No. 20-1753

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JULIE ELLEN WARTLUFT; FREDERICK J. BARTELS, JR., Individually and as Administrators of the Estate of Abrielle Kira Bartels, Deceased,

Plaintiffs-Appellants

v.

MILTON HERSHEY SCHOOL AND SCHOOL TRUST; HERSHEY TRUST CO., as Trustee of the Milton Hershey School Trust,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

Case No. 1:16-cv-02145-JEJ (Hon. John E. Jones)

MOTION TO INTERVENE AND UNSEAL ORAL ARGUMENT RECORD

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INTRODUCTION

Proposed Intervenor The Philadelphia Inquirer, PBC ("The Inquirer"), publisher of *The Philadelphia Inquirer*, respectfully submits this Motion to Intervene and Unseal Oral Argument Record.

This Court has long recognized a public right of access to judicial proceedings and records. Indeed, the existence of this right is "beyond dispute." *Littlejohn v. Bic Corp.*, 851 F.2d 673, 677–78 (3d Cir. 1988) (citations omitted). Integral and essential to the integrity of the judiciary, the public right of access to judicial proceedings is applicable in both criminal and civil cases. *Id.* at 678 (explaining that access in civil cases "promotes public confidence in the judicial system"); *see also Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659–60 (3d Cir. 1991) ("*Westinghouse*"). And it encompasses "more than the ability to attend open court proceedings; it also encompasses the right of the public to inspect and to copy judicial records." *Littlejohn*, 851 F.2d at 678. Access is of particular importance where, as here, civil litigation has a component of heightened public interest. *See In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001) ("*Cendant*") (finding that, due to heightened public interest in a class action, the "test for overriding the right of access should be applied . . . with particular strictness").

The public has a particularly powerful interest in transparency in this case, which involves allegations of wrongdoing against the Milton Hershey School—a philanthropic boarding school for children from lower-income families—in connection with the death of a 14-year-old student once in its care.

For the reasons herein, The Inquirer respectfully requests that its Motion to Intervene for the limited purpose of challenging the sealing of the oral argument record in this case be granted; that the oral argument recording be unsealed and made available to The Inquirer and the public—or, in the alternative, if a transcript is created of the oral argument, that it be made available to The Inquirer and the public; and, to the extent any party seeking closure is able to meet its high burden of showing that continued sealing is necessary as to some portion of a transcript, that it be released with limited redactions.

PROCEDURAL HISTORY & STATEMENT OF THE FACTS

The Philadelphia Inquirer is an award-winning daily newspaper. It regularly publishes investigative reporting focused on Philadelphia and Pennsylvania, and it frequently reports on cases pending in federal and state courts within Pennsylvania. The Inquirer has extensively reported on allegations made against the Milton Hershey School and School Trust in this and similar lawsuits. *See, e.g.*, Bob Fernandez, *Federal Judge Dismisses Gay-Conversion-Related Lawsuit by Former Student Against Hershey School*, Phila. Inquirer (May 7, 2020),

https://fusion.inquirer.com/business/hershey-school-gay-conversion-video-sexual-orientation-lawsuit-federal-judge-20200507.html; Bob Fernandez, *Did the Hershey School Reject Students for Depression? Two Suits Say Yes*, Phila. Inquirer (June 30, 2016), https://perma.cc/X6MV-DP4T ("Fernandez, *Did the Hershey School Reject Students for Depression?*"). Indeed, The Inquirer filed two separate motions to intervene and unseal judicial records before the district court. *See* Motion to Intervene and Unseal Judicial Records, *Wartluft et al. v. Milton Hershey Sch. & Sch. Tr., et al.*, No. 1:16-cv-02145-JEJ (M.D. Pa. June 20, 2019), ECF 266; Intervenor The Philadelphia Inquirer's Motion to Unseal Judicial Records, *Wartluft v. Milton Hershey Sch. & Sch. Tr.*, No. 1:16-cv-02145-JEJ (M.D. Pa. Dec. 20, 2019), ECF 303. In two orders issued on March 6, 2020, Magistrate Judge Martin C. Carlson ordered that the majority of the records sought to be unsealed by The Inquirer should be unsealed subject to limited redactions. Amended Order, *Wartluft v. Milton Hershey Sch. & Sch. Tr.*, No. 1:16-cv-02145-JEJ (M.D. Pa. Mar. 20, 2020), ECF 354; Amended Order, *Wartluft v. Milton Hershey Sch. & Sch. Tr.*, No. 1:16-cv-02145-JEJ (M.D. Pa. Mar. 20, 2020), ECF 355. Implementation of Judge Carlson's orders is currently stayed pending resolution of The Inquirer's limited request that Judge Carlson reconsider portions of his orders in light of Judge Jones' publicly filed opinion and order granting Milton Hershey School and School Trust and the Hershey Trust Co.'s ("Defendants-Appellees") motion for

summary judgment, now on appeal before this Court. *See* Letter, *Wartluft v. Milton Hershey Sch. & Sch. Tr.*, No. 1:16-cv-02145-JEJ (M.D. Pa. Apr. 1, 2020), ECF 357. Specifically, because Judge Jones' publicly filed opinion names third parties involved in this lawsuit—Dr. Benjamin Herr, Mic Stewart, Heather Teter, Dr. Jeannette Morales-Brandt, and Dr. Lidija Petrovic-Dovat—The Inquirer asserted that the continued redaction of these individuals' names in other records on the docket is unwarranted. *Id.* at 1.

Public interest in this lawsuit is substantial; the Milton Hershey School, which provides tuition-free education to disadvantaged youth, is considered one of the nation's wealthiest charitable schools. *See* Victor Fiorillo, *Is Milton Hershey School to Blame for Abbie Bartels' Suicide?*, Phila. Magazine (July 1, 2016), https://perma.cc/3PCT-L8DL; *see also* Nonprofit Explorer, *Milton Hershey School & School Trust*, ProPublica, https://projects.propublica.org/nonprofits/display_990/231353340/08_2019_prefixes_22-23%2F231353340_201807_990_20190803165440 59 (tax form 990 for period ending July 2018 reflecting total assets of $13.8 billion). And this lawsuit arises out of the death of a 14-year-old student of the Milton Hershey School and allegations by her estate and custodial parents ("Plaintiffs-Appellants") that actions taken by the school led to her death.

Plaintiffs-Appellants appealed from a grant of summary judgment in favor of Defendants-Appellees. Notice of Appeal at 1, ECF 1. The parties filed their

appellate briefs on the public docket, subject to limited redactions. Br. for Pls.-Appellants & J.A. Volume I of V, ECF 19; Defs.-Appellees' Resp. Br., ECF 25; Reply Br. for Pls.-Appellants, ECF 37. Oral argument was scheduled for November 16, 2020, to be conducted via videoconference, with the audio livestreamed on the Court's YouTube channel, due to the ongoing COVID-19 pandemic. Letter at 1, ECF 47. Additionally, the parties were notified that, in keeping with the Court's standard practices:

> Audio of all arguments are posted on the Court's internet website shortly after the conclusion of arguments for the day. In addition, the Court may direct that video of oral argument in cases that are of significant interest to the public, the bar or the academic community be posted on the website.

Id. at 2.

Four days prior to the scheduled oral argument date, Defendants-Appellees filed a letter under seal. ECF 50. Though the content of that letter is unavailable to the public, the docket text accompanying it notes that it communicated Defendants-Appellees' "opposition to posting video of oral argument." The docket entry reflecting the minutes of the November 16, 2020 oral argument is also sealed, ECF 52, and there is no publicly available video or audio recording of the argument. *See* United States Court of Appeals for the Third Circuit, *Oral Argument Recordings – Video*, https://www.ca3.uscourts.gov/oral-argument-recordings-video; United States Court of Appeals for the Third Circuit, *Oral*

Argument Recordings, https://www.ca3.uscourts.gov/oral-argument-recordings. The audio of the argument was not livestreamed on the Court's YouTube channel.

The Inquirer now seeks an order from the Court making the audio and/or video recording of the oral argument available to the public, or, in the alternative, directing the transcript of that argument, if one is created, to be placed on the public docket.[1]

ARGUMENT

I. The Inquirer's Motion to Intervene Should be Granted.

It is well established that members of the public have a right to intervene in order to challenge efforts to close proceedings and seal records. *See, e.g.*, *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 167–78 (3d Cir. 1993); *Littlejohn*, 851 F.2d at 677–78. The Inquirer should be permitted to intervene for this limited purpose, as it seeks to vindicate the public's right to access the oral argument recording and transcript in this appeal.

II. The Oral Argument Recording Should Be Unsealed.

Consistent with the public's presumptive right of access to judicial proceedings and records, The Inquirer respectfully requests that the oral argument

[1] Because Defendants-Appellees' letter requesting that video of the oral argument not be made public is under seal, ECF 50, it is unclear whether they have also requested that the transcript of that argument, once it is released, be kept under seal as well.

recording—or, if created, the transcript of the oral argument—be unsealed. To the extent the Court determines that any party seeking continued sealing of any portion of the oral argument recording or transcript has met its burden to show that such sealing is necessary and warranted, The Inquirer respectfully requests that such sealing be both narrowly tailored and explained in sufficiently detailed, on-the-record findings.

A. The Public Right of Access to Judicial Proceedings and Records in Civil Cases.

i. The First Amendment Right of Access.

The public right of access to civil proceedings and records is protected by the First Amendment. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) ("*Publicker*"); *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 673 (3d Cir. 2019) ("*Avandia*"). "Two complementary considerations" govern whether a particular judicial proceeding or court document is subject to the First Amendment presumption of access. *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*"). The first is whether it is the type of judicial proceeding or record that has "historically been open to the press and general public." *Id*. (explaining that a "tradition of accessibility implies the favorable judgment of experience[]" (citations omitted)). The second is "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*; *see also United States v. Wecht*, 537 F.3d 222,

233–43 (3d Cir. 2008) (explaining and applying the *Press-Enterprise II* "experience and logic" test).

Though this Court has not addressed application of the First Amendment right of access to appellate proceedings and records, *see Cendant*, 260 F.3d at 198 n.13, the U.S. Courts of Appeals for the Fourth and Fifth Circuits have recognized that the First Amendment right applies with equal force in appellate proceedings. *BP Expl. & Prod., Inc. v. Claimant ID 100246928*, 920 F.3d 209, 210–11 (5th Cir. 2019) ("*BP Expl.*"); *United States v. Moussaoui*, 65 F. App'x 881, 890 (4th Cir. 2003). The Fourth Circuit reasoned that "the very considerations that counsel in favor of openness of criminal trial[s] support a similar degree of openness in appellate proceedings," *Moussaoui*, 65 F. App'x at 890, and the same is true with respect to appellate proceedings in civil matters. With respect to civil appellate proceedings, the Fifth Circuit emphasized the detrimental effect closing argument would have on public trust in the courts, noting: "Sealing a record undermines that interest, but shutting the courthouse door poses an even greater threat to public confidence in the judicial system." *BP Expl.*, 920 F.3d at 211. And this Court has held that "the First Amendment right of access must extend equally to transcripts as to live proceedings." *United States v. Antar*, 38 F.3d 1348, 1361 (3d Cir. 1994).

Where the First Amendment right applies, it may be overcome only if "the record . . . demonstrate[s] 'an overriding interest based on findings that closure is

essential to preserve higher values and is narrowly tailored to serve that interest.'" *Publicker*, 733 F.2d at 1073 (quoting *Press-Enterprise II*, 478 U.S. at 9).

ii. The Common Law Right of Access.

This Court has also long recognized a public right of access to civil proceedings and records rooted in common law. *Publicker*, 733 F.2d at 1067; *see also Nixon v. Warner Commcn's, Inc.*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."). The existence of this right, which antedates the Constitution, is "beyond dispute." *Littlejohn*, 851 F.2d at 677–78 (citations omitted); *Avandia*, 924 F.3d at 672. This presumption of access serves numerous functions; among other things, it assures that the public has a "more complete understanding of the judicial system," *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 345 (3d Cir. 1986) (citations omitted), and "promotes public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court," *Littlejohn*, 851 F.2d at 678.

Under this Court's precedent, the right of access applies to civil proceedings themselves, as well as the transcripts of those proceedings. *Publicker*, 733 F.2d at 1067; *Antar*, 38 F.3d at 1361 (finding, in context of criminal proceedings, that transcripts are public judicial documents subject to common law right of access).

And, although this Court has not had occasion to address the applicability of the right of access to appellate oral arguments or the transcripts thereof, specifically, it has consistently held that the right of access applies to dispositive motions in civil cases. *See Westinghouse*, 949 F.2d at 661–62; *Avandia*, 924 F.3d at 672. This is because the disposition of a dispositive motion "shape[s] the scope and substance of the litigation." *Westinghouse*, 949 F.2d at 660; *see also Bank of Am.*, 800 F.2d at 344 (explaining that a court's "action on a motion [is a] matter[] which the public has a right to know about and evaluate"). And, applying this same reasoning, the U.S. Court of Appeals for the District of Columbia Circuit has concluded that the common law right of access undoubtedly applies to appellate briefs and the joint appendix filed in an appeal. *MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 669 (D.C. Cir. 2017); *see also Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (denying request to close oral argument to the public; noting that the U.S. Supreme Court declined to close even a portion of the argument in the *Pentagon Papers* case in *New York Times Co. v. United States*, 403 U.S. 944 (1971)).

The strong common law presumption of access "does not permit the routine closing of judicial records to the public." *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994). A "party seeking to seal any part of a judicial record bears the heavy burden of showing that 'the material is the kind of information that courts

will protect' and that 'disclosure will work a clearly defined and serious injury to the party seeking closure.'" *Id*. (quoting *Publicker*, 733 F.2d at 1071). Such injury must be shown with specificity. *Cendant*, 260 F.3d at 194. "Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient." *Id*.; *see also Avandia*, 924 F.3d at 679 (noting that courts may not seal judicial records that may cause "[m]ere embarrassment" because such "is insufficient to overcome the strong presumption of public access inherent in the common law right"); *Publicker*, 733 F.2d at 1074 (distinguishing trade secrets, protection of which may overcome the right of access, from "bad business practices," protection of which may not overcome the right of access); *United States v. Criden*, 681 F.2d 919, 922 (3d Cir. 1982) (clarifying that while significant privacy interests may sometimes justify some sealing, information that is unflattering, false, or merely embarrassing does not "rise to the level of 'intensified pain'" that justifies withholding access).

"[C]ompelling, countervailing interests" must also be shown to justify sealing records in civil litigation that where the public interest is heightened. *Avandia*, 924 F.3d at 677–78 (explaining that the presumption of access is especially strong in a case that "implicates the public's trust in a well-known and (formerly) widely-used drug").

B. Defendants-Appellees Cannot Meet Their Burden to Justify Continued Sealing of the Oral Argument Record in this Case.

Both the First Amendment and common law rights of access apply to the recording and, if one is created, the transcript of the November 16, 2020 oral argument in this case. Logic and experience both support the conclusion that the First Amendment right of access applies to appellate proceedings and records. *See Moussaoui*, 65 F. App'x at 890; *BP Expl.*, 920 F.3d at 211. The common law right of access also extends to appellate proceedings and records. *Cf. Publicker*, 733 F.2d at 1067; *MetLife, Inc.*, 865 F.3d at 669. Access to an audio and/or video recording of the argument is the best substitute for physical public access to the courtroom during argument, which is unsafe and infeasible during the ongoing COVID-19 pandemic—particularly when, as here, the argument was not livestreamed. *See Publicker*, 733 F.2d at 1072 ("As any experienced appellate judge can attest, the 'cold' record is a very imperfect reproduction of events that transpire in the courtroom.") (quoting *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 663 (8th Cir. 1983)). Both rights of access apply equally to transcripts of oral argument. *Antar*, 38 F.3d at 1361. Accordingly, the oral argument recording, or, in the alternative, a transcript if one is created, must be unsealed absent "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Publicker*, 733 F.2d at 1073 (citation omitted).

The public interest in this case is uniquely strong. The Milton Hershey School is one of the nation's wealthiest charitable boarding schools. Children from lower income families from across Pennsylvania and the country are entrusted to its care. The Hershey Trust, which oversees the Milton Hershey School, has in recent years faced a number of controversies that have prompted criticism and calls for increased public oversight. *See* Pablo Eisenberg, *Hershey School Scandal Underscores Need for Watchful Governance*, Chron. of Philanthropy (Sept. 14, 2011), https://perma.cc/9XM7-5FAE; Eric DuVall, *Hershey Trust Agrees to Changes Amid Allegations of Corruption*, United Press Int'l (July 23, 2016), https://perma.cc/MX3M-PSD6. This lawsuit, in particular, has sparked intense public interest in light of its allegations that the school was responsible for the death of a student previously in its care. *See*, *e.g.*, Fernandez, *Did the Hershey School Reject Students for Depression?*, *supra*; Fiorillo, *supra*. Given the public interest in this lawsuit, sealing of any judicial records can only be justified by "compelling countervailing interests." *Avandia*, 924 F.3d at 678.

Yet no on-the-record findings establish any basis, let alone a "compelling countervailing interest," that would justify maintaining the recording of the oral argument under seal.[2] Given the strong presumption in favor of access to judicial

[2] Here, because Defendants-Appellees' letter requesting that the oral argument video not be posted is itself under seal, ECF 50, it is unclear what reasons—if any—were offered by Defendants-Appellees as initial justifications for sealing.

proceedings and records—a presumption that is only strengthened by the heightened public interest in this case—as well as the absence of any "compelling countervailing interests to be protected" and any "specific findings on the record concerning the effects of disclosure," the oral argument recording should be made publicly available, or in the alternative, if a transcript is created, it should be made available on the public docket. *Miller*, 16 F.3d at 551.

III. To the Extent Continued Sealing Is Proper, Such Sealing Should Be Narrowly Tailored and Supported by Specific, On-the-Record Findings.

Even assuming, *arguendo*, that the parties can satisfy their burden to demonstrate a compelling countervailing interest sufficient to overcome the public right of access, any abridgement of the public right of access to the oral argument recording and transcript should be no broader than necessary to "serve that interest." *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"); *see also Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (narrow tailoring "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy"). Thus, even assuming that, if a transcript is created, continued sealing of some portion of the transcript is justified, limited sealing and/or redaction—not continued sealing of the transcript in its entirety—is warranted. *See Press-Enterprise I*, 464 U.S. at 510.

In addition, as past decisions of this Court have made clear, if the Court finds that continued sealing of any portion of the oral argument record is justified,

the Court should "articulate[] the compelling countervailing interests to be protected, [make] specific findings on the record concerning the effects of disclosure, and provide[] an opportunity for interested third parties to be heard." *Miller*, 16 F.3d at 551; *see also Avandia*, 924 F.3d at 672–74.

CONCLUSION

For the reasons set forth above, The Inquirer respectfully requests that the Court grant its motion to intervene and enter an order requiring the Clerk of the Court to immediately make the audio and/or video recordings of the oral argument available on the Court's website, or in the alternative, if a transcript is created, to make it available on the public docket.

Dated: November 25, 2020

Respectfully submitted,

/s/ Katie Townsend

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COMBINED CERTIFICATIONS

I hereby certify that:

1. The type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 4,268 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief.

2. 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 in 14-point Times New Roman.

3. The electronic versions of the Motion and this Certification filed on ECF were virus-checked using Avast Security, and no virus was detected.

Dated: November 25, 2020

By: */s/ Townsend*
Katie Townsend
Counsel for Proposed Intervenor
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF filing system with a resulting electronic notice to all counsel of record on November 25, 2020.

Dated: November 25, 2020

By: */s/ Katie Townsend*
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