IN THE SUPERIOR COURT
of PENNSYLVANIA

No. 21 WDA 2023

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

RESPONSIVE 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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PRELIMINARY STATEMENT

It is beyond dispute that the right of the press and public to contemporaneously access judicial records is protected by the First Amendment and the Pennsylvania Constitution. *See* Pa. Const. art. I, § 11; *United States v. Wecht*, 537 F.3d 222, 229 (3d Cir. 2008); *Commonwealth v. Fenstermaker*, 530 A.2d 414, 418 (Pa. 1987). Media Intervenors depend on that access right to fulfill their role of informing readers in a timely fashion about court proceedings in their community, and are entitled to intervene to vindicate it and challenge court closures. *Commonwealth v. Long*, 922 A.2d 892, 895 n.1 (Pa. 2007). When, as here, the Commonwealth seeks to seal presumptively open judicial records, it bears the burden of overcoming that presumption of access, and a court may not seal the records without particularized findings supporting closure. *See, e.g.*, *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13–14 (1986); *United States v. Antar*, 38 F.3d 1348, 1358–59 (3d Cir. 1994); *Commonwealth v. Upshur*, 924 A.2d 642, 645 (Pa. 2007). The Commonwealth has failed to satisfy these stringent requirements. So, too, has the trial court, leading to the impermissible blanket sealing of dockets and records in a case of significant public concern. As this Court observed, the trial court's sparse orders lack factual and legal findings and do not explain their scope, rendering "this Court [] unable to conduct meaningful appellate review." Jan. 26 Order at 2.

As has become clear from the Commonwealth's initial brief and criminal defense counsel's January 19, 2023 letter to the Court, ***no*** party objects to Media Intervenors' intervention, and ***no*** party objects to unsealing the dockets in the criminal proceedings against Keven Lam. *See* Commonwealth's Initial Br.; Commonwealth's Reply Br.; Def.'s Jan. 19 Letter. Although the Commonwealth's brief attempts to muddy the waters by making inapposite and incorrect arguments about the facts and legal burdens in this case, this Court should not be distracted by such efforts. Instead, Media Intervenors urge this Court to uphold the strong presumption of timely access to court records, requiring proponents of sealing to meet their burden to justify closure and courts to, if sealing any records, detail their factual and legal bases for doing so. When, as here, the proponent of sealing and the trial court do not comply with these strict requirements, the records at issue must be unsealed.

ARGUMENT

I. The Court of Common Pleas did not grant Media Intervenors' motion to intervene; rather, it erroneously denied the motion.

The Commonwealth does not object to Media Intervenors' intervention, nor does Mr. Lam. *See* Commonwealth's Initial Br. at 8–9; Def.'s Jan. 19 Letter; R.034a–059a (Dec. 14, 2022 Hr'g Tr.). Indeed, it is well established that "[i]n 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; *see also Upshur*, 924 A.2d at

645; *Cap. Cities Media, Inc. v. Toole*, 483 A.2d 1339, 1344 (Pa. 1984). The access question itself is "to be considered separately" from the question of intervention. *Fenstermaker*, 530 A.2d at 416 n.1.

The Commonwealth does not dispute this rule, but instead argues that because the trial court held a hearing on Media Intervenors' motion and referred to them as "Intervenors" in the appealed-from order, the trial court made "a *de facto* grant of intervenor status" and "could have done nothing more to acknowledge the Media Intervenors' status as intervenors" except granting their motion to unseal. Commonwealth's Initial Br. at 8–9. The Commonwealth cites no legal authority for this novel idea. *Id.* The trial court, of course, had but one way of conferring intervenor status: by granting Media Intervenors' motion to intervene. *See* Media Intervenors' Initial Br. at Ex. A (order denying motion to intervene). The court did not, and that decision is reversible error.

II. The Court of Common Pleas erred in denying Media Intervenors' motion to unseal, and the Commonwealth has not met its burden to establish an overriding need for sealing.

A. Media Intervenors indisputably have a presumptive right to timely access the dockets and judicial records in the *Lam* proceedings.

It is undisputed that the docket sheets, arrest warrant information, and other judicial records to which Media Intervenors seek access are presumptively open to the public. *See United States v. Smith*, 123 F.3d 140, 147 (3d Cir. 1997); *In re Forbes Media LLC*, No. 21-MC-52, 2022 WL 17369017, at *6 (W.D. Pa. Dec. 2,

2022); *Upshur*, 924 A.2d at 647; *Fenstermaker*, 530 A.2d at 417–19; *Commonwealth v. Curley*, 189 A.3d 467, 473 (Pa. Super. Ct. 2018); *Commonwealth v. Selenski*, 996 A.2d 494, 496 (Pa. Super. Ct. 2010); Commonwealth's Initial Br. at 8 (acknowledging "the right of public access that is the hallmark of our open system of justice," including access to arrest warrant information). Access to judicial records in criminal cases, including arrest warrant information, is essential to bolstering the fairness of the criminal justice system and the public's perception of its fairness. *Fenstermaker*, 530 A.2d at 418–19. Access to the docket sheets listing those filings is likewise essential to the public's ability to monitor ongoing proceedings, as it permits the public to learn about and attend hearings, understand what charges a defendant faces, challenge sealing and closure orders, and generally evaluate what is happening in a case. *See Doe v. Pub. Citizen*, 749 F.3d 246, 268 (4th Cir. 2014); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004); *In re Forbes Media LLC*, 2022 WL 17369017, at *6.

Although the Commonwealth acknowledges the presumption of openness, it fails to acknowledge that Media Intervenors' right of access is a right of ***timely*** access. "[T]he value of the right of access would be seriously undermined if it could not be contemporaneous." *Wecht*, 537 F.3d at 229. Because "[t]he newsworthiness of a particular story is often fleeting," "[t]o delay or postpone

disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co*., 24 F.3d 893, 897 (7th Cir. 1994). The Commonwealth dismisses the access restrictions in this case as "temporarily" imposed. Commonwealth's Initial Br. at 8 (emphasis in original). Yet by the time the current sealing order expires, the dockets and records in this case will have been sealed for 90 days, leaving members of the public entirely in the dark for more than three months about a homicide in their community, and members of the press without newsworthy records that would shed light on what happened. Suppl. R.001b–002b.[1] Further, the Commonwealth may seek and obtain another, and another, 30-day extension of the sealing order. Pa. R. Crim. P. 513.1(D). That is not "contemporaneous" access or "temporar[y]" closure. *Cf. Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("[E]ven a one to two day delay impermissibly burdens the First Amendment . . . ."); *Associated Press v. U.S. District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (finding 48-hour delays unconstitutional as "total restraint on the public's first amendment right of access even though the restraint is limited in

[1] Media Intervenors include the January 4 sealing motion and order in their Supplemental Reproduced Record because they had not obtained a copy as of the date of their initial brief. The Court of Common Pleas emailed a copy of the January 4 motion and order to Kristie Linden, an editor at Media Intervenor MVI, on January 23, 2023. The Court of Common Pleas also confirmed to the undersigned that it included this motion and order in the paper records it transmitted to this Court.

time"). The injury to Media Intervenors' and the public's presumptive right of timely access in this case is ongoing and, despite the Commonwealth's contention, has the potential to continue indefinitely.

B. The presumptive right of access to the dockets, arrest warrant information, and additional judicial records in this case has not been overcome.

Given the presumption of timely access to judicial records, sealing is improper because the Commonwealth, as the party seeking closure, has not met its burden to set forth reasons that override the presumption of access and the trial court has not issued an order detailing specific factual and legal grounds for sealing the records. *See Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984); *United States v. Criden*, 675 F.2d 550, 557–60 (3d Cir. 1982); *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). Where the First Amendment right of access attaches, "[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). 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)). Because there is "a

thumb on the scale in favor of openness," *In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig*., 924 F.3d 662, 676 (3d Cir. 2019), "[a]ny doubts must be resolved in favor of disclosure," *Grove Fresh Distribs., Inc*., 24 F.3d at 897 (citing *In re Cont'l Ill. Sec. Litig*., 732 F.2d 1302, 1313 (7th Cir. 1984)). The Commonwealth has wholly failed to meet its burden to justify sealing the dockets, arrest warrant information, and other judicial records in this case.

1. The dockets in this case must be open to public access, which the Commonwealth does not oppose.

Critically, the Commonwealth has made clear to this Court that it ***does not oppose*** public access to docket sheets in the *Lam* proceedings. "The Commonwealth did not and does not take a position on the propriety of the . . . sealing [of the] docket, itself" and admits "there is no evidence of record establishing . . . the propriety of sealing it[.]" Commonwealth's Initial Br. at 14, 16; *see also* Def.'s Jan. 19 Letter (taking no position on sealing); R.052a (Commonwealth stating at hearing, "we didn't ask for a specific ruling that a docket be sealed" and "we have no problem with" having a public-facing docket). Nor does any court order direct that the dockets be sealed, explain why taking the extraordinary step of doing so is necessary, or consider any less-restrictive alternatives such as sealing or redacting specific filings. *See* Media Intervenors' Initial Br. at Ex. A; R.001a; R.098a–099a; Suppl. R.002b–004b. That is the whole ball game. Docket sheets are presumptively open under the First Amendment and

common law, and cannot be sealed absent "individualized, specific, particularized findings on the record that closure is essential to preserve higher values and is narrowly tailored to that interest." *Curley*, 189 A.3d at 473; *accord Pub. Citizen*, 749 F.3d at 268; *Hartford Courant Co.*, 380 F.3d at 93; *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993); *In re State-Record Co.*, 917 F.2d 124, 129 (4th Cir. 1990). For the *Lam* dockets to remain sealed absent any government motion requesting to seal them or any proper court order doing so violates the constitutional and common law rights of access. Accordingly, the dockets must be unsealed. *Id*.

The Commonwealth's opposition to Media Intervenors' motion to unseal the dockets consists, instead, of a misleading hodge-podge of evidentiary arguments. The Commonwealth now concedes, as it must, that Magisterial District Judge ("MDJ") and Court of Common Pleas dockets in the *Lam* case exist, but argues Media Intervenors' motion fails because they have not established the dockets are sealed. *See* Commonwealth's Initial Br. at 15–17; Commonwealth's Reply Br.; *see also* 44 Pa. Bull. 245 (Jan. 11, 2014) (describing how in cases with Rule 513.1 sealing orders, the MDJ and Court of Common Pleas both maintain dockets during initial proceedings); *cf.* R.047a (Commonwealth arguing at trial court hearing that it did not know "what docket exists"). That is both an inaccurate description of the

record and an improper attempt to flip the Commonwealth's burden to Media Intervenors.

Indeed, at the same time the Commonwealth questions the dockets' sealing, its counsel admits he "was unable to locate the [MDJ docket] himself on the UJS Portal website Case Search function." Commonwealth's Initial Br. at 16; *see also* R.042a (counsel for Commonwealth stating at hearing, "I can't access a docket either."). That is because the dockets are sealed. Unsealed dockets are accessible on the Unified Judicial System ("UJS") Portal; sealed dockets are not. *See Search for and View Public Docket Sheets*, UJS, https://perma.cc/UPH5-UE9U ("Some docket sheets are not available even if the correct search information is entered. This includes docket sheets for . . . sealed cases[.]"). This Court may take judicial notice of whether docket sheets appear on the UJS Portal, which is the official statewide system for accessing public web docket sheets. Pa. R.E. 201(b); *see also In re J.S.D.*, No. 1378 MDA 2018, 2019 WL 1748777, at *2 (Pa. Super. Ct. Apr. 16, 2019) (noting that court took judicial notice of trial court docket sheets from portal); *In re Involuntary Termination of Parental Rts. to A.S-A.R.*, No. 162 WDA 2014, 2014 WL 10846746, at *15 (Pa. Super. Ct. Aug. 29, 2014) (same). Across four detailed declarations sworn under penalty of perjury, a reporter and an editor employed by Media Intervenors have likewise explained that the dockets are inaccessible on the UJS Portal and at the courthouse due to the trial court's sealing

orders. *See* Media Intervenors' Initial Br. at Ex. B, Jan. 17, 2023 Declaration of Mike Jones ("Jones Jan. Decl.") ¶¶ 12–16; Media Intervenors' Initial Br. at Ex. C, Jan. 19, 2023 Declaration of Kristie Linden ("Linden Jan. Decl.") ¶ 17; R.026a, Nov. 21, 2022 Declaration of Mike Jones ("Jones Nov. Decl.") ¶¶ 4–19; R.030a, Nov. 22, 2022 Declaration of Kristie Linden ("Linden Nov. Decl.") ¶¶ 6–14, 19. The Commonwealth, meanwhile, does not argue that the dockets are unsealed or point to any evidence that members of the public may access them, nor does it attempt to establish any harms that would come from their disclosure.

In addition to misstatements regarding the factual record concerning the dockets, the Commonwealth also misconstrues the law. It argues that Media Intervenors as the "moving party ha[ve] the burden of establishing the facts underlying their legal arguments" or else "courts would be called upon to decide matters without a full understanding of the facts." Commonwealth's Initial Br. at 16; *see also* Commonwealth's Reply Br. at 1 (claiming "Media Intervenors failed to proffer any testimony or evidence establishing that the Trial Court erred"). The Commonwealth gets the burden of proof in access cases exactly backwards. "The burden of showing that closure is warranted under the circumstances is on the party seeking to prevent access"—here, the Commonwealth—by submitting sufficient factual evidence and legal arguments. *Upshur*, 924 A.2d at 651. When the court does not have a "full understanding of the facts" supporting sealing,

Commonwealth's Initial Br. at 16, including when the proponent of closure "present[s] no evidence" for its position, sealing is impermissible, *Upshur*, 924 A.2d at 651; *see also Antar*, 38 F.3d at 1362 (reversing trial court opinion that improperly "shifted the burden to the press to demonstrate to the court why the documents should be unsealed"); *Fenstermaker*, 530 A.2d at 420; *A.A. v. Glicken*, 237 A.3d 1165, 1170 (Pa. Super. Ct. 2020) (affirming trial court's denial of sealing motion where proponent of sealing "offered no evidence to substantiate [its] claim" of harm from disclosure); *Hallowich v. Range Res. Corp.*, No. 2010-3954, 2013 WL 10254260, at *5–6 (Pa. Ct. Com. Pl. Mar. 20, 2013) (finding, in case where "defendants attempted to shift the burden to the press," that "[t]he burden remains upon defendants to demonstrate grounds for closure, *i.e.*, some harm that will befall them if the record is unsealed").

The contrary rule proposed by the Commonwealth would wholly undermine the public's ability to vindicate its right of access. Widespread sealing often makes it difficult for members of the press and public, as well as reviewing courts, to know exactly what is being withheld from them or to address each withholding in detail. *See* Jan. 26 Order at 2 (noting that "[w]ithout detailed answers to these questions" about what dockets and records are sealed in this case "and without the underlying records, this Court is unable to conduct meaningful appellate review"). For the presumption of access to have any meaning at all, openness, not closure,

must be the correct remedy for such a situation. *See In re Cap. Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89, 95, 98 (3d Cir. 1990) (vacating district court's order denying unsealing in case where media intervenor "had absolutely no information concerning" the sealed records' contents during trial court proceedings and thus "was unable to advance anything but the most general arguments concerning its First Amendment and common law rights to access criminal proceedings"); *Curley*, 189 A.3d at 474 (finding trial court erred where its sealing order "d[id] not identify the documents that remain sealed" or include "individualized findings," making it "impossible for Appellant to catalogue and preserve these issues" and "difficult for this Court to ascertain the exact documents that were intended to be sealed"). Again, in the absence of any valid court order sealing the dockets and any explanation by the Commonwealth or court as to why this wholesale sealing is necessary, the dockets must be unsealed.

In addition to trying to place its burden on Media Intervenors, the Commonwealth also improperly attempts to outsource its burden to court administrators. The Commonwealth argues that it is "not in charge of or privy to the considerations" behind sealing the dockets and that the responsibility to justify their sealing instead rests with the Administrative Office of Pennsylvania Courts, Court Administration, and the office of MDJ Vlasic. Commonwealth's Initial Br. at 17; *see also* Commonwealth's Reply Br. at 1 (calling those entities the "correct

parties"). The fact that Media Intervenors did not subpoena staff from these offices, the Commonwealth says, apparently would have made it "an abuse of discretion for the trial court to have issued some further directive concerning access to the docket." Commonwealth's Initial Br. at 18. The role of court administrative personnel, however, is solely ministerial. It is axiomatic that "[e]very court has supervisory power over its own records and files." *Warner Commc'ns, Inc.*, 435 U.S. at 598. For that reason, this Court ***twice*** directed the trial court to issue "a substituted or supplemental opinion that addresses the full scope of the sealing order . . . *in particular the sealing of the docket*." Jan. 13 Order on Briefing Schedule (emphasis added); *see also* Jan. 26 Order at 1–2 (noting that "[d]espite our previous order, the trial court has not addressed the sealing of any docket" and ordering it to describe whether, to what extent, and why, dockets have been sealed). The trial court has not done so as of this filing. *See* R.098a–099a; Suppl. R.003b–004b. It is this omission by the trial court that constitutes an abuse of discretion, as courts err when their sealing orders do not contain particularized, document-by-document findings describing the compelling interests in closure. *See* Jan. 26 Order at 1–2 (citing *Fenstermaker*, 530 A.2d at 421); *Antar*, 38 F.3d at 1359; *Long*, 922 A.2d at 906; *Curley*, 189 A.3d at 474.

Finally, the Commonwealth makes a halfhearted attempt to cite one potential legal reason for sealing the dockets: "that the language of the definition of 'arrest

warrant information,'" which includes "documents or information related to the case," "is not so definite and specific that sealing of the docket could not be interpreted as a necessary component of compliance with a Rule 513.1 sealing order." Commonwealth's Initial Br. at 14–15 (citing Pa. R. Crim. P. 513.1(A)). As Media Intervenors discussed in their initial brief, reading Rule 513.1 as the Commonwealth suggests—to permit the sealing of entire dockets—would violate the First Amendment right of access. Dockets are presumptively open under the First Amendment, so a proponent of sealing them must show sealing the dockets is the least restrictive means of serving a compelling state interest, a burden that can rarely, if ever, be satisfied. *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. Rule 513.1 applies the lower common law standard, requiring only a showing of good cause for sealing. Pa. R. Crim. P. 513.1. Permitting docket sheets and entire cases to be sealed on this weaker showing would erase the First Amendment right of access to these judicial records. When a statute or rule is susceptible to a reading that would raise constitutional doubts and a reading that would not, the Court must construe the rule to avoid constitutional doubt. *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017); 1 Pa. C.S. § 1922. For Rule 513.1 and its definition of "arrest warrant information" to be read

in concert with the First Amendment right of access, it cannot provide for the wholesale sealing of dockets.

In sum, no court order has sealed the dockets or attempted to explain why such closure is proper, the Commonwealth did not meet or attempt to meet its burden to seal the dockets, and sealing dockets is improper under the constitutionally permissible reading of Rule 513.1. *See id.*; *In re M.B.*, 819 A.2d at 63. Media Intervenors urge this Court to reverse the trial court's erroneous decision denying their motion to unseal the *Lam* docket sheets.

2. The presumption of access to the arrest warrant information has not been overcome.

The Commonwealth has again failed to meet its burden to justify the continued sealing of the arrest warrant information, and the trial court abused its discretion in denying Media Intervenors' motion to unseal it. Because arrest warrant information is presumptively public under the common law, the Commonwealth must establish an overriding need for sealing and the court's resulting order must "contain 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. Rule 513.1 describes this legal standard for sealing judicial records as "good cause." Pa. R. Crim. P. 513.1. The term "good cause," however, has a very specific meaning in

the context of a party seeking "[t]o rebut the presumption of openness, and to obtain closure of judicial proceedings and records." *Glicken*, 237 A.3d at 1170. In such cases, "[g]ood cause exists where closure is 'necessary in order to prevent a clearly defined and serious injury to the party seeking' it." *Id.* (quoting *R.W. v. Hampe*, 626 A.2d 1218, 1221 (Pa. Super. Ct. 1993)); *see also* Cmt., Pa. R. Crim. P. 513.1 ("When determining whether good cause exists to seal the arrest warrant information," the court must begin with "the presumption of openness" and then consider whether it "is rebutted by other interests").

The Commonwealth attempts to rewrite this standard for sealing, relying on a wholly unrelated case discussing "good cause" in the context of evidentiary rules for when a prosecutor may be excused from giving notice of trial evidence. Commonwealth's Initial Br. at 12–13 (citing *Commonwealth v. Yocolano*, 169 A.3d 47, 57 (Pa. Super. Ct. 2017)). That case defines good cause "generally as a substantial reason." *Yocolano*, 169 A.3d at 57 (citation and internal quotation marks omitted). Because that case arose in an irrelevant context, however, it of course makes no mention of the requisite starting point in access cases: the presumption of openness. This Court should disregard the Commonwealth's attempt to lower the bar for sealing judicial records, and instead hold it to its burden of showing that sealing the arrest warrant information is "necessary in

order to prevent a clearly defined and serious injury." *Glicken*, 237 A.3d at 1170 (quoting *Hampe*, 626 A.2d at 1221).

The Commonwealth has not shown that closure is required to prevent a clear and serious injury, instead resting on unsupported general claims that disclosure would jeopardize individuals' safety and an ongoing investigation. Yet openness is the default "even when a document discusses the Government's methods for a criminal investigation." *United States v. Hirsh*, No. 03-CR-58, 2007 WL 1810703, at *2 (E.D. Pa. June 22, 2007). And even when that investigation is ongoing, "[t]he party seeking the seal cannot . . . rest on mere generalities; it must point with specificity to the need for the seal." *Id.* Sealing for safety reasons is also improper where "there is simply no evidence" that anyone involved in the case "has taken any measures to jeopardize the safety of" another. *Id.* at *3; *see also Milton Hershey Sch. v. Pa. Hum. Rels. Comm'n*, 226 A.3d 117, 127 (Pa. Commw. Ct. 2020) ("Importantly, 'general concerns for harassment or invasion of privacy' are not sufficient to support closure." (quoting *Long*, 922 A.2d at 906)). Here, the Commonwealth alludes vaguely to safety risks "to known and unknown individuals" and the need to protect "the integrity of an ongoing investigation," without adducing any supporting facts. Commonwealth's Initial Br. at 4, 13. Similarly, its motion to extend the November 6 sealing order states only that "[t]he reasons articulated to this Honorable Court why sealing was necessary persistent

[sic], and the release of the arrest warrant information would jeopardize the ongoing investigation and the safety of individuals." Suppl. R.001b.[2] These brief and conclusory assertions do not establish a current, particularized risk from disclosure of the arrest warrant information in this case.

Moreover, it has for months been public knowledge that Mr. Lam is in custody in connection with his alleged role in the November shooting in Rostraver Township, and that the shooting victim was fellow Rostraver resident Boyke Budiarachman. *See, e.g.*, 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, *Suspect in Custody After Fatal Rostraver Shooting*, Observer-Reporter (Nov. 9, 2022), https://perma.cc/6GUK-XQPW; Westmoreland County Prison Inmate Locator, https://apps.co.westmoreland.pa.us/prison/PrisonInmates/inmatesearch.html (last accessed Jan. 26, 2023). Potential witnesses and co-defendants have presumably learned about and acted upon this information in the intervening months, whether by coming forward with information or increasing their efforts to avoid law enforcement detection, further diminishing any claimed government interest in

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[2] The Commonwealth's initial sealing motion is itself sealed. R.001a. This Court may, and should, review the sealed motion in assessing whether the Commonwealth has met its burden. *See In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 184 (5th Cir. 2011); *In re Forbes Media LLC*, 2022 WL 17369017, at *9 (reviewing sealed filings in finding presumption of access was not overcome).

continued secrecy. *Cf. Wash. Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (rejecting government's claims that disclosure would create safety risks and harm ongoing investigation where press had already reported pertinent facts about case).

Additionally, "it is not enough for the Government to plausibly assert that the documents in question contain sensitive information about an ongoing investigation; the Government must also show that specific sensitive information cannot be protected via redactions." *In re Forbes Media LLC*, 2022 WL 17369017, at *8. For example, the Commonwealth may succeed in showing a need to redact the names of confidential informants, but that need for specific redactions cannot justify the wholesale and monthslong sealing of the case. *Cf., e.g.*, *Wartluft v. Milton Hershey Sch. & Sch. Tr.*, No. 16-CV-2145, 2019 WL 5394575, at *5 (M.D. Pa. Oct. 22, 2019) (courts "are encouraged to consider redaction of sensitive material as an alternative to wholesale sealing of documents"); *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 less-restrictive alternatives); *Haber v. Evans*, 268 F. Supp. 2d 507, 513 (E.D. Pa. 2003) (granting unsealing but ordering targeted redactions, including to names of confidential informants).

The trial court's orders sealing the arrest warrant information likewise fail to comport with the presumptive right of access, as they do not establish an overriding need for secrecy, discuss with particularity the reasons supporting sealing, or consider alternatives such as unsealing with narrow redactions. *See Press-Enter. Co.*, 464 U.S. at 520 (Marshall, J., concurring) (citing redaction as a less-restrictive alternative to complete closure); *Fenstermaker*, 530 A.2d at 421 ("[T]he record shall contain an articulation of the factors taken into consideration[.]"); *In re Forbes Media LLC*, 2022 WL 17369017, at *2 (requiring "document-by-document review" with "careful[] factfinding" and consideration of redaction (citation and internal quotation marks omitted)).[3] The appealed-from order denying Media Intervenors' motion to unseal is the trial court's only order stating its rationale for sealing: "maintaining the integrity and confidentiality of the Commonwealth's ongoing investigation." Media Intervenors' Initial Br. at Ex. A. That order, however, contains no further detail illuminating the factual or legal

[3] To the extent the trial court had more detailed factual and legal bases for sealing but found a compelling interest in keeping those details under seal, it could have issued a sealed statement of reasons, which this Court could review. *See In re Hearst Newspapers, L.L.C.*, 641 F.3d at 184 (citing *In re Wash. Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986)); *In re The Herald Co.*, 734 F.2d 93, 100–01 (2d Cir. 1984) (holding, "we cannot sustain the order on the limited basis thus far set forth by the District Judge," in case where trial court "identified, in conclusory fashion, two grounds for closure" and "did not elaborate on these grounds . . . nor file under seal any supplement to his closure order"); *United States v. Harris*, 204 F. Supp. 3d 10, 15 (D.D.C. 2016) (detailing publicly the reasons for closure but redacting in part its opinion).

bases for this decision, or why less restrictive alternatives to sealing would not suffice. *Cf. In re Avandia*, 924 F.3d at 678 (rejecting "broad, vague, and conclusory allegations of harm that are, standing alone, insufficient to overcome the presumption of public access"). The court's sparse November 6 order granting the Commonwealth's sealing motions did not make ***any*** factual or legal findings to support sealing the arrest warrant information, and instead "stated only that 'good cause has been shown.'" Jan. 26 Order at 1 (quoting R.001a). Nor did its January 4 order extending the sealing, which was a single sentence long, offer any reasons justifying the continued sealing. Suppl. R.002b. *See In re Cendant Corp*., 260 F.3d 183, 196 (3d Cir. 2001) ("[C]ontinued sealing must be based on *current evidence* to show how public dissemination of the pertinent materials *now* would cause . . . harm[.]" (citation and internal quotation marks omitted) (emphasis in original)); *United States ex rel. Brasher v. Pentec Health, Inc*., 338 F. Supp. 3d 396, 401 (E.D. Pa. 2018) (warning, under another statute allowing government to request extensions of sealing orders, that "courts considering extension requests should be wary of the ex parte nature of such requests, and the ease by which a case can slip into a 'comfortable routine' of a request followed by another request: the results can amount to significant abuses of the statutory scheme"). The court's supplemental opinions issued pursuant to Rule 1925(A) likewise do not contain any additional bases for sealing. R.098a–099a; Suppl. R.003b–004b. Absent on-

the-record findings showing a specific need for continued sealing in this case, the trial court committed reversible error in denying Media Intervenors' motion to unseal the arrest warrant information. *See Press-Enter. Co.*, 464 U.S. at 510; *Upshur*, 924 A.2d at 652; *Fenstermaker*, 530 A.2d at 421. To the extent any specific information in the arrest warrant information "merits protection under the common law," "the presumption of access is not automatically and broadly outweighed"; instead, the court must consider targeted redactions of specific information. *In re Forbes Media LLC*, 2022 WL 17369017, at *7.

3. The presumption of access to the remaining judicial records has not been overcome.

The Commonwealth also has not met its burden to establish an overriding need for sealing the remaining sealed judicial records in the case, and the trial court committed reversible error in denying Media Intervenors' motion to unseal them. Because "any 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," the proponent of closure bears "[t]he burden of showing that closure is warranted under the circumstances" and the trial court must "place on the record its reasoning and the factors relied upon in reaching its decision." *Upshur*, 924 A.2d at 648, 651.

The Commonwealth makes no effort to describe how the disclosure of the remaining judicial records would harm any compelling interests. The

Commonwealth simply says that "of the information requested by the Media Intervenors at the hearing, that which could arguably fall outside of the express language of Rule 513.1(A) was provided in open court, and ordered to be shared with Media Intervenors in the event of a change." Commonwealth's Initial Br. at 18. That is not accurate. Various filings and information requested by Media Intervenors beyond the arrest warrant information remain off-limits, including the bail information, the charges filed, scheduling orders, motions and potentially judicial opinions. Nor is sharing preliminary hearing dates solely with the undersigned counsel an adequate substitute for the right of access shared by all members of the public. *See Fenstermaker*, 530 A.2d at 416; *Criden*, 675 F.2d at 560. Additionally, to the extent Media Intervenors have been made aware of information contained within the sealed judicial records, that exposure is a reason for ***un***sealing. *See In re State-Record Co.*, 917 F.2d at 129 ("Overbreadth [of the sealing order] is also obvious from the fact that motions and documents" were "sealed, although their content and substance were made public"); *Curley*, 189 A.3d at 474 (rejecting "requests to seal matters already in the public domain").

The trial court's orders likewise fail to satisfy the constitutional and common law presumption of access to the remaining judicial records. Neither the sealing orders, the December 14 order, nor the Rule 1925(A) opinions explain any need for sealing the remaining judicial documents in the case, or even purport to do so. *See*

Media Intervenors' Initial Br. at Ex. A; R.001a; R.098a–099a; Suppl. R.002b–004b. Instead, the orders 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. Despite this lack of specific direction from the trial court, numerous innocuous documents such as scheduling orders are sealed. *See* Jones Nov. Decl. ¶ 14. "There are probably many motions and responses thereto that contain no information prejudicial to a defendant," the continued sealing of which is plainly improper. *In re State-Record Co*., 917 F.2d at 129; *see also In re Forbes Media LLC*, 2022 WL 17369017, at *10 (unsealing pretrial motion to seal arrest warrant materials); *see also* Jan. 26 Order at 2 (noting that this Court was unable to review which docket entries had been sealed and why). 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. As with the dockets, because the stronger First Amendment access right attaches to certain of the sealed records, it is erroneous to seal those records under the lower common law standard of Rule 513.1. *See Long*, 922 A.2d at 897–98 & n.6. And, to the extent the court found any continued sealing of the remaining records was required, it erred by entering a blanket sealing order instead of considering the records document by document and utilizing targeted redaction if necessary. *See Press-Enter. Co*., 478 U.S. at 14

(reversing where "the court failed to consider whether alternatives short of complete closure would have protected the interests" at stake); *Fenstermaker*, 530 A.2d at 420 (considering "the availability of reasonable alternative means" to closure); *Curley*, 189 A.3d at 473 (finding error where trial court "did not issue document-by-document findings" but rather "a blanket conclusion" on sealing in the criminal prosecution of a Penn State administrator in proceedings linked to the Jerry Sandusky case).

C. Reversal of the decision below, not remand, is the proper remedy in this case.

Last, Media Intervenors urge this Court to vacate the decision below and direct the Court of Common Pleas to grant intervention and unsealing, instead of remanding to the trial court for further proceedings. *Cf.* Commonwealth's Initial Br. at 19 (requesting remand followed by additional hearings). Where a trial court has plainly erred in sealing presumptively open judicial records and the proponent of closure failed to establish any overriding need for sealing, outright reversal is common and proper. *See, e.g.*, *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1092 (9th Cir. 2014) (directing "the district court to unseal the docket"); *In re Cendant Corp.*, 260 F.3d at 201 ("[W]e direct that the District Court enter an order unsealing all sealed bids and documents in the record . . . ."); *Antar*, 38 F.3d at 1364 ("[T]he order of the district court will be reversed as to the original sealing order . . . ."); *Milton Hershey Sch.*, 226 A.3d at 134 (granting unsealing outright);

Curley, 189 A.3d at 479 (instructing "the trial court to unseal the records as ordered").

Remand is not necessary in this case. Neither the Commonwealth nor the trial court have requested or directed the sealing of the dockets or any records other than the arrest warrant information, thus ordering the trial court to unseal the dockets and additional records outright is proper. As to the arrest warrant information, despite having multiple opportunities to file motions and orders that comport with the presumption of access, the Commonwealth and trial court failed to do so and offer only generalizations. Accordingly, unsealing should result. Remanding for further proceedings would also undercut the press and public's interest in contemporaneous access to the *Lam* proceedings, given the length of time that this case has been almost entirely sealed and Mr. Lam's fast-approaching preliminary hearing on February 13.

CONCLUSION

For the reasons set forth above and those in their initial brief, 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 the *Lam* proceedings ahead of the scheduled February 13 preliminary hearing. Media Intervenors also

respectfully request that this Court award reasonable counsel fees pursuant to 42 Pa. C.S. § 2503(9), as the Commonwealth's arguments in opposing the instant appeal have been "arbitrary, vexatious or in bad faith," as well as such other relief the Court deems necessary and proper. *See Thunberg v. Strause*, 682 A.2d 295, 299 (1996).

Dated: January 27, 2023

Respectfully submitted,

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CERTIFICATES OF COMPLIANCE

I hereby certify that:

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Dated: January 27, 2023

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CERTIFICATE OF SERVICE

I certify that on this 27th day of January, 2023, I caused a true and correct copy of the foregoing document to be served by email and PACFile on the following:

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