

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, ss.
NORTHERN DIVISION

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

CARLOS MARSACH

Case No. 216-2021-CR-00046

**MOTION OF UNION LEADER CORPORATION AND
THE NEW ENGLAND FIRST AMENDMENT COALITION
TO INTERVENE AND TO UNSEAL COURT RECORDS**

Union Leader Corporation, (hereinafter “Union Leader”), and the New England First Amendment Coalition, (hereinafter “NEFAC”), through counsel, move to intervene in this civil action and to unseal court records. In support of this Motion Union Leader and NEFAC state as follows:

1. Union Leader is a corporation organized and existing under the laws of the State of New Hampshire with a principal office located in Manchester, Hillsborough County, and is the publisher of newspapers of general circulation, and other media, throughout the state of New Hampshire, and elsewhere;
2. The New England First Amendment Coalition is a non-profit corporation organized and existing under the laws of the Commonwealth of Massachusetts and it is dedicated to advancing

protection for First Amendment and Right-to-Know rights in the six New England states.

3. Union Leader has learned that certain documents have been filed in this case “under seal”. It is apparent from the Court record that the records now under seal relate to the performance of their public duties by Assistant County Attorneys during the prosecution of this criminal case.
4. The conduct referenced in paragraph 3 above is exactly the type of conduct that New Hampshire courts have held to be of the highest order requiring openness and accountability. The right to know sought by this motion is made sacrosanct by Part I Article 8 of the New Hampshire Constitution.

Union Leader and NEFAC respectfully direct the Court’s attention to the memorandum submitted herewith and in support of this motion.

WHEREFORE, Union Leader and NEFAC now pray that the motion to intervene and unseal filed on behalf of Union Leader and NEFAC be granted and for such other and further relief as the Court deems just.

UNION LEADER AND NEFAC RESPECTFULLY REQUESTS THE OPPORTUNITY TO PRESENT ORAL ARGUMENT IN SUPPORT OF UNION LEADER’S MOTION TO INTERVENE AND TO UNSEAL COURT RECORDS

Respectfully submitted,
Union Leader Corporation and the
New England First Amendment Coalition
by their attorney,

/s/ Gregory V. Sullivan
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Dated: October 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Motion through the Court's e-filing system to registered counsel of record.

/s/ Gregory V. Sullivan
Gregory V. Sullivan

THE STATE OF NEW HAMPSHIRE

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CARLOS MARSACH

Case No. 216-2021-CR-00046

**MEMORANDUM OF UNION LEADER CORPORATION AND THE NEW
ENGLAND FIRST AMENDMENT COALITION IN SUPPORT OF THEIR
MOTION TO INTERVENE AND UNSEAL COURT RECORDS**

Union Leader Corporation, (hereinafter “Union Leader”), and the New England First Amendment Coalition, (hereinafter “NEFAC”), through counsel, submit this memorandum in support of their Motion to Intervene and to Unseal Court Records. "The right to open courtrooms and access to court records related to court proceedings is firmly supported by New Hampshire practice and common law principles, Part I, Articles 8 and 22 of our State Constitution and our guidelines for public access." Petition of Union Leader Corp., 147 N.H. 603, 604 (2002). "Such access is critical to ensure that court proceedings are conducted fairly and impartially, . . . and that the judicial process is open and accountable." Associated Press v. State of New Hampshire, 153 NH 120, 129 (2005) (*quotations omitted*).

Whenever any member of the public seeks access to sealed court records, the party opposing disclosure must demonstrate that "there is a sufficiently compelling reason that would justify preventing public access to that document"; and that the Court "determine that no reasonable alternative to nondisclosure exists" and "use the least

restrictive means available to accomplish the purposes sought to be achieved." *Id.* at 130.
See also Petition of Keene Sentinel, 136 N.H. 121 (1992).

In Keene Sentinel, 136 N.H. 121, the New Hampshire Supreme Court mandated the following procedures and standards to be used when a member of the public or the media seeks access to sealed court records:

- I. When a member of the public or the media seeks access to a court record and is denied access because the record has been sealed, the party seeking access shall file a petition with the court requesting access to the record in question (i.e. Petition For Access To Court Records). Upon receipt of the petition, orders of notice shall issue to the parties in the original action.
- II. The court shall separately examine each document in question in camera (in chambers with only counsel for the parties and for the petitioner present) on the record. During the in camera hearing, it shall rest within the sound discretion of the trial judge, taking into consideration the particular circumstances of the case at hand, to determine whether and to what extent the content of any document is to be revealed to a petitioner. There will be instances where the claimed countervailing rights of a party (for example, constitutional rights of a defendant in a criminal case or statutory provisions granting or requiring confidentiality in certain cases) must not be rendered moot pending final resolution of the access issue. When appropriate, the document's subject matter, however, can be described in general terms such that persons objecting to closure can present an adequate argument to the court.
- III. The court shall determine if there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, that would justify preventing public access to the records. *Thomson v. Cash*, 117 N.H. 653, 377 A.2d 135. The party seeking closure or nondisclosure bears the burden of proof under the standard set forth above. There is a presumption that court records are public. The court must determine that no reasonable alternative to nondisclosure exists and must use the least restrictive means necessary to effectuate the purposes sought to be achieved. For example, instead of sealing an entire document because it has been determined that parts of it should not be accessible to the public, the court should consider if redaction of those parts is the appropriate least restrictive means.
- IV. The court shall issue a general conclusory order setting forth its holding, and in a separate order shall set forth specific findings of fact and rulings

of law to support its conclusion. The general conclusory order shall be made public. The specific order together with the record of the in camera proceeding shall be sealed. Keene Sentinel, 136 N.H. 121 at 130-131.

“New Hampshire courts have always considered their records to be public, absent some overriding consideration or special circumstance.” Petition of State of New Hampshire (Bowman Search Warrants), 146 N.H. 621, 625 (2001) (quoting Thomson v. Cash, 117 N.H. 653, 654 (1977)). Certain court records are understandably confidential, i.e. juvenile cases, adoption and parental rights cases, certain guardianship cases, grand jury records and other matters that are confidential by statute. This case is clearly distinguishable. The records now sealed in this criminal case all apparently relate to the conduct of governmental actors and agents during the performance of their official and public duties. All members of the public have the right to know how well, or not well, their agents and servants are doing in providing the public services paid for with taxpayers’ funds. Nowhere within the field of governmental accountability is the light of public scrutiny more critical than when it shines within our courts of law.

Respectfully submitted,
Union Leader Corporation and the
New England First Amendment Coalition
by their attorney

/s/ Gregory V. Sullivan
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I hereby certify that I served the foregoing Memorandum through the Court's e-filing system to all registered counsel of record.

/s/ Gregory V. Sullivan
Gregory V. Sullivan