COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS SUPERIOR COURT DEPARTMENT

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

KAREN READ,

Defendant.

No. 2282-CR-0117

MEMORANDUM IN SUPPORT OF MOTION OF BOSTON GLOBE MEDIA PARTNERS, LLC TO TERMINATE OR MODIFY IMPOUNDMENT ORDERS

Pursuant to Rules 6 and 10 of the Uniform Rules of Impoundment Procedure (Trial Court Rule VIII), Non-Party Boston Globe Media Partners, LLC, publisher of *The Boston Globe* (the "Globe"), submits this memorandum in support of its motion to terminate or modify the orders impounding the following court records:

A. Dkt. 199-201 - Defendant's Motion to Dismiss and supporting documents;

B. Dkt. 227 - Motion to Impound Supplemental Memorandum in Support of Defendant's Motion to Dismiss;

C. Dkt. 228 - Supplemental Memorandum in Support of Defendant's Motion to Dismiss;

D. Dkt. 231 - Motion to Impound Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss; and

E. Dkt. 232 - Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss.

On March 28, 2024, the Court issued a Memorandum of Decision and Order denying Defendant's motion to dismiss indictments. It appears from the docket entries that the documents listed above were considered by the Court in issuing its ruling. For the reasons set forth below, the Globe respectfully submits that the public has a presumptive right of access to the documents under the Uniform Rules of Impoundment procedure, the common law of Massachusetts, the First Amendment, and Article 16 of the Declaration of Rights and therefore requests that the orders impounding the documents be terminated or modified to permit public access to all or portions of the documents.

I. PROCEDURAL HISTORY

On January 8, 2024, defendant filed a notice of filing impounded information (grand jury minutes and photographs of injuries) (Dkt. 194). Defendant also filed a motion to impound her motion to dismiss the indictments, a memorandum and affidavit in support thereof, and grand jury minutes and exhibits lodged in support of the motion, (Dkt. 195, 196). The notice of filing impounded information cited an order entered during a May 24, 2023, hearing, as well as G.L. c. 268 § 13D(e), which pertains to grand jury minutes and documents. (Dkt. 194). Both the motion to impound and the affidavit filed in support thereof cited as grounds for impoundment that the documents made reference to or consisted of grand jury minutes and exhibits. (Dkts. 195-196). The docket indicates that defendant filed her motion to dismiss papers on January 10, 2023, and each was impounded. (Dkts. 199-201).[1]

On February 21, 2024, the Commonwealth filed a 49-page opposition to defendant's motion to dismiss. (Dkt. 216). The detailed opposition—which is not impounded—addressed the specific arguments made in impounded motion papers filed by defendant and included multiple

[1] The docket does not reflect whether a separate written order of impoundment was entered by the Court.

references to grand jury testimony,[2] including testimony that the defendant challenges in her motion to dismiss. *Id.* at 8-9, 13-15, 32, 34-41, 44-45.

On March 7, 2024, the defendant filed a supplemental memorandum in support of the motion to dismiss (Dkt. 228) and a motion to impound that memorandum (Dkt. 227). Both are impounded. The docket does not indicate whether an affidavit was filed in support of the motion or whether a separate written order of impoundment was entered.

On March 11, 2024, the Commonwealth filed a supplemental opposition to defendant's motion to dismiss (Dkt. 232) and a motion to impound that memorandum (Dkt. 231). Both are

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[2] *See, e.g.*, Opposition at 8-9 (grand jury testimony of Brian and Nicole Albert and "[s]everal other witnesses"); *id.* at 13 (grand jury testimony of Timothy Nuttall, Anthony Flematti, Ms. McCabe, and Ms. Roberts); *id.* at 14-15 (grand jury testimony of Dr. Irini Scordi-Bello); *id.* at 17 (describing grand jury exhibit 53); *id.* at 26, 41 (grand jury testimony of Mr. Higgins); *id.* at 32 (citing grand jury testimony of Canton Police Sergeant Lank, Trooper Proctor, and Julie Albert); *id.* at 34 ("The Grand Jury heard testimony from Ms. McCabe, Ms. Roberts, and the recorded interview from the victim's niece, in regard to the defendant stating that she did not remember going to the residence on Fairview Road with the victim."); *id.* ("the Grand Jury heard testimony from all of the police officers that arrived prior to Sergeant Lank, and their conversations with the defendant."); *id.* at 34-35 (Sergeant Lank "clearly testified that he was relying on his memory of what was told to him by other officers who preceded his arrival, all of whom testified before the Grand Jury."); *id.* at 35 (referencing Sergeant Lank's "supposed failure to disclose his relationship with the Albert family"); *id.* at 37 (referencing Trooper Proctor's testimony about the Ring video and that the entire video was shown to the grand jury); *id.* ("The grand jury was also permitted to consider testimony about the conveniently missing portion of the Ring video, the defendant's access to the account, and the defendant's statement that she knew where the cameras were located inside the victim's residence."); *id.* ("the 'formal introductions' section of the report regarding the interview with Christopher and Julie Albert, was read to the Grand Jury by Sergeant Bukhenik"); *id.* ("both Christopher and Julie Albert testified before the Grand Jury, and neither they, nor any of the witnesses present that evening, testified to the presence of Chris or Julie Albert at 34 Farview Road at any point that night"); *id.* ("Jennifer McCabe's cellphone extraction was admitted as an exhibit before the Grand Jury"); *id.* at 37-38 (describing grand jury testimony of Julie Albert, Christopher Albers and Jennifer McCabe); *id.* at 40 ("The testimony offered to the grand jury detailed an incident four weeks prior to the victim's death where the defendant became enraged at the victim for speaking to a female friend who was on their group vacation in Aruba."); *id.* at 41 ("the grand jury was also permitted to consider testimony that days prior to the victim's death, the victim expressed a desire to terminate the relationship and the defendant refused to leave the victim's home"); *id.* at 43 (testimony of Mr. Higgins and the victim's niece and nephew and a voice recording of the defendant); *id.* at 45 (Trooper DiCicco's testimony); *id.* at 45-46 (Trooper Guarino's testimony).

impounded. The docket does not indicate whether an affidavit was filed in support of impoundment or whether a separate written order of impoundment was entered.

In connection with his reporting on this case, Globe reporter John Ellement sought access to court records, including the documents at issue in this motion. He was informed by the docket that Dkts. 199-201, 227, 228, 231, and 232 are impounded.

II. ARGUMENT

A. The Public Has a Presumptive Right of Access to the Impounded Materials.

The public has a presumptive right of access to court records under Massachusetts common law and the federal and state constitutions. *See Commonwealth v. George W. Prescott Pub. Co., LLC*, 463 Mass. 258, 268 (2012) (search warrant affidavits); *The Republican Company v. Appeals Court*, 442 Mass. 218, 223 n.8 (2004) (same); *Boston Herald v. Sharpe*, 432 Mass. 593, 605-06 (2000) (ch. 209A affidavits). *See also Care and Protection of Sharlene*, 445 Mass. 756, 772-73 (2006) ("We do not depart from our cases that recognize a common-law right of access to the records of judicial proceedings, nor disagree with a decision of the United States Court of Appeals for the First Circuit, cited by the petitioner, holding that the First Amendment to the United States Constitution may encompass a public right of access to records submitted in connection with criminal cases.") (citations omitted). "This presumption of public access to judicial records allows the public and the media to develop a full understanding of a judicial proceeding so that they may 'keep a watchful eye' on the judicial system." *Commonwealth v. Winfield*, 464 Mass. 672, 678 (2013) (quotations and citations omitted). *See also Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) ("every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed").

The procedural and substantive standards governing the impoundment of judicial records, as developed in the case law, are embodied in the Uniform Rules on Impoundment Procedure

(the "Uniform Rules"), which apply to both "civil and criminal proceedings in each Department of the Trial Court." Rule 1, Uniform Rules. *See generally* Trial Court Advisory Committee on Impoundment Law and Procedure, *Handbook on Trial Court Rule VIII, The Uniform Rules on Impoundment Procedure* 2–3. *See also* Uniform Rules 7(a) and 7(b) (requiring showing of "good cause" to justify impoundment). The Uniform Rules provide that impoundment motions and orders must satisfy the following requirements.

1) **Movant Particularity**—the movant "shall describe with particularity (i) the material sought to be impounded, (ii) the duration for which the impoundment is sought, (iii) the reasons impoundment is necessary, and (iv) the reasons other alternatives to impoundment will not afford adequate protection." Uniform Rule 2(a)(1).

2) **Affidavit in Support**—the motion "shall be accompanied by an affidavit in support thereof." Uniform Rule 2(a)(2).

3) **A Hearing**—An order of impoundment may be entered by the court only after a hearing, with the exception of ex parte orders, cases involving in camera review or trade secrets. Uniform Rules 7(a) and (e), 2(b)(3) and 3(a).

4) **Written Finding of Good Cause**—"An order of impoundment, whether ex parte or after notice, may be made only upon a written finding of good cause." Uniform Rule 8(a).

5) **Specificity of Order**—"An order of impoundment shall state specifically what material is to be impounded . . . include the date of issuance and shall specify the duration of the order with a date certain for expiration of the order." Uniform Rule 8(b).

6) **Public Inspection of Motion, Affidavit, and Order**—"The clerk shall enter the motion and affidavit on the case docket. Unless the court impounds the motion and affidavit by separate order, they remain publicly available documents." Uniform Rule 2(a)(3). Similarly, "The order shall be entered on the docket, kept in the public file, and made available for public inspection. The order shall provide sufficient information for the public to identify the case caption, the case number, and to ascertain the grounds, duration, and scope of the impoundment." Uniform Rule 8(d).

The Globe respectfully submits that there no longer is good cause for continuation of the impoundment orders for the reasons set forth below.

B. G.L. c. 268 § 13D(e) Does Not Require Impoundment of the Entirety of the Documents at Issue.

The defendant's notice of filing impounded information cites the Court's impoundment order made during the May 24, 2023 hearing,[3] as well as G.L. c. 268 § 13D(e). (Dkt. 194). The motion to impound defendant's motion to dismiss the indictments and memorandum in support, as well as the affidavit in support of the motion, both cite the inclusion of and reference to grand jury minutes and exhibits as the reason good cause exists to file these documents under seal (Dkts. 195-196).

The requirement of grand jury secrecy, "while deeply rooted in the common law of the Commonwealth[,]" is not absolute. *WBZ-TV4 v. Dist. Atty. for Suffolk Dist.*, 408 Mass. 595, 599–600 (1990) (citation omitted). "Although grand jury proceedings are secret, [courts] may summarize pertinent facts contained in the grand jury minutes." *Commonwealth v. Cabral*, 443 Mass. 171, 173 (2005). Grand jury minutes also are "routinely used in criminal proceedings to impeach witnesses at trial and yet the courtroom is not closed simply because portions of grand jury transcripts are being read aloud." *Doe v. Lyons*, No. CIV. A. 96-0341, 6 Mass. L. Rptr. 274, 1996 WL 751531, at *10 (Mass. Super. Dec. 23, 1996). And in cases such as this one where grand jury testimony and exhibits have been disclosed in a public court filing, *see* n. 2, *supra*, the interests in grand jury secrecy are overcome by the public's right of access to court records.

The Supreme Judicial Court considered an analogous situation in *Globe Newspaper Company, Inc. v. Police Com'r of Boston*, 419 Mass. 852 (1995). *Police Com'r* involved a public records request for documents underlying public reports prepared by two law enforcement agencies into the Boston Police's response to the murder of Carol DiMaiti Stuart and the shooting of her husband, Charles Stuart. The Supreme Judicial Court affirmed a Superior

[3] The May 24, 2023, oral order concerned impounding photographs of injuries. The Globe is not moving to vacate the order impounding those images.

Court's order requiring the disclosure of underlying grand jury information contained in the two reports. The Court held that "because the report and the response identified several grand jury witnesses and summarized, and in some instances quoted, their testimony, as far as to the disclosure ordered here, there is no real remaining secrecy to protect." *Id.* at 866. *See also In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994) ("There must come a time, however, when information is sufficiently widely known that it has lost its character as [protected grand jury] material. The purpose in [protecting grand jury material] is to preserve secrecy. Information widely known is not secret.") (cited in *Police Com'r*, 419 Mass. at 866).[4]

Any contrary interpretation would render G.L. c. 268 § 13D(e) unconstitutional. Section 13D(e) provides in relevant part: "Any grand jury transcript or document citing or describing grand jury testimony filed with any court shall be filed and maintained under seal, unless the paper is filed in a criminal prosecution for perjury before a grand jury." As a matter of constitutional law, however, "[w]here, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 606–07 (1982); *see also Pokaski*, 868 F.2d 509 ("the public has a First Amendment right to judicial documents and records because without them a full understanding of judicial proceedings would be impossible.") .

[4] *See also In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154–55 (D.C. Cir. 2007) (releasing portions of sealed opinion and two affidavits discussing grand jury materials disclosed during trial); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006) ("Our case law, moreover, reflects the common-sense proposition that secrecy is no longer "necessary" when the contents of grand jury matters have become public [and] we see little purpose in protecting the secrecy of grand jury proceedings that are no longer secret."); *In re Petition of Craig*, 131 F.3d 99, 107 (2d Cir. 1997) ("the extent to which the grand jury material in a particular case has been made public is clearly relevant because even partial previous disclosure often undercuts many of the reasons for secrecy.").

The Globe does not dispute the Commonwealth's interest in protecting the secrecy of grand jury proceedings. "But as compelling as that interest is, it does not justify a *mandatory* closure rule" for grand jury materials already in the public domain. *Globe*, 457 U.S. at 607-08 (emphasis in original). In *Globe*, the Supreme Court struck down on First Amendment grounds a Massachusetts statute that imposed a "mandatory closure rule barring press and public access to criminal sex-offense trials during the testimony of minor victims." *Id.* at 607. The Court found the Commonwealth's interest "safeguarding the physical and psychological well-being of a minor" compelling, *id.*, but held that the statute was not narrowly tailored because "the circumstances of the particular case may affect the significance of the interest [in secrecy and a] trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim." *Id.* at 608. For example, although the statute barred the press from the courtroom during the testimony of minor sex victims, "the press [was] not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony. Thus [the statute] cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity." *Id.* at 610. *See also id.* ("If the Commonwealth's interest in encouraging minor victims to come forward depends on keeping such matters secret, [the statute] hardly advances that interest in an effective manner.").

The detailed public disclosure of grand jury materials in the Commonwealth's opposition papers similarly compels the conclusion that continued impoundment no longer is an effective means of protecting grand jury information already made public. *See* n.2 *supra*; Dkt. 216 at 8-9, 13-15, 32, 34-41, 44-45. Nor is it a "narrowly tailored means of accommodating the State's asserted interest[.]" *See generally Sharpe*, 432 Mass. at 605 n.24 (impoundment orders must be "narrowly tailored to prevent potential prejudice.").

This does not render such material without protection. The parties may still justify impoundment but only by demonstrating that good cause warrants keeping the documents at issue impounded. *See Republican*, 442 Mass. at 225 ("The burden of demonstrating the existence of good cause always remains with the party urging their continued impoundment.").

C. **There Is No Good Cause for Continued Impoundment.**

An order impounding judicial records is warranted only upon a showing of "good cause," and the burden of making that showing rests squarely on the party seeking either to obtain or continue an impoundment order. *See Republican*, 442 Mass. at 225 ("The burden of demonstrating the existence of good cause always remains with the party urging their continued impoundment."); *see also Prescott*, 463 Mass at 263. The Court's "exercise of the right to restrict access . . . must recognize that impoundment is always the exception to the rule, and the power to deny public access to judicial records is to be 'strictly construed in favor the general principle of publicity.'" *Republican*, 442 Mass. at 223 (citation omitted).

In determining whether good cause exists, "the court shall consider all relevant factors, including, but not limited to, (i) the nature of the parties and the controversy, (ii) the type of information and the privacy interests involved, (iii) the extent of community interest, (iv) constitutional rights, and (v) the reason(s) for the request." Uniform Rule 7(b). *See also Sharpe*, 432 Mass. at 604-605 & n.22 (discussing good cause standard and factors to consider); *Republican*, 442 Mass. at 223 (same). "Agreement of all parties, interested nonparties, or other persons in favor of impoundment shall not, in itself, be sufficient to constitute good cause." Uniform Rule 7(b).

The standard is a rigorous one. As the *Republican* court observed, the test "require[s] a judge conducting a good cause analysis to take into account essentially the same factors as required by the First Amendment: 'the competing rights of the parties **and alternatives to**

impoundment.'" 442 Mass. at 223 n.8 (emphasis added) (quoting *Sharpe*, 432 Mass. at 605 n.24). "If there is good cause to impound documents, a judge is required to tailor the scope of the impoundment order so that it does not exceed the need for impoundment." *Sharpe*, 432 Mass. at 605; *see also* Uniform Rule 8(c) ("The court shall tailor the scope of the impoundment order so that it does not exceed the need for impoundment."); *Ottaway Newspapers*, 372 Mass. at 550 n.17 ("We fully agree that the scope of an impoundment should not in any case exceed the need."); *Commonwealth v. Martin*, 417 Mass. 187, 195 (1994) ("If any reasonable alternative to closure is not expressly considered by the judge in reaching a decision to order closure, the order shall be vacated."). Accordingly, even if good cause exists for the impoundment of any portion of the materials at issue, the continued impoundment of the remaining materials would not be justified.[5]

Based on the ascertainable grounds in the record, the required balancing of competing interests in this case demonstrates that there no longer is good cause to justify the blanket impoundment of these records. Vacating the impoundment orders or limiting their scope so as not to exceed the requirement of good cause, *see Sharpe*, 432 Mass. at 605, will permit the public to better understand the judicial action taken by this Court and satisfy itself of the public duties discharged concerning a matter of significant public interest.

[5] Nor does the demonstration of good cause in the first instance imply a continuing presumption of validity. Uniform Rule Committee Notes, Rule 8 ("The order carries no continuing presumption of validity and it may be subject to subsequent challenges."). Once the order of impoundment is entered, it remains an interlocutory order subject to the existence of "good cause." Uniform Rule Committee Notes, Rule 8. And the "burden of demonstrating the existence of good cause always remains with the party urging their continued impoundment." *Republican*, 442 Mass. at 225.

1. The Nature of the Parties and Controversy, the Extent of the Community Interest, and the Reason for the Request Support Vacating the Impoundment Orders.

The first, third, and fifth factors to be addressed under the Uniform Rules, "the nature of the parties and the controversy," the "extent of community interest," and the "reason for the request," all strongly favor public access in these records.

Defendant's prosecution has garnered significant public interest. She is charged with murdering a Boston police officer, and has alleged that she is the victim of a coverup perpetrated by the Canton police and local prosecutors. The case has divided the Town and put Canton public institutions under scrutiny as defendant's supporters have rallied around her and decried what they claim is a corrupt prosecution. In a case such as this one, the transparency of the proceedings is crucial to the public's understanding and acceptance of the judicial process. "When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion . . . . The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.' It is not enough to say that results alone will satiate the natural community desire for 'satisfaction.'" *Richmond Newspapers v. Virginia*, 448 U.S. 555, 571 (1980) (emphasis added). Stated otherwise, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572.

The nature of the parties, community interest in the case, and the reason for the request thus favor terminating the impoundment order.

2. The Type of Information and Privacy Interests Involved Support Vacating the Impoundment Order.

The second factor to be addressed, "the type of information and the privacy interests involved" also favor public access in this case. Because the documents at issue were submitted to the Court and formed the basis for a significant judicial ruling, they are a presumptively public. *See generally F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987) ("relevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies"). The records themselves address the legitimacy of the prosecution, a highly publicized matter that is the subject of legitimate public concern and controversy. *See Restatement (Second) of Torts* § 652D, cmt. f (1977) ("Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed."). Any asserted privacy interests are further mitigated by the information already made public in this case, including but not limited to the Commonwealth's opposition to defendant's motion to dismiss. Dkt. 216.

To the extent any portion of the documents implicate legitimate privacy interests, a blanket impoundment of the entire document is not required. As the *Republican* court explained, "privacy protection available to individual witnesses through redaction of identifying names and addresses" weakens an interest in impoundment. 442 Mass. at 226. *See also New England Internet Cafe, LLC v. Clerk of Superior Ct. for Crim. Bus. in Suffolk Cnty.*, 462 Mass. 76, 93 (2012) (trial court "extended to the Commonwealth [an opportunity] to suggest the redaction of information that it believed was particularly sensitive," which "considerably diminished" the Commonwealth's interest in secrecy). In sum, alternatives to impoundment afford adequate

protection to any legitimate privacy interests at issue here. *See* Uniform Rule 2(a)(1); *Republican*, 442 Mass. at 223 n.8 ("a judge conducting a good cause analysis [must] take into account essentially the same factors as required by the First Amendment: 'the competing rights of the parties and alternatives to impoundment.'") (citation omitted).

3. The Parties Have Not Demonstrated that Constitutional Rights Require Impoundment.

The fourth factor to be addressed, "constitutional rights" does not weigh in favor of impoundment. The burden is on the party seeking impoundment to demonstrate a "substantial probability that permitting access to [the specific documents at issue here] will prejudice her fair trial rights." *Republican*, 442 Mass. at 223 n.8. In *Sharpe*, for example, the Supreme Judicial Court rejected the argument made by a defendant in a highly publicized spousal murder case that public access to impounded documents in his divorce case and a related abuse prevention injunctive action would prejudice his fair trial rights. 432 Mass. at 594. As the Supreme Judicial Court observed, "[p]retrial publicity that may be occasioned by the release of the [court records] does not, however, necessarily trump the principle of publicity: '[P]retrial publicity-even pervasive, adverse publicity--does not inevitably lead to an unfair trial.'" *Id.* at 609 (citation omitted). Besides finding that the disclosure of the records would "increase only marginally" the risk of prejudicial pretrial publicity, *id.*, the Court stressed the availability of alternative remedies to minimize any prejudicial impact on the defendant, *id.* at 610.

> History counsels that, in the face of significant hostile publicity surrounding a criminal case, jurors may be selected who are capable of, and do, reach an impartial decision based solely on the evidence at trial. *See, e.g., Commonwealth v. James*, 424 Mass. 770, 775 (1997) (aggravated rape and murder of young woman in public park by eight young men); *Commonwealth v. Colon-Cruz*, 408 Mass. 533, 551 (1990) (murder of state trooper). That is the reason we recognize that "[a] defendant's right to a fair and impartial jury does not require that jury members have no prior knowledge of the crime." *Id.* . . . [Moreover,] if the judge at [the]

> criminal trial determines that the jury pool . . . may be so tainted by pretrial publicity that [the defendant] may not obtain a fair trial before an impartial jury, the judge has substantial discretion in deciding whether to order a change in venue.
>
> The judge at [the defendant's] criminal trial may also conduct an individual *voir dire* of prospective jurors concerning their exposure to pretrial publicity to ensure that each juror is able to render a fair and impartial verdict. ... The trial judge may also give explicit jury instructions during the trial that command the jurors to accord weight only to the evidence admitted at trial.

432 Mass. at 610-611.

As in *Sharpe*, the parties here "poin[t] to no specific factors that compel the conclusion that these and other remedies available to the trial judge will be ineffective or inadequate" to protect her fair trial rights if the impoundment order is vacated. *Id.* at 611. The record does not demonstrate that the *incremental effect* of disclosing the documents at issue—particularly in light of the publicity the case necessarily has engendered—will prejudice any party's fair trial rights.

The same result is required as a matter of constitutional law. "Under the First Amendment to the United States Constitution, '[t]he burden falls on the party seeking closure to demonstrate that (1) there exists a substantial probability that permitting access to court records will prejudice his fair trial rights; (2) closure will be effective in protecting those rights, and that the order of closure is narrowly tailored to prevent potential prejudice; and (3) there are no reasonable alternatives to closure.'" *Id.* (citation omitted). Even a "reasonable likelihood" that public access will harm the defendant's fair trial rights is not enough. *Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty.*, 478 U.S. 1, 14, (1986) (reversing closure order based on finding that publicity would cause a "reasonable likelihood" of harm to defendant's fair trial rights and instead requiring showing of a "substantial probability" of such harm). Moreover, the impoundment order must *effectively* serve its intended interest, *i.e.*, the harm from public access must be one "that closure would prevent." *Press-Enterprise*, 478 U.S. at 14; *see also*

Pokaski, 868 F.2d at 505-06. Thus, if the impoundment order will not itself prevent the perceived harm—as, for example, when the information already is in the public record or will inevitably become so—the constitutional standard cannot be met. *Globe*, 457 U.S. at 609-10.

D. Article 16 Independently Provides the Public with a Right of Access to the Search Warrant Case File.

The Supreme Judicial Court has long stated that "no inference should be drawn that the Declaration of Rights of the Constitution of the Commonwealth is less capable of protecting the essentials of freedom of speech, of the press, and of assembly than is the Federal Constitution." *Commonwealth v. Gilfedder*, 321 Mass. 335, 343 (1947). The press clause of Article 16 has remained unchanged since 1780, and thus predates the enactment of the First Amendment. Its construction, therefore, is not necessarily limited by constructions of its federal analogue. *Cf. Attorney General v. A Book Named "Naked Lunch."*, 351 Mass. 298, 301 (1966) (Reardon, J., dissenting) ("[O]ur disinclination to serve as a censor of published material has an historical constitutional foundation which antedates that of any other American tribunal.").

Although the precise issue raised here never has been considered by the Supreme Judicial Court, the provisions of Article 16 have been held to extend protections even greater than those of the First Amendment. *See Commonwealth v. Sees*, 374 Mass. 532 (1978); *Cabaret Enterprises v. Alcoholic Beverages Control Commission*, 393 Mass. 13, 16-17 (1984); *see also* H. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 Suffolk L. Rev. 887, 889-90 (1980). *See generally Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 268-69 (1993) ("the independent protections of freedom of speech which are found in our common law and in art. 16 would lead us to reach the same result even if there existed no Federal constitutional support for the principles which we applied"). As Justice Holmes stated over 140 years ago:

> It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Cowley, 137 Mass. at 394. The Commonwealth's long common law tradition of public access to judicial proceedings and records, viewed in light of the emphatic protections for free speech and the press in Article 16, thus amply support a state constitutional right of access justifying the requested relief.

III. CONCLUSION

For the foregoing reasons, the Globe respectfully requests that the Court vacate the impoundment order(s) entered in this case or, in the alternative, modify the order by redacting only those portions of the record for which the parties can satisfy their burden of proving good cause.

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CERTIFICATE OF SERVICE

I, Samuel Thomas, hereby certify that on April 4, 2024, I served the above document by email and FedEx on all counsel of record, including:

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