

IN THE SUPERIOR COURT
of PENNSYLVANIA

No. 21 WDA 2023

IN RE: SEALED ARREST WARRANT
PURSUANT TO PA. R. CRIM. P. 513.1

INITIAL BRIEF OF MEDIA INTERVENORS

On Appeal from the December 14, 2022 Opinion and Order of the
Court of Common Pleas of Westmoreland County

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal, which is taken from the December 14, 2022 Opinion and Order of the Court of Common Pleas of Westmoreland County-Criminal Division in the matter *In re Sealed Arrest Warrant Pursuant to Pa. R. Crim. P. 513.1*, pursuant to 42 Pa. C.S. § 742.

Additionally, this Court has jurisdiction pursuant to the collateral order doctrine, which provides for immediate appellate review of orders denying motions to intervene for the limited purpose of seeking access to judicial records and proceedings, as well as orders on motions to unseal. *See* Pa. R. App. P. 313; *Cap. Cities Media, Inc. v. Toole*, 483 A.2d 1339, 1344 (Pa. 1984); *Commonwealth v. Long*, 922 A.2d 892, 897 (Pa. 2007); *A.A. v. Glicken*, 237 A.3d 1165, 1169 (Pa. Super. Ct. 2020). Access-based motions to intervene and unseal are separate from the merits of the underlying case; they raise the important and “deeply rooted” right of timely public access to the courts; and the access rights they seek to vindicate will be irreparably lost absent appellate review. *Glicken*, 237 A.3d at 1169.

DECISION UNDER REVIEW

Appellants the Herald-Standard – Uniontown Newspapers, Inc. (“Herald-Standard”), the Mon Valley Independent (“MVI”), and the Observer-Reporter (collectively, “Media Intervenors”) seek review of the order of the Court of Common Pleas of Westmoreland County-Criminal Division in the matter *In re Sealed Arrest Warrant Pursuant to Pa. R. Crim. P. 513.1*, No. 801 MD 2022, dated December 14, 2022. **Ex. A.** That order denied, in full, the Emergency Motion to Intervene and Unseal filed by the Herald-Standard – Uniontown Newspapers, Inc., the Mon Valley Independent, and the Observer-Reporter.

SCOPE AND STANDARD OF REVIEW

This Court reviews *de novo* all legal determinations made by the Court of Common Pleas, including rulings on motions to intervene, *see Schriener v. Schaffhauser*, No. 1762 MDA 2012, 2013 WL 11261854, at *2 n.1 (Pa. Super. Ct. June 18, 2013), and rulings on “whether there exists a common law or constitutional right of public access to a judicial proceeding” or record, and the scope of its review is plenary, *see Commonwealth v. Curley*, 189 A.3d 467, 472 (Pa. Super. Ct. 2018) (quoting *Commonwealth v. Selenski*, 996 A.2d 494, 496 (Pa. Super. Ct. 2010)). “A trial court’s decision . . . regarding access to a particular item must be reviewed for abuse of discretion.” *Selenski*, 996 A.2d at 508. A trial court commits an abuse of discretion when it errs as a matter of law or its decision is “the result of partiality, prejudice, bias, or ill-will.” *Kurtzman v. Hankin*, 714 A.2d 450, 453 (Pa. Super. Ct. 1998).

QUESTIONS INVOLVED

1. Did the trial court err as a matter of law when it denied Media Intervenors' motion to intervene for the limited purpose of seeking access to sealed judicial records?

Suggested answer: Yes.

2. Did the trial court err as a matter of law when it denied Media Intervenors' motion to unseal dockets and sealed judicial records?

Suggested answer: Yes.

STATEMENT OF THE CASE

This case raises an issue fundamental to our nation’s guarantee of open courts: when may a criminal court seal entire docket sheets, and nearly all filings therein, from public view.

On November 22, 2022, Media Intervenors moved to intervene and unseal the docket and judicial records in criminal proceedings against defendant Keven Van Lam.¹ Media Intervenors provide news coverage of Westmoreland County and nearby western Pennsylvania communities, including coverage of public safety and criminal activity in the area. Reporters for Media Intervenors routinely cover criminal and civil cases proceeding before the Westmoreland County Court of Common Pleas and local Magisterial District Judges (“MDJs”). To provide their readers with timely and important information about news impacting their communities, Media Intervenors frequently rely on timely access to court dockets and filings.

¹ Although Media Intervenors filed their motion on November 22, 2022, for unknown reasons the Court of Common Pleas docket sheet attached as Exhibit B to the Notice of Appeal lists this filing as having occurred on December 2. R.070a. Additionally, that docket sheet is not publicly available. Media Intervenors were only able to obtain it by contacting Court Administration, who downloaded the docket from the office’s back-end CPCMS system and emailed it to the undersigned counsel so that Media Intervenors could comply with the Superior Court’s requirement that a notice of appeal include the docket entry showing the order appealed from. This exchange confirms that, as discussed *infra*, there is a docket sheet and that docket sheet is sealed.

Media Intervenors have been covering this case since they first heard reports that a shooting death had occurred in Rostraver Township on November 5.² Upon trying to inspect the docket and records in the case, Media Intervenors learned that the Westmoreland County Court of Common Pleas had issued a sealing order on November 6, 2022 (hereinafter, the “Sealing Order”). R.001a; *see also* R.026a, Nov. 21, 2022 Declaration of Mike Jones (“Jones Nov. Decl.”) ¶¶ 5–17; R.030a, Nov. 22, 2022 Declaration of Kristie Linden (“Linden Nov. Decl.”) ¶¶ 6–14, 19. The Sealing Order granted the Westmoreland County District Attorney’s petition to seal the arrest warrant information in *Commonwealth v. Keven Van Lam* for 60

² See Jon Andreassi, *Superior Court Considers Appeal on Sealed Court Records*, Observer-Reporter (Jan. 11, 2023), <https://perma.cc/4E58-X8YR>; Kristie Linden, *Continuance Granted in Shooting Case*, Mon Valley Independent (Dec. 20, 2022), <https://perma.cc/4JJQ-WKWF>; Mike Jones, *Preliminary Hearing Delayed for Suspect in Rostraver Township Killing*, Observer-Reporter (Dec. 20, 2022), <https://perma.cc/2NDS-8TE3>; Jeff Stitt, *Hearing Slated on Motion to Unseal Shooting Case Records*, Mon Valley Independent (Nov. 30, 2022), <https://perma.cc/V5VK-GDFG>; Jon Andreassi, *Media Organizations Move to Unseal Court Records in Rostraver Shooting*, Observer-Reporter (Nov. 23, 2022), <https://perma.cc/P2ED-Z36U>; Mike Jones, *Sources: Rostraver Shooting Victim, Suspect Had Business Ties*, Observer-Reporter (Nov. 19, 2022), <https://perma.cc/TF5Q-QTYD>; Kristie Linden, *Officials Remain Secretive in Murder Case*, Mon Valley Independent, Nov. 18, 2022, at A1 (abbreviated version available online at <https://perma.cc/P8D5-J4TZ>); Mike Jones, *Suspect Revealed in Case Involving Fatal Rostraver Township Shooting*, Observer-Reporter (Nov. 16, 2022), <https://perma.cc/4EG7-YPCJ>; Mike Jones, *Indonesian Man Killed in Rostraver Shooting Laid to Rest in Homeland*, Observer-Reporter (Nov. 15, 2022), <https://perma.cc/GFV3-PEPY>; Jon Andreassi, *Charges Filed Under Seal in Rostraver Shooting*, Observer-Reporter (Nov. 11, 2022), <https://perma.cc/G7WH-A6R7>; Jon Andreassi, *Suspect in Custody After Fatal Rostraver Shooting*, Observer-Reporter (Nov. 9, 2022), <https://perma.cc/6GUK-XQPW>.

days, subject to extensions, and to seal the petition itself. R.001a. The order did not provide a docket number for the *Lam* case. The court thus sealed records in two cases: the miscellaneous docket before the Court of Common Pleas in the above-captioned case and *Commonwealth v. Keven Van Lam* before the MDJ. The Sealing Order stated that “good cause has been shown” for the sealing, but did not detail what facts the court relied upon in finding good cause. R.001a. Although the Sealing Order did not purport to seal any docket sheet or judicial records beyond the arrest warrant information and the County’s sealing petition, Media Intervenors are unable to access any docket pertaining to the case, the charges against the defendant, and other basic information.³

Despite the lack of any judicial order sealing them, the MDJ and Common Pleas dockets were, in fact, sealed pursuant to the Sealing Order and remain so. As Media Intervenors detailed in their declarations, no docket sheet pertaining to the *Lam* case is accessible at the courthouse or through the online Unified Judicial System (“UJS”) case search portal, including when entering the miscellaneous docket number of the above-captioned case (CP-65-MD-0000801-2022), the defendant’s name, or the docket number of *Commonwealth v. Keven Van Lam*

³ On November 7, 2022, a further order of the Court of Common Pleas assigned the *Lam* case to Magisterial District Judge Wayne Vlasic due to the location of the shooting. *See* R.002a. That order did not mention or seal the docket.

(MJ-10103-479-22). *See* Case Search, UJS, <https://ujportal.pacourts.us/CaseSearch>; **Ex. B**, Jan. 17, 2023 Declaration of Mike Jones (“Jones Jan. Decl.”) ¶¶ 12–16; Jones Nov. Decl. ¶¶ 4–19; Linden Nov. Decl. ¶¶ 6, 10–13, 19. In investigating this confounding closure, Media Intervenors were told by the Westmoreland County Court Administrator, the Westmoreland County Clerk of Courts office, Magisterial District Judge Vlasic, the Administrative Office of Pennsylvania Courts (“AOPC”), and the Westmoreland County District Attorney’s office that the docket and all filings pertaining to the *Lam* case were sealed. *See* Jones Jan. Decl. ¶¶ 6–17; Jones Nov. Decl. ¶¶ 5–19; Linden Nov. Decl. ¶¶ 6–7, 10–13.

Only one official offered a legal basis for why the two dockets were sealed: AOPC spokesperson Stacey Witalec told MVI assistant editor Kristie Linden they were sealed as “arrest warrant information” under Pennsylvania Rule of Criminal Procedure 513.1, Sealing of Arrest Warrant. Linden Nov. Decl. ¶¶ 10–13. That rule does not, however, provide for the sealing of entire dockets, as discussed *infra*. Instead, when arrest warrant information is sealed pursuant to Rule 513.1,

[T]he arrest warrant information will be filed in the clerk of courts’ office as a miscellaneous docket case. When the warrant is executed . . . the case will proceed as any other case before the issuing authority. If the case is held for court, the clerk of courts will merge the case from the magisterial district judge with the miscellaneous case previously filed in the clerk of courts’ office.

44 Pa. Bull. 245 (Jan. 11, 2014).

In such cases, then, there are temporarily two dockets: a miscellaneous docket at the Common Pleas level—like the above-captioned case, docketed in the Westmoreland County Court of Common Pleas at 801 MD 2022—and another docket at the MDJ level—here, the docket captioned *Commonwealth v. Keven Van Lam*, at MJ-10103-479-22—that are combined if the case is bound over to the Court of Common Pleas. See Jones Jan. Decl. ¶¶ 5–6, 12–16. Again, Media Intervenors remain unable to access *any* docket related to this case against Mr. Lam, online or at any court, despite repeated attempts. See Jones Jan. Decl. ¶ 16; Jones Nov. Decl. ¶ 19; Linden Nov. Decl. ¶¶ 6–7, 11–14.

Through their newsgathering efforts, Media Intervenors have been able to uncover basic information about the subject criminal proceeding. They discovered that defendant Keven Lam, age 55, was arrested on unknown charges on November 6 or 7, 2022, following the shooting death of a man in Rostraver Square. See Linden, *Officials Remain Secretive*, *supra*; Jones, *Suspect Revealed in Case*, *supra*. Mr. Lam was committed to the Westmoreland County Prison on November 8, 2022, where he remains in custody. See Andreassi, *Suspect in Custody*, *supra*; Westmoreland County Prison Inmate Locator, <https://apps.co.westmoreland.pa.us/prison/PrisonInmates/inmatesearch.html> (last accessed Jan. 20, 2023). The victim was Boyke Budiarachman, age 49. See Jones, *Indonesian Man Killed in Rostraver Shooting*, *supra*; Andreassi, *Suspect in*

Custody, supra. Media Intervenors only learned the date of the preliminary hearing through court and County officials, rather than typical court docketing resources. *See* Jones Nov. Decl. ¶ 18; Linden Nov. Decl. ¶¶ 15, 20. Given the wholesale sealing of the *Lam* docket and filings, however, Media Intervenors remain in the dark as to other key facts, such as the charges against Mr. Lam and the bail amount. *Id.*

To challenge the unwarranted and unusual level of secrecy surrounding the *Lam* proceedings, Media Intervenors filed an emergency motion to intervene and unseal the docket and sealed judicial records on November 22, 2022. R.003a. The motion explained that intervention is the proper procedure for members of the news media to challenge access restrictions; that the strong presumption of access applies to the sealed docket and filings in *Lam*; and that the Commonwealth failed to demonstrate that the presumptive right of access to the sealed docket and records had been overcome. *Id.*

After a December 14 hearing on Media Intervenors' emergency motion, the trial court entered an order denying the motion in full. Ex. A. The court's brief opinion did not address Media Intervenors' intervention request, other than to deny it. *Id.* In its brief discussion on sealing, the trial court said it found that "sealing the arrest warrant as requested[] served a compelling state interest in maintaining the integrity and confidentiality of the Commonwealth's ongoing investigation,"

but did not offer any further explanation for closure or discuss alternatives to sealing. *Id.* at 2. Like the Sealing Order, the opinion did not acknowledge the sealing of the docket or explain how an entire docket sheet could be defined as “arrest warrant information.” *Id.* at 1–2. The order listed the time and place of the December 19 preliminary hearing “in an attempt to alleviate some of the concerns raised by the Intervenors,” and instructed the Assistant District Attorney on the case to “notify counsel for the Intervenors” if the date changed. *Id.* at 3.

On December 19, Mr. Lam appeared in open court, but the hearing was continued to February 13, 2023. *See Linden, Continuance Granted, supra.* The Assistant District Attorney notified Media Intervenors’ undersigned counsel of the continuance, but this information has not been placed on any docket or calendar accessible to members of the public or other members of the press. After the scheduled preliminary hearing, a reporter for Media Intervenors requested to view the complaint in the MDJ-level docket in *Lam*, MJ-10103-479-22, but was again told the case was sealed at the District Attorney’s request. *See Jones Jan. Decl.* ¶¶ 10–16. On January 4, 2023, the trial court extended the Sealing Order by another 30 days, to February 3, on the Commonwealth’s motion. *See Ex. C, Jan. 19, 2023 Declaration of Kristie Linden (“Linden Jan. Decl.”)* ¶ 6. The *Lam* dockets remain sealed.

Media Intervenors noticed this appeal on December 28, and it was docketed on January 5, 2023. R.061a. That same day, Media Intervenors filed an application to expedite the appeal, explaining that so long as the Sealing Order remains in effect, it will continue to thwart Media Intervenors' ability to gather and report the news and the public's ability to obtain timely and truthful information about this pending criminal case of public concern. Appl. to Expedite Appeal (Pa. Super. Ct. Jan. 5, 2023). After considering the Commonwealth's belated response objecting to the application, Answer to Pet. to Expedite (Pa. Super. Ct. Jan. 12, 2023), this Court on January 13, 2023 granted Media Intervenors' application to expedite the appeal and entered a briefing schedule. Orders (Pa. Super. Ct. Jan. 13, 2023). This brief and the reproduced record are filed in accordance therewith.

SUMMARY OF ARGUMENT

Secret dockets are anathema to this nation's guarantee of open courts. For the press and public to be able to monitor ongoing criminal cases—and the workings of the justice system writ large—they must have access to information on what charges a defendant faces, when hearings are scheduled, what the prosecution and defense have to say, and what a court orders. When a docket sheet and nearly all related court filings are sealed, none of that is possible. The news media cannot effectively gather and disseminate news about the case and the public is left in the dark, leading to doubts about whether justice will be served. For those reasons, the

First Amendment, the Pennsylvania Constitution, and the common law create a strong presumptive right of access to judicial records and proceedings. *See, e.g., United States v. Smith*, 123 F.3d 140, 147 (3d Cir. 1997); *Commonwealth v. Upshur*, 924 A.2d 642, 647 (Pa. 2007); *Commonwealth v. Fenstermaker*, 530 A.2d 414, 420 (Pa. 1987); *Selenski*, 996 A.2d at 496. While the right to access court records is not absolute, any sealing must be accompanied by a ruling confirming that the presumption of access has been overcome by interests justifying closure, and that no less-restrictive alternatives will suffice to protect those interests. *Fenstermaker*, 530 A.2d at 420; *Curley*, 189 A.3d at 472. The Court of Common Pleas erred in granting closure in the *Lam* proceeding, and that error has been compounded by total sealing of all relevant dockets and nearly every record filed in the case.

Indeed, in this criminal case involving a shooting death that occurred in public with a suspect already in custody, the dockets and nearly all filings have been sealed at the Commonwealth's request. Inexplicably, the dockets pertaining to Mr. Lam's case are sealed despite the fact that ***no court order*** purports to seal any docket. The Sealing Order and the December 14 order state that ***only*** the arrest warrant information and the County's petition are sealed. R.001a; Ex. A at 2. Yet as the direct result of the Sealing Order, relevant officials and judicial records custodians have barred in-person and online access to the *Lam* docket

entirely. Consequently, basic and presumptively public information about the proceedings, including the charges against Mr. Lam and the dates of scheduled hearings, is unavailable.

Media Intervenors sought to intervene in the above-captioned proceeding for the limited purpose of vindicating their constitutional and common law rights of access. The trial court's decision denying that motion erred as a matter of law in two respects. First, overlooking well-settled precedent that members of the press and public may intervene to challenge access restrictions, *see, e.g., Long*, 922 A.2d at 895 n.1, the trial court improperly denied the motion to intervene without any explanation, seemingly on the flawed basis that because the court intended to deny the relief sought—unsealing—intervention should also be denied.

Second, the trial court erred in denying Media Intervenors' emergency motion to unseal the dockets and judicial records, which are presumptively public. The Sealing Order was issued pursuant to Pennsylvania Rule of Criminal Procedure 513.1, Sealing of Arrest Warrant, but that rule does not apply to docket sheets. *No* court order to date has explained the unheard-of decision to define a docket sheet as "arrest warrant information" or described how sealing dockets is the least restrictive means to protect the Commonwealth's investigation. As to the arrest warrant information itself, the trial court erred in granting closure without sufficiently describing its legal and factual bases beyond a brief conclusory

statement, and in failing to consider alternative means of protecting the Commonwealth's asserted interests. As to additional sealed judicial records—likewise swept into the definition of “arrest warrant information” without explanation, even though the sealed records include documents as innocuous as scheduling orders—the trial court also erred by failing to explain why sealing such records was necessary and by failing to explain its consideration of less-restrictive alternatives such as targeted redaction.

Media Intervenors respectfully request that this Court reverse the decision below in full in an expedited fashion to allow Media Intervenors to obtain and report on basic information ahead of the scheduled February 13 preliminary hearing.

ARGUMENT

I. The Court of Common Pleas erred in denying Media Intervenors' motion to intervene.

The Court of Common Pleas erred in denying Media Intervenors' emergency motion to intervene. “In Pennsylvania, a Motion to Intervene is the proper vehicle for the press to raise a right of access question.” *Long*, 922 A.2d at 895 n.1 (citing *Fenstermaker*, 530 A.2d at 416 n.1). Pennsylvania courts consistently recognize that intervention by members of the news media is an appropriate means of vindicating the public's right of access to judicial proceedings and records, regardless of their subsequent ruling on the merits of the

access question. *See id.*; *Upshur*, 924 A.2d at 645; *Fenstermaker*, 530 A.2d at 416 n.1. “The media’s right of expression must necessarily include the right to be heard when that interest is adversely affected,” and intervention is the mechanism through which members of the media are heard. *Cap. Cities Media, Inc.*, 483 A.2d at 1344.⁴ This general proposition holds true with intervention to assert the public right of access to arrest warrant information. *Fenstermaker*, 530 A.2d at 416 n.1, 420.

Here, Media Intervenors moved to intervene for the limited purpose of asserting their right of access to dockets, judicial records, and proceedings under the First Amendment, the Pennsylvania Constitution, and the common law. *See* R.003a. Neither Defendant nor the Commonwealth contested Media Intervenors’ intervention; only unsealing. *See generally* R.034a–059a (Dec. 14, 2022 Hr’g Tr.). At the hearing and in its opinion and order, the trial court did not provide *any*

⁴ Accordingly, the Pennsylvania Rules of Civil Procedure provide a mechanism for members of the press and public to intervene. Rule 2327 enumerates four categories of non-parties who may intervene in an ongoing matter, including any person for whom “the determination of such action may affect any legally enforceable interest.” Pa. R. Civ. P. 2327(4). Unless one of the exclusionary criteria set forth in Rule 2329 applies, a non-party who fits within one of the four categories identified in Rule 2327 shall be permitted to intervene. *Larock v. Sugarloaf Twp. Zoning Hr’g Bd.*, 740 A.2d 308, 312–13 (Pa. Commw. Ct. 1999). Media Intervenors’ legally enforceable interest in access to judicial records justifies their intervention under Rule of Civil Procedure 2327(4), and none of the exclusionary criteria identified in Rule of Civil Procedure 2329 apply. Pa. R. Civ. P. 2327, 2329.

explanation as to why it denied Media Intervenors’ motion to intervene. *Id.*; *Ex.*

A. It appeared to hold that Media Intervenors should not be permitted to intervene because they were not entitled to access the requested records. *Id.* In conflating intervention with the merits of the unsealing request, the trial court committed legal error, and this Court should reverse. *See Fenstermaker*, 530 A.2d at 416 n.1 (instructing that intervenors’ access motion is “to be considered separately”).

II. The Court of Common Pleas erred in denying Media Intervenors’ motion to unseal.

A. The strong presumption of access attaches to the docket, judicial records, and proceedings in this case and in *Lam*.

The First Amendment, article 1, sections 9 and 11 of the Pennsylvania Constitution, and the common law all guarantee members of the press and public a presumptive right of access to judicial records and proceedings. *See, e.g., Smith*, 123 F.3d at 147; *Upshur*, 924 A.2d at 647; *Fenstermaker*, 530 A.2d at 417; *Selenski*, 996 A.2d at 496. The constitutional and common law rights of access are not identical—the constitutional right of access provides stronger protections, while the common law right of access attaches to more types of records. *See Long*, 922 A.2d at 897–98 & n.6.

Here, Media Intervenors have a presumptive right of access to the dockets, arrest warrant information, and any additional filings and proceedings in the proceedings against Mr. Lam.

1. Dockets are presumptively public.

First, docket sheets—including the miscellaneous docket in the above-captioned case and the docket maintained by the MDJ in *Commonwealth v. Keven Van Lam*—are presumptively public judicial records under both the First Amendment and common law. *See Curley*, 189 A.3d at 473 (“Docket entries and other filings in a criminal proceeding are public records” to which the constitutional and common law rights of access attach); *see also Doe v. Pub. Citizen*, 749 F.3d 246, 268 (4th Cir. 2014) (holding First Amendment access right attaches to civil and criminal dockets); *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993) (sealed dockets are “an unconstitutional infringement on the public and press’s qualified right of access to criminal proceedings”); *United States v. Criden*, 675 F.2d 550, 557–59 (3d Cir. 1982) (“The case dockets . . . are public records.”). Accordingly, the UJS Case Records Public Access Policy provides that “[a]ll case records,” including “dockets,” “shall be open to the public in accordance with this policy.” 204 Pa. Code § 213.81(1)(B), (3).

Indeed, access rights “would be merely theoretical if the information provided by docket sheets were inaccessible.” *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004). Docket sheets provide information on scheduled hearings, give notice of motions for closure so that the public may object, facilitate the inspection of public judicial records, educate the public on the courts’

workings, and increase fairness and the perception thereof. *Id.* at 93, 95. If members of the press and public do not have access to a docket sheet setting forth a hearing schedule, they will be unable to learn about and attend those hearings, which will effectively occur in secret even absent a closure order. *Pub. Citizen*, 749 F.3d at 268.

2. Arrest warrant information is presumptively public.

Next, the arrest warrant information pertaining to Mr. Lam is presumptively public under the common law. *Fenstermaker*, 530 A.2d at 418–19; *see also id.* at 419 (declining to reach First Amendment claim); *but see Commonwealth v. Fenstermaker*, 502 A.2d 181, 184 (Pa. Super. Ct. 1985) (holding First Amendment right attaches to arrest warrant information). Public access to arrest warrant information discourages perjury in affidavits, encourages law enforcement to ensure affidavits are supported by sufficient cause, promotes fairness and accuracy in judicial decision making, and increases the perception of fairness in the arrest warrant process. *Fenstermaker*, 530 A.2d at 418–19.

Rule 513.1 is not to the contrary. It provides for the temporary sealing of “arrest warrant information,” which it defines as “the criminal complaint in cases in which an arrest warrant is issued, the arrest warrant, any affidavit(s) of probable cause, and documents or information related to the case.” Pa. R. Crim. P. 513.1(A). The rule was drafted in 2013 to codify *Fenstermaker*, and, like that

case, recognizes that arrest warrant information is covered by “the presumption of openness” and should only be sealed in “rare cases” where the Commonwealth can overcome that presumption. Cmt., Pa. R. Crim. P. 513.1 (citing *id.*).

3. *The remaining filings and proceedings are presumptively public.*

Finally, while the Sealing Order renders Media Intervenors unable to ascertain what additional filings and proceedings have occurred in this matter, any filings and proceedings are, as a rule, presumptively public under the First Amendment and common law. *See Upshur*, 924 A.2d at 648 (“[A]ny item that is filed with the court as part of the permanent record of a case and relied on in the course of judicial decision-making will be a public judicial record or document.”); *see also In re Cendant Corp.*, 260 F.3d 183, 192–93 (3d Cir. 2001) (“[T]here is a presumptive right of public access to pretrial motions of a nondiscovery nature[.]” (citation and internal quotation marks omitted)). Sealing petitions, scheduling orders, and judicial opinions—to name a few types of records that may be in the sealed files—like all records filed with and relied on by the court, are presumptively public judicial records. *See Curley*, 189 A.3d at 473; *Selenski*, 996 A.2d at 496.

B. The strong presumption of access to judicial records and proceedings in this case is not overcome.

Where, as here, the presumption of access to judicial records and proceedings attaches, the burden is on the party seeking closure to overcome that

presumption and justify sealing. *See Upshur*, 924 A.2d at 651. The First Amendment and the common law each set their own bar for overcoming the presumption of access. Under the First Amendment, “[o]nly a *compelling* government interest justifies closure and then only by a means narrowly tailored to serve that interest.” *In re M.B.*, 819 A.2d 59, 63 (Pa. Super. Ct. 2003) (emphasis in original) (citations and internal quotation marks omitted). Specifically, the party seeking to restrict public access must demonstrate “that opening the proceedings will work a clearly defined and serious injury to the party seeking closure” and “that the material [it seeks to keep secret] is the kind of information that the courts will protect.” *Id.* (citations and internal quotation marks omitted). Where the common law presumption of access attaches, the party seeking closure must establish that the presumption of access is outweighed by interests in secrecy. *Upshur*, 924 A.2d at 651 (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 602 (1978)).

The burden on the proponent of closure is heaviest when that party seeks to seal a case in its entirety. *Ayala v. Speckard*, 131 F.3d 62, 70 (2d Cir. 1997) (en banc) (“[T]he more extensive . . . the closure requested, the greater must be the gravity of the required interest and the likelihood of risk to that interest.”); *United States v. Doe*, 63 F.3d 121, 129 (2d Cir. 1995); *Miller v. Indiana Hosp.*, 16 F.3d

549, 551 (3d Cir. 1994) (“A party who seeks to seal an *entire* record faces an even heavier burden.” (emphasis in original)).

Procedurally, courts must publicly docket notice of a hearing on closure, permit individuals opposing closure to be heard, make specific on-the-record findings justifying closure, and explain their consideration and rejection of less-restrictive alternatives to closure. *See Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984); *Criden*, 675 F.2d at 557–60; *Upshur*, 924 A.2d at 651–52; *Commonwealth v. Hayes*, 414 A.2d 318, 322 (Pa. 1980); *Commonwealth v. Buehl*, 462 A.2d 1316, 1321–22 (Pa. Super. Ct. 1983). Because these procedural steps are essential to protecting access rights and enabling appellate review of sealing decisions, it is reversible error for the trial court to ignore them. *See Long*, 922 A.2d at 906; *PG Publ’g Co. v. Commonwealth*, 614 A.2d 1106, 1109 (Pa. 1992).

1. The trial court erred in sealing the dockets.

Here, the strong presumption of public access is not overcome as to any of the sealed records, beginning with the dockets. As noted, access to dockets is protected not only by the common law, but also by the First Amendment, which requires that closure be the least restrictive means of serving a compelling state interest. *See Pub. Citizen*, 749 F.3d at 268; *Hartford Courant Co.*, 380 F.3d at 93; *Valenti*, 987 F.2d at 715; *Criden*, 675 F.2d at 557–59; *Curley*, 189 A.3d at 473. Yet the dockets are sealed—remaining inaccessible online and at the courthouse—

despite the fact that the Commonwealth has shirked its burden to justify sealing and *no* court order purports to seal any docket. *See* Jones Jan. Decl. ¶ 16; Jones Nov. Decl. ¶¶ 4–19; Linden Jan. Decl. ¶ 17; Linden Nov. Decl. ¶¶ 6, 10–13, 19; R.001a, 098a; Ex. A.

Rather than attempt to meet its burden to justify sealing dockets, the Commonwealth claimed at the December 14 hearing that it did not know “what docket exists,” it “didn’t ask for a specific ruling that a docket be sealed,” and it “w[as] not in the position to be able to answer” whether it believed sealing the docket was necessary to protect its investigation. R.047a, 052a. Instead, it pointed to court administrators such as the AOPC and MDJ’s office, arguing they were responsible for the sealing. *See* R.040a. In its belated response to Media Intervenors’ Application to Expedite Appeal, the Commonwealth claimed that the motion to unseal the dockets was “based upon a false premise” because there was ostensibly no “docket at the Magisterial District Court level” and “the only docket concerning this matter is the one from which Appellant has secured access to the orders they are currently appealing, CP-65-MD-801-2022.” Answer to Pet. to Expedite, *supra*, ¶ 7. On January 19, the Commonwealth—in an email to the undersigned from Assistant District Attorney James Lazar—conceded for the first time that the MDJ docket in *Lam* exists, and had been included on a hearing notice sent to the arresting officer. Again, at both the Common Pleas and MDJ levels, the

fact remains that Media Intervenors cannot access any docket sheet pertaining to the *Lam* case, and thus cannot access basic information about the defendant and proceedings. *See* Jones Jan. Decl. ¶¶ 6, 16–17; Jones Nov. Decl. ¶¶ 4–19; Linden Nov. Decl. ¶¶ 6, 10–13, 19; *see also* Case Search, UJS, <https://ujportal.pacourts.us/CaseSearch> (showing “No results found” for docket numbers CP-65-MD-0000801-2022 or MJ-10103-47-0000009-2022) (last accessed Jan. 20, 2023). While Media Intervenors can access the Sealing Order, that is the extent of their ability to scrutinize the case—no docket sheet or additional records are accessible. Such near-total closure occurred as the direct result of the Commonwealth’s sealing motion and it bears the burden to justify sealing—not the administrative staff whose role is simply to carry out court orders, and not Media Intervenors.

The trial court likewise failed to satisfy the First Amendment’s stringent criteria for sealing the docket, or even those of the common law. The word “docket” does not appear in the Sealing Order or any other trial court order. Even after this Court directed the trial court to issue “a substituted or supplemental opinion that addresses the full scope of the sealing order as raised by Appellants in their application to expedite, *in particular the sealing of the docket*,” Order on Briefing Schedule (Pa. Super. Ct. Jan. 13, 2023) (emphasis added), the trial court did not mention the docket and instead incorporated its December 14 order

denying Media Intervenors’ unsealing motion, which likewise does not mention the docket. R.098a. This hardly fulfills the court’s requirement to issue “individualized, specific, particularized findings” for sealing. *Curley*, 189 A.3d at 473. At the hearing, the trial court appeared to recognize that “[t]here has to be” a docket in the *Lam* case, and that unsealing it would reveal “[n]o identifying information about any ongoing investigation. It’s really just informational factors concerned with where the hearing is going to be, what’s the date, what’s the time of the hearing, who is counsel of record.” R.049a–050a. The resulting order denying unsealing, however, again only mentioned the “arrest warrant information.” Ex. A at 1–2. Although that order provided a brief, conclusory reason for sealing—to protect the Commonwealth’s investigation—it did not explain how sealing the *entire* docket was the least restrictive means of serving that interest, or discuss any alternatives such as providing a docket sheet but sealing or redacting some filings. *See Pub. Citizen*, 749 F.3d at 268; *Hartford Courant Co.*, 380 F.3d at 93; *Valenti*, 987 F.2d at 715; *Curley*, 189 A.3d at 473. “Such overbreadth violates one of the cardinal rules that closure orders must be tailored as narrowly as possible.” *In re State-Record Co.*, 917 F.2d 124, 129 (4th Cir. 1990).

Additionally, the trial court’s listing of the preliminary hearing time and place in its December 14 order, with a directive that the Commonwealth notify the

undersigned counsel of schedule changes, did not “alleviate” the “concerns raised by the Intervenors” regarding the sealed dockets. Ex. A at 3. If anything, it only highlighted the contradictions inherent in the Sealing Order—if the trial court agrees it is proper to share information about upcoming hearings, why seal the docket sheet which provides notice of those hearings? *See* Jones Nov. Decl. ¶¶ 11, 14 (describing denial of access to docket and scheduling orders). Additionally, this *ad hoc* system of public notice is grossly insufficient. Only individuals connected to Media Intervenors or the parties would be able to learn of preliminary hearing dates and, therefore, attend. The right of access is shared by *all* members of the press and public alike; it is not a privilege granted only to those who have access to an attorney who can file a motion and agitate enough to receive a court date as a means to placate. *See Fenstermaker*, 530 A.2d at 416. Granting one person special access to information about the preliminary hearing does not satisfy the presumption of open courts. As the Third Circuit explained, “such a procedure, whereby the” District Attorney’s office “personnel act as ‘stringers’ for the press” by notifying them of hearings “is unworkable” and cannot replace public docketing. *Criden*, 675 F.2d at 560. That loss of access is particularly harmful for a preliminary hearing, as it is “the first opportunity for both sides to present evidence and call witnesses before a judicial officer” and there is “no record of the proceedings” unless the parties request a court reporter. *FAQ: Limited Jurisdiction*

Courts in Pennsylvania, AOPC (Aug. 17, 2015), <https://perma.cc/N38R-H36Q>. If the public is to rely on press reports to observe and understand preliminary hearings, journalists must be able to report about what transpires at these hearings fully and in detail.

Confoundingly, while the trial court’s orders do not mention sealing dockets—even as they attempt to “alleviate” Media Intervenors’ “concerns” about sealed dockets—the dockets remain sealed. Apparently, the dockets have been construed by court officials and the District Attorney’s office as falling within Rule 513.1’s definition of “arrest warrant information” to include “documents or information related to the case.” Pa. R. Crim. P. 513.1(A) (defining the term as “the criminal complaint in cases in which an arrest warrant is issued, the arrest warrant, any affidavit(s) of probable cause, and documents or information related to the case”); Linden Nov. Decl. ¶ 13. Rule 513.1, however, does not provide for the sealing of docket sheets, only certain filings. In cases with a Rule 513.1 seal order, “the arrest warrant information will be filed in the clerk of courts’ office as a miscellaneous docket case,” which is “merge[d]” with the MDJ’s case file if the case is held for court. 44 Pa. Bull. 245 (Jan. 11, 2014). In other words, while some filings are sealed, the dockets at the Common Pleas and MDJ levels exist and remain presumptively public, as in “any other case.” *Id.* This makes sense because while the basic information contained in docket sheets is essential to the

public right of access, it would not—as the trial court noted—reveal the details of law enforcement investigations. R.049a–050a. Rule 513.1’s drafters had no reason to provide for sealing dockets, nor were dockets at issue in *Fenstermaker*, which the rule was written to codify. Cmt., Pa. R. Crim. P. 513.1; *Fenstermaker*, 530 A.2d at 420–21.

Reading Rule 513.1 to provide for the sealing of entire dockets would not only be inconsistent with the rule’s text and purpose, but it would also violate the constitutional right of access. When a statute or rule is susceptible to one reading that would raise constitutional doubts and one that would not, it is incumbent upon the Court to construe the rule to avoid constitutional doubt. *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017); 1 Pa. C.S. § 1922. Here, that principle requires this Court to avoid defining dockets as arrest warrant information under Rule 513.1(A).

The First Amendment protects the right of access to docket sheets, which are essential to the public’s ability to monitor litigation and rarely—if ever—contain sufficiently sensitive information to warrant sealing. *See Pub. Citizen*, 749 F.3d at 268; *Hartford Courant Co.*, 380 F.3d at 93; *Valenti*, 987 F.2d at 715; *In re State-Record Co.*, 917 F.2d at 129; *Curley*, 189 A.3d at 473. Accordingly, to seal a docket, the proponent of sealing must show it is the least restrictive means of serving a compelling state interest. *Id.* In contrast, Rule 513.1 requires only a

showing of “good cause” for sealing. Pa. R. Crim. P. 513.1. If docket sheets could be sealed on this weaker showing, the press and public’s First Amendment right of access to them would disappear. Instead, for Rule 513.1 to be consistent with the First Amendment right of access, this Court should hold that it does not provide for the sealing of dockets.

In sum, no court order has sealed the docket, the Commonwealth did not meet its burden to justify sealing, the trial court did not explain how sealing the docket was the least restrictive means of serving a compelling state interest, and the sealing is improper under Rule 513.1. Accordingly, denying Media Intervenors’ motion to unseal the docket was reversible error. *See id.; In re M.B.*, 819 A.2d at 63.

2. The trial court erred in sealing the arrest warrant information.

Next, although the trial court did explicitly seal the arrest warrant information, such closure was likewise inconsistent with the public right of access. Under Rule 513.1, the Commonwealth bears the burden of establishing “good cause” for sealing arrest warrant information. Pa. R. Crim. P. 513.1. Consistent with the common law right of access, the court is required to issue an order “contain[ing] an articulation of the factors taken into consideration” in deciding whether “the presumption of openness attached to a public judicial document is outweighed by circumstances warranting closure of the document to public

inspection.” *Fenstermaker*, 530 A.2d at 420–21. Additionally, the court is required to address “the availability of reasonable alternative means to protect the interest threatened by disclosure” of arrest warrant information. Cmt., Pa. R. Crim. P. 513.1. Neither the Commonwealth, nor the trial court, met these requirements.

The Sealing Order failed to describe the purported “good cause” or any factual or legal ground for sealing the arrest warrant information, and did not discuss any alternatives. R.001a. The trial court’s December 14 order explained, for the first time, its rationale for sealing: to “serve[] a compelling state interest in maintaining the integrity and confidentiality of the Commonwealth’s ongoing investigation.” Ex. A at 2; *but see* R.044a (Commonwealth refusing at hearing to describe reason for sealing arrest warrant information, because “I believe fervently that we should not be required to do that in open court.”). Here, too, however, the trial court erred by failing to provide any factual and legal grounds for closure beyond this brief and conclusory statement. *See In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, 924 F.3d 662, 678 (3d Cir. 2019) (rejecting “broad, vague, and conclusory allegations of harm that are, standing alone, insufficient to overcome the presumption of public access”); *PG Publ’g Co.*, 614 A.2d at 1109. And, the court did not address any less-restrictive alternatives, such as targeted redactions. *See Press-Enter. Co.*, 464 U.S. at 510; *Criden*, 675 F.2d at 560; *Upshur*, 924 A.2d at 652; *Fenstermaker*, 530 A.2d at 420; *Buehl*, 462 A.2d at

1322. Accordingly, the trial court committed reversible error in denying Media Intervenor’s motion to unseal the arrest warrant information.

3. *The trial court erred in sealing the remaining filings.*

As to the additional sealed records in the case, their presumptively public nature requires the trial court to explain the factual and legal bases in favor of closure and describe why less-restrictive alternatives would be insufficient to serve the Commonwealth’s interests. *Id.* Neither the Sealing Order nor the December 14 order does so. Instead, they seal only “arrest warrant information,” with no mention of the other records in the case that have been sealed because of the court’s orders. Not all of the sealed documents are arrest warrant information. For example, scheduling orders are sealed. *See* Jones Nov. Decl. ¶ 14. Absent an overriding interest in closure supported by individualized, document-by-document findings following *in camera* review, it was error to seal the judicial records in this case. *See In re M.B.*, 819 A.2d at 63; *Curley*, 189 A.3d at 474.

* * *

The constitutional and common law presumption of openness—which is always weighty—has particular force here, where a member of the community has been shot and killed in a public shopping plaza and the entire case against the suspect has been sealed. It is undeniable that the public has a significant, legitimate interest in timely access to the facts and legal proceedings surrounding

this incident, which occurred entirely in the public. The pervasive yet unexplained sealing of the dockets, arrest warrant information, and additional filings in this case violates the presumption of public access. The trial court erred in denying Media Intervenors' motion to unseal, and Media Intervenors urge this Court to reverse.

III. To the extent any continued sealing is necessary, such sealing must be narrowly tailored and supported by specific, on-the-record findings.

Even assuming, *arguendo*, that the parties could demonstrate a countervailing interest necessitating some form of closure, any such access restrictions must be no broader than necessary to serve that interest. *Press-Enter. Co.*, 464 U.S. at 510; *Buehl*, 462 A.2d at 1322. Further, any such continued sealing must be supported by specific, on-the-record factual findings. *Upshur*, 924 A.2d at 651 (citing *Fenstermaker*, 530 A.2d at 420–21).

Accordingly, if the Court finds any continued sealing may be necessary, Media Intervenors respectfully ask that this Court direct the trial court to unseal the docket sheets—including the nature of the charges against Mr. Lam—and utilize targeted redaction of specific records instead of wholesale sealing. *Cf., e.g., Press-Enter. Co.*, 464 U.S. at 520 (Marshall, J., concurring) (citing redaction as a less-restrictive alternative to complete closure); *Wartluft v. Milton Hershey Sch. & Sch. Tr.*, No. 16-CV-2145, 2019 WL 5394575, at *5 (M.D. Pa. Oct. 22, 2019) (“[C]onsider[ing] redaction of sensitive material as an alternative to wholesale sealing of documents, an approach which also calls for a document-specific

analysis.”); *United States v. Korbe*, No. 09-CR-0056, 2010 WL 11527423, at *4 (W.D. Pa. Nov. 8, 2010) (granting in part motion to unseal but redacting records “in the narrowest possible manner” after finding “no alternatives . . . would protect the compelling interests” at stake). Media Intervenors also request that the trial court be directed to place its detailed factual and legal findings on the record, explaining, as necessary, why the presumptive right of access is overcome, as well as why less-restrictive alternatives do not adequately protect the interests at stake.

CONCLUSION

For the reasons set forth above, Media Intervenors respectfully request that this Court vacate the order of the Court of Common Pleas denying their motion to intervene and unseal. Media Intervenors also respectfully request that the Court adjudicate this matter in an expedited fashion to allow Media Intervenors to obtain and report on basic information ahead of the scheduled February 13 preliminary hearing.

Dated: January 20, 2023

Respectfully submitted,

/s/ Paula Knudsen Burke

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CERTIFICATES OF COMPLIANCE

I hereby certify that:

1. This filing complies with the word count limit set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1). Based on the word-count function of Microsoft Word, the filing contains 7,564 words.

2. This filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: January 20, 2023

/s/ Paula Knudsen Burke

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