No. 14-1187

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Larry C. Flynt,

Movant-Appellant,

v.

George A. Lombardi, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Missouri
(2:12-cv-04209 BP)

# Opening Brief of Movant-Appellant

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## Summary of the Case and Request for Oral Argument

Larry C. Flynt moved to intervene in the underlying case for a limited purpose. He wished to ask the district court to unseal twenty docket entries hidden from public view, including the entry for an order dismissing some claims and refusing to dismiss others.

Consistent with the guidance of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits, Flynt sought permissive intervention under Federal Rule of Civil Procedure 24(b)(2) for the limited purpose of filing a motion to unseal. No party opposed Flynt's motion to intervene. Contrary to the precedents of those circuits, the district court ultimately denied intervention by a docket-text order stating: "A generalized interest in a subject of litigation does not justify intervention."

Because the district court's denial of Flynt's motion to intervene for the limited purpose of seeking to unseal records conflicts with the decisions of the circuit courts that have addressed the issue and there is no binding precedent in this Circuit, oral argument is appropriate.

Appellant requests oral argument of fifteen minutes.

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## Jurisdictional Statement

The Complaint in the underlying litigation alleges that Missouri's execution protocol violates provisions of the federal constitution. Thus, the district court had jurisdiction pursuant to 28 U.S.C. § 1331.

This Court's jurisdiction arises under 28 U.S.C. § 1291 because the orders denying Flynt's motion to intervene for the limited purpose of asking the district court to unseal docket entries and his motion to vacate are final orders. "[W]hen an order prevents a putative intervenor from becoming a party in *any* respect, the order is subject to immediate review." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987); *accord Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 776 (3d Cir. 1994) (finding jurisdiction under 28 U.S.C. § 1291 over order denying motion to intervene and motion to vacate or amend). The district court conclusively rejected Flynt's request to participate in the case for the purpose of asking the court to unseal records. *See In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 571 (8th Cir. 1988) (holding order denying motion to unseal is final for purposes of appeal).[1]

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[1] Additionally, the order is final for purposes of appeal because Flynt's claim could have been treated by the district court as a new civil case, and, had it been treated as such, the order denying his claim would have been final in that case. In these circumstances, "[n]o jurisdictional significance should attach simply because the district court chose to treat appellants as intervenors[.]" *Matter of New York Times Co.*, 828 F.2d 110, 113 (2d Cir. 1987).



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In the alternative, the district court's orders are appealable as collateral orders. *See Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992).

Flynt's motion to intervene was denied on November 20, 2013. Flynt Appendix A88. Flynt's motion to vacate was filed on November 22, 2013, and denied on December 26, 2013. *Id.* at A89-A93. Flynt's notice of appeal was filed on January 24, 2014. *Id.* at A94-A95. Accordingly, the appeal is timely.



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## Statement of Issue Presented for Review

I. Whether the district court abused its discretion by denying Flynt's unopposed motion to intervene for the limited purpose of asking the court to unseal docket entries.

**Most Apposite Cases**:

*In re Neal*, 461 F.3d 1048 (8th Cir. 2006)

*Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994)

*Jessup v. Luther*, 227 F.3d 993 (7th Cir. 2000)

*E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042 (D.C. Cir. 1998)

## Statement of the Case

This appeal arises within a challenge to Missouri's protocol for carrying out executions.

Twenty docket entries are hidden from the public view. Flynt Appendix A65-A87. There is no explanation in the public record.

It is not apparent what most of the sealed docket entries represent. One of the district court's orders cites to Doc. # 31, suggesting that it is a November 2012 order on Missouri's motion to dismiss. Flynt Appendix A97 (stating that "[i]n November 2012, the Court granted in part and denied in part a motion to dismiss brought by Defendants. [Doc. # 31]."). The entry (and associated document) for Doc. # 31, however, are hidden from the public view.

Flynt, a publisher and advocate opposed to the death penalty, moved to intervene in this case for the limited purpose of filing a motion to unseal the docket entries. Flynt Appendix A1, A6-A7, A14-A16. Aside from his interest as a publisher in secret court records, Flynt has a particular interest in Missouri's decision-making and procedure related to executions. Flynt's interest in Missouri's execution procedure is heightened because Joseph Franklin, a former inhabitant of Missouri's death row, confessed to shooting Flynt. *Id*. at A6-A7, A14-A16. The 1978 sniper shooting of Flynt, during his trial on obscenity charges in Georgia, left Flynt paralyzed with permanent spinal-cord damage. *Id*. Flynt has written,



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published articles, and spoken publicly about both about this experience and how Franklin's impending execution affected his views on the death penalty. *Id*.

No party opposed Flynt's motion to intervene. *See* United States District Court for the Western District of Missouri Local Rule 7.0(d) (requiring "each party opposing the motion [to] serve and file a brief written statement of the reasons in opposition to the motion") (Flynt Appendix A106-A107).

On November 20, 2013, just hours after Franklin was executed by the State of Missouri, the district court denied Flynt's motion to intervene for the purpose of asking the court to unseal its docket entries. The court's order stated:

> At approximately 6:07 a.m., on November 20, 2013, the Missouri Department of Corrections administered a lethal injection to Plaintiff Joseph Franklin, and he was pronounced dead at 6:17 a.m. Accordingly, Larry Flynt's Motion to Intervene [Doc. 149] and Franklin's Renewed Motion for Stay of Execution [Doc. 167] are denied as moot.

Flynt Appendix A88.

On November 22, 2013, Flynt moved the district court to vacate the portion of the order denying his motion to intervene as moot. *Id.* at A89-A90. Flynt explained that his interest in unsealing the docket entries did not expire with Franklin's demise. *Id*. No party opposed Flynt's request to vacate the portion of the order denying his motion to intervene.



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On December 26, 2013, the district court denied the motion by docket-text order stating: "A generalized interest in a subject of litigation does not justify intervention." *Id*. at A92.

Flynt filed his notice of appeal on January 24, 2014. *Id*. at A94-A95.

## Summary of Argument

The district court abused its discretion by denying Flynt's motion to intervene for the limited purpose of asking the court to unseal docket entries.

While denial of a motion to intervene is reviewed for an abuse of discretion, the district court's decision in this case was for legal reasons. First, the district court found the motion was rendered moot by the execution of the man who shot and paralyzed Flynt. Upon reconsideration, the court found intervention should be denied because "[a] generalized interest in a subject of litigation does not justify intervention." These underlying legal determinations are reviewed de novo.

Intervention for the limited purpose of asking the court to unseal records is the proper procedural vehicle for members of the press or public to request that records be unsealed. Missouri's execution of the man who shot and paralyzed Flynt did not render Flynt's claimed right of access to court records moot. The docket entries remain sealed and their contents hidden from the press and the public without explanation. Further, Flynt's interest is sufficient to justify intervention for the limited purpose. Like other members of the press and public, Flynt has a claim under the common-law right of access to judicial records in civil proceedings and the First Amendment right of public access. When third parties seek to intervene to vindicate these rights, it is not necessary to show a strong nexus of fact

or law with the underlying action. The secrecy challenged is the question of fact or law that Flynt's claim has in common with the underlying case.

When members of the press or public intervene for the limited purpose of challenging the confidentiality of judicial records, they should not have to provide an independent basis for jurisdiction. Nevertheless, Flynt has demonstrated an independent basis for jurisdiction in this case. His claim could have been treated as a new civil case rather than a motion to intervene in the pending case. However, the better practice is the one adopted by every other circuit court: allowing intervention under Rule 24(b)(2) to seek access to judicial records.

The district court's denial of intervention for the limited purpose of moving to unseal docket entries should be reversed.

## Argument

**A. The district court abused its discretion by denying Flynt's unopposed motion to intervene for the limited purpose of asking the court to unseal docket entries.**

1. Docket entries are public records that are presumed open for public viewing.

Flynt and members of the press and public have a claim that the docket entries should be unsealed. The issue on appeal is whether Flynt may intervene to assert the claim. "Generally, 'the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.'" *In re Neal*, 461 F.3d 1048, 1053 (8th Cir. 2006) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)). "'The case dockets maintained by the clerk of the district court are public records.'" *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d at 575 (quoting *United States v. Criden*, 675 F.2d 550, 559 (1982)). "[T]he common-law right of access applies to judicial records in civil proceedings." *IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013).



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2. Intervention for the limited purpose of asking the court to unseal records is the proper procedural vehicle for members of the press or public to request that records be unsealed.

Nonparties seeking access to judicial records in a civil case do so by seeking permissive intervention under Rule 24(b)(2). *Jessup v. Luther*, 227 F.3d 993, 996-97 (7th Cir. 2000) ("It is apparent . . . that intervention is the procedurally appropriate course for third-party challenges to protective orders." (quotation marks and citation omitted)); *see E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) (citing *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 (2d Cir. 1979); *Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 778 (3d Cir.1994); *In re Beef Indus. Antitrust Litig.*, 589 F.2d 786, 789 (5th Cir. 1979); *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); *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); *see also Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988) (noting that the Fourth Circuit granted a newspaper's motion to intervene for the limited purpose of challenging an order sealing a file). Courts "are not willing to create a special category of non-Rule 24 intervention for third parties who wish to

challenge protective order through informal motion," *Pub. Citizen*, 858 F. 2d at 783, and thus have held that intervention is "the procedurally correct course" for accessing closed records. *In re Beef Indus. Antitrust Litig.*, 589 F.2d at 789; *see also Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1015 (11th Cir. 1992) (reversing the denial of third party's motion for permissive intervention for the purpose of unsealing a record).

3. Because the district court's denial of Flynt's intervention for the limited purpose of requesting that records be unsealed was premised on a mistake of law, review is de novo.

In this context, a motion to intervene pursuant to Rule 24(b)(2) is within the sound discretion of the district court. *San Jose Mercury News, Inc. v. U.S. Dist. Court--N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999). Here, however, the district court denied the motion for legal reasons. First, the court concluded that the motion was moot because, before the court ruled on Flynt's motion, the State of Missouri executed the man who had paralyzed Flynt. Flynt Appendix A88. Then, when Flynt explained that his request was not made moot by the execution, the court found that "[a] generalized interest in a subject of litigation does not justify intervention." *Id.* at A92-A93. "Where, as here, the district court's decision turns on a legal question…, its underlying legal determination is subject to *de novo* review." *San Jose Mercury News*, 187 F.3d at 1100; *see also Pansy*, 23 F.3d at 777



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(“We normally review the district court’s denial of the Newspapers’ Motion for Intervention for abuse of discretion. However, because the question raised is whether the district court applied the correct legal standard for intervention, we exercise plenary review.” (citation omitted)).

Accordingly, a court’s decision to deny an intervention request for the purpose of asking the court to unseal docket entries is reviewed for an abuse of discretion, but legal determinations that caused the court to deny intervention are reviewed de novo. Moreover, this Court conducts its review while “keeping in mind that Rule 24 should be liberally construed with all doubts resolved in favor of the proposed intervenor.” *South Dakota ex rel. Barnett v. U.S. Dep’t of Interior*, 317 F.3d 783, 785 (8th Cir. 2003).

4. The execution of the man who shot and paralyzed Flynt did not render Flynt’s claimed right of access to court records moot.

Flynt’s motion to intervene for the limited purpose of asking the district court to unseal its docket entries was not made moot by Missouri’s execution of Franklin before the district court ruled on Flynt’s unopposed motion.

Thus, Flynt’s request for intervention is not moot. As a publisher and member of the public, Flynt has a right to ask the district court to unseal its docket entries. The content of the docket entries remains a secret, and there is still no explanation for the secrecy. Other than Flynt’s ability to advocate for a

commutation of Franklin's death sentence, nothing is altered by Franklin's execution. Flynt's interest relates to the integrity of the judicial process and Missouri's procedure for executing inmates in the name of crime victims like Flynt, not solely about sparing Franklin's life. Therefore, the interests advanced by Flynt's request survive Franklin. "Public scrutiny over the court system serves to (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding." *Grove Fresh Distribs., Inc.*, 24 F.3d at 897 (citing *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980)). As this Court has observed, access to judicial records "bolsters public confidence in the judicial system by allowing citizens to evaluate the reasonableness and fairness of judicial proceedings and to keep a watchful eye on the workings of public agencies." *IDT Corp.*, 709 F.3d at 1220 (quotation and citations omitted). These are the interests Flynt seeks to vindicate.

5. Flynt's interest is sufficient to justify intervention for the limited purpose of asking the district court to unseal its docket entries.

Flynt wants to challenge the sealing of the district court's docket entries under the common-law right of access to judicial records in civil proceedings and the First Amendment right of public access. Flynt Appendix A3-A13. This Court has recognized a common law right of access. *See IDT Corp.*, 709 F.3d at 1222. Nearly thirty-five years ago, the Supreme Court discussed the First Amendment

right of access to civil judicial proceedings and observed that the question "is not raised by this case, but we note that historically both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980). Every circuit that has ruled on the issue since has also concluded that civil judicial proceedings, like criminal proceedings, are subject to a First Amendment right of access. *See Lugosch v. Pyramid Co.*, 435 F.3d 110, 124 (2d Cir. 2006) ("'[T]he First Amendment does secure to the public and to the press a right of access to civil proceedings.'" (quoting *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984))); *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988) ("We believe that the more rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case."); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) ("[T]he public and press possess a First Amendment right of access to civil proceedings."); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) ("[T]he policy reasons for granting public access to criminal proceedings apply to civil cases as well."); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178-79 (6th Cir. 1983) ("The historical support for access to criminal trials applies in equal measure to civil trials."). *But see Ctr. for Nat. Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 935 (D.C. Cir.



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2003) (doubting—but not deciding—whether First Amendment right of access extends to civil proceedings).

When third parties, such as a publisher or member of the public, seek to intervene for the limited purpose of seeking access to judicial records, it is not necessary to demonstrate a strong nexus of fact or law with the underlying action. Courts "have routinely found … that third parties have standing to challenge protective orders and confidentiality orders in an effort to obtain access to information or judicial proceedings." *Pansy*, 23 F. 3d at 777 (citing *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1016 (11th Cir.1992); *Pub. Citizen*, 858 F.2d at 787 & n. 12; *In re Alexander Grant & Co., Litig.*, 820 F.2d 352, 354 (11th Cir. 1987); *United States v. Cianfrani,* 573 F.2d 835, 845 (3d Cir. 1978); *City of Hartford v. Chase,* 733 F. Supp. 533, 534 (D.Conn.1990), *rev'd on other grounds*, 942 F.2d 130 (2d Cir.1991). Standing to intervene for this limited purpose exists even where a member of the public asserts rights that may belong to a broad portion of the public at large, so long as the injury-in-fact alleged by a proposed intervenor is a distinct and palpable injury to himself. *Id.* The Supreme Court has held that a concrete injury can constitute an injury-in-fact sufficient to confer standing even when the injury is widely shared. *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998). The Supreme Court has also held that the denial of information to which a party is legally entitled can constitute an injury-in-fact. *Id.*



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at 21. For this reason, "[b]y virtue of the fact that the [intervenors] challenge the validity of the Order of Confidentiality entered in the main action, they meet the requirement of Fed. R. Civ. P. 24(b)(2) that their claim must have 'a question of law or fact in common' with the main action." *Pansy*, 23 F.3d at 778.

Indeed, for the common-law right of access to court records that this Court acknowledged in *IDT Corporation* to have any meaning, members of the public must be permitted to intervene so that they can vindicate that right. As the Seventh Circuit explained:

> In order to preserve the right of access, those who seek access to [sealed] material have a right to be heard in a manner that gives full protection to the asserted right. 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 the documents. Thus, we have recognized intervention as the logical and appropriate vehicle by which the public and press may challenge a closure order. This method not only guarantees the public's right to be heard, it also ensures that the issue [of closure will] be examined in a procedural context that affords the court an opportunity for due deliberation.

*Jessup*, 227 F.3d at 997. Thus, in *United States v. Amodeo*, a newspaper interested solely in obtaining access to a court officer's report was permitted to intervene. 71 F.3d 1044, 1047 (2d Cir. 1995). In *In re "Agent Orange" Product Liability Litigation*, the Vietnam Veterans of America was allowed to intervene solely to seek access to discovery materials. 821 F.2d 139, 141 (2d Cir. 1987). In *Pansy*,



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*Stone*, and *Jessup*, newspapers intervened to seek access to court records. *Pansy*, 23 F.3d at 777-78; *Stone*, 855 F.2d at 180; *Jessup*, 227 F.3d at 997; *see also In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 471 (6th Cir. 1983) (permitting intervention of newspapers interested solely in obtaining access to court records); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1327 (D.C. Cir. 1985) (permitting intervention of newspaper reporters interested solely in unsealing court records); *Davis v. E. Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 923 (5th Cir. 1996) (permitting intervention of news organizations interested solely in seeking access to information about litigation). In none of these cases were the intervenors required to meet the burden articulated by the district court in the case *sub judice*, nor could they have. If only those with a personal stake in the merits of the underlying litigation could exercise the right of access to court records, then the Supreme Court would have denied access to members of the media in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984), and *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596 (1982).

Flynt alleges a specific injury—the denial of access to court records—that demonstrates a particularized injury beyond a general grievance, and this is a question of law in common between Flynt and the parties to the underlying action. Flynt challenges the confidentiality of judicial records—secrecy about which the

parties and the district court appear to agree. "[T]hat confidentiality is—in the language of Rule 24(b)(2)—a 'question of law . . . in common' between the Parties and the [intervenor]." *Jessup*, 227 F.3d at 999.

6. An independent jurisdictional basis is not necessary to intervene for the limited purpose of asking the district court to unseal its docket entries; nevertheless, Flynt does have an independent jurisdictional basis.

Although, in most circumstances, intervention requires an independent jurisdictional basis, "courts have crafted a narrow exception when the third party seeks to intervene for the limited purpose of obtaining access to documents protected by a confidentiality order." *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1047 (D.C. Cir. 1998). As the D.C. Circuit explained,

> [t]he rationale for this exception is simple—such intervenors do not ask the district court to exercise jurisdiction over an additional claim on the merits, but rather to exercise a power that it already has, namely the power to modify a previously entered confidentiality order. An 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 defense.

*Id.* Likewise, this Court should hold that those who seek to unseal court records need not demonstrate an independent jurisdictional basis for intervention when their intervention is limited to that purpose.

Nevertheless, Flynt has claims that provide an independent basis for jurisdiction. He has both a First Amendment and a common-law right to access records of the district court's proceedings. The docket entries identified by Flynt are part of the judicial record and, therefore, publicly accessible under the First Amendment. In addition to the First Amendment right of access, there is a common-law right of access to public records generally from all three branches of government, which includes judicial records. *See Wash. Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 903-04 (D.C. Cir. 1996). Under the First Amendment, access can be denied only when "'(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.'" *Wash. Post v. Robinson*, 935 F.2d 282, 290 (D.C. Cir. 1991) (quoting *Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of Oregon*, 920 F.2d 1462, 1466 (9th Cir. 1990)). As this Court recognizes,

> Where the common-law right of access is implicated, the court must consider the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access and balance that interference against the salutary interests served by maintaining confidentiality of the information sought to be sealed. . . . Modern cases on the common-law right of access say that the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and resultant value

> of such information to those monitoring the federal courts.

*IDT Corp.*, 709 F.3d at 1223-24 (quotation and citations omitted).

Flynt's claim could have been filed, or treated by the district court, as a separate civil case. The public record does not demonstrate any justification for sealing the docket entries. In fact, from the record, it does not appear that any party has advocated to establish or to maintain the secrecy of docket entries, much less articulated a justification for doing so and explained how that justification might outweigh the presumptive First Amendment and common-law rights of access. The lack of a finding of good cause to seal docket entries, or an order that they be sealed, is itself peculiar. *See In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d at 575 (noting that "[t]he fact that a closure or sealing order has been entered must itself be noted on the court's docket, absent extraordinary circumstances"); *Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999) (observing that a finding of good cause is required to seal any portion of the record). So too is the unexplained sealing of Doc. # 31—an order that apparently dismisses some claims and refuses to dismiss others. *See United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006) (denying a motion to file an opinion under seal "because the decisions of the court are a matter of public record, and the circumstances of [the] case are not sufficient to distinguish it from numerous other criminal cases in which our opinions are



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routinely published”). Under these circumstances, if a motion for permissive intervention were not the appropriate procedural vehicle, Flynt could have filed a new civil case against the district court. As the Second Circuit has explained, a request to unseal could be treated as a new civil case rather than an intervention in the pending case. *Matter of New York Times Co.*, 828 F.2d at 113. There is no jurisdictional significance in whether the matter is a new case or an intervention. *Id.*

For these reasons, the district court’s denial of Flynt’s motion to intervene for the limited purpose of requesting that the district court unseal its docket entries should be reversed and this matter remanded for consideration of Flynt’s motion to unseal.



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## Conclusion

The district court's denial of intervention for the limited purpose of moving to unseal docket entries should be reversed and this matter remanded for further proceedings.

Respectfully submitted,

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**Certificate of Compliance**

I, Anthony E. Rothert, do hereby certify: (1) Appellant's Brief complies with the type-volume limitation Fed. R. App. P. 32(a)(7)(B) because it contains 4,763 words, according to the word count of Microsoft Office Word 2010; (2) Appellant's Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman; and (3) Appellant's Brief has been scanned for viruses and is virus free.

/s/ Anthony E. Rothert

**Certificate of Service**

I, Anthony E. Rothert, do hereby certify that I have filed the foregoing Appellant's Brief electronically with the Court's CM/ECF system with a resulting electronic notice to all counsel of record on March 20, 2014. Upon approval and filing of this brief, a true and correct paper copy of the Brief with updated certificate of service will be sent via first-class mail, postage prepaid to counsel of record.

/s/ Anthony E. Rothert



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