No. 14-1202

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
(2:09-cv-04095 NKL)

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 judicial records hidden from public view in their entirety but relied upon by the district court in adjudicating the case.

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 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 Amended Complaint in the underlying litigation alleges violations of the federal Controlled Substances Act as well as the federal Food, Drug and Cosmetics Act. 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 order denying Flynt's motion to intervene for the limited purpose of asking the district court to unseal judicial records is a final order. "[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). 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).

In the alternative, the district court's order is appealable as a collateral order. *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 December 27, 2013. Flynt Appendix A40-41. Flynt's notice of appeal was filed on January 24, 2014. *Id.* at A87-88. Accordingly, the appeal is timely.

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 judicial records relied upon by the court to adjudicate the case.

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 case claiming that Missouri's former protocol for carrying out executions violated federal statutes.

Numerous records the district court relied upon to adjudicate the case are hidden from the public view. Flynt Appendix A42 (citing Doc. ## 211-3, 211-4, 211-5, 211-6, 214, 214-1, 219). They appear to be sealed based upon the parties' marking of the records as "confidential" pursuant to a protective order that they jointly asked the district court to enter in order to facilitate discovery. *Id.* at A24-39.

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 judicial records or, if necessary, redacted versions of the records. Flynt Appendix A40-65. 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 A44. 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, published articles, and spoken publicly about both his experience as a victim of the

shooting and how Franklin's impending execution affected his views on the death penalty. *Id*.

No party opposed Flynt's motion to intervene. *See* 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 A89-92).

On December 27, 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 A85-86.

Flynt filed his notice of appeal on January 24, 2014. *Id*. at A87-88.

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 judicial records.

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. The district court found the motion for intervention should be denied because "[a] generalized interest in a subject of litigation does not justify intervention." This underlying legal determination is not afforded deference and is 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. Flynt's interest is sufficient to justify intervention for this 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 addressing the matter: allowing intervention under Rule 24(b)(2) to seek access to judicial records.

The district court's denial of Flynt's motion to intervene for the limited purpose of moving to unseal judicial records 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 judicial records.

1. Judicial records are public records that are presumed open for public viewing.

Flynt and members of the press and public have a claim that the judicial records relied upon by the district court in adjudicating the underlying case should be unsealed. The issue on appeal is whether Flynt may intervene to assert that 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)). "[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). Except for two categories of documents—grand jury transcripts and warrant materials in a pre-indictment investigation—a "strong presumption in favor of access is the starting point." *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quotation and citations omitted). The party that wishes to seal a judicial record bears the burden of overcoming the

presumption. *Id.* "[T]he strong presumption of access to judicial records applies fully to dispositive pleadings, including motions for summary judgment and related attachments [because] the resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the public's understanding of the judicial process and of significant public events." *Id.*, at 1179 (quotation and citations omitted). "[D]iscovery material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right [of access]." *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001).

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 a legal reason. The court concluded that "[a] generalized interest in a subject of litigation does not justify intervention." Flynt Appendix at A85. "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 ("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 judicial records is reviewed for an abuse of discretion, but legal determination that caused the court to deny intervention is 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. 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, under the common-law right of access to judicial records in civil proceedings and the First Amendment right of public access, the sealing of judicial records relied upon by the district court in adjudicating the underlying case. Flynt Appendix A40-41. 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. 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.*, 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*, *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.[2] "[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.

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[2] The district court appears to have considered confidentiality in a protective order and then delegated to the parties the decision on how records they deemed confidential would be filed. Flynt Appendix A29 (allowing counsel to designate material as "Confidential"); A33 (directing that "the parties shall agree upon a means of filing that prevents the disclosure of material designated as Confidential"). "[A] protective order is entirely different than an order to seal or redact Court documents and implicates entirely different interests. [T]he public has a right to access documents that are submitted to the Court and that form the basis for judicial decisions." *Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc.*, 960 F. Supp. 2d 1011, 1013 (D. Minn. 2013). Protective orders assist in discovery, which serves "a vastly different role" than judicial records and does not raise the same right-of-access concerns. *Id.* (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33-5 (1984)). The district court does not appear to have evaluated whether sealing of the records that were filed, and particularly sealing them in their entirety, was necessary.

5. An independent jurisdictional basis is not necessary to intervene for the limited purpose of asking the district court to unseal records upon which it relied to adjudicate the case; 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 through a motion for intervention 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 judicial records 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, but is not limited to, 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.3d 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. While a protective order facilitated discovery by allowing the parties to designate discovery materials as "confidential" and to agree among themselves how to file materials so marked (p.11), nothing in the record suggests that the district court reviewed the materials to determine if they—or portions of them—could be unsealed. More particularly, nothing in the record articulates a justification for sealing the records in their entirety once they were relied upon by the district court to adjudicate the case. And further, nothing in the record explained how any potential justification might outweigh the presumptive First Amendment and common-law rights of access.[3] The rights of the press and the public do not appear to have been advocated or considered at all. Under these circumstances, if a motion for permissive intervention were not the appropriate procedural vehicle, Flynt could have filed a new civil case. As the Second Circuit

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[3] Even if sealing portions of the records might be justified despite Flynt's First Amendment and common-law right-of-access claims, the district court should consider whether portions of the sealed records may be unsealed. As the Second Circuit concluded, "it is proper for a district court, after weighing competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document[.]" *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995).

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 judicial records relied upon to adjudicate the case should be reversed and this matter remanded for consideration of Flynt's motion to unseal.

Conclusion

The district court's denial of intervention for the limited purpose of moving to unseal judicial records 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) Appellee's Brief complies with the type-volume limitation Fed. R. App. P. 32(a)(7)(B) because it contains 4,504 words, according to the word count of Microsoft Office Word 2010; (2) Appellees' 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) the 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 Appellees' 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