-step argument identified above, Team Health reasserts that "in the absence of a live controversy in a pending case, an intervenor would need standing to intervene," citing *Newby v. Enron Corp.* and *Deus v. Allstate Insurance Co.* Response Br. at 60. But Team Health fails to address Adler's arguments as to why these cases do not control.

First, Team Health never addresses that the quote it relies on from *Newby* is pure dicta. *See* Opening Br. at 25. Nor does it address that the question of whether an intervenor needs to establish Article III standing was never raised or considered in *Deus*. Opening Br. at 26. In *Deus*, the movant never argued that it did not need to establish Article III standing, the issue was never briefed, and the words "Article III" do not appear in the court's analysis. And any assumptions *Deus* made regarding intervenor standing in its very brief analysis of the motion to intervene hold no weight because *Deus* predates *Ruiz*.

Finally, Team Health overlooked a key distinguishing factor between this case and *Newby*, *Deus*, and the unpublished, non-binding decision in *Allen-Pieroni v. White*, 694 F. App'x 339 (5th Cir. 2017). In

none of those cases did the movant invoke the public's right of access to court records. *Newby* and *Allen-Pieroni* did not involve motions to intervene to unseal; the intervenors sought to modify a protective order to gain access to discovery. *See Newby v. Enron Corp.*, 443 F.3d 416, 417 (5th Cir. 2006); *Allen-Pieroni*, 694 F. App'x at 340. That distinction matters because while there is binding case law about a court's inherent authority to continue to defend the public's right of access to court records after a case is closed, there is no such case law about a court's inherent authority to entertain a private party's motion seeking access to discovery material that was never filed on the court record. Opening Br. at 22-23.

Deus is also distinguishable. There, the intervenors never invoked the public's right of access to the court record. Two entities "moved to intervene in the lawsuit for the express purpose of having the protective order lifted from all of the documentary evidence and deposition testimony stemming from the instant lawsuit." Br. of Appellants, Nat'l Neighborhood Office Agent's Club, Inc. & Randy J. Lane, at 4, *Deus v. Allstate Ins. Co.*, 15 F.3d 506 (5th Cir. 1994) (No. 92-4795), 1992 WL 12128687. The briefing on appeal was focused entirely on whether the

district court had authority to grant the motion to intervene while an appeal in the case was pending. *See generally id.* The movants never asserted the public's common law or First Amendment right to access the court record. *Id.*

The Court's decision in *Deus* was based on that missing element. The Court held that the motion to intervene should be denied regardless because the movants had "no rights or claims" and only wanted "to gain access to documents and testimony that are subject to the protective order." *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 525 (5th Cir. 1994). The case here stands in stark contrast because Adler asserts, on behalf of himself and the general public, a common law and First Amendment right to access documents sealed on the court record. *See* ROA.2962.

Thus, the analyses in *Deus, Newby*, and *Allen-Pieroni* are not controlling or applicable, and this Court should instead rely on the extensive, thoughtful analysis in *Ruiz*, which postdates *Deus*, and lays out the proper framework for determining when a movant-intervenor needs Article III standing.

C. Regardless, Adler Has Article III Standing.

Team Health's entire argument that Adler lacks Article III standing relies on *Deus*, but Team Health's brief fails to respond to the post-*Deus* Fifth Circuit case law holding that an intervenor has Article III standing to intervene and challenge court orders that deny them access to information to which they have a legal right. *See Davis v. E. Baton Rouge Par. Sch. Bd.*, 78 F.3d 920, 926-27 (5th Cir. 1996); *United States v. Aldawsari*, 683 F.3d 660, 664-65 (5th Cir. 2012). The Court "need only find that the [order] being challenged presents an obstacle to the [intervenor's] attempt to obtain access." *Ford v. City of Huntsville*, 242 F.3d 235, 240 (5th Cir. 2001) (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994)). Other courts have likewise held that because there is a public right of access to court records, anyone who seeks and is denied access to judicial records sustains an injury. *See* Opening Br. at 32.

Nor does Team Health address the argument that the sealing orders harm Adler by denying him access to information that is critical to his research and cannot be found elsewhere, and harms both Adler and the public by preventing them from being informed about how healthcare

billing works and how it can be improved to lower costs and minimize fraud. *See* Opening Br. at 32-33. Thus, this Court could find that Adler satisfies the Article III standing requirement, and leave questions of whether Article III standing is necessary to intervene to unseal court records for another day.

II. Adler Satisfies the Rule 24(b) Standard for Permissive Intervention.

In interpreting Rule 24(b), Team Health takes a radical, atextual position that conflicts with over a century of common law and every circuit court in the country, including this one. Rule 24(b) permits intervention when a person "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). This Court and every other circuit court to have considered the issue has recognized permissive intervention under Rule 24(b) is the proper mechanism for third parties to vindicate their longstanding common law and First Amendment rights to access court records. *See In re Beef Indus. Antitrust Litig.*, 589 F.2d 786, 789 (5th Cir. 1979); *Newby*, 443 F.3d at

422; *EEOC v. Nat'l Children's Ctr., Inc.,* 146 F.3d 1042, 1045 (D.C. Cir. 1998) (citing cases).[1]

A. Adler Has a Common Law and First Amendment Claim.

Team Health first makes the bold argument that Adler has no claim. Response Br. at 48. Team Health defines claim, per Black's Law Dictionary, as an "interest or remedy recognized at law." *Id.* This Court and the U.S. Supreme Court have held that members of the public, like Adler, have a legal right—*an interest recognized at law*—to access court records. *See Bradley ex rel. AJW v. Ackal*, 954 F.3d 216, 224 (5th Cir. 2020) ("The public 'has a common law right to inspect and copy judicial records.'"); *see also* Opening Br. at 30-31. The public's right of access dates back to English common law and, before that, Roman law. *See Binh Hoa Le*, 990 F.3d at 418. Thus, according to longstanding common law and

[1] *See also Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 783 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2nd Cir. 1979); *Pansy*, 23 F.3d at 778; *In re Beef Indus. Antitrust Litig.*, 589 F.2d at 789; *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162 (6th Cir. 1987); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896 (7th Cir. 1994), *superseded on other grounds as recognized by Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009); *Flynt v. Lombardi*, 782 F.3d 963, 965 (8th Cir. 2015); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992), *cert denied*, 506 U.S. 868 (1992); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Comm'r, Ala. Dep't of Corr. v. Advance Local Media, LLC*, 918 F.3d 1161, 1171 (11th Cir. 2019).

binding circuit precedent, Adler has asserted a claim—an interest recognized at law—by moving to unseal court records.

Team Health's interpretation of the "claim or defense" requirement finds virtually no support in the law. For that reason, Team Health relies on a single source, meeting minutes from 1946 from the Advisory Committee on Civil Rules, in which two Committee members rejected as too broad a proposal to permit intervention for an applicant with a pecuniary or other interest that may be adversely affected by the litigation. Response Br. at 49. Based on this, Team Health concludes that a "claim or defense" requires something more than an interest in the litigation. But Adler has more than just an interest: He has an interest *recognized at law*—a legal right, a claim—to access the underlying court records.

Team Health also has the argument backwards. This Court and the Supreme Court have held that the "claim or defense" language under Rule 24(b) is *broader* and *more* flexible than having a pecuniary or personal interest in the outcome of the litigation. Rule 24's permissive intervention provision "has been construed liberally" and "the Supreme Court has said that it 'plainly dispenses with any requirement that the

intervenor shall have a direct personal or pecuniary interest in the subject of the litigation.'" *In re Estelle*, 516 F.2d 480, 485 (5th Cir. 1975) (quoting *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940)).[2]

Indeed, "the intervenor-by-permission does not even have to be a person who would have been a proper party at the beginning of the suit." *Id.* (quoting Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1911). The test for permissive joinder of parties requires "a common question of law or fact and some right to relief arising from the same transaction," but "only the first is stated as a limitation on intervention." 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1911 (2023). Thus, a "claim" does not require the intervenor to have a claim against one of the named parties or a claim on the merits.

[2] *SEC v. U.S. Realty & Improvement Co.* concluded that because the district court had a duty to dismiss the Chapter XI bankruptcy to protect the public interest, the SEC—despite having no direct interest in the outcome of the litigation—was entitled to intervene to represent the public interest. *See* 310 U.S. at 460. Similarly, here, the district court has a duty to consider the public interest in making its sealing determinations, and Adler should be permitted to intervene to represent the public's interest.

B. Adler's Claim Shares Questions of Fact and Law with the Main Action.

Not only does Adler have a claim to access court records, but that claim shares questions of fact and law with the main action. Team Health fails to respond to the Opening Brief's position that by challenging the court's sealing orders in the main action, Adler's claim *necessarily* shares common questions of law and fact with the main action. Opening Br. at 38. Team Health's brief only further confirms this point because it states that the parties already litigated questions of confidentiality and sealing. *See* Response Br. at 20-21, 35, 44, 55.

Ignoring the actual text of Rule 24(b)'s "nexus" requirement, Team Health makes a policy argument about the supposed purpose of the rule—to avoid multiple lawsuits—and argues that Adler's intervention "seeks to expend judicial resources in [a] matter that has no bearing on him." Response Br. at 51-52. Again, Team Health ignores well-established law that members of the public, like Adler, *do* have a legal interest in access to court records. *See Binh Hoa Le*, 990 F.3d at 418. And permitting intervention *avoids* multiple lawsuits because it means Adler does not need to file a separate mandamus action to vindicate his right of access. As explained below in Part III.B, Adler best preserved judicial

resources by waiting to see if the court itself would, consistent with its duty under Fifth Circuit law, unseal the records after the parties settled.

Team Health also fails to distinguish *Newby*, where the Fifth Circuit held that the intervenor's claim for access to discovery shared common questions of law and fact with the main action. 443 F.3d at 422. Team Health argues there was a nexus in that case because the intervenor, the Texas Board of Public Accountancy, was "investigating alleged audit failures that may have led to Enron's collapse to determine whether any Texas-licensed CPAs violated the Public Accountancy Act or the Board's rules." Response Br. at 52. But that is not materially different than this case: Adler is investigating how private equity-owned companies like TeamHealth operate and bill Medicare and Medicaid programs to further his academic research and help shape public policy. ROA.2978-2979.

If anything, the nexus is stronger in this case because there is a clear shared question of law: Whether there are compelling reasons for sealing that outweigh the public's right of access. A court must analyze that question any time it seals parts of the court record, and Adler is directly challenging that legal determination.

C. Team Health's Other Arguments Fare No Better.

i. Adler Complied with Rule 24(c) Pleading Requirements.

Team Health, citing an unpublished, out-of-circuit district court decision, argues that Adler failed to file a pleading identifying his claim as required by Rule 24(c). Response Br. at 56. But that case, and all the others Team Health cites as examples of where courts have strictly construed Rule 24(c)'s pleading requirement are cases where the movant was intervening on the merits. *See* Response Br. at 57-58. That is not this case.

Where a movant seeks to intervene for a collateral purpose, like the unsealing of court records, it is enough that the movant "describes the basis for intervention with sufficient specificity to allow the district court to rule" and "its failure to submit a pleading is not grounds for reversal." *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992); *see also Ex Parte Uppercu*, 239 U.S. 435, 441 (1915) (pre-FRCP case holding third-party assertion of right of access to discovery materials "requires no particular formality").

Indeed, the Fifth Circuit, in cases where the intervenor seeks collateral relief and is not pursuing a claim on the merits, has only

required a formal motion to intervene. *See In re Beef Indus. Antitrust Litig.*, 589 F.2d at 789; *Newby*, 443 F.3d at 422. In fact, even when an intervenor is not seeking collateral relief, "this court has traditionally 'been lenient in hearing the appeals of parties who have failed to fulfill the provisions of Rule 24(c)." *SEC v. Funding Res. Grp.*, No. 99-10980, 2000 WL 1468823, at *3 (5th Cir. Sept. 8, 2000) (quoting *Int'l Marine Towing, Inc. v. S. Leasing Partners, Ltd.*, 722 F.2d 126, 129 (5th Cir. 1983)); *see also DeOtte v. Nevada*, 20 F.4th 1055, 1067 n.2 (5th Cir. 2021).

Here, Adler's position was set forth in a formal motion to intervene, an attached motion to unseal (which is akin to a complaint given the nature of the relief he seeks), and a supporting declaration setting out Adler's legally-recognized interest in the court records at issue.[3]

ii. Adler's Intervention Does Not Prejudice the Adjudication of Team Health's Rights.

Team Health also argues that it would be unduly prejudiced if Adler was permitted to intervene to move to unseal court records because it

[3] Team Health also waived this argument below. Team Health claims that *Adler* waived any response regarding Rule 24(c)'s pleading requirements. But in the district court proceeding, Team Health did not argue—as it does now—that Adler failed to file a "pleading." Team Health only argued that by using the term "pleading," Rule 24(c) contemplated that the intervenor would join or oppose a claim or defense, *see* ROA.3027, and Adler responded to that argument, *see* ROA.3058. It is Team Health, not Adler, that waived this argument.

would have to "relitigate issues that [it] justifiably thought were resolved." Response Br. at 58. But Rule 24(b)(3) states that "the court must consider whether the intervention will unduly delay or prejudice *the adjudication* of the original parties' rights." There is no such prejudice here as the parties already settled the underlying dispute. Nonetheless, as explained below in Part III.C, Team Health was not justified in thinking the issue of sealing was resolved.

* * *

Ultimately, it is well-established that "nonparties to a case routinely access documents and records under a protective order or under seal in a civil case through motions for permissive intervention." *Newby*, 443 F.3d at 424. But Team Health's argument would shut the door on that possibility, leaving the public without any means of vindicating their common law and First Amendment rights to access court records. This position is not only inconsistent with the text of Rule 24(b) but also the Supreme Court's express instruction that "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion'" from the proceedings or access to documents. *Globe Newspaper Co.*, 457 U.S. at 609 n.25.

III. The District Court Abused its Discretion in Denying Adler's Motion to Intervene as Untimely.

Team Health tries to recast this case as nothing more than a district court exercising its discretion to find a motion to intervene untimely. But Team Health concedes that a district court abuses its discretion if it "bases its decision on an error of law or a clearly erroneous assessment of the evidence." *United States v. Hill*, 63 F.4th 335, 345 (5th Cir. 2023). The district court did both.

A. The District Court Failed to Consider the Limited, Collateral Purpose of Adler's Motion to Intervene

Whether the *Stallworth* factors are applicable is a red herring. Courts can recognize the unique nature of a timeliness inquiry for motions to intervene to unseal court records in context of the *Stallworth* factors or independent of the *Stallworth* factors. Here, the district court did neither. It relied on delay periods from cases involving motions to intervene on the merits and found no unique circumstances militating in favor of timeliness. *See* ROA.3100-3101.

The purpose of the timeliness requirement—to prevent prejudice in the adjudication of the rights of the existing parties—is not at issue when a party moves to intervene for the limited purpose of unsealing court

records; as a result, courts have routinely found motions to intervene to unseal court records timely even when they are filed long after a case closes. *See* Opening Br. at 43-45 (citing cases).

Team Health argues that these cases do not go so far as to show it is necessarily an abuse of discretion if the court refuses to grant a motion to intervene to unseal court records after a case is closed. *See* Response Br. at 29-30. No such blanket rule is necessary. These cases reflect, as a matter of law, that motions to intervene to unseal court records are not subject to the same stringent timeliness analysis as motions to intervene on the merits. In other words, the collateral nature of the relief creates a unique circumstance under the fourth *Stallworth* factor that a court should consider in assessing timeliness. Here, the district court failed to consider that unique circumstance. *See* ROA.3101.

Team Health has also not cited a single case where a court denied a motion to intervene to unseal court records solely on timeliness grounds. But, as Adler has explained, courts routinely allow parties to intervene to unseal court records years after a case has closed. *See* Opening Br. at 43-45. In one such case, the court held that the district court abused its discretion by denying a motion to intervene to unseal

court records on the grounds that it was filed six months after the case closed. *See Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992).

Team Health's only response to *Brown* is that there is no significant timeliness analysis in the decision—but that proves the point. As here, the district court in *Brown* held the motion to intervene was untimely under *Stallworth* because the parties had since settled the case. *See id.* at 1015. The Eleventh Circuit then held that was immaterial because "[o]nce a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case." *Id.* at 1016. "[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 in the event the record has been improperly sealed." *Id.* No timeliness analysis was necessary because the public has a continuous right to access court records and that right does not dissipate when a case settles.

Team Health also makes much of the fact that *Bradley ex rel. AJW v. Ackal*, did not hold that a different legal standard applies to motions to intervene to unseal records. Adler never argued it did; indeed, Adler

stated that the "Fifth Circuit has never addressed how the timeliness analysis should be applied in cases where a party seeks to intervene solely for the purpose of gaining access to the court record." *See* Opening Br. at 42. *Bradley* does, however, explain that, unlike a claim on the merits, the public's right of access is continuous and courts may modify sealing and protective orders long after a case has ended. *See* 954 F.3d at 224. In other words, motions to intervene to unseal are not on the same timeline as motions to intervene on the merits.

This Court should follow every other circuit court to address the issue and hold that a motion to intervene to unseal does not implicate the same timeliness concerns as a motion to intervene on the merits, and that the district court erred, as a matter of law, in not considering the unique, collateral purpose of Adler's motion to intervene.

B. The District Court Erred in Measuring Adler's Purported Delay.

To the extent that it is necessary to consider delay in filing a motion to intervene to unseal, the district court applied the wrong standard for assessing Adler's delay. An intervenor's delay should be measured from the time that "she became aware that her interests 'would no longer be protected'" without intervening. *Stallworth*, 558 F.2d at 264 (quoting

United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 (1977)); *see also* Opening Br. at 46-47. But the district court measured Adler's purported delay from when the court entered the protective order and provisional sealing orders.

Counting Adler's delay from (at best) when the court's first sealing order was entered is wrong for the same reason it's wrong to count from when an intervenor first learns of the pendency of the case. At that stage, "the probability that [the potential intervenor] will misjudge the need for intervention is correspondingly high" and "[o]ften the protective step of seeking intervention will later prove to have been unnecessary," resulting in "needless prejudice to the existing parties and the would-be intervenor." *Stallworth*, 558 F.2d at 265. "[S]carce judicial resources would be squandered, and the litigation costs of the parties would be increased." *Id.* This is particularly true where, as here, the court expressly states its decision is temporary and that it sees no need to lift confidentiality "at this time," ROA.2683, given concerns about "try[ing] the merits of th[e] case in the media." ROA.4670 (lines 7-8); *see also* ROA.4677 (lines 7-13).

Instead of addressing the argument that the district court miscalculated Adler's purported delay, Team Health argues that granting intervention here would encourage bad behavior by rewarding prospective intervenors who "sit on their rights." Response Br. at 31. But under that logic, members of the public would be *required* to seek just the sort of premature intervention to unseal court records that *Stallworth* called "unnecessary," and which would disrupt pending litigation and the court's discretionary judgment in sealing evidence prior to a trial. Adler followed the rule set forth in *Stallworth* and did not intervene until it became apparent that the court was not going to conduct the proper sealing analysis even now that no trial is forthcoming.

C. The District Court Erred in Assessing the Prejudice to Team Health.

The district court's conclusion that permitting intervention would force Team Health to relitigate questions it justifiably thought were resolved is based on both a clearly erroneous assessment of the facts and a misunderstanding of the law. Team Health references the transcript of the hearing that was held on the confidentiality and related sealing determinations as evidence that this issue was already litigated and resolved. *See* Response Br. at 40-41. But that transcript demonstrates,

clear as day, that Team Health did not think the question of sealing was resolved and, as a matter of law, the issue was not resolved. *See* ROA.4652-4677.

Team Health's continued insistence that the parties already litigated the issue of whether the public's right of access outweighs the need for secrecy misrepresents the facts. The hearing transcript confirms that documents marked confidential pursuant to the protective order were then automatically filed under seal on the court record when they were filed in support of various motions. *See* ROA.4658 (lines 13-21); *see also* ROA.4668 (lines 1-11). Relators challenged the underlying confidentiality designation as a means of getting those court records unsealed. *Id.*

Team Health's argument at the lower court hearing was that the higher standard required for sealing court records only applies once the parties go to trial and "that's just not the point that we're at yet in the case." ROA.4654 (lines 3-4). The company argued that whether disclosure of the documents would create a risk that outweighs the strong presumption in favor of public access is a "determination that will happen either much closer to or at trial." ROA.4655 (lines 22-23). Team Health

went on to explain that "at that time, relators surely have the right to object and can argue that they don't think we've met that burden, *but that's a dispute for a later day*." ROA.4656 (lines 16-18) (emphasis added); *see also* (lines 5-7) ("I think it's appropriate under the Court's standing order when we get to trial, but not at this point."); ROA.4676 (lines 1-2) ("they are jumping ahead").

In response, the district court expressed concerns about "try[ing] the merits of this case in the media." ROA.4670 (lines 7-8). This a common justification for keeping certain documents sealed prior to a trial. The district court judge further explained that "he is not prejudging whether th[e] confidentiality is such that would prevent it from being used during an open trial during the trial of the merits, but I see no reason to strike the confidential designation that the Defendants have placed on these documents now." ROA.4677 (lines 7-13). He concluded that "as of now, I see no basis to strike across the board the confidentiality." ROA.4677 (lines 20-21). "*So to that extent*, the motions are both granted." ROA.4677 (line 24) (emphasis added).

This transcript reveals two things. First, it shows that Team Health did not think questions of sealing were permanently resolved. Team

Health repeatedly said that whether documents should be sealed from the public in light of the strong presumption of public access is a question for another time. Thus, the district court's finding in this case that Team Health justifiably believed that questions regarding sealing were resolved is clearly erroneous.

Second, the transcript reveals a fundamental misunderstanding of the law: The conflation of the standard for a protective order and the standard for sealing court documents. The court appeared to believe that anything that was filed under seal because it was marked confidential could remain under seal, at least until trial.

But if documents marked confidential are then filed on the court record in support of a motion for summary judgment, as so many documents were in this case, then those documents must be made public—and may *only* remain under seal if the sealing party can justify to the court why there is a compelling need for secrecy that outweighs the public's right of access. To the extent the court found that Team Health could justifiably rely on those sealing orders because an open trial never happened, the court's decision was based upon an erroneous legal

assumption that documents marked confidential could remain sealed on the court record.[4]

D. The District Court Erred in Assessing the Prejudice to Adler.

The district court failed to consider the strong public interest in access to information regarding allegations of fraud by one of the largest providers of emergency department services in the country, impacting the cost of Medicaid and Medicare and ultimately the cost of health care for Americans. *See* Opening Br. at 53. The district court found Adler's interests were adequately represented, but the hearing transcript shows that Relators failed to raise important arguments regarding the legal standard for sealing court records, couching their argument instead in the context of challenging confidentiality designations under the protective order. *See* ROA.4652-4677. It also shows that the Court made only a provisional decision pending trial without determining whether there were reasons for secrecy, despite no forthcoming trial, that outweigh the public's right of access. ROA.4677.

[4] Adler did not waive the argument that the district court never fully resolved the confidentiality and sealing issues. *See* ROA.3052 (arguing Team Health could not have expected the documents to remain sealed and "the mere fact that a case was, at one time, placed under seal is not a reason, in and of itself, to indefinitely maintain that seal and thus negate the public's access to judicial records").

E. Adler Did Not Waive Arguments Regarding the District Court's Application of *Stallworth*.

Contrary to Team Health's assertion, Adler did not waive any argument that the district court misapplied the *Stallworth* factors. While Adler argued that *Stallworth* does not apply, he proceeded to make substantive arguments for each factor, including arguments about the length of the purported delay (first factor), lack prejudice to Team Health (second factor), and the prejudice Adler and the public would suffer if the motion were denied (third factor). *See* ROA.2930-2931; ROA.3050-3053. Adler's primary argument throughout has been that a motion to intervene to seek collateral relief like unsealing is a unique circumstance that militates in favor of timeliness (fourth factor). *Id.*

The fact that Adler did not refer to *Stallworth* factors each time it made these arguments does not constitute waiver. *See Templeton v. Jarmillo*, 28 F.4th 618, 622 (5th Cir. 2022) ("Whether or not an issue is preserved in the trial court does not depend on what authorities the arguing party cites."). Based on Adler's arguments, the Court could conclude that the district court erred in applying *Stallworth* at all or that it erred in its application of the *Stallworth* factors. Either way, this Court should reverse.

CONCLUSION

For the foregoing reasons, Movant-Appellant Adler respectfully requests that this Court reverse the district court's order denying the motion to intervene and remand for further proceedings.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on April 19, 2023.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a) because this brief contains 6,497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook 14-point font.

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