SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-13601

Essex, ss.,

DEPARTMENT OF CHILDREN & FAMILIES

v.

MOTHER, et al.

***

LCMEDIA PRODUCTIONS, INC., Appellant

On Appeal from Essex Juvenile Court

BRIEF OF PROPOSED AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND OTHER MEDIA ORGANIZATIONS IN SUPPORT OF APPELLANT LCMEDIA PRODUCTIONS, INC. URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 17(c)(1) of the Massachusetts Rules of Appellate Procedure, amici curiae state the following:

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. It is not publicly traded.

Boston Globe Media Partners, LLC, is a privately held company. No publicly held corporation owns ten percent or more of its stock.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned.

MediaNews Group Inc. (Boston Herald and The Lowell Sun) is a privately held company. No publicly-held company owns ten percent or more of its equity interests.

The Massachusetts Newspaper Publishers Association is a non-profit corporation. It has no parent, and no publicly held corporation owns ten percent or more of its stock.

New England Newspaper and Press Association, Inc. is a non-profit corporation. It has no parent, and no publicly held corporation owns ten percent or more of its stock.

News/Media Alliance represents the newspaper, magazine, and digital media industries, including nearly 2,200 diverse news and magazine publishers in the United States and internationally. It is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

Pro Publica, Inc. ("ProPublica") is a Delaware nonprofit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

Trustees of Boston University owns the broadcast license for WBUR. Trustees of Boston University is a nonprofit organization. Trustees of Boston University has no parent corporation and no publicly held corporation owns ten percent or more of it.

MASS. R. APP. P. 17(c)(5) STATEMENT

Amici declare that:

1. No party or party's counsel authored the brief in whole or in part;
2. No party or party's counsel contributed money intended to fund preparing or submitting the brief;

3. No person or entity, other than amici, their members, or their counsel, contributed money intended to fund preparing or submitting the brief;

4. Amici and their counsel do not represent, and have not previously represented, any of the parties to this appeal in other proceedings involving similar issues;

5. Amici and their counsel do not represent any party to a proceeding or legal transaction currently at issue in this appeal, nor are they parties to any such proceeding or transaction themselves.

INTEREST OF AMICI CURIAE

Lead amicus the **Reporters Committee for Freedom of the Press** ("Reporters Committee") is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Reporters Committee has previously filed amicus curiae briefs in matters before this Court concerning the practice and publication of journalists. *See* Br. of Amicus Curiae Reporters Comm. for Freedom of the Press in Supp. of Neither Party, *Mass. Port Auth. v. Turo Inc.*, No. SJC-13012 (Mass. filed Dec. 18, 2020), 2020 WL 7668895; Br. of Reporters Comm. for Freedom of the Press et al. as Amici Curiae in Supp. of Pl./Appellant, *Bos. Globe Media Partners, LLC v. Dep't of Pub. Health*, 482 Mass. 427 (2019) (No. SJC-12622), 2018 WL 6990709.

The Reporters Committee is joined by nine news and media organizations (collectively, "amici") that report on matters of public concern, including the operation of Massachusetts courts and agencies, and that represent the press and public in safeguarding First Amendment rights to obtain, report and receive the news:

The **Associated Press** ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations, including the Commonwealth of Massachusetts, in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Boston Globe Media Partners, LLC publishes *The Boston Globe*, the largest daily newspaper in New England.

Gannett is the largest local newspaper company in the United States. The company's more than 200 local daily brands in 43 states — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month. In the Commonwealth, Gannett publishes *Milford Daily News*, *MetroWest Daily News* (Framingham), *The Enterprise* (Brockton), *The Patriot Ledger* (Quincy), *The Herald News* (Fall River), *The Taunton Daily Gazette*, *Cape Cod Times* (Hyannis), *The Standard-Times* (New Bedford), *The Gardner News, Telegram & Gazette* (Worcester).

MediaNews Group publishes 68 daily and more than 300 weekly publications throughout the United States. In the Commonwealth, it publishes the *Boston Herald* and *The Lowell Sun*. Its newspapers also include the *Denver Post*, *San Jose Mercury News*, *Orange County Register*, and *St. Paul Pioneer Press*. In

print and online, its publications reach a combined audience of more than 60 million every month.

The **Massachusetts Newspaper Publishers Association** (MNPA) is a voluntary association composed of newspapers published throughout the Commonwealth. Its membership includes virtually all Massachusetts daily and weekly general-circulation newspapers and it represents those newspapers on legal and legislative matters of common concern. On numerous occasions over its more than 40-year history, MNPA has filed briefs as amicus curiae in Massachusetts appellate courts in matters affecting the interests of Massachusetts newspapers.

The **News/Media Alliance** represents over 2,200 diverse publishers in the United States and internationally, ranging from the largest news and magazine publishers to hyperlocal newspapers, and from digital-only outlets to papers who have printed news since before the Constitutional Convention. Its membership creates quality journalistic content that accounts for nearly 90 percent of daily newspaper circulation in the United States, over 500 individual magazine brands, and dozens of digital-only properties. The Alliance diligently advocates for newspapers, magazine, and digital publishers, on issues that affect them today.

New England Newspaper and Press Association, Inc. ("NENPA") is the regional association for newspapers in the six New England States (including Massachusetts). NENPA's corporate office is in Dedham, Massachusetts. Its

purpose is to promote the common interests of newspapers published in New England. Consistent with its purposes, NENPA is committed to preserving and ensuring the open and free publication of news and events in an open society.

Pro Publica, Inc. ("ProPublica") is an independent, nonprofit newsroom that produces investigative journalism in the public interest. It has won six Pulitzer Prizes, most recently a 2020 prize for national reporting, the 2019 prize for feature writing, and the 2017 gold medal for public service. ProPublica is supported almost entirely by philanthropy and offers its articles for republication, both through its website, propublica.org, and directly to leading news organizations selected for maximum impact. ProPublica has extensive regional and local operations, including ProPublica Illinois, which began publishing in late 2017 and was honored (along with the Chicago Tribune) as a finalist for the 2018 Pulitzer Prize for Local Reporting, an initiative with the Texas Tribune, which launched in March 2020, and a series of Local Reporting Network partnerships.

Trustees of Boston University owns the broadcast license for **WBUR**, a leader in public media, which also runs the associated news website wbur.org and other digital publishing platforms. WBUR's reporters routinely attend and report on court proceedings in the Commonwealth, and they have sought access to presumptively closed proceedings in circumstances of high public interest. *See, e.g.*, *Trustees of Bos. Univ. v. Clerk-Magistrate of Cambridge Div. of Dist. Ct. Dep't*, 495 Mass. 56

(2024). WBUR frequently publishes investigative news articles that shed light on the workings of the Massachusetts court system. As such, Trustees of Boston University has an interest in ensuring that the records of care and protection proceedings in Juvenile Court are disclosed to the public when such disclosure serves the public interest of transparency and accountability.

As media organizations and industry groups seeking to protect the rights of a robust free press, amici are committed to ensuring and preserving media and public access to government and judicial records and proceedings. This appeal addresses these interests directly in a matter in which the applicable statute provides for access in circumstances such as these, and where the public's interest in the impounded materials weighs strongly in favor of disclosure. The decision by this Court will have a significant impact on the ability of the press in the Commonwealth to report on the courts and the child welfare system, and to ensure the public interest is served.

SUMMARY OF THE ARGUMENT

This appeal arises from the effort of an award-winning documentary filmmaker to obtain access to the impounded audio file and transcript of a care and protection proceeding held in Juvenile Court in 2019 concerning Harmony Montgomery ("Harmony" or "Harmony M."). During that proceeding, Harmony's father was granted full custody of Harmony, who was four years old at the time. Later that year, Harmony disappeared, but her disappearance went undetected and unreported until 2021. One year later, Harmony's father was arrested and convicted of her murder.

Harmony M.'s case drew widespread media and public attention and raised serious questions about the involvement of the Massachusetts Department of Children and Families ("DCF") and the Juvenile Court in Harmony's life and her tragic death. In 2022, the Commonwealth's Office of the Child Advocate ("OCA") released a 70-page report identifying, among other things, numerous oversights and missed opportunities by child welfare agencies in two states, including DCF, as well as decisions by the Juvenile Court, that failed to protect Harmony from abuse and allowed her death to go undetected for years. *See* Off. of the Child Advoc., *A Multi System Investigation Regarding Harmony Montgomery* (May 2022), https://www.mass.gov/doc/office-of-the-child-advocate-investigative-reportharmony-montgomerymay-2022/download (hereinafter the "OCA Report").

Harmony's death at the hands of her father—despite the involvement of the Commonwealth—is the type of tragedy that demands public scrutiny and accountability to ensure it does not happen again. In cases like this one that implicate few, if any, ongoing privacy interests, records of care and protection proceedings should be made available to the public. While Massachusetts law provides for confidentiality in sensitive Juvenile Court proceedings involving children, the legislature tempered that secrecy by providing for disclosure where "good cause" warrants lifting the veil on impounded documents. In Harmony M.'s case, there is clearly good cause for disclosure.

Here, documentary filmmaker Bill Lichtenstein, through his production company, LCMedia Productions, Inc. ("LCMedia" or "Appellant"), seeks access to the audio and transcript of the 2019 care and protection proceeding in Harmony's case for journalistic purposes. Appellant seeks greater insight into the Juvenile Court's decision to award full custody to Harmony's father in order to inform the public about how the Commonwealth's administrative and judicial systems worked (or failed) in Harmony's case, and what is needed to prevent such tragedies in the future. As the legislature expressly recognized, even in Juvenile Court, transparency is warranted in certain cases and is essential to ensuring the system is functional and accountable. Through proper application of that statutory framework, Appellant

and, accordingly, the public, will have the information it needs to understand what occurred in Harmony's case.

Amici agree that Appellant has satisfied the applicable standard to compel relief from impoundment here because the privacy concerns articulated by the lower court cannot overcome the public interest in access in this case. Amici urge this Court to reverse because the lower court's interpretation of the relevant statutory provisions, if left undisturbed, would severely and unduly limit the press's ability to report on matters of the utmost public concern relating to child safety and welfare.

ARGUMENT

I. There is "good cause" for access to the Juvenile Court records at issue.

A "care and protection" proceeding in Juvenile Court is intended to "focus[] on the child's best interests and whether the parents should retain custody of the child." *In re Care & Prot. of M.C.*, 479 Mass. 246, 261 (2018) ("*M.C. I*"). Such proceedings are "closed to the general public," Mass. Gen. Laws Ann. ch. 119, § 38, and "[t]he records from [such] proceeding[s], including the transcripts and exhibits," are impounded unless and until a "party or interested nonparty" successfully moves for an order lifting the impoundment under the Uniform Rules of Impoundment Procedure ("URIP"). *M.C. I*, 479 Mass. at 247, 253–54 (citing Juvenile Court Standing Order 1-84); *see also* URIP 11 (providing that both parties and nonparties may move to lift impoundment).

To obtain access to impounded records, the movant must show "good cause." *M.C. I*, 479 Mass. at 254. In assessing whether good cause has been established in a given case, the URIP sets forth five nonexclusive factors for courts to consider: "(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." *Id*. (quoting URIP 7(b)).[1]

That the legislature provided for lifting the impoundment of records of care and protection proceedings for good cause serves as a recognition that openness—while not the default in all proceedings—is not only warranted but also necessary in certain cases. *See In re Care & Prot. of M.C.*, 483 Mass. 444, 450 (2019) ("*M.C. II*") (comparing presumptively public criminal proceedings to presumptively closed care and protection proceedings); *compare Bos. Herald, Inc. v. Sharpe*, 432 Mass. 593, 606–07 (2000) ("The media interven[o]rs properly note that it is of considerable importance for the public to be in a position to evaluate why an order may or may not have been successful in protecting a victim of domestic violence."); *see also Trs. of Bos. Univ. v. Clerk-Magistrate of Cambridge Div. of Dist. Ct. Dep't*, 495 Mass. 56, 64 (2024) (recognizing that "while members of the public are not *entitled* to attend show cause hearings . . . 'there may be circumstances in which an open

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[1] Each of these factors is addressed in Appellant's brief. *See* Appellant's Br. at 12–38.

hearing is appropriate'" and that is evaluated in light of, *inter alia*, the public interest (emphasis original) (citation omitted)). The lower court's rigid adherence to impoundment in this case—despite the statute's express recognition of good cause as a basis for disclosure—effectively locks all care and protection proceedings in a permanent black box of secrecy, to the detriment of those within the child welfare system and the public who would seek to ensure that system is functioning effectively.

The decision, below, gives too short shrift to Appellant's role as a journalist and the powerful, legitimate interest of the public in understanding what occurred in Harmony M.'s case, including any insight that may be obtained from the transcript and recording of her care and protection proceeding. At the same time, the decision below places far too great a weight on purported privacy interests that, if they exist at all, are significantly diminished under the circumstances.

A. Journalists and media organizations can be interested nonparties for purposes of establishing good cause for access.

The trial court described LCMedia as "an uninterested party seeking private and sensitive information to produce a television program." Order at 3, *In re Care & Prot. of Harmony Montgomery*, No. 14CP0268LA (Mass. Trial Ct., Juv. Ct. Dep't, Lawrence Sess. June 26, 2023) (slip op.) (hereinafter "Op.").

Though not a party to the underlying custody dispute, a journalist or media organization—like LCMedia—can be an "interested nonparty" eligible to request

access to impounded records under URIP 11. This statutory mechanism for the press to move the Juvenile Court for access to impounded records resembles unsealing procedure applicable in civil and criminal courts, where public access is the presumptive default but members of the public, including the press, can move to intervene for the purpose of challenging a sealing. *See In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984); *Sharpe*, 432 Mass. at 605–06 (same). Press access to judicial proceedings and records enables public oversight. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality op.) (observing that press access to judicial proceedings serves the public interest because the press can "report what people in attendance have seen and heard"); *Bos. Herald, Inc. v. Super. Ct. Dep't of Trial Ct.*, 421 Mass. 502, 505 (1995) (same); *In re Globe Newspaper Co.*, 729 F.2d at 52 (recognizing "need for a public educated in the workings of the justice system and for a justice system subjected to the scrutiny of the public"). Put another way, as this Court has noted, access to court records "permits the public to assume a significant, positive role in the functioning of the judicial system." *Sharpe*, 432 Mass. at 607.

Appellant seeks access to the impounded records here for a forthcoming documentary film about the child protection, foster care and juvenile court systems in and outside Massachusetts—a topic of vital public importance. *See, e.g.*, Olivia Hampton, *'Deluged' child welfare systems struggle to protect kids amid calls for*

reform, Nat'l Pub. Radio (Nov. 30, 2023), https://www.npr.org/2023/11/30/1211781955/deluged-child-welfare-systems-struggle-to-protect-kids-amid-calls-for-reform. That documentary, produced by a Peabody Award winning documentarian and years in the making, is slated to air on public broadcasting in 2025. *Pipeline 2025: Our annual survey of shows coming to public TV*, Current (Nov. 11, 2024), https://current.org/2024/11/pipeline-2025-our-annual-survey-of-shows-coming-to-public-tv/; *Mission & Values*, PBS, https://www.pbs.org/about/about-pbs/mission-values/ (last visited Dec. 14, 2024) (describing PBS mission as "using media to educate, inspire, entertain and express a diversity of perspectives" and "strengthen the social, democratic, and cultural health of the U.S."). Rather than accord appropriate weight to the public interest served by such journalism, the lower court instead cited the fact that the documentary would air on television and that it might "entertain" (as well as educate) as reasons for *denying* LCMedia's motion. Op. at 6. That was error. Neither the fact that a documentary will be broadcast on television nor the fact that some people might view it as "entertain[ing]" undercuts the value of journalism of this nature. *See, e.g.*, *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."). And the lower court's stated "concern[]"—based on a slight (and later clarified) arguable factual

inaccuracy in a publicity statement—that LCMedia would allegedly publish incorrect information if granted access to the impounded records at issue, Op. at 3–4, 6, is likewise not a proper basis to deny Appellant's motion. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (disfavoring restrictions to speech made with reference to its content). Simply put, LCMedia, while a nonparty, has a legitimate interest in access to the records in question and is eligible to seek access under the URIP. And, given the importance to the public of a full accounting of what occurred in Harmony's case, granting LCMedia's motion to lift the impoundment will serve the public's interest.

B. The public has a particularly powerful interest in access in this case.

In applying the good cause standard, courts consider whether there is community interest in the matter and whether that interest would be served by lifting impoundment. URIP 7(b). The answer to both questions here is yes.

1. There is ongoing community interest in Harmony M.'s case.

There is a legitimate interest in the Commonwealth and beyond in understanding what happened to Harmony—and how agencies, the Juvenile Court, and other institutions of the Commonwealth acted or failed to act. That factor should weigh heavily in favor of access.

Years after her death, search parties continue to comb acres of Massachusetts and New Hampshire with hopes of uncovering Harmony's remains.[2] Debate persists as to who bears responsibility for failing to prevent her death, and leaders have decried state actors for ignoring, or failing to identify, her father's criminal background, placing Harmony in his care without proper oversight and then losing track of her.[3] The Juvenile Court's decision in 2019 to award custody of Harmony to her father has faced particularly harsh criticism, including from New Hampshire's governor, who questioned why the Juvenile Court would "abruptly" reach that decision and permit Harmony to move to New Hampshire where her father was

[2] Beth Germano, *Volunteers continue to search for Harmony Montgomery's remains in Massachusetts*, WBZ-News (July 28, 2024), https://www.cbsnews.com/boston/news/search-for-harmony-montgomerys-remains/.

[3] Matt Schooley, *New Hampshire police chief says state agencies need to be held accountable for Harmony Montgomery's death*, WBZ-News (Feb. 22, 2024), https://www.cbsnews.com/boston/news/harmony-montgomery-death-manchester-new-hampshire-police/; J.J. Bullock & Keleigh Beeson, *Child welfare system failed missing girl, report finds*, NewsNation (May 5, 2022), https://www.newsnationnow.com/missing/child-welfare-system-failed-missing-girl-report-finds/ ("Harmony was in the custody of Child Protective Services by the time she was 2 months old. In 2019, her father was awarded custody [and permitted to take Harmony with him to] New Hampshire. Soon after, Harmony was missing. But it took almost two years for anyone to report the missing little girl.").

living, while Massachusetts had a pending request for information about him from New Hampshire authorities.[4]

Harmony's death and the resulting outcry prompted the Commonwealth's OCA to review the entire matter. Its 70-page Report sets forth findings and recommendations and identifies issues that remain unaddressed. Among other things, the OCA Report notes that Harmony's own appointed legal representative supported placement of Harmony with her father. OCA Report at 28. And neither the DCF attorney nor Harmony's attorney probed her father's vague answers to questions regarding his fitness, criminal activities, and sobriety, nor did they present information regarding Harmony's unique medical and educational needs, or press the court to make its fitness assessment in light of those needs. *Id.* at 47–54. Not

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[4] Letter from Christopher T. Sununu, Governor, State of N.H., to Kimberly S. Budd, Chief Justice, Mass. Sup. Jud. Ct. (Jan. 18, 2022), https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/mass-supreme-court-01182022.pdf; *see* Lauren Mascarenhas & Eric Levenson, *Father sentenced to 45 years to life in prison for the killing of his 5-year-old daughter Harmony Montgomery*, CNN (May 9, 2024), https://www.cnn.com/2024/05/09/us/adam-montgomery-harmony-sentencing/index.html ("The judge's decision to place Harmony with her father has come under intense scrutiny. New Hampshire Gov. Chris Sununu wrote a scathing letter to the chief justice of the Massachusetts Supreme Judicial Court about the decision."); Aya Elamroussi et al., *Governors express concern over handling of case of missing 7-year-old girl and call for further review*, CNN (Jan. 20, 2022), https://www.cnn.com/2022/01/20/us/harmony-montgomery-missing-girl-new-hampshire/index.html (describing letter "questioning why a Massachusetts court placed Harmony in the custody of her father before New Hampshire children's services officials could ensure the safety of his home").

only was Harmony's father ultimately found fit to parent her at the hearing, but the Juvenile Court declined to order an interstate oversight plan on the ground that it would constitute an unconstitutional violation of the father's parental rights. *See id.* at 51–54. In short, the OCA Report paints a complicated but concerning picture of the care and protection proceeding that access to the records at issue could help clarify.[5]

What occurred in Harmony M.'s case—and how officials and institutions will prevent it from occurring in the future—affects the community directly. Indeed, as a general matter, "[n]o decisions have a more profound impact on the daily lives, emotional well-being, and safety of litigants than those made every day in family courts." *See* Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 Denv. U. L. Rev. 1, 51–52 (2001) (citation omitted). And, in this particular

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[5] Massachusetts' Governor Charlie Baker's conclusion from the OCA Report was that "everybody failed in this case." *See* Heather Morrison, *Harmony Montgomery: Gov. Charlie Baker pushes bill to train guardian ad litems, says 'everybody failed in this case'*, MassLive (May 5, 2022), https://www.masslive.com/politics/2022/05/harmony-montgomery-gov-charlie-baker-pushes-bill-to-train-guardian-ad-litems-says-everybody-failed-in-this-case.html; *see also* Melissa Alonso & Christina Maxouris, *Massachusetts child protective system failed missing 7-year-old Harmony Montgomery, state office says*, CNN (May 5, 2022), https://www.cnn.com/2022/05/05/us/harmony-montgomery-massachusetts-report/index.html; Tristan Smith, *Harmony Montgomery: Massachusetts OCA report says 7-year-old missing girl's 'needs, wellbeing and safety were not prioritized or considered' by DCF or judge*, MassLive (May 4, 2022), https://www.masslive.com/news/2022/05/harmony-montgomery-massachusetts-oca-report-says-7-year-old-missing-girls-needs-wellbeing-and-safety-were-not-prioritized-or-considered-by-dcf-or-judge.html (same).

case, involving the tragic death of a young child for which the public seeks both closure and accountability, "no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Richmond Newspapers, Inc.*, 448 U.S. at 571 (citation omitted).

In applying the URIP's good cause standard to assess a request for access to records from juvenile proceedings involving the alleged abuse of children and resulting criminal prosecutions, this Court recognized that "the extent of community interest in [that] case cannot be overstated." *M.C. II*, 483 Mass. at 454. Here too, the community interest in information about Harmony's case is particularly powerful and constitutes good cause to lift the impoundment of records from her care and protection proceeding.

2. Access to the impounded records serves the public interest in ensuring a responsive and accountable child welfare system.

Good cause for granting access to the records at issue is also supported by "the general principle of publicity" recognized by this Court, namely that "'the public often would not have a "full understanding" of the [court] proceeding and therefore would not always be in a position to serve as an effective check on the system' if it were denied access to judicial records." *Sharpe*, 432 Mass. at 605–06 (citation omitted); *see Trs. of Bos. Univ.*, 495 Mass. at 67 (weighing the public interest not just in the specific crime but in the integrity of the court and operation of the justice system); *see also, e.g.*, Erin Gretzinger, *The dire need for systems-level*

stories about U.S. foster care: a Q&A with journalist Roxanna Asgarian, Ctr. for Journalism Ethics (May 12, 2023), https://ethics.journalism.wisc.edu/2023/05/12/the-dire-need-for-systems-level-stories-about-u-s-foster-care-a-qa-with-journalist-roxanna-asgarian/ (discussing the difficulties of reporting on the "totally confidential" child welfare system that "[f]irst and foremost, [] doesn't answer to anyone really" and as a result "we've seen problems and we've known about problems for a really long time").

For more than a century, media coverage of court cases involving abused or neglected children has helped bring about institutional and societal reform by helping the public serve as an "effective check" on government. *See Sharpe*, 432 Mass. at 606 (citation omitted). In 1874, news of the abuse of ten-year-old Mary Ellen McCormack (nee Wilson) in her foster home included the young girl's own testimony in court. *See* Howard Markel, *Case Shined First Light on Abuse of Children*, N.Y. Times (Dec. 14, 2009), https://www.nytimes.com/2009/12/15/health/15abus.html. Her firsthand account inspired lawyers and philanthropists to form the New York Society for the Prevention of Cruelty to Children—what is "believed to be the first child protective agency in the world." *Id.*

Nearly 150 years later, the Miami Herald used court records to investigate the deaths of 477 children from abuse or neglect—nearly all of whom had some

involvement with the judicial system. *See* Carol Marbin Miller & Audra D.S. Burch, *Preserving Families But Losing Children*, Miami Herald (Mar. 16, 2014), https://media.miamiherald.com/static/media/projects/2014/innocents-lost/stories/overview/. The investigation relied on sources who provided information and court documents, as well as numerous public records obtained after journalists sued the state. *See* Carol Marbin Miller, *Miami Herald reporters share how they reported award-winning series on child abuse and deaths*, Ctr. for Health Journalism (Apr. 10, 2015), https://centerforhealthjournalism.org/our-work/insights/miami-herald-reporters-share-how-they-reported-award-winning-series-child-abuse (describing the reporting process for the published articles). Just "weeks after the series ran," Florida's legislature "unanimously passed a sweeping overhaul of the state's child welfare system," committing "about $40 million for child welfare improvements." *Id.*

In 2009, the Courier Journal newspaper in Kentucky published a multi-part investigation that exposed "the failings of the child welfare system" in that state that "sparked both public ire and legislative reform." Veena Srinivasa, *Sunshine for D.C.'s Children: Opening Dependency Court Proceedings and Records*, 18 Geo. J. on Poverty L. & Pol'y 79, 85 (2010); *see also* Deborah Yetter, *How the Courier Journal uncovered horrific cases of child torture and abuse*, Courier J. (Aug. 7, 2019), https://www.courier-journal.com/story/news/investigations/2019/08/07/

how-courier-journal-uncovered-horrific-cases-child-abuse-in-kentucky/ 1938810001/ (discussing 2009 reporting project). Following its publication, the Kentucky legislature introduced a bill "to create an open courts pilot program in several jurisdictions." Srinivasa, *supra*, at 85. Although the bill did not pass, the Chief Justice of the Kentucky Supreme Court issued a public statement in favor of opening dependency court proceedings to the public. *Id.*

In 1981, a nine-month news investigation (overseen by, *inter alia*, the LCMedia journalist seeking the impounded records at issue here) exposed the conditions of abused and neglected children living under state care in Oklahoma. *See* Mindy Ragan Wood, *Reviewing "Throwaway Kids: Reforming Oklahoma's Juvenile Justice System"*, Sw. Ledger (Nov. 20, 2024), https://www.southwestledger.news/news/reviewing-throwaway-kids-reforming-oklahomas-juvenile-justice-system (reviewing book about the ABC News/Gannett investigation and a lawsuit against the state). Oklahoma at that time had no foster care program, and children were instead housed in large facilities, while the state received federal funds for each child in its care. ABC News and local Gannett reporters obtained thousands of pages of confidential "abuse reports" generated by state workers, which showed abuse by adults, that younger and more vulnerable children were often housed with children who were older and had criminal records, and that outdated approaches to punishment were utilized. These news reports,

along with a lawsuit by a child advocate attorney against Oklahoma, led to major changes in the state's approach to housing and punishing children in its care.

In New York, in 1995, six-year-old Elisa Izquierdo died due to abuse and neglect while in her mother's custody. *See* Lizette Alvarez, *Report in Wake of Girl's Death Finds Failures in Child Agency*, N.Y. Times (Apr. 9, 1996), https://www.nytimes.com/1996/04/09/nyregion/report-in-wake-of-girl-s-death-finds-failures-in-child-agency.html; Jo Craven McGinty, *State Keeps Death Files of Abused Children Secret*, N.Y. Times (Feb. 28, 2012), https://www.nytimes.com/2012/02/29/nyregion/nys-evades-requirement-for-disclosure-on-childrens-deaths.html. "The resulting outcry led to an overhaul of New York City's child welfare system and the passage in Albany of Elisa's Law, a measure loosening the secrecy regulations in child-abuse investigations." McGinty, *supra*. The legislation "required a public accounting of the events leading up to the death of any child in New York State who had been reported as abused or neglected." *Id.* Within a year of Elisa's Law's enactment, abuse and neglect numbers appeared to decrease. *See* Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 Yale L. & Pol'y Rev. 155, 184 (1999); *see* N.Y. Comp. Codes R. & Regs. tit. 22, § 205.4.

These examples underline the benefits to the public when journalists are able to access juvenile court records and proceedings, and they are reinforced by studies

by social scientists and child welfare advocates. As one scholar put it, "the individuals harmed the most by [] shortcomings" of the child courts and welfare systems "are the children the dependency court is supposed to protect." Kelly Crecco, *Striking A Balance: Freedom of the Press Versus Children's Privacy Interests in Juvenile Dependency Hearings*, 11 First Amend. L. Rev. 490, 529 (2013). Advocates have argued that "lifting the veil of secrecy" and permitting access to juvenile court records "will increase public awareness of the critical problems faced by juvenile and family courts and by child welfare agencies in matters involving child protection, [and] may enhance accountability in the conduct of these proceedings," which, in turn, can "increase public confidence in the work of the judges of the nation's juvenile and family courts." Nat'l Council of Juv. & Fam. Ct. Judges, Resolution No. 9: Resolution in Support of Presumptively Open Hearings with Discretion of Courts to Close (July 20, 2005), https://www.ncjfcj.org/wp-content/uploads/2019/08/in-support-of-presumptively-open-hearings.pdf. Moreover, "public scrutiny would force all parties working on the child's behalf to be more accountable for their actions." Jennifer Flint, Comment, *Who Should Hold the Key? An Analysis of Access and Confidentiality in Juvenile Dependency Courts*, 28 J. Juv. L. 45, 74 (2007) (citation omitted); *cf. Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.) ("It is *desirable* that the trial . . . 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." (emphasis added)).

Such public scrutiny is never more important than when a child has died. Jay David Blitzman, *Let the Sunshine in: Open the Doors to Closed Juvenile Sessions*, Am. Bar Ass'n (May 2, 2024), https://www.americanbar.org/groups/criminal_justice/resources/magazine/2024-spring/let-sunshine-open-doors-closed-juvenile-sessions/ ("There are circumstances when the public's right to know may trump state conferred confidentiality. This is especially so in those rare circumstances when a child dies and when calls are made for fundamentally changing the way juvenile court state intervention cases are heard."); Cheryl Romo, *Secrecy Battle over Dead Kids File Escalates—Mothers Protest, County Seeks Closure*, L.A. Daily J., Nov. 24, 1999 ("If a public agency is hiding behind a wall of confidentiality, the safety of our children demands that the wall be torn down."); Crecco, *supra*, at 528–29 ("Often though, these consequences could be prevented or at least alleviated through public action, but this is impossible unless the public knows what is happening."). In these cases, the public interest, including the interest of children in the system, heavily favors transparency.

C. The public interest in transparency in this case far outweighs any privacy interests.

The good cause standard recognizes that in some cases, privacy interests in a care and protection proceeding, particularly privacy interests of the adults involved, will be minimal and outweighed by the interests favoring access. URIP 7(b). Additionally, privacy interests are diminished where "the relief a party seeks is the impoundment of documents after there has already been extensive media coverage of the individuals and events at issue." *Sharpe*, 432 Mass. at 611–12; *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494–95 (1975) ("[T]he interests in privacy fade when the information involved already appears on the public record."); *United States v. Kravetz*, 706 F.3d 47, 63 (1st Cir. 2013) (holding party's claim of privacy in certain records "may lose some force in light of his prior publication of the information that he now seeks to protect"). Harmony M.'s disappearance,[6] the subsequent arrest, conviction, and sentencing of her father,[7] and many details about

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[6] *See* Rachel Sharp & Andrea Blanco, *Harmony Montgomery was missing two years before anyone noticed. Now her father has been convicted of murder*, The Independent (Feb. 22, 2024), https://www.independent.co.uk/news/world/americas/crime/harmony-montgomery-missing-girl-new-hampshire-b2491581.html; Mike Toole, *Harmony Montgomery murder investigation timeline*, WBZ-News (Feb. 22, 2024), https://www.cbsnews.com/boston/news/harmony-montgomery-murder-investigation-timeline-manchester-new-hampshire-trial/.

[7] *See* Mascarenhas & Levenson, *supra*, https://www.cnn.com/2024/05/090/us/adam-montgomery-harmony-sentencing/index.html; Catherine Stoddard, *Adam Montgomery sentenced for murder of daughter, Harmony*, FOX10-Phoenix (May 9,

her brutal murder[8] have been the subject of news reporting for years, diminishing any privacy interests that might otherwise be implicated. *See George W. Prescott Publ'g Co. v. Reg. of Prob. for Norfolk Cnty.*, 395 Mass. 274, 278–80 (1985) (vacating impoundment order where judge did not properly weigh privacy interest against "public's vital interest in acquiring information about official wrongdoing") (citing Restatement (Second) of Torts § 652D, cmt. d (1977)). As an initial matter, although concerns for the privacy of children involved in care and protection proceedings may justify impoundment, such concerns are not present here. Many sensitive facts about Harmony's life and interactions with the child welfare system are already public, and any privacy interests that remain yielded their urgency upon her passing.

Her parents' privacy interests are likewise diminished, if present at all. Harmony's father, who is serving a sentence for her murder and other unrelated

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2024), https://www.fox10phoenix.com/news/adam-montgomery-murder-trial-sentencing-harmony.

[8] *See, e.g.*, *Gruesome details revealed in opening statements of Adam Montgomery murder trial*, WBZ-News (Feb. 8, 2024), https://www.cbsnews.com/boston/news/watch-live-adam-montgomery-murder-trial-harmony-montgomery/; Sharp & Blanco, *supra*, https://www.independent.co.uk/news/world/americas/crime/harmony-montgomery-missing-girl-new-hampshire-b2491581.html.

crimes, did not oppose LCMedia's motion.[9] And, while Harmony's mother opposed it, in light of her extensive media interviews and other public communications—including about Harmony's death, issues with substance abuse, and her and her children's interactions with DCF—much sensitive information is already public.[10] In addition to her own statements, details about Harmony's family life prior to her care and protection proceeding were made public through the OCA Report. *See* OCA Report at 13–21, 32–46 (detailing, *inter alia*, DCF contact with Harmony's family, prior care and protection evaluations, and her home life).

Finally, the DCF employees who oversaw Harmony's case have significantly diminished privacy interest in the execution of their official government duties, if they have any at all, and redaction is a tool that can be used to address that concern, if it is well founded. *George W. Prescott Publ'g Co.*, 395 Mass. at 279–80, 283 (finding potential privacy interest only as to victim and observing redaction of name

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[9] While the lower court noted that Harmony had siblings, it did not explain how their privacy interests might be affected by disclosure.

[10] *See, e.g.*, Elamroussi et al., *supra*, https://www.cnn.com/2022/01/20/us/harmony-montgomery-missing-girl-new-hampshire/index.html ("[Harmony's mother Crystal] Sorey describes herself as a single mother of three who only has custody of two of her three children. . . . Sorey wrote that DCYF officials had failed to remove her daughter from [Harmony's father, Adam] Montgomery's custody when 'they witnessed [Harmony's] bruises' and that the house she was living in at the time had no running water.").

could resolve it). Any cognizable interest asserted is clearly dwarfed by the prodigious public interest in transparency and protecting children.

II. Other jurisdictions permit disclosure of records in juvenile court cases concerning deceased children.

Massachusetts is not alone in providing a mechanism for access to records of juvenile court proceedings when a party or nonparty satisfies a "good cause" or similar standard. In states with laws similar to the Commonwealth's, courts have permitted access to records in juvenile cases where, as here, a child has died.

For example, in Florida, proceedings related to children are, in general, "not [to] be open to inspection by the public." Fla. Stat. Ann. § 39.0132(3). Like Massachusetts, which permits disclosure for "good cause," Florida courts are however statutorily empowered to make such documents available to requestors who have a "proper interest" in them. *Id.* In determining whether a member of the press or public has a "proper interest," Florida courts balance the potential harm to the children involved against the public interest in the information that would be disclosed and the potential benefits to society, including to other children in the judicial system. *See C.H.-C. v. Miami Herald Publ'g Co.*, 262 So. 3d 226, 227–28 (Fla. Dist. Ct. App. 2018) (comparing the interests of the newspaper requesting records to the interests of the children involved in the records); *see also* Fla. Stat. Ann. § 39.2021(1) ("Any person or organization . . . may petition the court for an

order making public the records of the Department of Children and Families which pertain to investigations of alleged abuse, abandonment, or neglect of a child. The court shall determine whether good cause exists for public access to the records sought or a portion thereof . . . [by] balanc[ing] the best interests of the child . . . against the public interest.”).

In *C.H.-C.*, the Miami Herald sought access to a transcript and audio recording of a family court hearing relating to a child in connection with its coverage of a separate case involving the child’s sibling, who was allegedly killed by their mother. 262 So. 3d at 227. The Herald argued that it was acting as a “surrogate for the public in reporting the performance of the Department of Children and Families, the courts, and private agencies, all of which are tasked with the care and protection of our children.” *Id.* Finding that the Herald’s interest in reporting about the case outweighed the potential for “irreparable harm” to the living children, the appellate court affirmed the trial court’s conclusion that the newspaper had a “proper interest” in the records. *Id.* at 228 & n.4. In so holding, the appellate court observed:

> There is a public interest in having an adequate basis for evaluating the performance of the Department of Children and Families and the courts in carrying out their responsibilities relating to the protection of our children. It is the press that can provide critical information to enable the community to gain a greater understanding of the causes and contributing factors of deaths resulting from child abuse or neglect.

Id.

Similarly, California also has statutory provisions that close juvenile proceedings and records to the public and require petitioners seeking access to such records to demonstrate good cause. Cal. Welf. & Inst. Code § 827(b)(1); *In re Keisha T.*, 44 Cal. Rptr. 2d 822, 834 (Ct. App. 1995) ("A petitioner seeking access to juvenile court records must first show good cause."). Like Massachusetts' law, California requires that the parties' interests in privacy be balanced against other factors, including the public interest in disclosure. *See In re Elijah S.*, 24 Cal. Rptr. 3d 16, 22 (Ct. App. 2005) (discussing obligation to "balance the interests of the minor and those of the public" when considering a petition to obtain access to juvenile case records); *see also In re Keisha T.*, 44 Cal. Rptr. 2d at 833 (explaining that a "juvenile court should accommodate, to the extent possible, the legitimate request by the press for information necessary to permit public awareness and monitoring of the juvenile welfare system").

California also has enacted a presumption in favor of access to juvenile court records pertaining to a deceased child. *See* Cal. Welf. & Inst. Code § 827(a)(2)(A)–(B); *see In re Elijah S.*, 24 Cal. Rptr. 3d at 22–23 ("Thus, where the child whose records are sought has died, *no* weighing or balancing of interests is required[.]" (emphasis original)); *Therolf v. Super. Ct. of Madera Cnty.*, 295 Cal. Rptr. 3d 683, 706 (Ct. App. 2022) (granting a journalist's petition to obtain the juvenile case file of deceased child when her adoptive mother was convicted of her torture and

murder). Thus, California expressly recognizes the importance of public access to juvenile court records in matters pertaining to a deceased child in order to "promote free investigation, uncover any government culpability, and prompt necessary changes in the system of placing and monitoring dependents." *Therolf*, 295 Cal. Rptr. 3d at 689 (citation omitted); *In re Elijah S.*, 24 Cal. Rptr. 3d at 18, 34 (affirming the lower court's decision to grant two newspapers access to juvenile court records pertaining to two deceased children).

This same reasoning aptly applies to Harmony M.'s case. While juvenile court records frequently are kept confidential to protect the privacy of the child whose records are at issue, under a reasonable application of the URIP and this Court's precedent, the balance tips towards transparency when the child is deceased.

In such a case, the Commonwealth may no longer be able to protect the child who has passed, but courts can allow the press to fulfill its role of informing the public about matters of public concern, thereby ensuring accountability, spurring reform, and protecting other vulnerable children who are or will be in the same system.

CONCLUSION

For these reasons, amici respectfully urge this Court to reverse the trial court's ruling and remand with instructions to grant LCMedia's motion pursuant to URIP 11.

Dated: December 16, 2024

Respectfully submitted:

/s/ Bruce D. Brown

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17(c)(9) of the Massachusetts Rules of Appellate Procedure, I, Bruce D. Brown, hereby certify that the foregoing Brief of Proposed Amici Curiae the Reporters Committee for Freedom of the Press and Other Media Organizations complies with the rules of court that pertain to the filing of amicus briefs, including, but not limited to:

Mass. R. App. P. 16(e) (references to the record);
Mass. R. App. P. 17(c) (cover, length, and content);
Mass. R. App. P. 20 (form and length of brief);
Mass. R. App. P. 21 (redaction).

I further certify that the foregoing complies with the applicable length limitation of Mass. R. App. P. 20(a)(2)(C) because it uses Times New Roman, a proportionally spaced font, in size 14, and contains 5,690 words, as counted by the word-count feature of Microsoft Word for Mac, Version 16.77.

Dated: December 16, 2024

/s/ Bruce D. Brown
Bruce D. Brown (BBO# 629541)
Counsel of Record for
Amici Curiae

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS
No. SJC-13601

Essex, ss.,

DEPARTMENT OF CHILDREN & FAMILIES

v.

MOTHER, et al.
***
LCMEDIA PRODUCTIONS, INC., Appellant

On Appeal from Essex Juvenile Court

CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. P. 13(e), I hereby certify, under the penalties of perjury, that on this date of December 16, 2024, I have made service of a copy of the foregoing BRIEF OF PROPOSED AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND OTHER MEDIA ORGANIZATIONS IN SUPPORT OF APPELLANT LCMEDIA PRODUCTIONS, INC. URGING REVERSAL in the above-captioned case upon all attorneys of record by electronic service through eFileMA.

Dated: December 16, 2024

Respectfully submitted:

/s/ Bruce D. Brown

Bruce D. Brown (BBO# 629541)
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