IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	
	CRIMINAL NO. 15-548
	JUDGE JOEL SLOMSKY
v.	
LESLIE ACOSTA	

MOTION OF THE *PENNSYLVANIA NEWSPAPERS* TO INTERVENE AND UNSEAL

Non-parties *LNP Media Group*, the *Philadelphia Inquirer*, and *Spotlight PA* (collectively, the "*Pennsylvania Newspapers*"), hereby move to intervene in this matter and for an order granting access to certain materials that presently appear on the docket as sealed or inaccessible, including docket entries 10, 13, 16, 17, 18, 19, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, and 38, and docketed transcripts 21 and 22. In support of their motion, the *Pennsylvania Newspapers* rely on the accompanying Memorandum of Law and the exhibits attached thereto.

WHEREFORE, the *Pennsylvania Newspapers* respectfully request that the Court grant the motion to intervene and enter an order granting access to the aforementioned sealed materials.

Date: February 16, 2021

Respectfully submitted,

By: */s/ Paula Knudsen Burke*

Paula Knudsen Burke
PA 87607
Reporters Committee for Freedom of the Press
PO Box 1328
Lancaster, PA 17608
Tel: (717) 370-6884
pknudsen@rcfp.org

CORNELL LAW SCHOOL FIRST AMENDMENT CLINIC

Tyler Valeska (*pro hac vice* forthcoming)
Cortelyou Churchill Kenney (*pro hac vice* forthcoming)
Cornell Law School
G33 Hughes Hall
Ithaca, NY 14853-4901
Tel: (607) 255-8897
Fax: (607) 255-7193
tv77@cornell.edu
cck93@cornell.edu

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	**CRIMINAL NO. 15-548**
	:	**JUDGE JOEL SLOMSKY**
v.	:	
LESLIE ACOSTA	:	

MEMORANDUM OF LAW IN SUPPORT OF THE *PENNSYLVANIA NEWSPAPERS'* MOTION TO INTERVENE AND UNSEAL

PRELIMINARY STATEMENT

"I don't think it was a deception [because the] case was under seal." Trial Tr. 106:18–107:1, *United States v. Tartaglione*, No. 15-941 (E.D. Pa. June 6, 2017) (Slomsky, J.). That is how former State Representative Leslie Acosta explained away her decision to seek reelection in 2016 without disclosing to voters her felony guilty plea in this case. Her explanation underscores the enormous costs to Pennsylvania's democratic process wrought by sealed proceedings and documents. Acosta's indictment and subsequent guilty plea were not uncovered until only two months before the election, nearly half a year after the filing deadline for other candidates to run had passed. Running unopposed, Acosta won reelection by default despite her ineligibility to hold office once sentenced. She eventually resigned under bipartisan pressure, requiring a special election to replace her. Because most of the proceedings and documents in this case were sealed, Acosta was able to keep her involvement in a criminal scheme to defraud a mental health clinic in one of Philadelphia's poorest neighborhoods hidden from her constituents until her reelection was all but guaranteed. And now, over two years

after sentencing and despite the significant public interest in a state representative's criminal prosecution, twenty-three of the forty documents filed in this case remain sealed.

Intervenors are a coalition of Pennsylvania news organizations (collectively, the "*Pennsylvania Newspapers*"). They include the state's two most-read newspapers, *LNP* and the *Philadelphia Inquirer*, (which reach millions of combined readers each week) and *Spotlight PA*, a collaborative investigative journalism project of several of the state's top publications. More than 150 journalists work for *LNP's* various publications, including its Harrisburg bureau, which publishes *The Caucus*, a state government watchdog publication. The *Inquirer* is a nonprofit owned publication that has won 20 Pulitzer prizes in its storied history. *Spotlight PA* is an independent, non-partisan effort led by the *Inquirer* in partnership with the *Pittsburgh Tribune-Review, WTTF Public Media*, and *PennLive/The Patriot-News*. It focuses on issues surrounding state government with a special interest in how the Pennsylvania government uses tax dollars. The *Pennsylvania Newspapers*' reporting—consisting of information cobbled together from related trials and legislative proceedings—helped shed light on Acosta's crimes.

They now move to vindicate their common law and First Amendment rights of access to the documents under seal in this case. These rights require open courtrooms, proceedings, and documents, with few exceptions. District courts in this Circuit have periodically improperly sealed court records on the basis of good cause. *See, e.g.*, *In Re Gabapentin Patent Litigation*, 312 F. Supp. 2d 653, 664 (D.N.J. 2004); *Mosaid Technologies Inc. v. LSI Corp.*, 878 F. Supp. 2d 503, 50708 (D. Del. 2012); *Del. Display Grp. LLC v. LG Elecs.*, 221 F. Supp. 3d 495, 496 (D. Del. 2016).

This widespread confusion carries a heavy toll. Access educates the public about the judicial system, encourages the perception that court proceedings are conducted fairly, and allows for observation and evaluation of prosecutorial performance. These interests are particularly stark in cases of public corruption. Without transparency in such cases, the public's faith in the judicial system and government as a whole is jeopardized. Here, the citizens of Pennsylvania were denied transparency,

were prevented from serving their important observational function during most of Acosta's proceedings, and still now cannot evaluate the prosecution because the majority of the docket remains sealed.

The *Pennsylvania Newspapers* thus seek access to twenty-three sealed documents: eight orders (docket entries 10, 18, 19, 25, 26, 27, 37, and 38), two motions (docket entries 17 and 24), two transcripts (docket entries 21 and 22), two sentencing documents (docket entries 34 and 35), eight notices (docket entries 13, 16, 23, 28, 29, 30, 32, and 33), and one "judicial document" (docket entry 36).

In accordance with their common law and First Amendment rights, the *Pennsylvania Newspapers* respectfully request that:

1. they be permitted to intervene;
2. they and the public be granted access to docket entries 10, 13, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, and 38;
3. if any party opposes unsealing of the documents and meets its high burden of justifying why some information must remain under seal, the materials be released with redactions limited only to such information; and
4. if any of the *Pennsylvania Newspapers'* requests are denied, particularized findings be made on the record to justify denial and the *Pennsylvania Newspapers* first be given an opportunity to be heard.

FACTS

The Scheme

Acosta was indicted on one count of conspiracy to commit money laundering in November 2015. Minute Entry, *United States v. Acosta*, No. 15-0548 (E.D. Pa. 2018) (Slomsky, J.). Her testimony nearly two years later at the trial of her co-conspirator, Philadelphia political scion Renee Tartaglione,

gave the public its first official account of her criminal activity. *See United States v. Tartaglione*, No. 15-941, 2018 WL 1740532, at *15–*16 (E.D. Pa. Apr. 11, 2018); Joseph A. Slobodzian, *Ex. Pa. Rep. Acosta Testifies in Tartaglione Fraud Trial*, Philadelphia Inquirer (June 6, 2017).[1] Acosta testified that she and her mother participated in a check-cashing scheme run by Tartaglione at the Juniata Community Mental Health Clinic. Trial Tr. at 11:18–24, 23:9–18 (June 6, 2017); *Tartaglione*, 2018 WL 1740532, at *15. As one prosecutor noted, their victims "were uniquely vulnerable and sympathetic" given that Juniata Clinic is located "in one of the city's poorest neighborhoods." Bobby Allyn, *Renee Tartaglione Sentenced To Nearly 7 Years in Prison for Defrauding Nonprofit*, WHYY (July 12, 2018) (internal quotation marks removed).[2]

The scheme operated as follows. Acosta's mother worked at the clinic as an administrator. Trial Tr. at 17:8–10 (June 6, 2017); *Tartaglione*, 2018 WL 1740532, at *15. She wrote checks to herself from the clinic, then cashed those checks and gave the money to Tartaglione. Trial Tr. 120:18–121:4 (May 31, 2017); *Tartaglione*, 2018 WL 1740532, at *15. Acosta's mother roped Acosta into the scheme in a similar role. Trial Tr. 122:24–123:7 (May 31, 2017); *Tartaglione*, 2018 WL 1740532, at *15. Acosta received checks for work that she never performed, cashed those checks, and then gave the money to Tartaglione. Trial Tr. 23:9–18 (June 6, 2017); *Tartaglione*, 2018 WL 1740532, at *15; Criminal Information at 3, *United States v. Acosta*, No. 15-0548 (E.D. Pa. 2018). These cashed checks created large tax liabilities for Acosta; the clinic sent her checks to cover them, and Acosta inflated her business expenses to lower her tax liability the following year. Trial Tr. 57:7–58:20, 62:22–63:9 (June 6, 2017). In total, Acosta and her mother helped Tartaglione steal over three hundred thousand dollars from Juniata Clinic. *Tartaglione*, 2018 WL 1740532, at *18.

[1] https://www.inquirer.com/philly/news/crime/ex-pa-rep-acosta-testifies-in-tartaglione-fraud-trial-20170606.html.

[2] https://whyy.org/segments/renee-tartaglione-sentenced-to-nearly-7-years-in-prison-for-defrauding-nonprofit/.

The Fallout

Acosta pled guilty in March 2016, shortly after the filing deadline for candidates to run for her seat in the Pennsylvania House of Representatives. Trial Tr. 103:18–22 (June 6, 2017); Jeremy Roebuck, *State Rep Has a Secret: She's a Convict*, Philadelphia Inquirer (Sept. 16, 2016).[3] The public did not learn of her indictment and plea until the *Inquirer* broke the story some six months later. Trial Tr. 105:23–106:10 (June 6, 2017); Roebuck, *State Rep*, *supra.* By then, the general election was only two months away, giving the public little time to take action. *See* Trial Tr. 105:20–106:13 (June 6, 2017). And because the filing deadline to run against her had long passed, there was no opportunity for other candidates to participate in the election.

After the election was a different story. Acosta's guilty plea sparked a bipartisan effort to remove her from public office. Jeremy Roebuck & Angela Couloumbis, *Guilty, But Reelected, Rep. Acosta Finds a Chill at the Capital*, Philadelphia Inquirer (Nov. 17, 2016).[4] Her colleagues rebuffed her: at Acosta's first appearance in the legislature after the news broke, a member of her own party told her that she was no longer welcome. *Id.* Even the governor of Pennsylvania—Tom Wolf, a member of Acosta's own political party—called for her resignation. Jeremy Roebuck & Angela Couloumbis, *Wolf Calls For Convicted State Rep. Acosta to Resign; She Vows to Stay*, Philadelphia Inquirer (Sept. 20, 2016).[5] Acosta finally agreed to step down effective January 3, 2017—notably, she accepted her salary for those three days in January (approximately $720). Jan Murphy, *Convicted Philadelphia Lawmaker to Resign After Collecting a Partial January Paycheck*, PennLive (Dec. 16, 2016).[6] The day that Acosta resigned, the

[3]https://www.inquirer.com/philly/news/politics/20160917_State_rep_has_a_secret__She_s_a_convict.html.

[4]https://www.inquirer.com/philly/news/20161118_Guilty__but_reelected__Rep__Acosta_finds_a_chill_at_the_Capitol.html.

[5]https://www.inquirer.com/philly/news/politics/20160921_Gov__Wolf_calls_for_convicted_state_Rep__Acosta_to_resign__she_vows_to_stay.html.

[6] https://www.pennlive.com/politics/2016/12/convicted_philadelphia_lawmake.html.

House voted to change the General Operating Rules of the House of Representatives so that a guilty plea alone to certain crimes could result in removal from office. *See* H.R. 1, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017).[7]

Acosta's prosecution took place under a shroud of secrecy. Most docket entries were filed under seal and most proceedings were closed. For proceedings that were open, the public did not receive advance notice on the docket of the date and location. *See* Jeremy Roebuck, *Ex-State Rep. Leslie Acosta Sentenced to 7 Months in Career-Ending Case*, Philadelphia Inquirer (June 28, 2017).[8] Acosta's attorney indicated that he requested this widespread sealing to protect the integrity of Tartaglione's trial: "To the extent that anything was sealed after the indictment, it was done at my request, rather than the government's. For us to comment further, might prejudice the ability of Renee Tartaglione to receive a fair trial." Roebuck, *State Rep*, *supra*. Yet even though both Acosta and Tartaglione have been sentenced and sent to prison, twenty-three of the forty documents on Acosta's docket remain sealed.

ARGUMENT

The *Pennsylvania Newspapers*' motion should be granted under Supreme Court and Third Circuit precedent recognizing the First Amendment and common law rights of access to judicial proceedings and documents in criminal cases. The motion proceeds in four parts. First, the *Pennsylvania Newspapers* have standing to intervene. *See United States v. Antar*, 38 F.3d 1348, 1350 (3d Cir. 1994). Second, both the common law and the First Amendment rights of access entitle the *Pennsylvania Newspapers* to access the sealed documents. *See id.* at 1358. Third, if any compelling or countervailing interest outweighs the

[7] Pennsylvania's state constitution bars convicted felons from holding public office, but prior to this rule change that bar did not become effective until after sentencing. *See* Pa. Const. art. II, § 7; Roebuck & Couloumbis, *Guilty, But Reelected*, *supra*.

[8] https://www.inquirer.com/philly/news/pennsylvania/philadelphia/pa-rep-leslie-acosta-sentence-7-months-judge-joel-slomsky-renee-tartaglione-20180628.html#loaded.

Pennsylvania Newspapers' rights of access, continued sealing must be narrowly tailored to satisfy that interest. Fourth, in the event the court allows for continued sealing of some portion of the records at issue, the court must make findings on the record to support its decision. *Press-Enter. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 13–14 (1986) ("*Press-Enterprise II*").

I. THE *PENNSYLVANIA NEWSPAPERS* HAVE STANDING TO INTERVENE

Third parties have standing to challenge the improper sealing of judicial documents. *See Antar*, 38 F.3d at 1350 (granting third party news organization intervenors' request for access to a voir dire transcript). Intervention for such challenges is proper even after the underlying case has been closed. *See Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 n.5 (3d Cir. 1993).[9] The *Pennsylvania Newspapers* thus have standing to intervene for the limited purpose of asserting the public's rights of access to the sealed documents filed with the court.

II. THE FIRST AMENDMENT AND COMMON LAW RIGHTS OF ACCESS APPLY TO THE REQUESTED DOCUMENTS

The dual rights of access serve many important functions. For example, they raise confidence in the judicial system and promote informed discussions on civic matters. *United States v. Kemp*, 365 F. Supp. 2d 618, 630 (E.D. Pa. 2005). For both rights, the court must engage a two-step inquiry: (1) whether the right attaches to the document or proceeding at issue, and if so; (2) whether access is warranted. *See In re Avandia Mktg.*, 924 F.3d 662, 672–73 (3d Cir. 2019) (civil).

To determine whether access is warranted, the common law right requires a balancing test and the First Amendment requires strict scrutiny. *Id.* Thus, "[t]he First Amendment right of access requires

[9] The rights of access were first recognized in the criminal context. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980). The Third Circuit has extended the rights to civil cases as well. *See Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984). Courts generally cite to right of access opinions without making a distinction between civil and criminal. *See, e.g., N. Jersey Media Grp. Inc v. United States*, 836 F.3d 421, 421 (3d Cir. 2016) (citing multiple civil cases when deciding an access issue in a criminal case). Out of an abundance of transparency, this memorandum denotes civil cases when citing them.

a much higher showing than the common law right to access before a judicial proceeding [or document] can be sealed." *In re Cendant Corp.*, 260 F.3d 183, 198 n.13 (3d Cir. 2001). Although the same critical values of openness and accountability undergird both, the rights are distinct.

"The common law right of access antedates the Constitution, and its purpose is to 'promote public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court.'" *Leap Sys. v. Moneytrax, Inc.*, 638 F.3d 216, 220 (3d Cir. 2011) (civil) (quoting *Littlejohn v. Bic Corp.*, 851 F.2d 673, 677–68 (3d Cir. 1988) (civil)). It is frequently applied to judicial documents, ensuring that the public can inspect public records. The common law right can also "fill[] gaps left" by the First Amendment: where the "First Amendment does not afford access . . . the common law may recognize such a right." *Kemp*, 365 F.Supp.2d at 630. The common law's "strong presumption of openness" clearly forbids "the routine closing of judicial records." *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994) (civil). A party seeking to partially seal a record must overcome a "heavy burden"; "[a] party who seeks to seal an *entire* record faces an even heavier burden." *Id.* (emphasis in original). When considering whether the common law right is overcome, a trial court should make a fact-bound determination using "sound discretion." *Nixon v. Warner Communications*, 435 U.S. 589, 599 (1978). Unsealing "information concerning the operation of government" for public dissemination by a newspaper publisher is a paradigmatic application of the common law right. *See id.* at 598.

The First Amendment goes even further. It guarantees freedom of speech and press and, as a corollary to these freedoms, protects the right to listen and hear ideas. *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980). Without this corollary, the freedom of speech would suffer because news organizations would be unable to gather information needed for reporting, depriving the citizenry of the requisite knowledge for a robust civic dialogue. *See In re Express-News Corp.*, 695 F.2d 807, 808 (5th Cir. 1982) ("[F]reedom to speak is of little value if there is nothing to say."). As with the

common law right, the First Amendment's protection for access to the judicial system serves the public interest: the public has a right to learn how our system of justice operates, and the press helps inform the public of important judicial decisions. *See id.*

The Supreme Court has recognized the particular importance of receiving information relating to criminal trials in the First Amendment context. *Richmond Newspapers*, 448 U.S. at 575 ("[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted."). While the right to listen is not explicitly enumerated in the Constitution, "free speech and fair trials are two of the most cherished policies of our civilization," *Bridges v. California*, 314 U.S. 252, 260 (1941). The First Amendment thus guarantees the public a right to attend criminal trials. *Richmond Newspapers*, 448 U.S. at 576.

Courts applying the common law and First Amendment rights of access should evaluate each right separately. *See United States v. Gonzalez*, 927 F. Supp. 768, 774 (D. Del. 1996) (explaining how courts often conflate the common law and First Amendment analyses).[10] The rights have distinct analytical frameworks that require separate applications. *See id.* (unsealing documents under both the common law and the First Amendment after evaluating each right individually). Although courts should generally avoid resolving constitutional questions when possible, the First Amendment right of access (and its higher bar for sealing) is appropriately considered here even should the court find that the common law right compels access. *See id.* ("[B]ecause the Third Circuit appellate court has

[10] The Third Circuit's analysis addressing protective orders in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994), is also sometimes incorrectly applied to right of access cases. In May of 2019, the Third Circuit clarified that the factors in *Pansy* were not to be conflated with the common law or First Amendment right of access to judicial records. *See Avandia Mktg.*, 924 F.3d at 670 ("[W]hile the *Pansy* factors may provide useful guidance for courts conducting the balancing required by the common law test, the *Pansy* factors do not displace the common law right of access standard."). *Avandia Mktg.*, 924 F.3d at 676 (citing *Pansy*, 23 F.3d at 779). *Pansy* was not overturned, but its factors should only be used when evaluating requests for protective orders. *Avandia Mktg.*, 924 F.3d at 676 (citing *Pansy*, 23 F.3d at 779).

recognized that both theories provide a right of access to judicial records, the Court will examine the case *sub judice* under both the common law and the First Amendment right of access theories.").

A. The Common Law Right of Access Entitles the *Pennsylvania Newspapers* to the Requested Documents

The common law right of access encompasses the types of sealed judicial records at issue in this case. *See generally Kemp*, 365 F. Supp 2d at 629–30. While this right is "not absolute" and courts can restrict access after weighing the relevant interests, *see Nixon*, 435 U.S. at 598, there is a "strong presumption in favor of public access," *United States v. Martin*, 746 F.2d 964, 968 (3d Cir. 1984). The Third Circuit has described this strong presumption as a "a thumb on the scale in favor of openness." *See Avandia Mktg.*, 924 F.3d at 676. The balance in this case requires that the *Pennsylvania Newspapers* be granted access.

i. The Common Law Attaches to Judicial Records

Courts evaluating whether the common law right of access attaches to a particular document should ask whether that document is a "judicial record." *N. Jersey Media Grp.*, 836 F.3d at 434. A document is a judicial record when (1) a party files the document with the court or incorporates the document into court proceedings; (2) the court "interprets or enforces the terms of that document"; or (3) the court requires a party to submit the document under seal. *Id.* Of these factors, "[t]he act of filing, in fact, seems to be the most significant consideration" when reviewing a document's status as a judicial record. *Id.* at 434–35 (listing examples of documents that were filed with the court and are thus subject to the common law right of access); *see also United States v. Wecht*, 484 F.3d 194, 209 (3d Cir. 2007) ("[D]ocuments filed with the court are generally subject to the common law right of access."). The common law right of access also extends to transcripts and other documents that are not in evidence, as "[t]he public interest can best be vindicated by the release of complete and accurate transcriptions." *Martin*, 746 F.2d at 968.

If a document is deemed a judicial record, the court must weigh the parties' interests in keeping the documents sealed against the public's presumptive right of access. *See Nixon*, 435 U.S. at 598. Only a significant countervailing interest—such as "a grave risk of serious injury to innocent third parties"—will be considered sufficient to overcome the public's presumptive right. *See In re Capital Cities*, 913 F.2d 89, 94 (3d Cir. 1990). That a document may contain embarrassing or unflattering information cannot "outweigh the strong presumption of access." *Gonzalez*, 927 F. Supp. at 777. This is especially so where an individual has already been publicly connected to the facts in the sealed material. *Capital Cities*, 913 F.2d at 95. Similarly, if a public person testifies publicly in another trial, their privacy interests cannot support sealing. *See United States v. Smith*, 787 F.2d 111, 116 (3d Cir. 1986) ("*Smith II*") (denying the appellant's request to keep transcripts sealed because the appellant was a public person that testified in a public trial). The court must also consider whether the reasons that originally justified the sealing are still valid concerns. *See Miller*, 16 F.3d at 551–52. If not, the documents should be unsealed. *See id.*

ii. The Common Law Compels Access to Documents Filed in This Case

The common law right attaches to the requested documents[11] because all were filed with the court. *See N. Jersey Media Grp.*, 836 F.3d at 434. And the right compels access for each document. Documents 21 and 22 are transcripts*, see Martin*, 746 F.2d at 968–69 (unsealing transcripts not in evidence); Documents 10, 18, 19, 25, 26, 27, 37, and 38 are orders, *see Bonner v. Justia Inc.*, No. 3:18-CV-9187 (PGS) (LHG), 2019 WL 5622536, at *3 (D.N.J. Oct. 31, 2019) (denying request to seal judicial order) ("'[I]t should go without saying that the judge's opinions and orders belong in the public domain.'") (quoting *Union Oil Co. of California v. Leavell,* 220 F.3d 562, 568 (7th Cir. 2000)); Documents 17 and 24 are motions*, see Avandia Mktg.*, 924 F.3d at 677 (remanding where district court's justifications for sealing were insufficient to outweigh presumption of access); Documents 34, 35, and 36 are sentencing documents, *see United States v. Kushner*, 349 F. Supp. 2d 892, 905 (D.N.J. 2005) (granting media group's motion to intervene and unseal sentencing memoranda and letters referenced therein).

Documents 13, 16, 23, 28, 29, 30, 32, and 33 are sealed notices. Sealing of at least some of these documents abridged the public's right of access to court proceedings by failing to notify the public where and when they would take place. Acosta's guilty plea was not known to the public for months after her March appearance, *see* Roebuck, *State Rep Has a Secret*, *supra*, and the press reported that her docket did not include the date or location of her sentencing, *see* Roebuck, *Ex-State Rep, supra.* Inadequate notice jeopardizes public confidence in the fairness of proceedings and inhibits substantive conversation about the legal issues in the community. *See Kemp*, 365 F. Supp 2d at 630. While the public's right to view these proceedings cannot be cured, the Court can now unseal the requested

[11] Docket entries 10, 13, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, and 38.

documents for public inspection. *See Smith II*, 787 F.2d at 114–15 (noting that releasing transcripts is the "next best" way to satisfy the public's right of access after "contemporaneous observation").

B. The First Amendment Also Entitles the *Pennsylvania Newspapers* to the Requested Documents

The First Amendment guarantees the public's and press's right of access to criminal trials. *Richmond Newspapers*, 448 U.S. at 580. This right was well established at the time the First Amendment was adopted, when public attendance at trials was considered an integral part of the American justice system. *Richmond Newspapers*, 448 U.S. at 575. Public access promotes the public's confidence that trials are conducted fairly, ensures that they are free from corruption and bias, and helps citizens become more informed about the judicial system, creating a more educated public. *United States v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982) ("*Criden II*") (citing *Richmond Newspapers*, 448 U.S. at 594 (Brennan, J., concurring)). The Third Circuit has extended this right beyond criminal trials "to additional aspects of criminal proceedings" and "to the records and briefs that are associated with those proceedings." *United States v. Smith*, 123 F.3d 140, 146 (3d Cir. 1997).

Under Supreme Court precedent, courts look to two "complementary" and "related" considerations—the "experience and logic" test—designed to determine whether the First Amendment right attaches to a particular proceeding or document. *Press-Enterprise II*, 478 U.S. at 9. First, the experience prong: "whether the place and process have historically been open to the press and general public." *Id* at 8. Second, the logic prong: "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

In evaluating the experience prong, the Third Circuit has held the historical inquiry should be "wide-ranging" and not "narrow." *Delaware Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 515 (3d Cir. 2013) ("In determining the bounds of our historical inquiry, we look 'not to the practice of the specific public institution involved, but rather to whether the particular *type* of government proceeding [has] historically been open in our free society.'") (quoting *PG Pub. Co. v. Aichele*, 705 F.3d 91, 108 (3d Cir.

2013)) (conclusion reached in the context of an arbitration proceeding) (emphasis in original). Historical openness has been found in many contexts. *See, e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (trials involving specified sexual offenses where the victim was less than eighteen years old); *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) (voir dire examination of potential jurors for criminal trials) ("*Press-Enterprise I*"); *Criden II*, 675 F.2d at 554 (pretrial suppression, due process, and entrapment hearings;); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (civil trials); *United States v. Smith*, 776 F.2d 1104, 1112 (3d Cir. 1985) ("*Smith I*") (a bill of particulars supporting an indictment); *United States v. Simone*, 14 F.3d 833, 835 (3d Cir. 1994) (post-trial hearings to examine jurors for juror misconduct); *Antar*, 38 F.3d at 1359 (the transcripts of voir dire proceeding); *United States v. Thomas*, 905 F.3d 276, 279 (3d Cir. 2018) (plea hearings and the documents related to those hearings).

In evaluating the logic prong, the Third Circuit looks to six societal interests examined by the Supreme Court in *Richmond Newspapers*. *See Criden II*, 675 F.2d at 556. Of these six interests, three are particularly relevant here. First, "public access to criminal proceedings promotes informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system." *Id.* This serves "an important 'educative' interest." *Id.* (quoting *Richmond Newspapers*, 448 U.S. at 572). Here, a high-profile indictment of a sitting public official offered a valuable opportunity to educate the public on how criminal prosecutions and pleas work. That opportunity was missed because the case proceeded under seal.

Second, "public access to criminal proceedings gives 'the assurance that the proceedings were conducted fairly to all concerned' and promotes the public 'perception of fairness.'" *Id.* (quoting *Richmond Newspapers*, 448 U.S. at 570). Importantly, "public confidence in and respect for the judicial system can be achieved only by permitting full public view of the proceedings." *Id.* Here, given the

nature of Acosta's conduct, her status as a political figure, and the significant effect on her constituents, it is critical that the public be satisfied that the proceedings were conducted fairly.

Third, "public access to criminal proceedings serves as a check on corrupt practices by exposing the judicial process to public scrutiny, thus discouraging decisions based on secret bias or partiality." *Id.* Here, while there is no indication that anything untoward occurred in Acosta's case, the public remains unable to serve its constitutional role as a check on the judicial process while the majority of the documents in this case remains under seal.

The logic inquiry is broader than just these interests, which are neither "exhaustive [n]or mandatory." *PG Pub. Co.*, 705 F.3d at 111; *see also, Richmond Newspapers*, 448 U.S. at 569–75; *Criden II*, 675 F.2d at 557. Along with evaluating the benefits that would come from public access, the logic prong also considers "the extent to which openness impairs the public good." *See PG Pub. Co*, 705 F.3d at 111 (quoting *N. Jersey Media Grp., Inc.*, 308 F.3d at 217).

If a matter passes the experience test and logic test, a First Amendment right of public access attaches. *See Press-Enterprise II*, 478 U.S. at 9. Any restraint on the First Amendment right is subject to strict scrutiny. *PG Pub. Co.*, 705 F.3d at 104 (citing *Globe*, 457 U.S. at 606–07). The right can thus be overcome only if sealing is justified by a compelling governmental interest and narrowly tailored to serve that interest. *Globe Newspaper*, 457 U.S. at 606–07.

i. The First Amendment right of access attaches to these documents

The First Amendment right of access attaches to the requested documents. The Third Circuit has extended the First Amendment right of access to documents spanning the entirety of the criminal process. It applies pre-trial. *See In re Newark Morning Ledger, Co.*, 260 F. 3d 217, 220 (3d Cir. 2001) (finding a First Amendment right of access to many pretrial criminal proceedings including pre-trial suppression, due process, and entrapment hearings). And it applies post-trial. *Simone*, 14 F.3d at 839 ("[W]e see no reason to suspect that post-trial proceedings as a general category are any different with

respect to the First Amendment right of access than the other components of a criminal trial."). While the Third Circuit has not specifically considered whether the right attaches to post-trial *documents* (separate from proceedings), strong reasoning suggests it must. As then-Judge Kennedy wrote for the Ninth Circuit, there is "no principled basis for affording greater confidentiality to post-trial documents and proceedings than is given to pre-trial matters" because the "primary justifications" for access, including "that access to criminal trials plays a significant role in the functioning of the judicial process and the governmental system, apply with as much force to post-conviction proceedings as to the trial itself." *CBS, Inc. v. United States Dist. Court*, 765 F.2d 823, 825 (9th Cir. 1985) (internal citation omitted). Given how closely this reasoning tracks the Third Circuit's justification for applying the right to post-trial proceedings, the right applies to post-trial documents for the same reasons.

ii. **The First Amendment Compels Access to the Requested Transcripts**

Two of the documents are transcripts (docket entries 21 and 22), for which there is a strong presumption of access. *See Antar*, 38 F.3d at 1361 ("This strong presumption of access to records, including transcripts, provides independent support for the conclusion that the First Amendment right of access must extend equally to transcripts as to live proceedings."); *See also United States v. Raffoul*, 826 F.2d 218, 225 (3d Cir. 1987) ("[I]nterested members of the press and public must be permitted a hearing within a reasonable time in order to move for access to sealed transcripts of a closed proceeding.").

iii. The First Amendment Compels Access to the Requested Orders

Eight of the sealed documents in this case are orders (docket entries 10, 18, 19, 25, 26, 27, 37, and 38), which are forms of judicial opinions and presumptively open under the First Amendment. "A court's decrees, its judgments, its orders, are the quintessential business of the public's institutions." *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996) (civil); *see also Application of Nat'l Broad. Co., Inc.*, 828 F.2d 340, 345 (6th Cir. 1987) (finding a First Amendment right

of access to proceedings inquiring into conflicts of interest by attorneys because the proceedings "require the court to make factual determinations and to apply settled legal principles in order to rule.") (civil).

Both experience and logic support this conclusion. As to experience, judges have historically issued public decisions. *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006) (civil). And as to logic, there is inherent value in announcing a court's decision and the reasoning behind it. *Id.* ("We hope never to encounter another sealed opinion."); *see also United States v. Ressam*, 221 F. Supp. 2d 1252, 1262–63 (W.D. Wash. 2002). Orders serve to enlighten the public about the functioning of the judicial system and their public dissemination make for a fairer process. *See Ressam*, 221 F. Supp. 2d at 1262. The "disclosing [of] court orders to the public not only plays a significant role in the judicial process, but is also a fundamental aspect of our country's open administration of justice." *Id.* at 1263.

iv. The First Amendment Compels Access to the Requested Motions

Two of the requested documents are motions (docket entries 17 and 24), to which the First Amendment right attaches. *See, e.g., CBS, Inc.*, 765 F.2d at 826 (finding that First Amendment right attaches to Rule 35 motions); *United States v. Cicale*, No. 05-CR-60-2 (NGG), 2018 WL 388941, at *3–4 (E.D.N.Y. Jan. 11, 2018) (same for motions to vacate or alter sentences); *United States v. Raybould*, 130 F. Supp. 2d 829, 833 (N.D. Tex. 2000) (same for motions for downward departure in sentencing and related proceeding).

Both experience and logic support this result. Motions are documents typically filed on a public docket, for which the Third Circuit has identified a traditional presumption of public access (thereby satisfying the experience inquiry). *See Leucadia, Inc.*, 998 F.2d at 161–62. And motions precede judicial decisions, for which the presumption of access applies. In order to understand the court's decision about a motion, the public must have access to the request. Additionally, cases often hinge on motions. Their sealing can thus undermine the *Criden II* interests discussed above by preventing

the public from having a complete understanding of the judicial system, reducing the assurance that proceedings were conducted fairly, and blinding the public's watchful eye. *See Criden II*, 675 F.2d at 556. Here, only the severest of negative consequences could outweigh the sure public benefits to unsealing these motions.

v. The First Amendment Compels Access to the Requested Sentencing Documents

Two of the documents under seal are sentencing documents (docket entries 34 and 35), for which the First Amendment right of access attaches. *See In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986); *see also United States v. Alcantara*, 396 F.3d 189, 191–92 (2d Cir. 2005) (finding the public and the press have a First Amendment right of access to sentencing proceedings); *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 176 (5th Cir. 2011) (same). The Third Circuit recently favorably cited *In re Washington Post Co.* in holding that the First Amendment right of access attaches to plea agreements and related documents. *See Thomas*, 905 F.3d at 282.

Applying the *Press-Enterprise II* experience and logic framework, the Third Circuit would likewise adopt the *In re Washington Post Co.* approach for sentencing documents. "Sentencings have historically been open to the public[.]" *Washington Post Co.*, 807 F.2d at 389; *see also Hearst Newspapers, L.L.C.*, 641 F.3d at 177–79 (conducting robust historical analysis and concluding that sentencing proceedings have traditionally been open). And public access plays a significant positive role in the sentencing process. *See Washington Post Co.*, 807 F.2d at 389; *Hearst Newspapers, L.L.C.*, 641 F.3d at 179. It serves to discourage arbitrary or wrongful conduct because the mere "presence of the public operates to check any temptation that might be felt by either the prosecutor or the court to . . . seek or impose an arbitrary or disproportionate sentence." *Washington Post Co.*, 807 F.2d at 389. The absence of a jury at sentencings makes public access extremely important. *See Press-Enterprise II*, 478 U.S. at 12–13. The value of public presence is not limited to the actual hearings: knowledge that the public can read and evaluate the prosecutor's and the court's conduct in sentencing documents serves the same

function as the public's presence in the actual courtroom. Experience and logic thus tell us that the right attaches to sentencing documents.

vi. The First Amendment Compels Access to the Requested Notices

Eight of the sealed documents here are notices (docket entries 13, 16, 23, 28, 29, 30, 32, and 33). The constitutional right also attaches to these documents under the experience and logic test. Like motions, notices are typically filed on a public docket for which there is a traditional presumption of public access under the common law. *See Leucadia, Inc.*, 998 F.2d at 161–62. Public access to notices is clearly in the public interest because sealing a notice abridges the public's right of access to court proceedings by failing to notify the public where and when these proceedings will take place. The harm of sealing a notice is thus not only the restriction of access to a single document, but also the restriction of access to other parts of the judicial process. In *Criden II*, the Third Circuit acknowledged the important role that notice plays for those that are not present at the courtroom the moment that it is closed; the court held that a motion to close the courtroom for a pretrial criminal proceeding must be docketed "sufficiently in advance of any hearing on or disposition of the closure motion." 675 F.2d at 559. Any negative consequences from granting the public access to notices will be far outweighed by the benefits to the community and the judicial process. Even notices for proceedings or appearances which have already taken place can provide the public with valuable details about what happened. Notices not only provide the public with an opportunity to reconstruct closed proceedings, but also to uncover how the court treated the notices at the time. The public perception of the judicial system is strengthened when notices are made public because there is no perception of secret proceedings.

III. NO PARTY HAS OVERCOME THE HIGH BURDEN TO JUSTIFY SEALING

A document is presumed open to the public once the common law or First Amendment right attaches. *See Avandia Mktg.*, 924 F.3d at 672–74. This presumption can be overcome only if findings

are made that closure is essential to preserve higher values. *See id.* The court must thus "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." *Id.* at 672–73. (quoting *In re Cendant Corp.*, 260 F.3d at 194) (internal quotation marks omitted). The findings must not be "broad allegations of harm," and "specificity is essential." *Id.* at 673.

These strict procedural requirements for sealing were not met in this case. No findings were recorded, nor were any interests articulated by the court. Because no specific findings to justify sealing are available for any of the sealed documents, the public cannot properly evaluate whether or not the high bar for sealing was justified.

Nor are the common law or First Amendment rights of access overcome in this case. Under the common law, the party seeking closure bears the burden of showing that "the interest in secrecy outweighs the presumption." *See id.* at 672. Importantly, there should not be a "routine closing of judicial records to the public." *See id.* (quoting *Miller*, 16 F.3d at 551). Under the First Amendment, the right of access is accorded the same due process protections as other fundamental rights. *See id.* at 673. Sealing should be evaluated under strict scrutiny, with the party seeking closure only prevailing if they can demonstrate—with specificity—"an overriding interest [in excluding the public] based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *See id.* (quoting *Publicker Indus.*, 733 F.2d at 1073). Neither of these tests is met here.

The public's right to these documents is not overcome by any countervailing interests. Any privacy interest that Acosta might have had at the time of sealing has dissipated, given that she was a public person and publicly testified in open trial. *See Smith II*, 787 F.2d at 116 (denying the appellant's request to keep transcripts sealed because the appellant was a public person that testified in a public trial). Much of the information in this case is already public. The local news media (including the *Pennsylvania Newspapers*) reported widely on both Tartaglione's trial and Acosta's guilty plea. Any

publicly available information in the requested documents should be unsealed because "there is no legal basis to seal publicly available information." *See Berrada v. Cohen*, No. CV-16-574 (SDW) (LDW), 2017 WL 11477122, at *1 (D.N.J. Mar. 6, 2017) (civil); *see also Constand v. Crosby*, 833 F. 3d 405, 409 (3d Cir. 2016) (civil) (finding an appeal moot after the district court unsealed documents because the party seeking resealing "indicated that no meaningful relief is possible."). While these documents may contain some information that is embarrassing or unflattering to Acosta, embarrassment cannot "outweigh the strong presumption of access." *See Gonzalez*, 927 F. Supp. at 777.

Further, the danger of "a grave risk of serious injury to innocent third parties" has passed. *See Capital Cities*, 913 F.2d at 94. Tartaglione's trial concluded on June 23, 2017, when Tartaglione was found "guilty on all counts of a fifty-three count Superseding Indictment." *Tartaglione*, 2018 WL 1740532, at *1. The information that came out in the course of the trial is now public. There do not appear to be any reasons that would justify keeping the documents at issue under seal at this juncture. *See Miller*, 16 F.3d at 551–52. Acosta's attorney told the *Inquirer* that the sealing was ordered on his request to prevent prejudice in Tartaglione's trial. Roebuck, *State Rep*, *supra*. Both Tartaglione's and Acosta's proceedings have now concluded, and any fear of prejudicing Tartaglione's trial has therefore abated.

In contrast to the weak justifications for sealing, the public interest in openness here is particularly strong. Two public servants embezzled money from one of Philadelphia's most vulnerable populations. Acosta then used the sealing in this case as cover to distort the democratic process, ultimately forcing her district to hold a special election to replace her. The voters and taxpayers have a strong interest in learning how the state prosecuted Acosta's crimes and how Acosta maneuvered her reelection while under indictment. Unsealing the documents here would have a positive effect on the community and help ensure public confidence in the judicial system.

IV. THE SEALING IN THIS CASE IS NOT NARROWLY TAILORED

The *Pennsylvania Newspapers* ask that the 23 identified documents be unsealed to the fullest extent possible. The exclusion of the press and the public should extend no farther "than is likely to achieve the goals of protection of the defendant's right to a fair trial and the state's interest in confidentiality or prevention of harm to seriously endangered third parties." *Raffoul*, 826 F.2d at 224–25 (internal citations omitted). Even if the Court holds that some of the information contained in these documents should be kept from the public, doing so should not require the sealing of whole documents. The sealing must be "the least restrictive means" and "alternative measures" must be considered. *Antar*, 38 F.3d at 1359.

If necessary, this limited sealing can be accomplished through targeted redactions. However, redactions should only be used when there is a risk of serious harm to third parties, not to avoid the potential for "mere embarrassment." *Smith I*, 776 F.2d at 1110 (quoting *United States v. Criden*, 681 F.2d 919 (3d Cir. 1982)). If any redactions are warranted (i.e. if the court finds that there is a grave risk of serious injury to a third party), those redactions should be narrowly tailored and limited to the names and identifying information of any third parties facing a serious risk of harm. Redactions of these type can be employed to avoid the wholesale sealing of documents while protecting the public's right of access. For example, if there are third parties who were not publicly connected with Tartaglione's crimes through her trial but are identified in the sealed documents, the Court might redact identifying information to protect those individuals. *See Comm'r, Alabama Dep't of Corr. v. Advance Local Media, LLC*, 918 F.3d 1161, 1170 (11th Cir. 2019).

If the heavy burden is met and the court deems it necessary for the documents to remain sealed or to be released only in redacted form, findings must be made to justify such sealing and the *Pennsylvania Newspapers* are entitled to an opportunity to be heard on the matter. These findings must be "specific, individualized," and "articulated on the record." *Antar*, 38 F.3d at 1359. Any closure

should be limited to targeted redactions. Further, if the documents are to be redacted or remain sealed, the *Pennsylvania Newspapers* are entitled to a hearing on such measures before their requests are denied. *See Avandia Mktg.*, 924 F.3d at 678.

CONCLUSION

For the above reasons, the *Pennsylvania Newspapers* request that they be allowed to intervene in this matter to request the unsealing of docket entries 10, 13, 16, 17, 18, 19, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, and 38, and docketed transcripts 21 and 22, and any other judicial document as the Court sees fit to unseal based upon the publicly available information in the document. Further, for any document that the Court declines to unseal, the *Pennsylvania Newspapers* request that the Court make findings on the record as to why the documents do not fall within either the common law or First Amendment rights of access and give justification for any redactions deemed necessary.

Date: February 16, 2021

Respectfully submitted,

By: */s/ Paula Knudsen Burke*

Paula Knudsen Burke
PA 87607
Reporters Committee for Freedom of the Press
PO Box 1328
Lancaster, PA 17608
Tel: (717) 370-6884
pknudsen@rcfp.org

CORNELL LAW SCHOOL FIRST AMENDMENT CLINIC[12]
Tyler Valeska (*pro hac vice* forthcoming)
Cortelyou Churchill Kenney (*pro hac vice* forthcoming)
Cornell Law School
G33 Hughes Hall
Ithaca, NY 14853-4901
Tel: (607) 255-8897
Fax: (607) 255-7193
tv77@cornell.edu
cck93@cornell.edu

[12] Cornell Law School First Amendment Clinic students Julia Gebhardt and Hayden Rutledge assisted in the preparation of this motion.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served the Motion to Intervene and Unseal and Memorandum of Law in support thereof via the District Court's Electronic Filing System and via electronic mail on February 16, 2021 to counsel of record as follows:

Christopher D. Warren
1717 Arch Street
Suite 3640
Philadelphia, PA 19103
christopherduffwarren@hotmail.com

Bea Witzleben
US Attorney's Office
615 Chestnut Street
Suite 1250
Philadelphia, PA 19106
Bea.witzleben@usdoj.gov

Peter Halpern
US DOJ Public Integrity Section
1400 New York Ave. NW
Suite 12000
Washington, DC 20530
Peter.halpern@usdoj.gov

By: */s/ Paula Knudsen Burke*
Paula Knudsen Burke
PA 87607
Reporters Committee for Freedom of the Press
PO Box 1328
Lancaster, PA 17608
Tel: (717) 370-6884
pknudsen@rcfp.org