EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

John Doe,	)	
	)	Case No. 16-cv-07359
Plaintiff,	)	
	)	
v.	)	Judge Rebecca Pallmeyer
	)	
Jane Does, 1-3,	)	Magistrate Judge Michael Mason
	)	
Defendants.	)	

BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF EUGENE VOLOKH'S MOTION TO INTERVENE

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is the Reporters Committee for Freedom of the Press (the "Reporters Committee"), an unincorporated nonprofit association of reporters and editors dedicated to defending the First Amendment and newsgathering rights of journalists. The Reporters Committee has a strong interest in ensuring that members of the press and the public are able to assert and vindicate their First Amendment and common law rights of access to judicial proceedings and records, for the benefit of the public.

A rigid timing requirement for third-party motions to intervene for the sole purpose of unsealing court records is inconsistent with controlling precedent and incompatible with our nation's commitment to an open judicial system. Movants seeking unsealing are frequently journalists, news organizations, documentary filmmakers, and others with an interest in informing the public. Imposing a deadline by which they must intervene will create practical difficulties, and will necessarily infringe upon the public's rights of access to information about the functioning of its government. Accordingly, the Reporters Committee submits this *amicus* brief in support of Eugene Volokh's renewed motion to intervene.

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[1] The Reporters Committee affirms that no party or counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

ARGUMENT

The public's First Amendment and common law rights of access to judicial records are "fundamental to a democratic state." *Matter of Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (citation omitted). These rights allow the public to scrutinize the judicial system; as the Seventh Circuit has recognized, such public scrutiny "(1) promote[s] community respect for the rule of law, (2) provide[s] a check on the activities of judges and litigants, and (3) foster[s] more accurate fact finding." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994), *superseded on other grounds as recognized by Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009). Public access is particularly valuable in civil cases, where mistakes "may be more likely to inflict costs upon third parties." *Id.* And when parties make the choice to invoke a court's authority by filing a civil suit, "they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials." *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).

The Seventh Circuit has held that third parties—including journalists and news organizations—can assert the public's rights of access to judicial records through intervention, even though such intervention "does not fit neatly within the literal language of either section" of Rule 24 of the Federal Rules of Civil Procedure. *Jessup v. Luther*, 227 F.3d 993, 997–98 (7th Cir. 2000) (noting that the rule "was undoubtedly crafted principally for other situations occurring more frequently in federal litigation"). Indeed, numerous "courts have been willing to adopt generous interpretations of Rule 24(b)" so as to provide an effective mechanism for vindicating the public's rights of access to judicial records. *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998).

Application of the timeliness requirement generally applicable to standard intervention cases to third-party motions to intervene for the purpose of asserting the public's First Amendment and common law rights of access is inconsistent with those rights. In particular, consideration of "the length of time the intervenor knew or should have known of her interest in the case," *Reid L. v. Ill. State Bd. of Educ.*, 289 F.3d 1009, 1018 (7th Cir. 2002), is unworkable in this context, and antithetical to the constitutional and common law presumption in favor of public access that apply to judicial proceedings and records. The public's interest in seeking access to sealed civil and criminal cases is based not only on the subject matter of the sealed case alone, but also on the public's ability to monitor the judicial system more broadly. *See Jessup*, 277 F.3d at 998. A member of the public's interest in a particular case may not be immediately apparent, or may grow or change over time, and journalists and news organizations frequently seek to unseal cases years—or even decades—after they are closed. Indeed, courts can and should take into account changing circumstances over time when determining, in response to a third-party motion to unseal, whether compelling interests exist to keep the judicial records at issue under seal.

I. The need for a third-party motion to intervene to unseal records in a case may not be immediately apparent, making any strict timing requirement impracticable.

Journalists, news organizations, scholars like Volokh, 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. Such third-party intervenors may not have known about the case during its pendency or immediately thereafter, or, even if they did, may not have yet

realized the newsworthiness or the public's specific interest in unsealing that particular case.[2] Numerous journalistic, economic, and other practical considerations can affect a journalist's immediate ability to unseal a sealed case. 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. *See In re Pineapple Antitrust Litig.*, No. 04 MD. 1628 RMB MHD, 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 . . . .").

Among many editorial reasons for potential delays, 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. *See Hardy v. Equitable Life Assurance Soc'y of U.S.*, 697 F. App'x 723, 724–25 (2d Cir. 2017). The public became far more interested in the settlement when a named party to the suit, Donald J. Trump, ran for—and was elected—president of the United States. *Hardy v. Kaszycki & Sons*, 2017 WL 6805707, at *3 (S.D.N.Y. Nov. 21, 2017). The documents, unsealed in 2017, revealed that Trump had paid almost $1.4 million to settle claims related to the hiring of undocumented Polish workers in connection with the demolition of a Manhattan building to make way for Trump Tower, and were reported on by numerous national news outlets. *See, e.g.*, Ryan Teague Bechwith, *Donald Trump Paid $1.4 Million in a*

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[2] This is especially true when parties' names are obscured from public view. *See Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004) ("The concealment of a party's name impedes public access to the facts of the case, which include the parties' identity.").

Dispute Over Undocumented Workers. Read the Newly Unsealed Legal Papers, TIME (Nov. 27, 2017), https://perma.cc/DT42-ZRNY; Charles V. Bagli, *Trump Paid Over $1 Million in Labor Settlement, Documents Reveal*, N.Y. Times (Nov. 27, 2017), https://perma.cc/6BUQ-MV8J.

In addition, investigative reporters and historians may dig deeper into a years-old case to provide a richer prospective on prior newsworthy events. For example, the Reporters Committee, along with journalist and historian Eliot 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 v. United States*, 837 F.3d 753, 756–57 (7th Cir. 2016). 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. Tribune (Oct. 28, 2017), https://bit.ly/2Sl8vVy. Similarly, the Tenth Circuit recently affirmed the unsealing of seventy-five-year-old grand jury records related to a 1946 Georgia lynching after a book author requested access to them as part of his research. *See Pitch v. United States*, No. 17-15016, 2019 WL 512157, at *1 (11th Cir. Feb. 11, 2019).

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. You cannot fight every battle." 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, a plurality of respondents (44%) said their own newsroom's ability to pursue "offensive" lawsuits—such as seeking access to closed court proceedings and sealed judicial records—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 the Digital Age* (2016), https://perma.cc/NWT8-YXKY. Most cited financial considerations as a reason for the diminished capacity to challenge sealing. *Id.* 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 v. Borough of Stroudsburg*, 23 F.3d 772, 780 (3d Cir. 1994) ("[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, however, 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 becomes more apparent. *Cf. Stallworth v. Monsanto Co.*, 558 F.2d 257, 264–65 (5th Cir. 1977) (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 purposes of Rule 24 to foster judicial efficiency and to protect interested non-parties). Given that the public's interest—and thus those of a journalist, news organization, filmmaker, or any other third party—in records can grow over time, it is more practical to permit them to intervene whenever they "appreciate the significance of a suit," *id.* at 265, rather than based on an arbitrary deadline.

II. In determining a motion to unseal, a court must consider current circumstances to determine whether compelling interests overcome the presumptions of access, which is incompatible with a strict time limit.

When evaluating a request to unseal judicial records and determining whether countervailing or compelling interests overcome the common law or First Amendment presumptions of access, a court must look to *current* circumstances. In *Hardy*, for example, the district court considered Trump's current role as president when deciding to unseal records from the two-decades old class action lawsuit related to the construction of Trump Tower. 2017 WL 6805707, at *3 ("[T]he weight of the presumption is further strengthened by the public's interest in obtaining access to records from a class action lawsuit to which the now-President of the United States was a party."); *see also Newsday LLC v. Cty. of Nassau*, 730 F.3d 156, 163 n.8, 165 n.10 (2d Cir. 2013) (explaining that, when considering a motion to unseal the transcript of a closed proceeding, judges have "the benefit of hindsight," which provides additional knowledge not available when first deciding on closure); *Copley Press, Inc. v. Superior Court*, 63 Cal. App.

4th 367, 374 (1998) ("Due to its temporary nature and its infringement upon the public right to know, a sealing order in a civil case is always subject to continuing review and modification, if not termination, upon changed circumstances.").

In addition to precedent, common sense also dictates that courts must evaluate motions to unseal judicial records based on current facts, because changing circumstances can render obsolete the reasons that may have initially supported a sealing order. Not only can interests in favor of disclosure increase over time, but also the existence of countervailing interests in favor of nondisclosure often—if not always—disappear over time. *See* T.S. Ellis III, *Sealing, Judicial Transparency and Judicial Independence*, 53 Vill. L. Rev. 939, 949 (2008) (law review article by a federal judge explaining that "courts have recognized relatively few interests that justify curtailing the public's First Amendment and common law rights of access. Each of these interests is limited in its duration or applicability, and although the specific duration is often unknown at the time of sealing, no legitimate interest warrants perpetual protection."); *see, e.g.*, *United States v. Moten*, 582 F.2d 654, 661 (2d. Cir. 1978) (stating that sealing is justified only so long as the existence of the underlying compelling interest, which in this case was only until an ongoing criminal investigation was completed). Indeed, this Court acknowledged in its order striking Volokh's motion to unseal that overriding interests supporting sealing likely no longer exist for much of the sealed record in this case. *See* Memorandum Order, *Doe v. Does*, No. 16-cv-7359, at *6 (N.D. Ill. Feb. 12, 2019), ECF. No. 54.

"The judge is the primary representative of the public interest in the judicial process," *Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999), and thus must ensure the public's rights of access are fully protected. Indeed, courts can—and should—*sua sponte* consider whether documents are properly sealed under the First Amendment

and common law, meaning "an argument against sealing [is not] the kind of argument that can be waived." *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 307 (6th Cir. 2016). A journalist or news organization's motion to intervene to unseal helps a court properly consider the public's interests in access to records in a case, and so a court should not so narrowly read Rule 24 to impede its own ability to vindicate the public's interest in open judicial proceedings.

CONCLUSION

For the foregoing reasons, the Reporters Committee respectfully requests that the Court grant Eugene Volokh's motion to intervene and to unseal the record in the above captioned case.

Respectfully submitted,

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Dated: March 5, 2019

CERTIFICATE OF SERVICE

I certify that on March 5, 2019, I filed the foregoing motion via ECF, which caused plaintiff's counsel to be served. I am unable to serve defendants, who are not registered with ECF, and whose identity I do not know. In addition, proposed intervenor Eugene Volokh has been served via electronic mail at volokh@law.ucla.edu.

/s/ Brendan J. Healey