

**IN THE COURT OF COMMON PLEAS  
CRAWFORD COUNTY, PENNSYLVANIA  
CIVIL ACTION—LAW**

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CRAWFORD COUNTY, PA

	)	
	)	
	)	
	)	NO. FD 2023-208
	)	TYPE OF PLEADING
[UNKNOWN],	)	Brief
	)	
	)	FILED ON BEHALF OF
	)	The Meadville Tribune (“Tribune”)
[UNKNOWN],	)	
	)	COUNSEL OF RECORD
	)	Paula Knudsen Burke
Defendants.	)	
	)	PA I.D. NUMBER
	)	87607W
	)	
	)	
	)	

**BRIEF IN SUPPORT OF  
THE MEADVILLE TRIBUNE’S MOTION TO INTERVENE AND UNSEAL**

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## INTRODUCTION

Proposed intervenor The Meadville Tribune (“Tribune”) respectfully submits this brief in support of its contemporaneously filed motion to intervene and to unseal judicial records in civil matter No. 2023-208.

This divorce/equitable distribution case between two currently unidentified parties has been completely sealed from the public. The sealing order, presumably detailing the reasons for this decision, is also sealed. This secrecy prevents the Tribune and other members of the public from obtaining *any* information about these proceedings which violates the constitutional and common law rights of access in civil matters.

For the reasons herein, the Tribune respectfully moved the Court for an order unsealing judicial records in the case of *Unknown v. Unknown*.

## BACKGROUND

On July 25, 2023, while performing a routine review of filings and pleadings in the Crawford County Court of Common Pleas Prothonotary’s office, Tribune Reporter Keith Gushard came across a divorce/equitable distribution case with the docket number FD 2023-208 which had been filed the day before. The docket information did not include the names of the parties and was marked “SEALED.” *See* Mot. to Intervene Ex. A. On September 8, 2023, Mr. Gushard inquired with the Crawford County Prothonotary to obtain access to a copy of an order sealing the

above-referenced docket. He was told that a petition would have to be filed with the court seeking to unseal the sealing order.

The Tribune is a daily newspaper published Monday through Saturday in print format and online at [www.meadvilletribune.com](http://www.meadvilletribune.com). The Tribune covers Crawford County and regularly relies on judicial records to provide timely and important information about northwest Pennsylvania to its readers.

### **QUESTIONS PRESENTED**

1. May the Tribune intervene for the limited purpose of moving to unseal the docket in Case No. FD 2023-208?

**Suggested Answer: Yes.**

2. Can the parties satisfy the heavy burden of demonstrating a compelling interest sufficient to overcome the strong presumption of public access to the docket and all other sealed judicial records in the above-captioned proceeding which is established under the common law, the First Amendment, and the Pennsylvania Constitution?

**Suggested Answer: No.**

3. Must any sealing based on compelling interests be narrowly tailored?

**Suggested Answers: Yes.**

## ARGUMENT

### **I. The Court should grant the Tribune's motion to intervene.**

Intervention in this matter is proper. “In Pennsylvania, a Motion to Intervene is the proper vehicle for the press to raise a right of access question.” *Commonwealth v. Long*, 922 A.2d 892, 895 n.1 (Pa. 2007) (citing *Commonwealth v. Fenstermaker*, 530 A.2d 414, 416 n.1 (Pa. 1987)). 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. *See id.*; *Commonwealth v. Upshur*, 924 A.2d 642, 645 (Pa. 2007); *Fenstermaker*, 530 A.2d at 416 n.1; *Cap. Cities Media, Inc. v. Toole*, 483 A.2d 1339, 1344 (Pa. 1984). Here, the Tribune seeks 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 Fenstermaker*, 530 A.2d at 416 n.1.

### **II. The common law and the U.S. and Pennsylvania Constitutions afford the press and public a presumptive right of access to this information in civil cases.**

Under Pennsylvania law, the “mandate for open and public judicial proceedings” applies “in both the criminal and civil settings.” *PA Childcare LLC v. Flood*, 887 A.2d 309, 312 (Pa Super. Ct. 2005). Parties seeking to close judicial proceedings and seal judicial records bear the burden of overcoming the presumption

of openness. *Upshur*, 924 A.2d at 651 (citing *Fenstermaker*, 530 A.2d at 418). As a number of federal courts have observed, that burden is heaviest when a party seeks to seal a case in its entirety. *Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994) (“A party who seeks to seal an *entire* record faces an even heavier burden”); *Ayala v. Speckard*, 131 F.3d 62, 70 (2d Cir. 1997) (en banc) (holding that “the 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) (“The burden on the movant to show prejudice increases the more extensive the closure sought”).

Pennsylvania courts have recognized this strong presumption of access and acted to unseal records in civil matters. In 2021, the Court of Common Pleas of Butler County denied requests by a U.S. Senate candidate to seal all records in his ongoing custody case. *See* Order at 2, *Parnell v. Parnell*, F.C. No. 17-90403-C (Butler Cnty. Pa. C.P. Oct. 14, 2021). In 2022, the U.S. District Court for the Western District of Pennsylvania applied the presumption to All Writs Act orders used by the government to harness private databases and track suspects. *In re Forbes Media, LLC*, No. 21-MC-52, 2022 WL 17369017, at \*1 (W.D. Pa. Dec. 2, 2022). Forbes moved to unseal records related to such orders and the court granted the request allowing only “limited redactions.” *Id.* The district’s chief judge noted that the right of access is crucial to building public confidence in the judicial system and that the

government's asserted interests could not justify sealing these records in their entirety. *Id.*

**A. The constitutional right of access.**

Both the First Amendment to the U.S. Constitution and Article 1, section 11 of the Pennsylvania Constitution guarantee members of the press and public a qualified right of access to proceedings and judicial records in civil matters like this one. Although the U.S. Supreme Court has not addressed whether the First Amendment right of access extends to civil proceedings, *see Press-Enter. Co. v. Super. Ct. of Cal. (Press-Enterprise II)*, 478 U.S. 1, 8–9 (1986), numerous federal and state courts, including in Pennsylvania, have recognized that this presumptive right of access applies in the civil context. *See, e.g., Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984); *Katz v. Katz*, 514 A.2d 1374, 1379 (Pa. Super. Ct. 1986).

In determining whether the First Amendment presumption of access applies to a particular courtroom proceeding or document, courts look to “two complementary considerations.” *Press-Enterprise II*, 478 U.S. at 8–9. The first consideration—“experience”—is whether the proceeding or document is of the sort that has “historically been open to the press and general public.” *Id.* The second—often referred to as “logic”—looks to whether “public access plays a significant positive role in the functioning of the particular process in question.” *Id.*

Applying this framework, the Third Circuit in *Publicker* held that the qualified First Amendment right of access applies in civil matters, emphasizing the historical presumption of open civil courts as well as the numerous ways in which openness plays an integral role in the functioning of a healthy civil justice system. 733 F.2d at 1067–70 (“Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs”). In *Katz*, the Pennsylvania Superior Court embraced the Third Circuit’s reasoning, finding that civil trials, including divorce proceedings, are presumptively open to the public under the First Amendment. *Katz*, 514 A.2d at 1380.<sup>1</sup>

The First Amendment right of access encompasses the right to inspect court docket sheets and all judicial records at issue in a matter including the sealing order. In this case, the Sealing Order itself is sealed, so its breadth cannot be determined. Because the entirety of the docket is sealed and the names of the relevant parties have not been made public, the Tribune is unable to identify the remaining records with specificity.

Although neither the Pennsylvania Supreme Court nor the Third Circuit have had an opportunity to address the public’s right to access docket sheets specifically, numerous federal courts have held that the First Amendment right applies to them.

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<sup>1</sup> Although decisions of the Superior Court are not binding on this Court, “they offer persuasive precedent where they address analogous issues.” *Lerch v. Unemp’t Comp. Bd. of Rev.*, 180 A.3d 545, 550 (Pa. Commw. Ct. 2018).



*Doe v. Public Citizen*, 749 F.3d 246, 268 (4th Cir. 2014) (holding that “the public and press’s First Amendment qualified right of access to civil proceedings extends to docket sheets”); *Tri-Cty. Wholesale Distribs., Inc. v. Wine Grp.*, 565 F. App’x 477, 490 (6th Cir. 2012) (“The First Amendment access right extends to court dockets, records, pleadings, and exhibits . . .”); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004) (finding that “the media and the public possess a qualified First Amendment right to inspect docket sheets”); *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993) (holding that district court’s maintenance of sealed dockets violated the First Amendment). As this weight of authority demonstrates, both experience and logic strongly support a First Amendment right of access to docket sheets. As the Second Circuit explained, “[e]xperience casts an affirming eye on the openness of docket sheets and their historical counterparts.” *Pellegrino*, 380 F.3d at 94 (tracing the tradition of open “docket books” in the United States to “the first years of the Republic”). And “[l]ogic supports this judgment of history.” *Id.* At 95. Access to docket sheets simultaneously enhances the integrity of judicial proceedings and increases the appearance of fairness in the courts. *Id.* (citing *Press-Enter. Co. v. Super. Ct. of Cal. (Press-Enterprise I)*, 464 U.S. 501, 508 (1984)).

Docket sheets rarely—if ever—contain information that warrants sealing. *See In re State-Record Co.*, 917 F.2d 124, 129 (4th Cir. 1990) (per curiam) (reversing

the sealing of docket sheets as overbroad and incompatible with the First Amendment, noting “we can not understand how the docket entry sheet could be prejudicial”). And, as the Fourth Circuit has correctly observed, “there is a more repugnant aspect to depriving the public and press access to docket sheets: no one can challenge closure of a document or proceeding that is itself a secret.” *Public Citizen*, 749 F.3d at 268. The constitutional right of access is “merely theoretical” if members of the press and public have no opportunity to learn of motions to seal proceedings and to voice their opposition to closure. *Pellegrino*, 380 F.3d at 93; *see also United States v. Raffoul*, 826 F.2d 218, 224 (3d Cir. 1987) (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring)). The public docketing of a motion to close or seal, coupled with an opportunity for interested third parties to oppose the closure or sealing, are procedural due process requirements necessary for deprivation of the constitutionally protected right of access. *United States v. Criden*, 675 F.2d 550, 557–59 (3d Cir. 1982) (citing *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976)).

Like the First Amendment, the Pennsylvania Constitution also affords a qualified right of access to judicial records and proceedings. Article 1, section 11 of the Pennsylvania Constitution provides that “the courts shall be open,” which the Pennsylvania Supreme Court has read as creating a “constitutional presumption of openness of courts.” *Upshur*, 924 A.2d at 655. Though the Pennsylvania Supreme

Court in *Upshur* did not have occasion to address the applicability of Article 1, section 11 to civil matters, the Pennsylvania Superior Court has done so, recognizing that Article 1, section 11 creates a “constitutional right of public access to judicial proceedings” in the civil context. *In re M.B.*, 819 A.2d 59, 61 (Pa. Super. Ct. 2003).

The Pennsylvania constitutional right of access to judicial records and proceedings is often analyzed in tandem with the First Amendment right. *See, e.g., R.W. v. Hampe*, 626 A.2d 1218, 1220 n.3 (Pa. Super. Ct. 1993). Where either constitutional right of access applies, it may only be overcome if closure serves a compelling governmental interest and is the least restrictive means of furthering that interest. *Publicker*, 733 F. 2d at 1070; *M.B.*, 819 A.2d at 63. 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.” *M.B.*, 819 A.2d at 63.

**B. The common law right of access.**

Pennsylvania common law also affords the public a presumptive right of access to judicial proceedings and records, *Upshur*, 924 A.2d at 647, that applies to civil matters. *R.W.*, 626 A.2d at 1220 (explaining that the “existence of a common law right of access to judicial proceedings and inspection of judicial records is beyond dispute.”). As the Pennsylvania Supreme Court has held, the common law

right applies to “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.” *Upshur*, 924 A.2d at 648 (citing *Fenstermaker*, 530 A.2d at 418).

Where the common law right of access applies, it must be weighed against asserted interests in secrecy to determine whether sealing is justified. *Upshur*, 924 A.2d at 651 (citing *Nixon v. Warner Comm’ns, Inc.*, 435 U.S. 589, 602 (1978)). As with the constitutional right of access, the party seeking closure bears the burden of demonstrating that the common law presumption of access is overcome. *Id.*

**III. All sealed judicial records in this case should be unsealed because the presumption of access to judicial records and proceedings in this case is not overcome.**

**A. Requirements for sealing.**

Before sealing a record or closing a proceeding, a court must provide the public with notice and an opportunity to object. *Miller*, 16 F.3d at 551; *Commonwealth v. Buehl*, 462 A.2d 1316, 1317 (Pa. Super. Ct. 1983); *see also Criden*, 675 F.2d at 557–59 (citing *Matthews*, 424 U.S. at 334–35). In addition, courts must make specific, on-the-record findings as to why closure is proper. *Raffoul*, 826 F.2d at 226; *Upshur*, 924 A.2d at 652. When making such determinations, the court must consider less-restrictive alternatives such as redaction and must make specific findings as to why alternative methods would not satisfactorily protect the compelling or countervailing interests at stake. *Raffoul*,

826 F.2d at 226; *Upshur*, 924 A.2d at 652; *Commonwealth v. Hayes*, 414 A.2d 318, 322 (Pa. 1980). These on-the-record findings must be sufficiently detailed to allow a reviewing court to determine whether the closure decision was proper. *Press-Enterprise I*, 464 U.S. at 510; *Katz*, 514 A.2d at 1381.

**B. The requirements for sealing have not been met in this case.**

The presumption of access in this case has not been overcome. No details except for the docket number are available. The decision to seal this matter in its entirety was made without any notice to the public and interested third parties, like the Tribune, were not given the opportunity to oppose this action. Here, since the sealing document is also sealed, the unnamed parties have not asserted even a general privacy interest—much less specific, on-the-record findings—that would justify the continued sealing of this matter. In another western Pennsylvania Court of Common Pleas case, the dockets for two civil matters were entirely sealed. After intervention by the local newspaper—the Altoona Mirror—a Blair County Court of Common Pleas judge ordered both dockets unsealed except for very limited redactions involving minors. *John Doe v. Bellwood-Antis School District*, 2021-GN-782 (order granting motion to intervene and unseal); *Jane Doe v. Bellwood-Antis School District*, 2021-GN-141 (order granting motion to intervene and unseal). The same outcome is necessary here.

As set forth above, docket sheets are presumptively open to public inspection under the First Amendment because they serve an important role in facilitating the exercise of the public's constitutional and common law rights to attend judicial proceedings and inspect judicial records. By routinely checking the docket, as Mr. Gushard did in this case, members of the press and public can be made aware of motions for closure or sealing giving them ample time to object. *Criden*, 675 F.2d at 557-59; *Public Citizen*, 749 F.3d at 268. Because no compelling interest has been asserted to justify sealing the docket sheet in this case, it should be unsealed. See *Publicker*, 733 F.2d at 1070; *R.W.*, 626 A.2d at 1220 n.3.

While the sealing of the sealing order prevents the Tribune from specifying records that should be made public, this matter likely includes briefs filed by the parties and orders of the court, all of which are judicial records presumptively open to public inspection under common law.<sup>2</sup> Indeed, in addition to the Sealing Order and the docket sheet, any motions, briefs, exhibits, memoranda of law, orders, or opinions filed in this matter are judicial records to which the public has a presumptive right of access which cannot be overcome without additional information provided by the parties. See, e.g., *Upshur*, 924 A.2d at 648 (“[A]ny item

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<sup>2</sup> As set forth above, when the constitutional right of access applies, certain judicial records may remain under seal only if and to the extent that such sealing is necessary to serve a compelling interest. No such compelling interest can be ascertained because the docket in this case is entirely sealed and the Tribune cannot determine which of the remaining sealed documents are presumptively open to the public as a constitutional matter.

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.”).

**IV. To the extent that the sealing of any portion of the records in this case is deemed necessary, such sealing must be narrowly tailored and supported by specific, on-the-record findings.**

If the currently-unknown parties in this case seek the continued sealing of judicial records in this matter, they bear the burden of demonstrating that the presumption of public access is overcome—a burden that is particularly heavy if they wish to have the matter sealed in its entirety. *See Miller*, 16 F.3d at 551. Less restrictive alternatives to wholesale sealing, such as limited redaction, may be employed to protect any information for which privacy is a compelling concern. Further, as the Pennsylvania Supreme Court has instructed, to the extent the Court concludes that continued sealing of some portion of the sealed records is necessitated by compelling or countervailing interests, it must make specific, on-the-record factual findings supporting its conclusion. *Upshur*, 924 A.2d at 651 (citing *Fenstermaker*, 530 A.2d at 420–21); *see also Katz*, 514 A.2d at 1381 (requiring the trial court to state reasons for sealing on the record in a civil case). Accordingly, if the Court finds any continued sealing necessary in this proceeding, the Tribune respectfully requests that the Court place its findings on the record, explaining why

...CERTIFICATE OF COMPLIANCE WITH RULE 10.1(b)(2) OF THE RULES...

Submitted by: Paula Knudsen Burke

Signature:



9/27/23

Attorney No.: 87607