STATE OF MICHIGAN
IN THE COURT OF APPEALS

In re THE HOLLAND SENTINEL,

Nonparty Movant–Appellant.

ADELINE HAMBLEY,

Plaintiff–Appellee,

v.

OTTAWA COUNTY, *et al.*

Defendants–Appellees.

Docket No. 370169

Ottawa Circuit No. 23-007180-CZ

McNeill, J.
Muskegon Circuit Judge Sitting by Designation

BRIEF ON APPEAL FOR *THE HOLLAND SENTINEL*

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Appellant *The Holland Sentinel* (the "*Sentinel*") respectfully submits this brief on appeal. MCR 7.212(A)(1)(a)(iii).

DECISION BELOW

In re The Holland Sentinel, unpublished order of the Ottawa County Circuit Court, entered February 28, 2024 (Docket No. 23-7180-CZ) (McNeill, J.).[1] AT.001.

JURISDICTION

This action is on appeal from an interlocutory order of the circuit court. The Court has appellate jurisdiction to grant leave to appeal from such orders when an application is filed within 21 days after entry of the order. Const 1963, art 6, §1; MCL 600.308(2)(c); MCR 7.203(B)(1); MCR 7.205 (A)(1). The court rules also provide that a person aggrieved by an order denying access to court proceedings or sealed records may file an application for leave to appeal in the same manner as a party to the action. MCR 8.116(D)(2); MCR 8.119(I)(9). The *Sentinel* timely applied for leave, and the Court granted the application. *In re Holland Sentinel*, 2024 MI App 370169-10.

STATEMENT OF INTEREST

The *Sentinel* is a daily newspaper founded in 1896. It reports on newsworthy matters in Ottawa County and its communities. Since November 2022, the *Sentinel* has covered the meetings and decisions of the Ottawa County Board of Commissioners, including the existence and enforceability of the settlement agreement at issue in this action. The *Sentinel* pursues this appeal to protect the public's right of access to court proceedings and the records of those proceedings.

QUESTIONS PRESENTED

The circuit court closed a court proceeding held on January 19, 2024, and sealed the record of that proceeding. The *Sentinel* filed a motion requesting access to any video recordings of the proceeding that may exist and access to the sealed record. AT.038. The circuit court denied the request, except to make public its order at the end of the closed proceeding. See AT.001.

1. Did the circuit court err in closing the court proceeding on January 19, 2024, and sealing the record of that proceeding?

Circuit court:	No
The *Sentinel*:	Yes
Plaintiff:	Yes, on information and belief
Defendants:	No

[1] The judges of the Ottawa County Circuit Court recused themselves from this action. The State Court Administrator's Office assigned Hon. Jenny McNeill to preside over this action. AT.009.

2. If so, should the circuit court have unsealed the record and made available to the *Sentinel* the transcript and any video recordings of the proceedings to remedy its initial error?

Circuit court:	No
The *Sentinel*:	Yes
Plaintiff:	Yes, on information and belief
Defendants:	No

STATEMENT OF THE CASE

This case involved a dispute between Ottawa County's local public health officer Adeline Hambley, Ottawa County, and several County Commissioners. Although not pertinent here, the factual background of the parties' dispute is well summarized in an earlier decision of this Court. *Hambley v Ottawa Co Bd of Comm'rs*, —Mich App—; —NW3d—; 2023 MI App 365918-97, pp 2–3.

Hambley contended that the parties reached a settlement agreement on November 6, 2023, during a closed session of a special meeting of the Commissioners who later reneged on it. AT.072–73. The Commissioners disagreed. AT.084. Before the hearing on Hambley's motion, the defendants sought a protective order sealing the minutes of the November 6 meeting and prohibiting and limiting testimony on certain topics. AT.130. They did not ask in that motion to close the courtroom. See AT.142.

On January 19, 2024, the circuit court held a hearing on Hambley's motion. AT.013 (see entry for January 30, 2024). For the first time, before the hearing commenced, the defendants orally asked the court to close the proceeding to the public. The court granted the request, closed the courtroom, and took testimony from witnesses in secret and decided the motion from the bench, without even allowing the public back into the courtroom to hear the decision.[2]

On February 7, 2024, the *Sentinel* filed a motion for access to the closed proceeding and sealed record, contending that the court improperly closed the courtroom and deprived the public, including the *Sentinel*'s reporters, from observing the proceeding. AT.038. It asked the court to release video recordings of the proceeding that might exist and to order the release of a transcript at the defendants' expense for wrongfully prompting the closure of the courtroom. AT.042–49.

On February 28, 2024, the circuit court heard argument on the *Sentinel*'s motion. AT.016. The court denied the relief requested. AT.001. In so doing, the court implicitly confirmed that video of the proceedings exist. *Ibid.* The *Sentinel* sought leave to appeal, which this Court granted on November 8, 2024. *In re Holland Sentinel*, 2024 MI App 370169-10.

[2] The record of this proceeding remains under seal and unavailable to the *Sentinel*.

ABSTRACT

The *Sentinel* and citizens generally have a right of access to court proceedings and court rules under the First Amendment, the common law, and the court rules. While this right is not absolute, it is jealously protected. Courtrooms cannot be closed and records cannot be sealed except on a written motion showing that a party's protectable interest outweighs the public's right of access. Even if that showing is made, the scope and duration of the closure or sealing of records must be narrowly tailored to minimize the infringement upon the right of access. These requirements were not met. Defendants made an oral motion, the circuit court did not perform the required balancing test, and the scope and duration of the closure and sealing of records was not narrowly tailored. For the reasons that follow, the Court should vacate the circuit court's order, release any courtroom video recordings of the closed proceedings, and release the transcript of the proceedings to vindicate the public's right of access to judicial proceedings.

STANDARD OF REVIEW

The Court's review of this matter is plenary. Questions of constitutional law are review *de novo*. *Mothering Justice v Attorney Gen*, —Mich—; —NW3d—; 2024 MI 165325-115, p 10. Likewise, an appellate court reviews the proper interpretation and application of statutes and court rules *de novo*. *Bradley v Frye-Chaiken*, —Mich—; —NW3d—; 2024 MI 164900-76, p 22.

ARGUMENT

1. MCR 8.116(D): The circuit court erroneously closed the January 19 proceeding and should have remedied that error by releasing any available video recordings of the proceedings.

"Throughout our history, the open courtroom has been a fundamental feature of the American judicial system." *Brown & Williamson Tobacco Corp v FTC*, 710 F2d 1165, 1177 (CA 6, 1983). We are a self-governing people, and the "consent of the governed" makes all judicial business the people's business. *Ibid.* The First Amendment affords a qualified right of public access to judicial proceedings. See *Press-Enterprise Co v Superior Ct*, 478 US 1, 7–9; 106 S Ct 2735; 92 L Ed 2d 1 (1986) ("*Press-Enterprise II*") (although the cases in which this right attached arose in the criminal context, the standard of openness "enhanc[ing] both the basic fairness of the [proceeding] and the appearance of fairness so essential to public confidence in the system [of justice]" applies equally to civil cases).

The Legislature cemented this right by statute: "The sittings of every court within this state shall be public[.]" MCL 600.1420 (noting exceptions for national security, excluding minors when the subject matter is immoral or scandalous, and sequestering witnesses—none of which applies here). While this right is not absolute, *Detroit Free Press, Inc v Macomb Circuit Judge*, 405

Mich 544, 546; 275 NW2d 482 (1979), the occasions when the public can be excluded are sharply limited by procedures designed to protect access. The circuit court did not follow those procedures before closing the January 19 hearing and therefore violated the public's right to attend those proceedings.

By court rule, a court cannot limit public access to a court proceeding unless (1) a party files a written motion that identifies the specific interest to be protected, or the court *sua sponte* has identified a specific interest to be protected, and the court determines that the interest outweighs the right of access; (2) the denial of access is narrowly tailored to accommodate the interest to be protected, and there is no less restrictive means to adequately and effectively protect the interest; and (3) the court states on the record the specific reasons for the decision to limit access to the proceeding. MCR 8.116(D)(1).

A. The defendants failed to file a written motion. Start with the defendants' failure to file a written motion. They made an oral one. This alone should have been grounds to deny the motion.

When opposing the *Sentinel*'s application for leave to appeal, the defendants asserted that their motion for a protective order was sufficient. We disagree. They did not engage in the requisite constitutional analyses, they did not cite the appropriate court rule, they failed to request closure of the courtroom, and they failed to ask that the transcript of the entire proceeding be sealed. Moreover, MCR 2.302(C) is oriented towards protecting the scope and content of discovery, not closing court hearings. A motion for a protective order cannot be used to close open sessions of court and seal records of such sessions. That is what MCR 8.116 and MCR 8.119 are for, as discussed *infra*.

B. The defendants did not identify a proper interest. The defendants' stated interest was to keep secret the Commissioners' deliberations over litigation and settlement strategy during a closed session of a public meeting held on November 6, 2023. The threshold question, then, is whether the closed session was proper. A public body may meet in closed session "[t]o consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body." MCL 15.268(1)(e).

The Commissioners held an eight-hour closed session, during which four attorneys and some commissioners left the room for long stretches of time. AT.050, Leach, *Ottawa Co votes to accept settlement in Hambley case*, Holland Sentinel (Nov. 6, 2023), https://perma.cc/UK55-W8JY. This raises the possibility that there were active negotiations between the parties during that marathon session. If that was the case, then the closed session was not to consult with

counsel regarding settlement strategy as permitted by statute, but rather a cover to make offers, counteroffers, and the like, with counsel shuttling back and forth to convey them. Not only would that be an improper use of a closed session under the plain language of the Open Meetings Act ("OMA"), but it would also pose a second problem: offers and counteroffers are *decisions* on what terms are to be offered or counteroffered. MCL 15.262(d) (defining a "decision" as an action on a motion, proposal, recommendation, resolution, order, or other measure on which a vote is required and by which a public body effectuates or formulates public policy). "All decisions of a public body must be made at a meeting open to the public." MCL 15.263(2). The court should therefore have held an evidentiary hearing to determine if the requirements for a valid closed session had been met. If they were not met, then the defendants did not state a valid protectable interest.

Even if the closed session had been properly held, the circuit court should have next evaluated the scope of the claimed interest to be protected. The OMA affords protection to the *minutes* of a closed session. MCL 15.267(2) (providing that minutes may be released only if required by a civil action under MCL 15.270, MCL 15.271, and MCL 15.273). The defendants argue this protection extends to testimony regarding the closed session. The OMA does not so state, and appellate decisions implicitly approve of public testimony about what occurs during closed sessions. See, *e.g.*, AT.057, *A Felon's Crusade v Detroit Pub Schs Comm Dist Bd of Ed*, 2019 MI App U 343881-41, p 2 (describing deposition testimony regarding the closed session that was considered on summary disposition without any suggestion that the transcript was sealed); *People v Whitney*, 228 Mich App 230; 578 NW2d 329 (1998) (describing the content of a closed session in a criminal prosecution for violation of the OMA, even though prosecutions are brought under MCL 15.272 and minutes can be released only in civil actions brought under MCL 15.270, MCL 15.271, and MCL 15.273).

C. The circuit court did not perform the required balancing of interests. Even assuming *arguendo* that testimony regarding the closed session was a protectable interest under the OMA, the court rule required the Court to determine whether that interest outweighed the right of access. The purpose of the closed session was to allow for a privileged consultation with counsel on the litigation and settlement of a lawsuit. If the circuit court heard testimony about the consultation, then the attorney-client privilege was waived and no reason remains to protect the closed session. If the court did not hear such testimony about the closed session, then there was no reason to close the courtroom.

In any event, the OMA's protection of closed sessions is not absolute; the Act contemplates that information about closed sessions will be released. MCL 15.267(2). Indeed, it contemplates that such information will be disclosed *in court*. *Ibid.* The OMA does not say that the use of such information in court is grounds to close court proceedings. Nor does it say that the interest in

protecting closed sessions trumps the public's statutory right of access to court proceedings under MCL 600.1420. ***Protecting closed sessions is not one of the listed purposes for excluding the public from court hearings.*** MCL 600.1420. So, by express legislative choice, the right of access takes priority over whatever interest the Commissioners may have in protecting their closed session.

On information and belief drawn from Hambley's motion papers, the circuit court did not engage in this required examination of the competing interests. AT.163–164, at ¶1 (Feb. 1, 2024) ("The Court did not examine whether less restrictive means existed at the time of the hearing. The Court also did not examine whether Defendants' interpretation of the [OMA] outweighed the interest of the public in having access to what should normally be a public court proceeding on a matter of great public interest.").

On the public's side of the ledger, the underlying dispute here involved a power struggle between the Commission and the county's public health officer tracing back to public health orders issued during the pandemic. While such actions should be tried before judges elected by the residents of the county, MCL 600.1615, the case was assigned to an out-of-circuit judge—*i.e.*, one who was *not* elected by county residents—because the home circuit judges recused themselves. After heated litigation, the dispute was reportedly resolved in secret with an agreement to pay a substantial sum to the public health officer out of the public treasury, but then walked back on a perceived technicality because the agreement would impair the county's bond rating. This case therefore implicates not only the public's oversight of the courts but also its oversight of the defendant Commissioners and the plaintiff public health officer—*i.e.*, both branches of local government and the state judicial department. The public interest is at its zenith in this case.

On the defendants' side of the ledger, they purportedly invoked a closed session to "consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental effect on the litigating or settlement position of the public body." MCL 15.268(1)(e). The purpose of this provision is to protect a public body from "having to broadcast its trial or settlement strategy to the opposition along with the rest of the general public." *Manning v City of East Tawas*, 234 Mich App 244, 251; 593 NW2d 649 (1999), overruled on other grounds, *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125; 860 NW2d 51 (2014). The defendants rely on an unpublished decision, *Ader v Delta Coll Bd of Trustees*, 2015 MI App U 320096-42, p 5, where a panel of this Court opined that disclosing settlement strategy to the public might also have a detrimental effect on future litigation and settlement brought by other members of the public, and avoiding that risk independently justifies closed sessions under this section.

As an initial matter, *Ader* is factually distinguishable. There, the public body's attorney was present for the deliberations. Here, it seems the defendants' attorneys left the closed session:

> Board members, lawyers from Kallman Legal Group and a handful of County staff members—all of whom frequently left and reentered the meeting room—met in closed session for more than seven hours. At various points, some commissioners returned to the board table while others remained in the meeting room. Four lawyers representing KLG also left the room for long stretches.

AT.051, Leach, *Ottawa Co votes to accept settlement in Hambley case*, Holland Sentinel (Nov. 6, 2023), https://perma.cc/UK55-W8JY. If the defendants' lawyers were not in the room, then the closed session ceased to be one for the public body "to consult with its attorney[,]" as required under MCL 15.268(1)(e).

Apart from this and the nonprecedential nature of the decision, the reasoning in *Ader* is unsound. Litigation and settlement are driven by the facts and the law, and the composition of public bodies changes with elections. Both points undercut *Aders* implicit reasoning that disclosing strategy to the public somehow invites litigation with an expectation that it will be resolved in the same way (and that the resolution will invariably be to the public body's detriment). Rarely do the facts and the law align so tightly as to logically compel identical settlements, absent perhaps a bellwether case on an issue affecting a large portion of the public in precisely the same way (*e.g.*, the Flint water crisis litigation). But, even when the facts and law do align, a settlement in one case does not *legally* compel settlement in a subsequent case, much less on identical terms. Allowing the public body to hide its reasoning from the public (as opposed to only its opponent) guts the policy of accountability animating the OMA: to "facilitat[e] public access to official decision making and to provide a means through which the general public may better *understand the issues and decisions* of public concern." *Vermilya v Delta Coll Bd of Trustees*, 325 Mich App 416, 422; 925 NW2d 897 (2018) (emphasis added).

Even if one accepts *Ader* as rightly decided, the question remains: does protecting against the entirely speculative problem that public disclosure might affect some future litigation in some unknown way serve a higher purpose than public oversight of the judiciary when (*a*) the proceedings involve what is fundamentally a political dispute between the legislative and executive branches of local government; and (*b*) the possible settlement of that dispute with public dollars? The *Holland Sentinel* submits the answer is "no." One need only look to *Press-Enterprise II*. The more significant risk of prejudice from publicizing pretrial suppression hearings was not enough to refuse public access on every motion to suppress.

Should the Court disagree, finding that closing the courtroom is essential to serving a higher purpose is still only the first step in the *Press-Enterprise II* test. A court must then narrowly tailor the closure to serve that interest. The *Holland Sentinel* offered less restrictive alternatives to total closure and secrecy. The defendants contend those were not reasonable, but they fail to explain why. See Answer to Application 7. Their self-serving assertion that "the only way" to protect the public body's asserted interest was to close the courtroom and seal the record should be given no weight.

D. The closure of proceedings was not narrowly tailored. Even if the Court were to hold that the interest in keeping the closed session secret outweighed the public's right of access, then the closure of court proceedings had to be narrowly tailored to accommodate the interest to be protected and no less restrictive means existed to adequately and effectively protect the defendants' interest. MCR 8.116(D)(1)(b). The wholesale closure of the day's court proceedings was neither narrowly tailored nor the least restrictive means available. Assuming that testimony regarding the closed meeting was necessary, the circuit court could have ordered the defendants to designate the witness(es) who would testify about the meeting, to organize their testimony to facilitate temporary exclusion of the public, and to inform the court before and after that segment of questions so that the court could close the proceedings for the absolute minimum period of time necessary to protect the interest.

In addition, the circuit court reportedly made two rulings at the end of the hearing, neither of which needed (or need) to be sealed. First, the court ruled that there was a decision to settle reached in closed session but that the motion made in open session was "too vague" to be effective, so the settlement could not be enforced. Second, it ordered the attorneys not to discuss what happened during the closed proceedings. See AT.155–156. Courts cannot seal court orders or opinions, MCR 8.119(I)(6), so—at a minimum—closing those portions of the proceeding cannot be deemed narrow tailoring.

E. Specific reasons had to be given. Because the transcript is sealed, the *Sentinel* does not know if the circuit court stated on the record the specific reasons for the decision to limit access to the proceeding. On information and belief, the court expressed concern that "the bell can't be unrung" if it allowed the proceedings to remain open. If that is accurate, the *Sentinel* appreciates the sentiment, but it underscores that the court failed to engage in the rigorous analysis required under the court rules and merely "erred on the side of caution" for the sake of moving forward. Yet the more cautious approach would have been to adjourn the hearing, require the defendants to file a written motion, decide whether closure was appropriate, and determine how to balance the right of access with the defendants' alleged protectable interest.

Because the circuit court did not follow the required procedure, and because a correct application of the required procedure would have ensured that the public could have attended all or substantially all of the proceeding, this Court should order the release of courtroom video recordings and a copy of the transcript to remedy the violation of the public's right of access.

F. *In re Midland Publishing* does not support the defendants' position. *In re Midland Publishing*, 420 Mich 148; 362 NW2d 580 (1984), involved MCL 750.520k, which gave criminal defendants and victims a statutory right to suppress their names in rape cases until after the defendant was arraigned on the information (*i.e.*, arraigned in circuit court) or the case was dismissed or otherwise concluded. *Id.* at 159. The Court acknowledged the public has a common-law right of access to court *records* but noted that the Legislature may abrogate or amend the common law. *Ibid.*

MCL 750.520k was an unambiguous exercise of that legislative prerogative. Here, however, the defendants cannot point to a similar provision specifically addressing the suppression of court records in the OMA. The same section that directs the clerk of the public body to keep the minutes of closed meetings nonpublic also provides that those minutes can be disclosed when a civil action is brought to enforce the OMA. MCL 15.267(2). In other words, when they are relevant to judicial proceedings, the OMA allows the clerk to release the minutes of closed meetings. Unlike MCL 750.520k, the OMA does not direct the *court* to suppress *any* records of a public body that are filed in judicial proceedings. Absent an unambiguous abridgement of the common law right of access to court records in the OMA, the Court should not "lightly presume" that the Legislature intended to shield relevant closed meeting minutes in a court file when the OMA itself contemplates that such minutes, when used in court, cease to be nonpublic. *Sunrise Resort Ass'n v Cheboygan Co Rd Comm'n*, 511 Mich 325, 341; 999 NW2d 423 (2023) ("The Legislature may alter or abrogate common law through its legislative authority. But we will not lightly presume that the Legislature has abrogated the common law[.] The Legislature should speak in no uncertain terms when it exercises its authority to modify the common law." (cleaned up)). Accordingly, the Court should not hold that the OMA affects the public's common law right of access.

As to court *proceedings*, *Midland Publishing* held that suppressing names implicitly required closures of preliminary exams "as a practical matter" to prevent the public from learning of the names of defendants or victims. *In re Midland Publishing*, 420 Mich at 159 n 13. Starting first with the common law right of access to judicial proceedings, the Court found that the statute validly curtailed that right as well. Moving on to the statutory right of access, the Court cited the rule that subsequently enacted statutes like MCL 750.520k that are more specific and cover the same subject matter (*a*) control over an earlier statute when an irreconcilable conflict arises between them, or (*b*) can create exceptions or otherwise qualify the earlier statute when the conflict is not irreconcilable. *Id.* at 163–64. The Court held that MCL 750.520k created an

additional exception to the statutory right of access found in the earlier enacted MCL 600.1420. Finally, turning to the constitutional right of access, the Court held that the First Amendment provides a right of access to criminal trials, but that preliminary exams are not part of the criminal trial, so that there is no constitutional right of access to those proceedings. *Id.* at 172–73.

After *Midland Publishing*, however, the Supreme Court of the United States held that the First Amendment right of access does not turn on the label given to the judicial proceeding. *Press-Enterprise II*, 478 US at 7. Rather, it turns on two "complimentary considerations": (1) whether there is a tradition of accessibility, *id.* at 8; and (2) whether public access, serving as it does a "significant positive role" in public oversight of the judiciary, would "totally frustrate" the specific proceeding at hand, *id.*, at 8–9 (citing grand jury proceedings as a "classic example" when access would "totally frustrate" the proper operation of the grand jury system). When a proceeding passes these "tests of experience and logic, a qualified First Amendment right of public access attaches." *Id.* at 9. This right cannot be overridden unless "closure is ***essential*** to preserve ***higher values*** and is ***narrowly tailored*** to serve ***that*** interest." *Ibid.* (emphases added). Specific findings must be made so that "a reviewing court can determine whether the closure order was properly entered." *Id.* at 10. Applying this test, the Court held that the public has a qualified right of access to preliminary criminal proceedings.

Considering *Press-Enterprise II*, this Court subsequently declined to follow *Midland Publishing* because our Supreme Court erred in holding that there was no First Amendment right of access to preliminary exams. *Booth Newspapers, Inc v 12th Dist Ct Judge*, 172 Mich App 688, 694–95; 432 NW2d 400 (1988). This Court then invalidated MCL 750.520k because it infringed upon the right of access without first requiring specific findings to overcome that right. *Ibid.*

Although "the Supreme Court [of the United States] has not yet had occasion to address whether there is a First Amendment right to attend civil proceedings, [every federal circuit to address the issue has] agreed that the press and public have a First Amendment right to attend civil proceedings under that [two-part] test." *Detroit Free Press v Ashcroft*, 303 F3d 681, 695 n 11 (CA 6, 2002) (collecting cases). Our Supreme Court has also since acknowledged a qualified First Amendment right of access to *all* judicial proceedings, at least implicitly, by adopting MCR 8.116(D), which mirrors the *Press-Enterprise II* test.

There is, therefore, a qualified right of access to civil proceedings and the burden lies with the party seeking to infringe upon that right—*i.e.*, the County Commissioners—to pass the *Press-Enterprise II* test restated in MCR 8.116(D). There can be no reasonable dispute that there is a tradition of public access to civil proceedings and that public access serves a "significant positive role" in public oversight of the judiciary the same in civil cases as in criminal cases (especially in a

state like ours that has chosen to elect its judiciary). Nor can be it reasonably argued that public access would "totally frustrate" the purpose of an evidentiary hearing regarding whether a settlement agreement exists and is enforceable between a public body and a public official locked in a very public dispute. Accordingly, the *Holland Sentinel* and the public had a qualified First Amendment right of access to the hearing.

The defendants contend they did all the work required to overcome the right of access by baldly invoking the OMA's authorization for closed sessions. They disclaim any duty to prove that the factual predicates for invoking that authorization actually existed, much less that the cited statutory authorization (*a*) serves a higher purpose than the public oversight of judicial proceedings and (*b*) otherwise passes the *Press-Enterprise II* test in MCR 8.116(D). As the proponent of closing a courtroom, the burden lay with the defendants to prove that circumstances warrant judicial curtailment of the right of access. Cf. *ABC, Inc v Stewart*, 360 F3d 90, 106 (CA 2, 2004) (observing, in an appeal of a closed criminal jury voir dire, that "[t]he burden is heavy on those who seek to restrict access to the media, a vital means to open justice."); *Nat'l Org for Marriage v McKee*, 2010 US Dist Lexis 90749, *11 (D Me, Aug. 24, 2010) (holding, in the analogous context of the right of access to *records*, that the party seeking to keep trial evidence secret bears the burden); *United States v Doe*, 629 F Appx 69, 72 (CA 2, 2015) (the "presumption of access under the First Amendment … places a heavy burden *on those who seek to limit public access*." (emphasis added)).

Moreover, the judge abdicated her constitutional duty by refusing to assess whether the defendants validly invoked the OMA, ruling that the decisions of public bodies are presumed to comply with the OMA. Yet the asserted interest is a conditional one: license to hold a closed session *if* factual predicates exist. To presume that those factual predicates exist, and thereby presume the existence of a legitimate interest, shifts the burden from the proponent of closing the courtroom to those whose constitutional right stands to be infringed.

But, assume *arguendo* that the judge could make such presumptions. She still had to decide whether the County Commission's discretionary desire for a closed session served a higher purpose than public oversight of judicial proceedings when the business of the closed session is central to the judicial proceedings. The tension between Defendants' interest in conducting business in closed session and the public's constitutional right of access merely frames the question; it doesn't answer it. There is where *Press-Enterprise II* and MCR 8.116(D) require courts to weigh the competing interests. The circuit court failed to do so.

2. MCR 8.119(I): The circuit court erroneously sealed the record of the January 19 proceeding and should have remedied that error by releasing the video and transcript of the proceedings.

The standard for sealing court records is nearly identical to the standard for closing court proceedings. A court cannot seal records, in whole or in part, unless (1) a party has filed a written motion that identifies the specific interest to be protected; (2) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order; and (3) there is no less restrictive means to adequately and effectively protect the specific interest asserted. MCR 8.119 (I)(1). In determining whether good cause has been shown, the court must consider the interests of the parties and the interests of the public. MCR 8.119(I)(2). This requires a public hearing. *Capital Cities Broad Corp v Tenth Dist Judge*, 91 Mich App 655, 657; 283 NW2d 779 (1979).

"Freedom of the press and the public nature of court documents require a hearing, open to all interested parties, before inspection of public court documents may be denied." *Ibid.* "The purpose of this hearing is to explore the constitutional and statutory validity of any proffered justifications for noninspection and to determine whether any alternative and less restrictive mechanisms than complete suppression exist." *Ibid.* Sealing court records is so extraordinary that a court must forward a copy of its order sealing a record to the Clerk of the Supreme Court and to the State Court Administrator. MCR 8.119(I)(7).

The defendants here again failed to file a written motion, as required under the court rule. This alone should have been grounds to deny the motion, as posited in Argument 1.A, *supra*. Regardless, for the same reasons advanced in Argument 1.B, *supra*, there was no protectable interest that warranted sealing the record of the proceedings. Nor, on information and belief, did the Court make the required finding of good cause because it did not consider both the parties' interests and the public interest. Even if the Court had done so and were to find good cause for sealing the record, there were less restrictive means available to protect the defendants' claimed interest, to-wit: ordering the preparation of a transcript, ordering the parties to propose redactions to protect the claimed interest, deciding upon the appropriate redactions, and releasing a redacted transcript. This process is standard protocol in federal court. See Electronic Filing Policies and Procedures (ED Mich, 2023), at Exhibit B, Procedures Governing the Electronic Availability and Redaction of Transcripts (ED Mich, 2009), https://perma.cc/99Q7-9MXQ.

In response to this, the defendants contended, among other things, that redacted transcripts were unnecessary because courts speak through their written orders. By that logic, so long as a written order is issued after the fact, *all* court proceedings could be closed. That, of course, would be inconsistent with the common law right to attend court proceedings and the statutory command that the sittings of every court be open to the public (subject to very limited exceptions). It is also logically inconsistent with the rule that courts cannot seal court orders and opinions. MCR 8.116

(I)(6). The Court is no doubt familiar with the common practice of trial courts entering orders "for the reasons stated on the record." The defendants' approach would allow judges to hide the reasons for their decision in a sealed transcript, which is anathema to the public's right of access to court records and their ability to engage in oversight of the judicial department and its elected judiciary.

The defendants contend that, even if there was a violation of the right of access, there can be no remedy because MCR 8.116(D) applies only "to contemporaneous access to pending proceedings by members of the public" and that "nothing in MCR 8.116(D) … indicates that it is intended to apply to transcripts of proceedings." Answer to Application, at 5, citing *UAW v Dorsey*, 268 Mich App 313, 329; 708 NW2d 717 (2005). *Dorsey* is, however, inapposite. The UAW improperly obtained sealed transcripts of a divorce proceeding involving a *Dorsey* defendant. *Dorsey*, 268 Mich App at 321–22. Crucially, however, the Court noted that "[n]o party [wa]s certain, and the record d[id] not indicate, whether the public was restricted from the [divorce] proceedings [at issue]." *Id.* at 328. In other words, there was no record evidence that the public's right of access had been infringed in *Dorsey* like it was here.

Nor does *Dorsey* say that MCR 8.116(D) is toothless and leaves the courts unable to remedy a violation of a constitutional right. Indeed, MCR 8.116(D)(2) specifically confers on any person moving or objecting a right to request appellate review. If the rule *precludes* a remedy, as the defendants seemingly contend, then no purpose can be served by appellate review, and MCR 8.116(D)(2) is rendered nugatory. Not only must court rules be interpreted to avoid rendering any part of them surplusage or nugatory, *Casa Bella Landscaping, LLC v Lee*, 315 Mich App 506, 510; 890 NW2d 875 (2016), but *Press-Enterprise II* also requires factfinding to facilitate appellate review of the closure. And, lest it be forgotten, the remedy for the improper closure in *Press-Enterprise II* was release of the transcript. *Press-Enterprise II*, 478 US at 3–6 (identifying the issue to be whether the newspaper had a First Amendment right of access to the transcript of a preliminary hearing and discussing the procedural history of the case, including the closure of the preliminary hearing, the newspaper's attempt to obtain the transcript of that hearing, and the California courts' initial denial of access to the transcript), and 15 (reversing that decision and holding that there is a First Amendment right of access when a hearing is improperly closed).[3]

[3] The *Sentinel* seeks both the transcript and the video recording of the proceeding. *Press-Enterprise II* should not be read as limiting relief to a transcript. That case arose from proceedings in the California Superior Court. It was not until 1986 that the California Assembly ordered a pilot project for recording video as a means of producing a record of proceedings. *Bill Analysis on AB 251* (Cal 2013), p 9, https://perma.cc/7M2R-EH72. *Press-Enterprise II* was decided in 1986, so the preliminary hearing in that case pre-dated the pilot project and nothing in the high court's

Finally, the *Sentinel* respectfully submits that the defendants should bear the expense of the redaction remedy because their improper oral motion was the reason the public was wrongly excluded from the proceedings. It would not be equitable for the *Sentinel* to be forced to pay for the release of information to which it should have had real-time access for free.

CONCLUSION

WHEREFORE, the *Sentinel* respectfully asks the Court to reverse the circuit court's order closing the January 19 hearing and sealing the record of that proceeding, order the release of any available courtroom video recordings of the hearing, and/or order the release of a transcript (redacted or not) of the hearing, all at the defendants' expense.

Respectfully submitted,

BUTZEL

Dated: January 3, 2025

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decision suggests that a video recording was available or would not have been subject to release like the transcript if requested.

PROOF OF COMPLIANCE

This brief contains 5,757 countable words as calculated using Microsoft Word for Office 365 ProPlus. This complies with the limit of 16,000 words under Rule 7.212(B)(1).

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