IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 20-2744

To Be Argued By:
Katie Townsend

THE HARTFORD COURANT COMPANY, LLC,
Plaintiff-Appellee,

v.

PATRICK L. CARROLL III, in his Official Capacity as Chief Court Administrator of the Connecticut Superior Court;
(*Caption continued on inside cover*)
Defendants-Appellants.

On Appeal from the United States District Court for the District of Connecticut, Civil Action No. 3:19-CV-01951-MPS

BRIEF OF PLAINTIFF-APPELLEE

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Defendants-Appellants.

DISCLOSURE STATEMENT

The Hartford Courant Company, LLC is a subsidiary of Tribune Publishing Company LLC. Tribune Publishing Company LLC is a subsidiary of Tribune Publishing Company, which is publicly held. Alden Global Capital and affiliates own over 10% of Tribune Publishing Company's common stock. Nant Capital LLC, Dr. Patrick Soon-Shiong and California Capital Equity, LLC together own over 10% of Tribune Publishing Company's stock.

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PRELIMINARY STATEMENT

This appeal arises from a constitutional challenge by Plaintiff-Appellee The Hartford Courant Company, LLC (the "Courant"), the largest daily newspaper in the state of Connecticut, to a recently enacted state statute, Connecticut Public Act No. 19-187, that amended section 46b-127 of the General Statutes of Connecticut (the "Juvenile Transfer Act" or "Act") to mandate the closure of all court proceedings, and the automatic sealing of all judicial records, in criminal prosecutions of defendants who were, at the time they committed their alleged crimes, fifteen to seventeen years old. The Courant challenges the Act's flat prohibitions on public access to such criminal cases—in which juvenile defendants are tried as adults in regular criminal court—as violative of the public's right to contemporaneous access to judicial records and proceedings under the First Amendment and article first, sections 4 and 5 of the Connecticut Constitution.

On July 24, 2020, the District Court entered an order granting a motion for a preliminary injunction filed by the Courant, enjoining Defendants from automatically sealing judicial records, including docket sheets, pursuant to the Act, as amended (the "Order"). Joint Appendix ("JA") 22. For the reasons herein, the District Court's Order should be affirmed.

STATEMENT OF THE CASE

I. Juvenile Proceedings in the State of Connecticut

A. Juvenile delinquency proceedings

The above-captioned action concerns the presumption of public access to judicial records only in matters transferred to regular criminal court pursuant to the Juvenile Transfer Act. Public access to judicial records in juvenile proceedings is not at issue. As detailed herein, under Connecticut law, there are two types of juvenile proceedings—juvenile delinquency proceedings and youthful offender proceedings—that the District Court's Order does not concern.

Juvenile delinquency proceedings—along with certain other matters involving juveniles, including adoption proceedings—fall within the jurisdiction of the Connecticut Superior Court's family division. Conn. Gen. Stat. §§ 46b-121(a)(1)–(2); 46b-121(b)(1).[1]

Depending on his or her age, a minor under the age of eighteen may be adjudicated delinquent for some or all of the following: certain violations of federal or state law (with certain exceptions), violations of municipal or local ordinances, willfully failing to appear in a delinquency proceeding, violations of a court order in a juvenile delinquency proceeding, or violations of conditions of

[1] All statutory references are to the General Statutes of Connecticut unless otherwise stated.

probation supervision in a juvenile delinquency proceeding. § 46b-120(2)(A)–(B). Minors charged with committing felonies that are subject to mandatory transfer to regular criminal court under the Juvenile Transfer Act are not eligible for adjudication in a juvenile delinquency proceeding. § 46b-127(a)(1).

As the Connecticut Supreme Court stated in *State v. Ledbetter*, juvenile delinquency proceedings are "fundamentally different from criminal proceedings." 818 A.2d 1, 10 (Conn. 2003). "[A] delinquency petition does not charge a child with having committed a crime," and "adjudication of a juvenile offense is not a conviction . . . and does not permit the imposition of criminal sanctions." *Id.* at 14 (internal citations omitted). A minor who is adjudicated delinquent shall be provided, instead, with "a comprehensive system of graduated responses with an array of services, sanctions and secure placements . . . in order to provide individualized supervision, care, accountability and treatment." § 46b-121r.

Under Connecticut law, a minor who has been adjudicated delinquent may not be "committed to the Department of Children and Families as a result of such conviction," § 46b-121q, but rather may only be sentenced to a period of probation, which may include requiring that the child participate in specific youth service programs, attend school, undergo medical evaluations, and/or reside with a particular parent or guardian, § 46b-140(c). Probation may also include placement in a "residential facility," but only if the minor's clinical and behavioral needs so

require, or if the minor poses a risk to public safety that cannot be adequately managed in a less restrictive setting. § 46b-140(g).

Records in juvenile delinquency matters are by statute presumptively confidential, though they may be disclosed to certain enumerated persons, including the minor's attorney and parents. § 46b-124(b)–(c). The family court presiding over a juvenile delinquency proceeding may also order disclosure of records to "any person who has a legitimate interest in the information and is identified in such order." § 46b-124(e). Proceedings in juvenile delinquency matters are "kept separate and apart from all other business of the Superior Court as far as is practicable," and the court shall exclude from such proceedings "any person whose presence is, in the court's opinion, not necessary," though a victim may not be excluded unless good cause is shown. § 46b-122(a)–(b).

B. Youthful offender proceedings

A minor who was sixteen or seventeen years old at the time he or she allegedly committed a criminal act, or whose case was transferred to the Superior Court's regular criminal docket pursuant to the Juvenile Transfer Act, may be presumptively eligible for adjudication as a "youthful offender" in certain cases. Specifically, if (i) the individual was not charged with a Class A felony or certain enumerated sexual offenses; and (ii) was not previously "convicted of a felony in the regular criminal docket of the Superior Court" or "previously adjudged a

serious juvenile offender or serious juvenile repeat offender," he or she is eligible for the youthful offender docket. §§ 54-76b, 54-76c. A minor charged with a Class A felony, or with one of the majority of enumerated sexual offenses set forth in section 54-76c, is subject to mandatory transfer to regular criminal court pursuant to section 46b-127(a)(1) of the Juvenile Transfer Act and is not eligible for the youthful offender docket.

For a defendant who is eligible for the youthful offender docket, a prosecutor may, in her or his discretion, move the court to transfer that defendant's case to the regular criminal docket pursuant to the Act. § 54-76c(b)(1). The court may order such a transfer upon a finding of probable cause that the defendant committed the crime for which he or she is charged. *Id.* Once a matter has been transferred to regular criminal court, a prosecutor may move to return the case to the youthful offender docket no later than ten working days after the defendant's arraignment. § 54-76c(b)(2). During that period of time, judicial documents in the case are temporarily sealed. § 54-76c(b)(1). If a motion to transfer to the youthful offender docket is filed, the court must decide the motion no later than ten working days after its filing. § 54-76c(b)(2). Judicial documents in the case remain

temporarily sealed until the court makes a final decision on the motion to transfer. § 54-76c(b)(1).[2]

If an individual in a youthful offender proceeding enters a plea of "not guilty" or "if the court on its own motion so directs," the individual is tried—without a jury—"for the purpose of determining whether he [or she] shall be adjudged a youthful offender." § 54-76e. As with an adjudication of juvenile delinquency, an adjudication of "youthful offender" status is not a "conviction," and a minor who is adjudicated a "youthful offender" is not a "criminal by reason of such determination." § 54-76k. Like juvenile delinquency proceedings, the purpose of youthful offender proceedings is "to protect and possibly rehabilitate those youths who ha[ve] made a mistake because of their immaturity." *State v. Matos*, 694 A.2d 775, 783 (Conn. 1997).

Proceedings in youthful offender cases are closed to the public, though the victim may not be excluded unless good cause is shown. § 54-76h. Records in youthful offender matters are presumptively confidential, though they may be disclosed to certain enumerated persons, including the defendant's attorney and parents. § 54-76l(b). The court may also order disclosure of records in youthful offender matters to "any person who has a legitimate interest in the information

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[2] Prior to the effective date of the amendments to the Act, if the case was not returned to the youthful offender docket, and therefore remained in regular criminal court, judicial documents in the case would be unsealed.

and is identified in such order." § 54-76l(c). Defendants in youthful offender matters are eligible to have records automatically erased upon reaching twenty-one years of age, provided they are not convicted of a felony in the interim. § 54-76o.

II. The Juvenile Transfer Act

The Juvenile Transfer Act, section 46b-127 of the General Statutes of Connecticut, governs the transfer of matters involving defendants who are charged with certain enumerated felonies, and who were fifteen to seventeen years old when those alleged crimes were committed, to regular criminal court for prosecution as adults ("Transferred Matters").

The Act mandates that cases involving defendants charged with committing the most serious of crimes when they were fifteen to seventeen years old—including murder, felony murder, arson murder, first degree manslaughter, and aggravated sexual assault—be automatically transferred to regular criminal court, to be tried as adults, pursuant to section 46b-127(a)(1). *See, e.g.*, §§ 53a-54a, 53a-54c, 53a-54d, 53a-55a, 53a-70c. In addition, upon the recommendation of a prosecutor, juvenile defendants charged with certain enumerated felonies may be subject to discretionary transfer under section 46b-127(a)(3) if, following a hearing, a judge of the superior court for juvenile matters determines that transfer to regular criminal court is warranted based on a finding that, *inter alia*, "the best

interests of the child and the public will not be served by maintaining the case in the superior court for juvenile matters." § 46b-127(a)(3).

Of the more than sixty-one new cases transferred to regular criminal court under the Act from October 1, 2019, the effective date of the amendments at issue, through May 8, 2020, the vast majority—approximately fifty—were automatically transferred pursuant to the Act's mandatory transfer provision. *See* JA119. Defendants in these cases were charged with capital and Class A felonies. Many of these crimes carry mandatory minimum sentences of five to twenty-five years in prison or, in the case of capital felonies committed prior to April 25, 2012, life imprisonment without the possibility of release. *See* § 53a-35a.

Defendants in all Transferred Matters have been charged with felonies; misdemeanors and lesser offenses are not subject to transfer under the Act. And because the Act applies to defendants who were fifteen to seventeen years old *at the time of the alleged crime*, Transferred Matters may include criminal prosecutions of eighteen-year-old defendants and defendants over the age of eighteen. Indeed, according to Defendants-Appellants, as of October 1, 2019, four defendants in pending Transferred Matters were over the age of twenty-five, and three of those defendants were over the age of thirty. JA172:7–10, JA173:1–4.

Defendants in Transferred Matters are tried as adults in regular criminal court; they are subject to all applicable procedures of regular criminal court, as

well as the full range of possible penalties that may be imposed against adult criminal defendants, including criminal conviction and imprisonment in adult correctional facilities. *State v. Morales*, 694 A.2d 758, 761–62 (Conn. 1997) ("[Defendants] who are validly transferred from the juvenile docket to the regular criminal docket" pursuant to the Act "are to be prosecuted in all respects, including sentencing, as though they were adults.").

Connecticut Public Act No. 19-187, enacted on July 9, 2019, went into effect on October 1, 2019 (the "Effective Date") and made several changes to the Act. *See generally* Pub. Act No. 19-187, Gen. Assemb., Reg. Sess. (Conn. 2019). Prior to the Effective Date, judicial documents and court proceedings in Transferred Matters were open to the press and the public. *See* Br. of Defs.-Appellants at 5 n.2. But Connecticut Public Act No. 19-187 amended the Act to provide that, as of the Effective Date, all proceedings in Transferred Matters "shall be private" and "conducted in such parts of the courthouse . . . that are separate and apart from the other parts of the court which are then being used for proceedings pertaining to adults charged with crimes." § 46b-127(c)(1)(A). It further amended the Act to provide that "[a]ny records of such proceedings shall be confidential in the same manner as records of cases of juvenile matters are confidential . . . unless and until the court or jury renders a verdict or a guilty plea is entered in such case on the regular criminal docket." *Id.* The Act permits records from Transferred

Matters to be made available "to the victim of the crime," provided, however, that such records "shall not be further disclosed." § 46b-127(c)(1)(B).

These newly enacted provisions of the Juvenile Transfer Act categorically prohibit members of the press and the public, including the Courant, from attending courtroom proceedings in Transferred Matters; they also preclude the press and the public from accessing judicial documents in Transferred Matters unless and until a verdict or guilty plea is entered. Pursuant to these provisions, as of the Effective Date, judicial records in all newly filed Transferred Matters were automatically sealed, and judicial records in Transferred Matters pending as of the Effective Date were retroactively sealed. JA89–90 ¶ 14.

III. Procedural History

On December 11, 2019, the Courant filed suit in the District Court seeking a declaratory judgment that the Juvenile Transfer Act, as amended, violates the First Amendment to the U.S. Constitution and article first, sections 4 and 5 of the Connecticut Constitution, as well as preliminary and permanent injunctive relief enjoining Defendants-Appellants from automatically sealing judicial records and closing proceedings in Transferred Matters pursuant to the Act. JA62–78.

On March 26, 2020, the Courant moved the District Court for a preliminary injunction requiring Defendants-Appellants to unseal all judicial records, including docket sheets, in any Transferred Matters sealed pursuant to the Act after the

Effective Date, and enjoining Defendants-Appellants from automatically sealing any newly filed judicial records in Transferred Matters. JA100–02.

On July 24, 2020, the District Court entered the Order granting the Courant's motion for a preliminary injunction. JA22. The District Court held that the Courant had "shown a clear and substantial likelihood of success on the merits of its claim that [Conn. Gen. Stat.] § 46b-127(c) is not narrowly tailored to achieve a compelling state interest and therefore unconstitutionally infringes upon the First Amendment right of access to court records in criminal prosecutions"; that in the "absence of preliminary injunctive relief, [the Courant] will suffer irreparable harm in the form of an ongoing First Amendment injury"; and that the "balance of equities and public interest favor a preliminary injunction." JA54–57.

The Order immediately enjoined Defendants-Appellants "from automatically sealing or permitting the automatic sealing of any newly filed judicial records, including docket sheets, in any case transferred from the juvenile docket to the regular criminal docket pursuant to Conn. Gen. Stat. § 46b-127 after the date of [the Order], unless a Superior Court judge in a particular case issues an order requiring the sealing of specific records." JA58.

As to cases that were transferred from the juvenile docket to the regular criminal docket before the date of the Order, Defendants-Appellants were ordered "to unseal all judicial records, including docket sheets" in such cases. *Id.* The

District Court stayed that portion of the Order for thirty days "to allow parties in individual Transferred Matters to file a motion to seal as to some or all of the court records if they wish to do so" or, in matters not automatically transferred pursuant to the Act's mandatory transfer provisions, to file "a motion to transfer the case back to the juvenile docket" pursuant to section § 46b-127(c)(2) or section 46b-127(g). *Id.*; *see also* JA59 ("After the expiration of the period of 30 days from the date of [the Order], the records in these cases shall be unsealed, except as to specific records ordered sealed during that period by a Superior Court judge."). The thirty-day stay ordered by the District Court expired on August 23, 2020.

On August 18, 2020—more than three weeks after the Order was entered, and only three business days before the thirty-day stay of the unsealing portion of the Order expired—Defendants-Appellants filed a notice of appeal from the Order in this Court, ECF No. 1, as well as a non-emergency Motion to Stay Pending Appeal in the District Court (the "District Court Stay Motion"). Defendants-Appellants did not file a motion to expedite their appeal. Nor did they seek expedited resolution of the District Court Stay Motion, which—in addition to a stay of all further proceedings pending appeal—also requested a stay of the Order. On August 24, the Courant filed an opposition to the District Court Stay Motion,[3]

[3] Because Defendants-Appellants did not seek expedited resolution of the District Court Stay Motion, the Courant's opposition was not due to be filed until

and requested a telephonic status conference before the District Court. *See* Ex. A to Pl.-Appellee's Opp. to Defs.-Appellants' Mot. for Emergency Stay Pending Appeal, ECF No. 22 ("Opp.") at 3:22–23.[4]

In response to the Courant's request, the District Court conducted a telephonic status conference on August 28, 2020. At the conclusion of that conference, the District Court denied Defendants-Appellants' request to stay the Order, finding that they had "failed to make any showing" that the thirty-day stay provision included in the Order was "inadequate." *Id.* at 26:19–20. Nor had Defendants-Appellants produced any evidence—such as an affidavit—showing that any defendant had suffered or would suffer irreparable harm from the denial of a further stay of the Order. *Id.* at 26:19–24, 27:7–10.

On September 4, 2020, at a second telephonic status conference, the District Court denied Defendants-Appellants' request to stay all further proceedings in the District Court pending their appeal of the Order. Following that ruling, Defendants-Appellants filed an emergency motion with this Court for a stay of the Order as well as a stay of all proceedings in the District Court pending appeal.

September 8, 2020, more than two weeks after the expiration of the District Court's thirty-day stay of the unsealing portion of its Order.

[4] Following the conference, the District Court issued a minute order stating that Defendants-Appellants' request to stay the Order was denied "for the reasons set forth by the [District] Court on the record during the [Conference.]" *See* Ex. B to Opp.

ECF No. 19. The Courant filed its opposition to the motion that same day. ECF No. 22. On September 8, the Court issued an order referring Defendants-Appellants' motion to the next available three-judge motions panel and granting a temporary stay pending a decision on that motion. ECF No. 30. A three-judge motions panel granted Defendants-Appellants' motion to stay on September 23, 2020 and expedited the briefing schedule for Defendants-Appellants' appeal. ECF No. 46.

SUMMARY OF ARGUMENT

In granting the preliminary injunction sought by the Courant, the District Court correctly held that the Courant had "shown a clear and substantial likelihood of success on the merits of its claim" that the challenged provisions of the Juvenile Transfer Act are not "narrowly tailored to achieve a compelling state interest and therefore unconstitutionally infringe[] upon the First Amendment right of access to court records in criminal prosecutions." JA54. The Order was compelled by well-settled, binding precedent of this Court and the Supreme Court holding that the public has a presumptive constitutional right of contemporaneous access to judicial documents and proceedings in criminal cases. *See, e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) ("*Globe Newspaper*"); *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012).

Transferred Matters are not, as Defendants-Appellants contend, juvenile delinquency proceedings; they are criminal prosecutions to which the public's presumptive right of access applies. Defendants in such matters are tried as adults in regular criminal court; they are subject to all applicable procedures of regular criminal court, as well as the full range of possible penalties that may be imposed against adult criminal defendants, including criminal conviction and imprisonment in adult correctional facilities. As the District Court's Order correctly observes, "the right of access to court proceedings and records depends on the nature of the proceeding, not on the personal characteristics of the litigants." *See* JA40.

Where the First Amendment presumption of access applies, judicial documents may be sealed only if—and only to the extent that—shielding them from public view is necessary to preserve "higher values" and is "narrowly tailored" to serve such an interest. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13–14 (1986) ("*Press-Enterprise II*"); *In re N.Y. Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987). Defendants have not—and cannot—demonstrate a compelling government interest that would justify depriving the public of contemporaneous access to all judicial documents in all Transferred Matters. And, even if such a compelling government interest could be found, the Act's blanket sealing of all judicial documents, including docket sheets, in Transferred Matters until a verdict or guilty plea is entered is not narrowly tailored to serve such an interest.

The Juvenile Transfer Act, as amended, violates the First Amendment rights of the Courant by prohibiting contemporaneous public access to judicial documents in Transferred Matters, thus preventing the Courant from reporting on matters of significant public interest and concern to its readers. The Courant—and, by extension, its readership—has suffered, and will continue to suffer, irreparable harm absent injunctive relief. *See Paulsen v. Cty. of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The press and the public have a significant and legitimate interest in observing the prosecution of juvenile defendants charged and tried as adults pursuant to the Act; Defendants-Appellants, on the other hand, "do[] not have an interest in the enforcement of an unconstitutional law." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (quoting *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003)).

For the reasons herein, the District Court's Order should be affirmed.

ARGUMENT

I. Standard of Review

An appellate court reviews a district court's decision to issue a preliminary injunction for abuse of discretion. *Yang v. Kosinski*, 960 F.3d 119, 127 (2d Cir. 2020). The district court's legal conclusions, however, are reviewed *de novo*. *Id.*

An abuse of discretion occurs "when the district court bases its ruling on an incorrect legal standard or on a clearly erroneous assessment of the facts." *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 331 F.3d 342, 348 (2d Cir. 2003). A factual assessment may be deemed "clearly erroneous" when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

Entry of a preliminary injunction is warranted where the moving party has demonstrated "that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A party seeking a preliminary injunction "that will alter the status quo must demonstrate a "'substantial' likelihood of success on the merits." *Walsh*, 733 F.3d at 486 (citation omitted). "[I]n the First Amendment context" the "likelihood of success on the merits is the dominant, if not the dispositive, factor" in determining whether a preliminary injunction is warranted. *Id.* at 488.

II. The press and public have a presumptive constitutional right to contemporaneously access judicial documents in criminal proceedings.

Said to predate even the Constitution itself, the right of the public to observe criminal proceedings is deeply rooted in American history and is "an indispensible [sic] attribute" of our criminal justice system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564–68, 569 (1980) ("*Richmond Newspapers*"). Based on an "unbroken, uncontradicted history, supported by reasons as valid today as in centuries past," the Supreme Court has recognized "that a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Id.* at 573; *see also United States v. Erie Cty.*, 763 F.3d 235, 238–39 (2d Cir. 2014) ("The notion that the public should have access to the proceedings and documents of courts is integral to our system of government.").

Public access to criminal proceedings and related court documents serves important values. It "enhances . . . the basic fairness of the criminal trial," *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*"), by discouraging "the misconduct of participants, and decisions based on secret bias or partiality," *Richmond Newspapers*, 448 U.S. at 569. Openness also promotes "the appearance of fairness so essential to public confidence in the system." *Press–Enterprise I*, 464 U.S. at 508; *see also United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008) (explaining that "[t]ransparency is pivotal to public perception of the

judiciary's legitimacy and independence"). "[T]he sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press–Enterprise I*, 464 U.S. at 508; *see also United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*") (recognizing that access to judicial proceedings allows the public to monitor the functioning of the judiciary and encourages "confidence in the conscientiousness, reasonableness, [and] honesty of judicial proceedings").[5]

For these reasons, the First Amendment guarantees the press and the public a qualified right to attend criminal trials and other criminal proceedings, as well as to examine judicial records, including docket sheets, in criminal cases. *Press-Enterprise II*, 478 U.S. at 9; *Press-Enterprise I*, 464 U.S. at 508; *Globe Newspaper,* 457 U.S. at 603 (citing *Richmond Newspapers*, 448 U.S. at 558–81); *United States v. Abuhamra*, 389 F.3d 309, 323 (2d Cir. 2004); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004) (holding that the press and the public have a presumptive First Amendment right to inspect docket sheets). Article first, sections 4 and 5 of the Connecticut Constitution likewise guarantee a

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[5] The Supreme Court has long recognized that members of the press play a particularly important role in facilitating public monitoring of the judicial system; "[w]hile media representatives enjoy the same right of access as the public," they often "function[] as surrogates for the public" by attending proceedings, reviewing court documents, and reporting on judicial matters to the public at large. *Richmond Newspapers*, 448 U.S. at 573.

qualified right of public access to criminal proceedings and judicial documents in criminal cases. *See Green Party of Conn. v. Garfield*, 590 F. Supp. 2d 288, 346 (D. Conn. 2008) (finding that the Connecticut Constitution provides at least as much protection as the First Amendment of the U.S. Constitution and that Connecticut courts therefore "generally adhere to the guidance of the United States Supreme Court on First Amendment issues"); Conn. Const. art. 1, § 4 ("Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."); Conn. Const. art. 1, § 5 ("No law shall ever be passed to curtail or restrain the liberty of speech or of the press.").

In determining whether the First Amendment right of access attaches to a particular proceeding or judicial document, courts look to the "complementary considerations" of "experience and logic," considering "whether the place and process have historically been open to the press and general public," and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8–9. Under this framework, it is well settled that the First Amendment guarantees the public a presumptive right of access to criminal trials and related documents. *See Richmond Newspapers*, 448 U.S. at 580; *United States v. Cojab*, 996 F.2d 1404, 1407 (2d Cir. 1993); *United States v. Suarez*, 880 F.2d 626, 630 (2d Cir. 1989) (describing the constitutional "presumption of public access to a criminal trial," and "documents

filed in connection with criminal proceedings"). Indeed, this right of access has been held to apply to a wide range of pre-trial and post-trial criminal proceedings, including jury selection (*Press-Enterprise I*, 464 U.S. at 508–09), preliminary hearings (*Press-Enterprise II*, 478 U.S. at 13; *Suarez*, 880 F.2d at 630), plea hearings (*United States v. Haller*, 837 F.2d 84, 86 (2d Cir. 1988)), pretrial suppression hearings (*In re Herald Co.*, 734 F.2d 93, 99 (2d Cir. 1984)), and sentencing proceedings (*United States v. Alcantara*, 396 F.3d 189, 199 (2d Cir. 2005)).

In addition to applying the *Press-Enterprise II* framework, this Court has also recognized that the public has a constitutional right of access to judicial documents that is "derived from or [is] a necessary corollary of the capacity to attend the relevant proceedings." *Pellegrino*, 380 F.3d at 93; *see also In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (explaining that "the constitutional right of access" also "appl[ies] to written documents submitted in connection with judicial proceedings that themselves implicate the right of access").

It is well settled that when the public has a qualified constitutional right of access, it is a right to *contemporaneous* access. *See Abuhamra*, 389 F.3d at 323 ("The American legal tradition has long assumed that 'contemporaneous review' of criminal prosecutions 'in the forum of public opinion' serves as an important restraint on abuse of government power.") (quoting *In re Oliver*, 333 U.S. 257, 270

(1948)); *see also Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("In light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous. . . . To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression."); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (holding that a forty-eight-hour delay in unsealing judicial records is improper, because the effect of the delay acts as a "total restraint on the public's first amendment right of access" during that time).

III. Transferred Matters are regular criminal prosecutions to which the presumptive right of contemporaneous access applies.

Far from being "beyond the outer limits of existing law" as Defendants-Appellants' claim, Br. of Defs.-Appellants at 14, well-settled precedent firmly establishes a qualified right of public access to judicial documents and proceedings in Transferred Matters. *See, e.g.*, *Globe Newspaper*, 457 U.S. at 605–06 (recognizing that the criminal trial has long been presumptively open to the press and the public and that the "uniform rule of openness" applies to such trials, even those in which minor victims of sex crimes are called to testify as witnesses in regular criminal court); *see also, e.g.*, *N.Y. Civil Liberties Union*, 684 F.3d at 299 (recognizing that the presumptive right of access to judicial documents and proceedings turns not "on formalistic descriptions of the government proceeding

but on the kind of work the proceeding actually does and on the First Amendment principles at stake").

To be clear, Transferred Matters are regular criminal proceedings. They are not juvenile delinquency proceedings; nor are they youthful offender proceedings. Transferred Matters differ from such juvenile proceedings in substantial and consequential ways. Defendants in all Transferred Matters have been charged with felonies, many of which carry mandatory minimum sentences of five to twenty-five years in prison or, in the case of capital felonies committed prior to April 25, 2012, life imprisonment without the possibility of release. *See* § 53a-35a. And, unlike in juvenile proceedings—the purpose of which "are to provide measures of guidance and rehabilitation for the child and protection for society, *not to fix criminal responsibility, guilt and punishment*," *Kent v. United States*, 383 U.S. 541, 554 (1966) (emphasis added)—defendants in Transferred Matters are tried by a jury, may be found guilty of a criminal offense, and are subject to imprisonment in adult correctional facilities.

"Just as the legislature has opted to grant certain important benefits to children accused of misconduct, so, too, has it chosen to except certain especially serious crimes from the juvenile system pursuant to § 46b–127." *Ledbetter*, 818 A.2d at 10. By mandating the transfer of cases involving those most serious crimes to the regular criminal docket, the Legislature has determined that the

defendants in those cases should stand trial as adults and should be subject to the full range of potential penalties available for adult defendants. And, with respect to discretionary transfers recommended by a prosecutor under section 46b-127(a)(3), such a transfer may be made only if, following a hearing, a judge of the superior court for juvenile matters determines that transfer to regular criminal court is warranted based on a finding that, *inter alia*, "the best interests of the child and the public will not be served by maintaining the case in the superior court for juvenile matters." § 46b-127(a)(3). Thus, in the handful of matters transferred to regular criminal court under the Act's discretionary transfer provision, a prosecutor has recommended transfer, and a judge has made a specific, individualized determination that the interests of the defendant and the public will be best served by prosecuting the defendant as an adult in regular criminal court.

The Connecticut Supreme Court has expressly held that juvenile defendants "who are validly transferred from the juvenile docket to the regular criminal docket" pursuant to the Act "are to be prosecuted in all respects, including sentencing, as though they were adults." *Morales*, 694 A.2d at 761–62; *see also Ledbetter*, 818 A.2d at 9 (finding that a juvenile defendant who was charged with Class A and B felonies and whose "case automatically was transferred from the juvenile court docket to the regular criminal docket in accordance with § 46b–127 . . . was tried as an adult in criminal court, not as a

child in juvenile court"). And it is "axiomatic that delinquency proceedings in juvenile court are fundamentally different from criminal proceedings." *Ledbetter*, 818 A.2d at 10 (explaining that "adjudication as a juvenile rather than prosecution as an adult carries significant benefits, chief among which are a determination of delinquency rather than criminality").

Accordingly, Defendants-Appellants' argument that experience and logic support automatic, blanket secrecy in Transferred Matters is specious. First, there is no question that criminal prosecutions, like Transferred Matters, have historically been open to the public. *Globe Newspaper*, 457 U.S. at 605. Indeed, as Defendants-Appellants concede, prior to the Effective Date, court proceedings and judicial documents, including docket sheets, in Transferred Matters were open to the public. Br. of Defs.-Appellants at 5 n.2.[6] And the Act's new secrecy provisions not only altered what had been the longstanding status quo of openness of Transferred Matters; they also made Connecticut an outlier. No other state bars public access to judicial documents and proceedings in cases where juvenile defendants are tried as adults. To the contrary, even in the context of juvenile

[6] In written testimony to the Legislature regarding Connecticut Public Act No. 19-187 prior to its passage, the Connecticut Judicial Branch, stated that the proposed amendments to the Act raised "technical issues and implementation difficulties" for Connecticut courts because they altered the longstanding status quo of public access to court records and proceedings in Transferred Matters. Joint Standing Comm. Hearings, Judiciary, Pt. 6, 2019 Sess., 4674–75 (Conn. 2019).

proceedings—which are not at issue here—several states statutorily mandate that judicial documents and proceedings of juveniles charged with crimes that would constitute a felony if committed by an adult be presumptively open to the public. *See* JA72 ¶ 31 n.2; *see also* N.Y. Crim. Proc. Law § 720.15(3) (McKinney).

Logic supports this long experience. Decades of binding legal precedent, as well as centuries of legal tradition, recognize that contemporaneous public access to criminal proceedings provides a safeguard for defendants, promotes the integrity of judicial proceedings, and benefits the functioning of the criminal justice system as a whole. *See Press-Enterprise I*, 464 U.S. at 508 (explaining that openness protects against unfairness and gives "assurance that established procedures are being followed and that deviations will become known"); *Richmond Newspapers*, 448 U.S. at 569 ("[H]istorical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensible [sic] attribute of an Anglo-American trial.").

Defendants in Transferred Matters are not only subject to the full range of potential penalties applicable in adult criminal court; they are also entitled to the full panoply of constitutional protections available to defendants in regular criminal court—including a public trial. The public's First Amendment right of access is interconnected with defendants' Sixth Amendment right not to be

prosecuted in secret. *See Waller v. Georgia*, 467 U.S. 39, 46 (1984). And the guarantee of a trial subject to contemporaneous oversight by the public "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." *In re Oliver*, 333 U.S. at 270; *see also Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 380 (1979) (noting that open proceedings allow the public to see that a defendant "is fairly dealt with and not unjustly condemned") (citation omitted). Thus, as with all criminal prosecutions, public access to matters in which defendants are tried as adults for crimes they allegedly committed as juveniles provides important benefits not only to the public and the justice system, but also to defendants, by ensuring that proceedings are conducted fairly, and that potential irregularities and injustices may be exposed.

Given that the defendants in Transferred Matters were minors when their crimes were allegedly committed, the serious nature of the crimes they are charged with, and the severity of the penalties they face, public oversight and monitoring of their prosecutions is just as—if not more—vital than in cases involving adult defendants. Indeed, among other things, public access to Transferred Matters allows for public oversight of charging decisions made by prosecutors in cases involving crimes allegedly committed by minors and can bring public attention to important policy issues surrounding the prosecution of minors as adults.

For example, in 2019, *The Washington Post* reported on the pending criminal case of then seventeen-year-old Chrystul Kizer, who was charged with first degree homicide, and facing the possibility of life imprisonment, for killing her alleged sex trafficker. *See* Jessica Contrera, *He Was Sexually Abusing Underage Girls. Then, Police Said, One of Them Killed Him*, Wash. Post (Dec. 17, 2019), https://perma.cc/VP87-BM4A. The report sparked a national debate about the prosecution of sex trafficking victims—and, in particular, underage victims of color—and led to calls for the charges against Kizer to be dropped. *See* Jessica Contrera, *Activists, Celebrities Call for Chrystul Kizer's Release in Sex Trafficking Murder Case*, Wash. Post (Dec. 31, 2019), https://perma.cc/4FSE-WK3N. Kizer's jury trial has since been postponed and her bond amount reduced. *See* Jessica Contrera, *Judge Reduces Bond for Chrystul Kizer, Teen Charged with Killing Her Alleged Sex Trafficker*, Wash. Post (Feb. 7, 2020), https://perma.cc/J4R9-CPRQ. If she had been charged with similar crimes in Connecticut, her case could not have received such public scrutiny. The Juvenile Transfer Act would have barred the press from attending any proceedings or accessing any judicial records in her case until such time as a guilty plea or verdict was entered.

To be clear, Defendants-Appellants do not—and cannot—point to any precedent to support their assertion that the presumption of access applicable to criminal proceedings does not apply in Transferred Matters. Each of the cases

cited by Defendants-Appellants in support of their argument concerns juvenile delinquency proceedings—not proceedings in which a juvenile defendant is being tried as an adult in regular criminal court. *See* Br. of Defs.-Appellants at 21–23 (citing *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979); *In re Gault*, 387 U.S. 1 (1967); *United States v. Under Seal*, 853 F.3d 706 (4th Cir. 2017); and *United States v. Three Juveniles*, 61 F.3d 86 (1st Cir. 1995)). Those cases thus provide no support, whatsoever, for the notion that the right of access applicable to regular criminal proceedings does not apply in Transferred Matters. To the contrary, in *Three Juveniles*, the court recognized that mandatory closure of proceedings—*even in the context of juvenile delinquency proceedings*—raises "serious First Amendment concerns"; the court interpreted the Federal Juvenile Delinquency Act to avoid "trigger[ing]" such constitutional concerns, by concluding it did not mandate the closure of juvenile proceedings, but rather authorized closure "on a case-by-case basis at the discretion of the district court." 61 F.3d at 90–92.

By legislative mandate, or through the legislatively permitted individual determinations of prosecutors and juvenile court judges, defendants in Transferred Matters are made to stand trial as adults in regular criminal court. Judicial records in such Transferred Matters thus constitute judicial records of criminal proceedings to which the constitutional presumption of access applies. *See Press-Enterprise II*, 478 U.S. at 8; *In re N.Y. Times Co.*, 828 F.2d at 114 (explaining that "the

constitutional right of access" also "appl[ies] to written documents submitted in connection with judicial proceedings that themselves implicate the right of access").

IV. The Act's sealing mandate violates the presumption of public access guaranteed by the First Amendment and Connecticut Constitution.

A. The Act's automatic, blanket confidentiality provisions are irreconcilable with the First Amendment's substantive and procedural requirements for restricting access to judicial documents.

Where, as here, the First Amendment presumption of access applies to judicial documents, such documents may be sealed *only* if—and *only* to the extent that—shielding them from public view "is essential to preserve higher values." *Press-Enterprise I*, 464 U.S. at 510; *In re N.Y. Times Co.*, 828 F.2d at 116. Such sealing must be supported by "specific, on the record findings" demonstrating that sealing is "essential" and that it is "narrowly tailored" to serve a compelling interest. *Press-Enterprise II*, 478 U.S. at 13–14 (quoting *Press- Enterprise I*, 464 U.S. at 510); *see also In re N.Y. Times Co.*, 828 F.2d at 116 (explaining that "[b]road and general findings" are "not sufficient"). As this Court has explained, the more extensive the sealing of judicial documents sought, "the greater must be the gravity of the required interest and the likelihood of risk to that interest" to justify sealing. *Ayala v. Speckard*, 131 F.3d 62, 70 (2d Cir. 1997) (en banc); *see also United States v. Doe*, 63 F.3d 121, 129 (2d Cir. 1995) (stating that "[t]he

burden on the movant to show prejudice increases the more extensive the closure sought"). Thus, the complete sealing of a criminal case—including the docket, all proceedings, and all judicial records—is permitted, if at all, only in the most extraordinary of circumstances, and only upon the highest showing of overriding prejudice to a compelling interest. *Cojab*, 996 F.2d at 1405 ("The power to . . . seal the records of . . . [criminal] proceedings is one to be very seldom exercised, and even then only with the greatest caution, under urgent circumstances, and for very clear and apparent reasons.").

Because "representatives of the [press and the public] 'must be given an opportunity to be heard on the question of their exclusion,'" *Globe Newspaper*, 457 U.S. at 609 n.25 (citation omitted), the court undertakes decisions regarding sealing of documents or closure of proceedings pursuant to noticed motions. *See, e.g.*, *In re Herald Co.*, 734 F.2d at 102. "There are four steps that a . . . court must follow in deciding a motion" to seal a judicial document or to close a court proceeding to which the First Amendment right of access applies. *Doe*, 63 F.3d at 128. First, the court "must determine, in specific findings made on the record, if there is a substantial probability of prejudice to a compelling interest of the defendant, government, or third party" that sealing or closure would prevent. *Id.* (footnote omitted). Second, if there is a substantial probability of prejudice to a compelling interest, then the court "must consider whether 'reasonable alternatives

to closure [or sealing] cannot adequately protect' the compelling interest that would be prejudiced by public access." *Id.* (quoting *Press-Enterprise II*, 478 U.S. at 14). If no reasonable alternatives are available, the court must, third, "determine whether, under the circumstances of the case, the prejudice to the compelling interest 'override[s] the qualified First Amendment right of access.'" *Id.* (alteration in original) (quoting *Press-Enterprise II*, 478 U.S. at 9). Finally, if closure or sealing is warranted, the court must devise an "order that, while not necessarily the least restrictive means available to protect the endangered interest, is narrowly tailored to that purpose." *Id.* (internal citation omitted).

The Juvenile Transfer Act, as amended, is irreconcilable with these substantive and procedural requirements which, among other things, presuppose that whether the public's qualified constitutional right of contemporaneous access is overcome as to specific court documents necessitates an individualized determination. *See Globe Newspaper*, 457 U.S. at 609; *Doe*, 63 F.3d at 128; *In re N.Y. Times Co.*, 828 F.2d at 116. Because the confidentiality provisions of the Act mandate that *all* judicial documents in *all* Transferred Matters, including docket sheets, be confidential and unavailable to the press and public unless and until a verdict or a guilty plea has been entered, the Act prohibits contemporaneous public access in all cases. It does not allow for notice to the public or an opportunity for members of the public to object to closure or sealing in individual Transferred

Matters.[7] In addition, the Act precludes trial courts from fulfilling their constitutional obligation to make specific, on-the-record findings in individual cases as to whether sealing is essential and narrowly tailored to serve a compelling interest, *Press-Enterprise II*, 478 U.S. at 13–14, and it improperly strips trial courts of the power to consider less restrictive alternatives, such as redaction. *Press-Enterprise I*, 464 U.S. at 512–13 (suggesting that transcripts containing sensitive information could be partly sealed or have names redacted); *see also Doe*, 63 F.3d at 131 (requiring trial court to consider reasonable alternatives prior to closure of pretrial hearings and trial).

B. The blanket confidentiality provisions of the Act, as amended, do not serve a compelling interest.

Defendants-Appellants do not—and cannot—demonstrate a compelling government interest that necessitates the automatic, mandatory, categorical sealing of all court records in Transferred Matters until a verdict or guilty plea is entered.

The stated purpose of House Bill No. 7389, enacted as Connecticut Public Act No. 19-187 (the "Bill"), was "[t]o preserve confidentiality in a juvenile's case

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[7] Indeed, as discussed in more detail below, because docket information in Transferred Matters is unavailable to the public during the pendency of the prosecution, the public is precluded from knowing of even the existence of Transferred Matters until after a verdict or guilty plea is entered. *Cf. Pellegrino*, 380 F.3d at 93–94 (explaining that without public access to docket information, "the ability of the public and press to attend civil and criminal cases would be merely theoretical" and the presumptive right of the press and the public to inspect judicial documents would likewise be frustrated).

transferred *under the discretion of the court* to the regular criminal docket in the event that such case *may be transferred back to the docket for juvenile matters*." *See* Conn. Gen. Assemb., Bill Status, "An Act Concerning Confidentiality in the Case of a Discretionary Transfer of a Juvenile's Case to the Regular Criminal Docket and Implementing the Recommendations of the Juvenile Justice Policy and Oversight Committee," H.B. No. 7389, 2019 Sess., https://perma.cc/972R-63W6 (emphasis added). Yet the vast majority of Transferred Matters from the Effective Date through May 8, 2020 (approximately fifty of sixty-one) were automatically transferred to the regular criminal docket pursuant to the Act's *mandatory* transfer provision, § 46b-127(a)(1), which is applicable to defendants charged with committing capital felonies, Class A felonies or certain Class B felonies. *See* JA119. The broad reach of the Act's amendments is thus ill-fitted to the Legislature's narrow stated purpose to address the "very limited instances," in which certain Transferred Matters are returned to juvenile court, such as when "the charges have been reduced below those class B felon[ies] and there is good cause shown for returning the case back to the juvenile docket." *See* 62 H.R. Proc., Pt. 5, 2019 Sess., 3927–28 (Conn. 2019) (remarks of Rep. Steven Stafstrom).[8]

[8] The Legislature's failure to consider the overly broad reach of the Act's sealing provisions, as enacted, is reflected in the June 5, 2019 State Senate Proceedings on the Bill. When asked why the Legislature would want to mandate confidentiality of Transferred Matters when the alleged crimes involved are so serious as to warrant transfer to regular criminal court, Senator Gary Winfield,

Moreover, the Legislature appears to have overlooked the provisions of section 54-76c(b)(1), which mandate that judicial records in cases transferred pursuant to the Act's discretionary provision be temporarily sealed for ten working days. During this period, a prosecutor may move to transfer the case back to the youthful offender docket. § 54-76c(b)(2). If the prosecutor so moves, the records remain sealed until the court renders a final decision on the motion to transfer. § 54-76c(b)(1). Thus, the Act's amendments also are not necessary to serve the stated purpose of the Bill.

Ignoring the Legislature's stated intent, Defendants-Appellants attempt to proffer a broader *ex post* rationale for the Act's blanket sealing mandate. Relying solely on the report of Megan Kurlychek, Ph.D., a professor of sociology and criminology at Pennsylvania State University, JA121 (hereinafter, the "Kurlychek Report"),[9] Defendants-Appellants argue that juvenile defendants in Transferred Matters must be protected from the "negative consequences" they may face if their cases are made public, including potential difficulties obtaining housing and employment. *See* Br. of Defs.-Appellants at 36–37.

Chair of the Judiciary Committee, stated only that the Legislature should "think about juveniles in a way that we've learned we need to deal with juveniles." 62 S. Proc., Pt. 6, 2019 Sess., 4258–59 (Conn. 2019).

[9] The Courant moved to exclude the Kurlychek Report as irrelevant and inadmissible pursuant to Federal Rules of Evidence 402, 403, and/or 702. The District Court denied that motion, and fully considered the Kurlychek Report in issuing the Order. JA33.

As an initial matter, the Kurlychek Report—and Defendants-Appellants' arguments premised on it—wholly ignore the *benefits* of contemporaneous public oversight of criminal prosecutions for defendants, the public, and for the criminal justice system as a whole. *See* Section III, *supra*. Courts have long recognized the crucial role that press and public access to court proceedings and judicial documents plays in ensuring the fairness and legitimacy of criminal proceedings. *See Globe Newspaper*, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 571–72; *Press–Enterprise I*, 464 U.S. at 508; *see also Aref*, 533 F.3d at 83. The proffered opinion of an expert witness that "the presence of the media in the courtroom does not improve the nature of the case to be presented," JA143, is no grounds to ignore centuries of experience and decades of binding legal precedent to the contrary.[10]

[10] The opinions presented in the Kurlychek Report are, in any event, neither well-founded nor persuasive. Selectively citing to decades-old data in an effort to criticize current press coverage of criminal cases writ large, *see* JA136–138, Kurlychek, who has no expertise in media studies, ignores the contemporary news media landscape, as well as examples in which media coverage has provided vital public oversight in cases involving minors charged as adults. *See* Section III, *supra; see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (finding that the court need not consider "opinion evidence that is connected to existing data only by the *ipse dixit* of the expert"); *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir. 2002) (holding that expert opinion "based on data, a methodology, or studies that are simply inadequate to support the conclusions reached" must be excluded as "unreliable opinion testimony").

Yet, even assuming, *arguendo*, that shielding defendants in Transferred Matters from the "negative consequences" of public scrutiny is a compelling government interest, the Act does not—and cannot—effectively serve it. As Defendants-Appellants concede, Br. of Defs.-Appellants at 6, 14, 46, documents maintained under seal pursuant to the Act become public upon the entry of a verdict or guilty plea, thereby eliminating any of the supposed benefits of sealing touted by Defendants-Appellants. Any purported interest in protecting defendants in Transferred Matters from the "collateral consequences juveniles face as a result of being accused of a crime," *id.* at 36, is thus moot once a verdict or guilty plea is entered in a Transferred Matter, *see* JA51 ("Section 46b-127(c)(1) does not effectively protect against these evils [set forth in the Kurlychek Report] because it unseals the records of defendants after a verdict or a guilty plea, thereby exposing those defendants to the adverse effects Kurlychek describes.").[11]

Finally, even assuming that the interests identified by Defendants-Appellants could be sufficiently compelling to justify sealing in certain Transferred Matters, those interests do not necessitate a blanket statutory sealing mandate. In

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[11] As the District Court also noted, Defendants-Appellants' arguments are further undermined by section 46b-133(a), which permits the names and photographs of juvenile defendants who are subject to the automatic transfer provisions of section 46b-127(a)(1) to be disclosed to the public. *See* JA50; § 46b-133(a) ("Notwithstanding the provisions of section 46b-124, the name, photograph and custody status of any child arrested for the commission of a capital felony . . . or class A felony may be disclosed to the public.").

accordance with applicable substantive and procedural requirements, upon a motion to seal from an individual defendant, a judge may make specific findings of a compelling interest requiring sealing or redaction of judicial documents on a case-by-case basis. *See Globe Newspaper*, 457 U.S. at 609 (finding that, even where the interest to be served was the protection of minor victims of sex crimes, "[t]hat interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure"). Nothing in the District Court's Order precludes a judge from making such individualized determinations in specific Transferred Matters; the Order merely prohibits the automatic sealing of judicial records in Transferred Matters pursuant to the Act. JA58.

C. The Act's blanket confidentiality provisions are not narrowly tailored.

As the District Court correctly held, the Act, as amended, cannot pass constitutional muster because it "is not well tailored, let alone narrowly tailored, to further the interests identified by [Defendants-Appellants]." JA51.

The Act's automatic, categorical sealing mandate applicable to all judicial records, including docket sheets, in all Transferred Matters until a verdict or guilty plea is entered cannot meaningfully be distinguished from the mandatory closure rule found unconstitutional by the Supreme Court in *Globe Newspaper*, 457 U.S. at 609. There, the Court explained that "as compelling as [the government's

proffered interest in safeguarding the physical and psychological well-being of a minor] is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest." *Id.* at 607–08. As the District Court correctly held, here, Defendants-Appellants' stated "interest in the 'protection of vulnerable youth' does not justify a mandatory closure or sealing rule—or even a default closure or sealing rule—because the circumstances of individual cases affect the strength of the State's interest in protecting the defendant's privacy." JA48.

Indeed, that the Act, as amended, is not narrowly tailored is underscored by the fact that it applies to criminal prosecutions of defendants who are no longer minors. Pursuant to the Act, as amended, all judicial documents, including the docket sheet, in the criminal prosecution of now fifty-nine-year-old Michael Skakel, a relative of the Kennedy family, were sealed on the Effective Date. *See* JA84 ¶¶ 13–15. Skakel is awaiting possible retrial for the 1975 murder of Martha Moxley, which occurred when he was fifteen years old. *Id.* If he is re-tried, the Act would prohibit the public and the press from attending proceedings or reviewing records in the fifty-nine-year-old's criminal case. *Id.*[12] Similarly, as

[12] It is, at a minimum, not clear that the Legislature intended this result when it amended the Act. As noted above, the Bill was intended to respond to a narrow interest applicable—if at all—in only "very limited instances" in cases transferred pursuant to the Act's discretionary transfer provisions. 62 H.R. Proc., *supra*, at 3927–28. And, Senator Winfield, Chair of the Judiciary Committee,

noted above, as of the Effective Date, four defendants in pending Transferred Matters were over the age of twenty-five, and three of those defendants were over the age of thirty. JA172:7–10, JA173:1–4.[13] Defendants-Appellants do not—and, indeed, cannot—offer any explanation as to how sealing of judicial records in these criminal cases is essential to serve the government's purported "interests in rehabilitating juveniles" and "improving the juveniles' prospects for reintegration into society." Br. of Defs.-Appellants at 36.

Defendants-Appellants contend that the sealing provisions of the Act are narrowly tailored because they incorporate by reference section 46b-124(e) which, according to Defendants-Appellants, may permit members of the press and public to obtain a court order permitting access to specific judicial documents in specific Transferred Matters. Br. of Defs.-Appellants at 4–5;[14] § 46b-124(e) ("Records of

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acknowledged that the Bill did not address whether the confidentiality provisions of the Act, as amended, would lapse after a juvenile defendant reached the age of majority. *See* 62 S. Proc., *supra*, at 4260–62; *see also id.* at 4263 (remarks of Senator John Kissell agreeing to support the Bill "with th[e] caveat" that this issue "could be flushed out and made more concrete" in a future session).

[13] It is unknown how many defendants in Transferred Matters may have been between the ages of eighteen and twenty-five as of the Effective Date. When asked for this information by the District Court, counsel for Defendants-Appellants stated that she did not "have that exact number." JA172:23–25, JA173:1.

[14] Defendants-Appellants also argue that section 46b-124(b) may provide a means of access to judicial documents in Transferred Matters. Br. of Defs.-Appellants at 4. However, section 46b-124(b) applies only to certain matters involving juveniles: "matters in the civil session," custody matters, and probation-related matters. §§ 46b-124(b), 46b-121. On its face, section 46b-124(b) does not expressly apply to Transferred Matters.

cases of juvenile matters involving delinquency proceedings, or any part thereof, may be disclosed upon order of the court to any person who has a legitimate interest in the information and is identified in such order.").

As an initial matter, the Courant could locate no case in which section 46b-124(e) was invoked by a member of the press or public—let alone successfully—to obtain access to sealed records. Rather, the cases considering access to sealed records of juvenile delinquency proceedings pursuant to section 46b-124(e) that were identified by the Courant addressed requests by victims or family members of deceased minors. *See, e.g.*, *Jones v. Cosette*, No. CV176073290S, 2018 WL 4655865 (Conn. Super. Ct. Sept. 10, 2018); *In re Nathan B.*, Nos. 00002888612, -8618, -8625, 2016 WL 1552898 (Conn. Super. Ct. Mar. 22, 2016); *State v. Rashad C.*, No. DO2764167, 2013 WL 1189323 (Conn. Super. Ct. Feb. 26, 2013).

However, assuming, *arguendo*, that section 46b-124(e) applies to the press and the public, the District Court correctly held that it does nothing to remedy the Act's constitutional infirmities as "it reverses the presumption of openness, making sealing the default rule and requiring an affirmative step—a court order—to unseal." JA52.[15] Indeed, the provision unequivocally turns the presumption in

[15] Defendants-Appellants assert that the Courant's argument that section 46b-124(e) does not provide a constitutionally adequate mechanism by which the press and public may seek access to judicial documents in Transferred Matters was "rejected by the District Court." Defs.-Appellants Br. at 8 (citing JA39 n.9). This blatantly misstates the District Court's Order. In the footnote cited by Defendants-

favor of public access on its head. In determining whether to grant access to individual records under section 46b-124(e), Connecticut courts are required to factor in the movant's "exhaustion of other resources," and "articulation of [its] specific need for evidence," before then conducting an "in camera review of the documents prior to disclosure." *Jones*, 2018 WL 4655865, at *4 (citation omitted). Where the First Amendment right applies, however, the public does not bear the burden of proving a "specific need" to obtain access to court records. *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 13–14. To the contrary, the party moving to seal bears the burden of demonstrating that sealing is both necessary to serve a compelling interest and narrowly tailored. In addition, as the District Court recognized, "[r]ead literally, Section 46b-124(e) would also impose a prior restraint on the media, as it requires anyone who obtains access to records with the court's permission to seek further court permission before disclosing them to anyone else." JA52 n.17.

Appellants purportedly in support of that assertion, the District Court merely states that section 46b-124(e) is incorporated by reference into the Act; it does not state that section 46b-124(e) provides a means by which the press and the public may obtain access to judicial records in Transferred Matters. Defendants-Appellants also claim that the District Court "correctly found" that "the trial court does have discretion to order disclosure of confidential records in juvenile transfer cases, including before a verdict or guilty plea is entered" pursuant to section 46b-124(e). *Id.* at 44. However, as explained above, the District Court clearly held that, even if section 46b-124(e) did apply to the press and the public, it does not remedy the Act's constitutional infirmities. *See* JA52.

Finally, Defendants ignore the most obvious flaw in their argument: namely, that the Act requires that all judicial documents, including docket sheets, in all Transferred Matters be automatically sealed. As a result, the press and the public have no notice of even the *existence* of new Transferred Matters. *See* JA104–105, 108. As the District Court correctly recognized, section 46b-124(e) can be "of little practical value to the media or interested members of the public, who have no way of knowing that any new Transferred Matters even exist; it is difficult to request records about a case one has no knowledge of." JA52; *see also Doe v. Pub. Citizen*, 749 F.3d 246, 268 (4th Cir. 2014) (recognizing that, in addition to "effectively shut[ting] out the public and the press from exercising their constitutional . . . right of access" to judicial documents and proceedings, there is an even "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"); *Pellegrino*, 380 F.3d at 96 (finding that sealed dockets violate the "First Amendment right of access by rendering it impossible for anyone to exercise that right") (discussing *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993)).

In sum, automatic, categorical sealing of all judicial documents in all Transferred Matters is irreconcilable with the constitutional mandate that sealing of a judicial record to which the First Amendment presumption of public access applies be necessary to serve a compelling interest, narrowly tailored to such

interest, and based on case-specific factual findings. For these reasons, the District Court was correct to hold that the Courant was substantially likely to succeed on the merits of its claim that the Juvenile Transfer Act's sealing provisions violate the public's presumptive right of access to judicial documents under the First Amendment and the Connecticut Constitution.

V. The Courant has suffered—and continues to suffer—irreparable harm.

Where an alleged deprivation of First Amendment rights has occurred, this Court has applied a presumption of irreparable harm upon a showing of a likelihood of success on the merits. *See Walsh*, 733 F.3d at 488 ("Consideration of the merits is virtually indispensable in the First Amendment context, where the likelihood of success on the merits is the dominant, if not the dispositive, factor.").

In addition, this Court, and other federal courts of appeals, have consistently held that—due to the contemporaneous nature of the constitutional right of access to judicial documents—any delay in access constitutes irreparable harm. *See, e.g.*, *Paulsen*, 925 F.2d at 68 ("Specifically, our historical commitment to expressive liberties dictates that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) ("[E]ach passing day [that access is delayed] may constitute a separate and cognizable infringement of the First Amendment.").

Prior to the Effective Date, the Courant regularly reported on criminal proceedings involving juveniles prosecuted as adults in regular criminal court, including, for example, the arrest and arraignment of Alexander Bolanos, who was charged with conspiracy to commit murder in connection with the December 2018 drive-by shooting death of a twelve-year-old in Bridgeport, Connecticut. JA83 ¶¶ 10–11; *see also* David Owens, *Hartford Teen Charged with Killing Uncle to Be Prosecuted as an Adult,* Hartford Courant (Dec. 19, 2017), https://perma.cc/XA6J-P2T9 (reporting on pretrial hearing of seventeen-year-old charged with murder whose case had been transferred to regular criminal court); Alaine Griffin, *Additional Psych Exam OK'd on Prom Day Stabbing Suspect*, Hartford Courant (Mar. 31, 2015), https://perma.cc/M49E-GUGW (reporting on a pretrial hearing of a seventeen-year-old charged with murder). By blocking public access to judicial documents in Transferred Matters, the Act, as amended, has prevented the Courant from gathering information and providing timely reporting to its readers about criminal matters of significant public interest and concern.

With the exception of the period between the time the Order went into effect and the date on which the temporary stay of the Order was granted by this Court, the Courant has been denied its constitutional right of access to judicial records in Transferred Matters since the Effective Date, and it has suffered irreparable injury

as a result.[16] Each passing day during which access continues to be denied constitutes further irreparable harm for which there is no adequate remedy at law.

VI. The remaining factors also support the District Court's entry of a preliminary injunction.

"[W]hen a plaintiff establishes 'a likelihood that [d]efendants' policy violates the U.S. Constitution,'" the plaintiff has "also established that both the public interest and the balance of the equities favor a preliminary injunction." *See J.S.R. by & through J.S.G. v. Sessions*, 330 F. Supp. 3d 731, 743 (D. Conn. 2018) (quoting *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014)) (discussing public interest and balance of equities with regard to a preliminary injunction).

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[16] On August 24, 2020, the first business day following the expiration of the thirty-day stay of the unsealing portion of the Order, the Courant obtained from the State of Connecticut Judicial Branch a list of "pending disclosable cases" transferred to the regular criminal docket pursuant to the Act. Opp. at 10. The Courant requested—and received—judicial documents from the Judicial Branch in specific Transferred Matters that were previously sealed pursuant to the Act. *See* Ex. A to Opp. at 4:22–25, 23:17–21. On August 25 and August 28, 2020, the Courant published stories reporting on information obtained from judicial documents in connection with two of those Transferred Matters. *See* Nicholas Rondinone, *Newly Released Arrest Warrant Details Hartford Shootout, Hit-and-Run That Killed 71-Year-Old Grandmother*, Hartford Courant (Aug. 28, 2020), https://perma.cc/5K42-HH72; Steven Goode & Nicholas Rondinone, *"I Felt That If They All Died, My Life Would Get Better." Newly Unsealed Arrest Warrant Offers Motive Behind Bloody Fatal Double Stabbing in Windsor*, Hartford Courant (Aug. 25, 2020), https://perma.cc/HN7V-CC7Y.

Defendants-Appellants did not provide the District Court with any evidence—such as an affidavit—showing that a single juvenile defendant has suffered or will suffer irreparable harm from affirmance of the Order. Ex. A to Opp. at 26:19–24, 27:7–10. Indeed, before denying Defendants-Appellants' request to stay the Order, the District Court expressly asked counsel for Defendants-Appellants if she could "identify a single defendant who is suffering or will suffer irreparable harm from the fact that this injunction is in effect." *Id.* at 15:13–15. Counsel for Defendants-Appellants conceded she could not. *Id.* at 15: 22–23. Nor would it be possible to identify such a defendant. As noted above, the Order does not preclude a judge from making specific findings of a compelling interest requiring temporary sealing or redaction of individual judicial documents or portions thereof on a case-by-case basis; it merely prohibits automatic, categorical sealing of judicial documents in Transferred Matters. JA58.

Defendants-Appellants' assertions of generalized harm to juvenile criminal defendants are insufficient to override decades of well-settled legal precedent recognizing that the presence of the news media at criminal proceedings is beneficial to participants, the public, and the justice system as a whole. *See, e.g.*, *Globe Newspaper*, 457 U.S. at 606 ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole."); *Richmond Newspapers*, 448 U.S.

at 571–72 ("To work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' and the appearance of justice can best be provided by allowing people to observe it.") (internal citation omitted). Accordingly, the balance of the equities favors affirmance of the Order.

Finally, "securing First Amendment rights is in the public interest." *Walsh*, 733 F.3d at 488. The press, including the Courant, has a significant interest in reviewing court records in pending Transferred Matters so that it may report in a timely way on newsworthy criminal cases within the state of Connecticut. Defendants-Appellants, by contrast, "do[] not have an interest in the enforcement of an unconstitutional law." *Id.* (quoting *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003)). Because "it is decidedly against the public interest to abide the continued enforcement of an unconstitutional policy or law," *Deferio v. City of Syracuse*, 193 F. Supp. 3d 119, 131 (N.D.N.Y. 2016), the public interest weighs heavily in favor of affirmance of the Order.

CONCLUSION

For the foregoing reasons, the Courant respectfully requests that this Court affirm the District Court's Order and lift its September 23, 2020 stay order.

Dated: November 3, 2020

Respectfully Submitted,

/s/ Katie Townsend
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CERTIFICATE OF COMPLIANCE

I, Katie Townsend, do hereby certify that the foregoing Brief of Plaintiff-Appellee: (1) complies with the type-volume limit of Local Rule 32.1(a)(4) because, excluding the parts of the document exempted by the Fed. R. App. P. 32(f), it contains 11,743 words; and (2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman font.

Dated: November 3, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system with a resulting electronic notice to all counsel of record on November 3, 2020.

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