

IN THE SUPREME COURT OF TENNESSEE

FILED
JUN 1 2020
Clerk of the Appellate Courts Rec'd By _____

IN RE:)

COVID-19 PANDEMIC)

No. ADM2020-00428)

**JOINT PETITION OF
TENNESSEE COALITION FOR OPEN GOVERNMENT AND
OTHERS FOR COURT ACTION TO PROTECT THE PUBLIC'S
CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS**

The Tennessee Coalition for Open Government (“TCOG”) and other concerned Tennesseans identified below petition the Court to take immediate steps to protect the public’s Constitutional and common law right of access to Tennessee court proceedings.

Tennessee courts at all levels are now planning and implementing procedures to resume more in-person proceedings and expand the use of telephone, teleconferencing, email, and video conferencing to accomplish court business that otherwise would have been conducted in-person in open court. Petitioners and others have recently observed that compliance with the Constitutional mandate that courts be open to the public has been inconsistent. Further, few of the judicial district plans that have been approved by this Court for safely resuming judicial operations provide for any reasonable level of compliance with the Constitution: most plans omit any mention of the public’s Constitutional access right; only a very few address accommodations for public access;

and several actually prohibit access to proceedings by anyone other than court personnel, parties, witnesses and lawyers, in direct violation of the Constitution.

Because of this Court's extensive work since March 13, 2020, to promote the safe operations of all Tennessee courts, including enabling and encouraging the use by courts of electronic communication tools such as teleconferences and video conferences, Petitioners now ask this Court to use its administrative and emergency power to protect the public's Constitutional and common law right of access to court proceedings during the COVID-19 pandemic.

Specifically, Petitioners ask that the Court, in adopting rules and plans for court operations throughout the pandemic:

1. ***Mandate that all Tennessee courts, judges, and judicial branch personnel preserve and honor the right of the public, including all Tennessee citizens, crime victims and their families, the criminal accused and their families, parties to civil actions and their families, and members of the press, to be personally present in court for in-person court proceedings, to the greatest extent possible.***

2. ***Mandate that all Tennessee courts, judges, and judicial branch personnel, if electronic means are used to allow judges, court personnel, parties, counsel, court reporters, witnesses, or others to participate in court proceedings, accommodate the public's right of access to proceedings by use of electronic means, such as listen-only or view-only access that allows members of the public to listen to or view court proceedings, with clear notice to the public of the availability of this access, regardless of the ability to be present in person, because of the constitutional nature of the rights of the public to access court proceedings.***

3. Mandate that all Tennessee courts, judges, and judicial branch personnel, to the extent that space limitations of courtrooms or public health concerns lead to restrictions on in-person access to a court by the public, use electronic means such as listen-only or view-only access that allows members of the public to listen to or view court proceedings, with clear notice to the public of the availability of this access.

In these ways, Petitioners submit, the Court can give appropriate guidance to Tennessee courts to honor the public's Constitutional right of access to our courts.

Petitioners further ask that the Court make these mandates clear and express, to ensure the broadest possible compliance by all Tennessee courts, to avoid violations of the Constitution, and to convey firmly to the public this Court's unequivocal commitment to vigorously enforce the public's Constitutional right of access to the courts

Petitioners further state as follows:

THE PETITIONERS

Petitioner Tennessee Coalition for Open Government ("TCOG") is a Tennessee nonprofit corporation. It is the only non-partisan non-profit organization in the State whose sole mission is to protect and promote citizen access to government information and public meetings through education, tracking, and identification of developing issues aimed at preserving and improving government transparency. Since its founding in 2003, TCOG has worked through a unique alliance of citizens, media organizations, and good government groups. It has conducted research into open government issues and routinely provided information about

access issues to citizens, journalists, lawmakers, and government officials. TCOG's mission rests on the belief that access to government information, through public records and public meetings, is crucial to informed citizen participation in our democratic society.

The following parties join in this Petition:

Petitioner Reporters Committee for Freedom of the Press 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. As part of its new Local Legal Initiative, in 2020, the Reporters Committee hired a Tennessee-based attorney to provide direct legal services to journalists and news organizations in Tennessee.

Petitioners the Middle Tennessee Professional Chapter and the East Tennessee Professional Chapter of the Society of Professional Journalists, are parts of the nation's most broad-based journalism organization dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. These two chapters are comprised of professional journalists in their respective regions and conduct regular educational programs and events in line with the SPJ mission.

Petitioner Tennessee Association of Broadcasters is a trade association committed to the purpose of promoting free, over-the-air

radio and television since 1948 in the best interest of the public and the broadcasting industry.

Petitioner Tennessee Press Association is a trade association for 126 Tennessee newspapers with its principal place of business is Knoxville, Tennessee.

Petitioner The Associated Press (“AP”) is a news cooperative with employees and offices in both Memphis and Nashville.

Petitioner *The Bristol Herald Courier* (Sullivan County) newspaper has provided coverage in Northeast Tennessee for more than 147 years, including news coverage of courts.

Petitioner Chattanooga Publishing Company owns and operates *The Chattanooga Times Free Press*, a daily newspaper in Hamilton County, Tennessee; three weekly newspapers; and three magazines.

Petitioner *The Cleveland Daily Banner* is a community local daily newspaper publishing five days a week, primarily serving Bradley County, Tennessee.

Petitioner DB Tennessee Holdings, Inc., publishes *The Daily Herald* (Columbia) newspaper.

Petitioner Gannett GP Media, Inc., publishes of the Nashville-based daily newspaper, *The Tennessean*, as well as *The Ashland City Times*, *The Daily News Journal* (Murfreesboro), *The Dickson Herald*, *The Fairview Observer*, *The Jackson Sun*, *The Leaf-Chronicle* (Clarksville), and *The Robertson County Times*.

Petitioner Gatehouse Media Tennessee Holdings, Inc., publishes *The Oak Ridger* (Oak Ridge) newspaper.

Petitioner Gould Enterprises, Inc., d/b/a Main Street Media TN publishes the *Murfreesboro Post*, *Wilson Post*, *Gallatin News*, *Hendersonville Standard*, *Portland Sun*, *Robertson County Connection*, *Dickson Post*, *Cheatham County Exchange*, *Main Street Clarksville*, *Main Street Nashville*, and *Main Street Fairview*.

Petitioner Holler Media, LLC, publishes *The Shelbyville Times Gazette*, a thrice-weekly newspaper covering news throughout Bedford County, Tennessee.

Petitioner Memphis Publishing Company publishes *The Commercial Appeal* (Memphis) newspaper.

Petitioner *MLK50: Justice Through Journalism* is a nonprofit newsroom focused on poverty, power, and policy in Memphis, Tennessee.

Petitioner Nashville Public Radio serves Middle Tennessee by providing trusted in-depth news, engaging music, and unique cultural programs on 90.3 WPLN-FM, 91Classical, 1430 WPLN-AM, and online.

Petitioner Scripps NP Operating, LLC, publishes *The Knoxville News-Sentinel* newspaper.

Petitioner States Newsroom publishes *The Tennessee Lookout*, a nonpartisan, nonprofit investigative news outlet. States Newsroom is a nonprofit network of state government news sites supported by grants and a coalition of donors.

Petitioner WKRN-TV is an ABC-affiliated television station in Nashville, Tennessee, operated by Nexstar Broadcasting. WKRN-TV broadcasts news, information, network and syndicated programming.

Petitioner WBIR-TV is a television station based in Knoxville, Tennessee, and owned by TEGNA Inc. WBIR has for more than 60 years

covered East Tennessee, providing reporting through some 10 hours of daily broadcast coverage as well as 24-hour coverage on its website, www.wbir.com.

Petitioner WRCB-TV is the NBC affiliate in Chattanooga, Tennessee.

Petitioner WREG-TV is a CBS television affiliate based in Memphis that covers a large portion of western Tennessee.

Petitioner WSMV-TV is owned by Meredith Corporation and is a television station based in Nashville, Tennessee.

Petitioner WTVF NewsChannelFive is a Scripps television station based in Nashville, Tennessee.

Petitioner American Civil Liberties Union of Tennessee is dedicated to translating the guarantees of the Bill of Rights into realities for all Tennesseans, using a range of strategies to preserve and enhance the rights of all Tennessee residents.

Petitioner Choosing Justice Initiative is a non-profit law firm in Nashville working to end wealth-based disparities in the criminal legal system through education, advocacy, and direct legal representation.

Petitioner Court Watch Nashville harnesses the power of the Nashville community to fight for accountability and transparency in our courts.

Petitioner Free Hearts is an organization led by formerly incarcerated women that provides support, education and advocacy in organizing families impacted by incarceration with the ultimate goals of reuniting families and keeping families together.

Petitioner Interdenominational Minister's Fellowship is a Beloved Community of clergy representing all faiths that seek to bring their collective influence to bear, through direct action, to end Racism and other social injustices plaguing our communities

Petitioner Just City is a Memphis criminal justice reform organization.

Petitioner The League of Women Voters of Tennessee is a nonpartisan political organization that encourages informed and active participation in government, works to increase understanding of major public policy issues and influences public policy through education and advocacy. Access to the ballot box and to public records and public meetings are essential elements of this work.

Petitioner Nashville Community Bail Fund frees low-income persons from jail, connects with their loved ones, and works to end wealth-based detention through community partnerships.

Petitioner No Exceptions Prison Collective is a grassroots initiative in Nashville dedicated to transforming the social segregation of prison by advocating that no exceptions be made to the abolition of slavery.

Petitioner Unheard Voices Outreach advocates for decarceration, builds community bridges to prisons, co-constructs re-entry plans with prisoners, assists in parole support/preparation, and organizes to end felonism.

Petitioner Tennessee Association of Criminal Defense Lawyers is an organization representing over 1000 public and private lawyers in Tennessee, and advocates for fairness and equality in the criminal justice system.

Petitioner Tennessee Justice Center advocates relentlessly to protect and improve the laws, policies and programs that secure dignity and opportunity for all Tennesseans.

Petitioner Gautam Hans is Director of the Stanton Foundation First Amendment Clinic at Vanderbilt University Law School

Petitioner David L. Hudson, Jr., is a First Amendment author and scholar and Assistant Professor at Belmont University School of Law.

Petitioners share the common belief that Tennessee courts cannot dispense justice without public confidence. Petitioners also agree that the public cannot and will not maintain confidence in the courts without aggressive efforts, especially in these unusual times, to maintain our courts' traditional openness.

THE PUBLIC'S CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS

The Tennessee and U.S. Constitutions protect the fundamental right of all members of the public to access the public's business of our courts. Indeed, this fundamental right existed even before our country did. The Tennessee Constitution has always prominently recognized this right, now enshrined in Article I, Section 17, in the Declaration of Rights, which requires "[t]hat all courts shall be open." The courts, certainly including this Court, have strongly protected this right of access.

This Court's recent administrative orders have consistently explained that "Judges are charged with the responsibility of ensuring that core constitutional functions and rights are protected."¹ One of those

¹ *In re: COVID-19 Pandemic*, No. ADM2020-00428, at 2 (Tenn. Mar. 13, 2020); *In re: COVID-19 Pandemic*, No. ADM2020-00428, at 2 (Tenn.

core constitutional rights is the right of the public to attend and observe judicial proceedings under the First Amendment, as recognized in *State v. Drake*, 701 S.W.2d 604, 607-08 (Tenn. 1985), and other decisions.² Indeed, on March 13, 2020, on the same day this Court entered its first emergency order concerning operations during the pandemic, the Court’s Director of Communications, Barbara Peck, Tweeted that, “[i]f media would like to attend a specific court proceeding, please email me and we will work with the judge to find a workable solution.” Unfortunately, many of the recently-approved plans from judicial districts around the state for the gradual re-opening of in-person court proceedings do not take into account – or simply violate – this vital Constitutional right.

Mar. 25, 2020); *In re: COVID-19 Pandemic*, No. ADM2020-00428, at 2 (Tenn. Apr. 24, 2020).

² *Drake* and other Tennessee law are entirely consistent with the U.S. Supreme Court’s decisions in a quartet of seminal cases. See *Press-Enterprise v. Superior Court*, 478 U.S. 1 (1986); *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1986); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1982).

This Court has followed and applied this case law, and even imposed further and additional requirements on closures in Tennessee courts. In *Drake*, this Court applied this line of U.S. Supreme Court case law to recognize the right of the public and the press to attend pre-trial and trial proceedings, to recognize their right to intervene and be heard in opposition to such closure, and to set out a specific Tennessee procedure for such intervention. 701 S.W.2d at 608. This Court has also clearly and unequivocally held that the constitutional right of access applies with equal force to civil cases. *King v. Jowers*, 12 S.W.3d 410 (Tenn. 1999).

JUDICIAL DISTRICT PLANS AND THE CONSTITUTIONAL RIGHT OF ACCESS

This Court has provided leadership on public access to courts by its own example in holding oral arguments by telephone and by video conference. Indeed, oral arguments scheduled on May 19, 2020, were live-streamed on the TNCourts.gov YouTube channel.³ The Court also posted on its website page “frequently asked questions” about the Court’s response to the COVID-19 pandemic, and these expressly point out that “Court proceedings in Tennessee are open to the public.”⁴ Other Tennessee courts have made efforts to accommodate the public right of access.⁵

³ Press Release, “Court News for 05/16/2020, Tennessee Supreme Court to Hear Oral Argument Via Live-Stream Video Conference” (May 15, 2020), available at <https://us1.campaign-archive.com/?e=c757d32c27&u=726c22e195595bb5150eb4c3b&id=1bca4c28bc>.

⁴ “Frequently Asked Questions Regarding the Suspension of In-Person Court Proceedings in Tennessee Due to COVID-19,” Tenn. Admin. Office of the Courts (undated), available at http://www.tncourts.gov/sites/default/files/docs/faqs_final_jl.pdf. The document notes:

Access to Court Proceedings

Court proceedings in Tennessee are open to the public. Judges should be cognizant of the need to keep proceedings open and available through recording audio and video conferences and/or allowing live access of proceedings that would otherwise be held in open court. For help with this, contact Barbara Peck at the Administrative Office of the Courts (“AOC”) at barbara.peck@tncourts.gov.

⁵ See, e.g., Deborah Fisher, “Most Tennessee COVID-19 court plans offer no provisions for public, media access,” TCOG Blog (May 13, 2020)

Still, news reports suggest that, during the current pandemic, the compliance of Tennessee courts with the Constitutional mandate that courts be open to the public has been confusing.⁶

Responding to the mandate of this Court, many judicial districts have submitted to this Court plans for resuming safe operations, which are publicly available on this Court's website. A review by TCOG of 30 of these plans, as approved by this Court and posted on the Court's website as of May 29, 2020, reveals great variation in their treatment of the

(highlighting Davidson County Chancery Court hearings on its YouTube channel; reflecting a review of all approved district plans that has been updated and included in **Exhibit A** to this Petition), available at <https://tcog.info/most-tennessee-covid-19-court-plans-offer-no-provisions-for-public-media-access/>; John Madewell, "Hamilton County Criminal Courts streaming to public Sessions Court reset 13,000 cases" (May 13, 2020) (Hamilton County), available at <https://newschannel9.com/news/local/hamilton-county-criminal-courts-streaming-to-public-sessions-court-reset-13000-cases>. *See also* Jamie Satterfield, "Tennessee courtrooms are reopening, but the public is being kept out, Knox News review shows," Knoxville News Sentinel (May 13, 2020), available at <https://www.knoxnews.com/story/news/crime/2020/05/13/tennessee-courtrooms-reopening-but-public-being-kept-out/3115284001/>; "Are Tennessee courts maintaining transparency in their operations?," WJHL (Johnson City; May 14, 2020), available at <https://www.wjhl.com/reopening-the-region/are-tennessee-courts-maintaining-transparency-in-their-operations/>.

⁶ *See, e.g.*, Michelle Heron, "Concerns raised over public access to court proceedings during COVID-19; finding out how the public can view Hamilton County's criminal court proceedings in a post-pandemic world wasn't easy," WRCB-TV, available at <https://www.wrcbtv.com/clip/15065089/concerns-raised-over-public-access-to-court-proceedings-during-covid19>.

public's right of access. Among the most striking conclusions from this review are:

- Plans for courts in at least 17 districts expressly prohibit access to in-person proceedings by anyone other than court personnel, parties, witnesses, lawyers, and sometimes victims, and make no provision for members of the media, thus prohibiting members of the public and the news media from attending (*i.e.*, the 1st, 2nd, 5th, 6th, 9th, 10th, 11th, 13th, 14th, 15th, 16th, 17th, 18th, 23rd, 25th, 29th, and 31st districts). Plans for courts in several other districts appear to exclude by implication those who are not direct participants in a proceeding.
- Very few of these plans mention the public's access right. Three plans (21st, 24th, and 26th districts) refer to the importance of public access and these reserve one location or seat (and only one) for members of the media, on a first-come, first-served basis.
- Only ten plans (11th, 19th, 20th, 21st, 22nd, 24th, 26th, 27th, 28th, and 30th districts) include any provisions for media access, and these provisions do not always apply to all courts covered in the plan. Some of these require compliance with Tenn. Supr. Ct. R. 30.⁷
- Only two plans (11th and 20th districts) mentions access by the public and press to video conference proceedings, noting the authority of the court to mute such participants' microphones.

⁷ Tenn. Sup. Ct. R. 30 exclusively concerns access to court proceedings for photographic, video, or sound recording purposes. Because it was adopted by this Court almost 25 years ago, and adopted primarily to address requests for camera coverage of courtroom proceedings, Petitioners respectfully submit that Rule 30 is ill-suited to address the issues raised in this Petition.

A detailed summary of this review by Petitioner TCOG is attached to this Petition as **Exhibit A**.⁸

TREATMENT OF THESE ISSUES IN OTHER JURISDICTIONS

During the course of the pandemic, other jurisdictions have faced the same challenges. Some, including Texas, Oklahoma, Georgia, Kentucky, and Arizona, have more directly addressed the challenge of public access and acted to accommodate this fundamental Constitutional right.⁹ Petitioners would particularly draw the Court's attention to the

⁸ This summary is also available at <https://docs.google.com/spreadsheets/d/1fMJp250Oiy0r5WHq1BRRk5aenp9AH9k-d0eWEApbyrs/edit?usp=sharing>.

⁹ See, e.g., Twelfth Emergency Order Regarding the COVID-19 State of Disaster ¶ 3.d., Misc. No. 20-9059 (Tex. April 27, 2020), available at https://81db691e-8a8c-4e25-add9-60f4845e34f7.filesusr.com/ugd/64fb99_b7fb85089d4942e1a20cd655117e4966.pdf; Texas Office of Court Administration, "Background and Legal Standards – Public Right to Access to Remote Hearings During Covid-19 Pandemic" (undated), available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwixsdvVsMDpAhWBWM0KHUNYCgsQFjAAegQIBBAB&url=https%3A%2F%2Fwww.txcourts.gov%2Fmedia%2F1446351%2Fpaper-and-research-on-public-courts.pdf&usq=AOvVaw0-Ddu3wMXJ6lsVwpuay2d3> (availability limited due to recent ransomware attack on Texas Supreme Court; copy attached as **Exhibit B**); Third Emergency Joint Order Regarding the COVID-19 State of Disaster ¶ 11, 2020 OK 23 (Okla. and Okla. Ct. Crim. App, April 29, 2020), available at <https://www.oscn.net/applications/oscn/deliverdocument.asp?citeid=486524>; Second Order Extending Declaration of Statewide Judicial Emergency ¶ 3 (Ga. May 11, 2020), available at <https://www.gasupreme.us/wp-content/uploads/2020/05/Second-Order-Extending-Declaration-of-Statewide-Judicial-Emergency-as-issued.pdf>; Order, *In re: Kentucky Court of Justice Response to COVID-19 Emergency*

emphasis by these other high courts on the need for clear public notice of the availability of online access to court proceedings.

APPLICATION OF THE PUBLIC’S CONSTITUTIONAL ACCESS RIGHT

As this Court explained in *Drake*, court closures are only justified where they advance overriding interests and are no broader than necessary to serve that interest. Petitioners appreciate that, due to the ongoing pandemic, as court proceedings resume, courts must take steps necessary to address public health concerns. Petitioners strongly believe that an outright ban on public access is, virtually by definition, constitutionally impermissible.

However, a tailored solution that facilitates the public’s exercise of its rights of access is today dramatically easier than ever before. Thanks to this Court’s leadership, commonly-available technology of telephone

– *Health and Safety Requirements for the Expansion of Court Operations* ¶ 1.d., No. 2020-39 (Ky. May 15, 2020), available at https://kycourts.gov/courts/supreme/Rules_Procedures/202039.pdf; Admin. Order No. 2020-79, *In the Matter of Authorizing Limitation of Court Operations During a Public Health Emergency and Transition to Resumption of Certain Operations* (Ariz. May 20, 2020) at 4 ¶ 6, Attachment A, at 2, 2nd bullet point under “Technology” for Phase I (“Courts shall provide public access by video or audio to court proceedings which are typically open to the public, specifically for cases designated in this Administrative Order”) (replacing prior Admin. Order No. 2020-75).

Further, one federal court has recently considered these issues and entered an order finding public access to a court hearing through access to a video conference constituted an appropriate alternative under the Constitution. Order Setting Out Public Access Findings, *Robson Xavier Gomes v. U.S. Dep’t of Homeland Sec., Acting Sec’y*, No. 20-CV-453-LM, 2020 WL 2606162 (D.N.H. May 22, 2020) (copy attached as **Exhibit C**).

and video conferencing is being widely adopted by Tennessee courts. These tools provide clear alternatives to complete closure to the public.

Where a court has telephone- or video-conferencing tools available to it, the alternative of allowing listen- or view-only access by the public costs the court and the parties virtually nothing, either in money or disruption. The appropriate application of the Constitutional standard for public access would require public access through these means if the public or press were unable to appear in person due to public health-based attendance restrictions.

Petitioners live and work in communities of all sizes across Tennessee, where public-health conditions and the physical situation of courtrooms and courthouses vary widely. The varied sizes of courtrooms and public-health conditions require flexibility in continued court operations.

Still, the new telephone and video-conferencing tools purchased by the judicial branch, and on which so many court personnel have already been trained, provide a ready alternative to in-person presence where public-health guidelines mandate a limit on the number of people who may be physically present in a small courtroom. Under the constitutional standard announced in *State v. Drake*, Tennessee courts must consider public access by means of one of these readily-available tools as an alternative to closure to the public.¹⁰

¹⁰ Consideration of these issues may grow more complex in the coming months. As the COVID-19 pandemic continues, social-distancing guidelines that set a limit on the number permitted to gather in one place or that set a limit on the distance that must be maintained between

An Opportunity for Collaboration

Many of the Petitioners are members of the news media, ranging from small media outlets to representatives of the largest media enterprises in the country. A number of petitioners cover the courts on a daily basis; many have done so for decades. Others are attorneys who regularly practice in courts across Tennessee. Still others are concerned citizens who frequently attend court as spectators.¹¹

Petitioners understand that it may be difficult to craft either an appropriate state-wide mandate for public access to courts during this pandemic, or specific guidelines or tools individual courts might use to ensure public access. Should the Court wish to engage with Petitioners on a collaborative basis to assist in these efforts, all Petitioners stand ready to do so.

The Long-Term Benefit of Progress on Public Access to Courts during the Pandemic

Finally, we would also note that rigorous and visible efforts by the Court to use technology to enhance public access to the courts in this time of crisis would pay dividends once this crisis passes. We have no doubt that increased public access, unfettered by the demands of travel and long presence in a courtroom, would increase the confidence and respect

individuals, may well make it difficult to hold jury trials even in larger courtrooms. The combination of telephone or video-conferencing tools and in-person proceedings would allow in-person proceedings to meet the requirements of the Constitution for public access.

¹¹ For example, Petitioner Just City runs a Court Watch program, in which trained citizen volunteers regularly attend Shelby County criminal courts as members of the public to observe proceedings.

that Tennesseans now have for the Tennessee judiciary and the work of its courts. Gains made today in ease of public access could be a watershed moment that increases the transparency of, and trust in, our courts for years to come.

CONCLUSION

For all of the reasons set forth above, the Petitioners urge the Court to grant this Petition and take swift action to protect the public's Constitutional right of access to Tennessee courts.

Further, Petitioners request that any costs of filing this Petition be waived in the public interest and given the purpose for which submitted.

Respectfully submitted,

TENNESSEE COALITION
FOR OPEN GOVERNMENT

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Exhibit A

District	Provision either mandating or reminding courts of their constitutional obligation of openness	Does the plan limit in-person proceedings to litigants/ participants (excludes the public and/or media)	Describe limit on in-person proceedings	Specific provision for news media?	Provisions for public access to proceedings that are NOT in-person (teleconferences, etc...)	Provisions for public access to in-person proceedings (livestreaming, recordings or other)	Describe provisions for public in-person access
1st Judicial District (Carter, Johnson, Unicoi, Washington)	no	yes	2. Only litigants/defendants appearing on the docket will be permitted into the courthouses. No spectators or support groups will be permitted entry. Clerks in each county will post a notification on the exterior of the courthouse that only the litigants or defendants will be permitted into the courthouse.	no	no	no	n/a
2nd Judicial District (Sullivan)	no	yes	...only litigants (check the dockets) and attorneys are allowed past the security screens in the front lobby	no	no	no	n/a
3rd Judicial District (Greene, Hamblen, Hawkins, Hancock)	no	not clear, but implied	(Not clearly spelled out in all the courts covered in this order, but implication is that only litigants)	no	no	no	n/a
4th Judicial District (Cocke, Grainger, Jefferson, Sevier)	no	not clear	(Not clearly spelled out if there is a limit or not a limit on who can attend, but talks about 'lawyers, parties, witnesses, court personnel or other participants'. May imply it's only litigants.)	no	no	no	n/a
5th Judicial District (Blount)	no	yes	4(c) We will continue the practice of allowing into the courtroom only attorneys, parties, witnesses subpoenaed or named by an attorney, security officers, and other necessary persons, including victims.	no	no	maybe	(Note 4c) "other necessary persons"
6th Judicial District (Knox)	no	yes	(Chancery Court): The Chancellors will conduct other nonjury hearings in the courtroom one case at a time and subject to adequate spacing among counsel, parties, witnesses and other necessary participants...(Other Matters): Adopting hearings will be limited to the immediate family, DCS home/study workers and counsel will take place in the courtroom rather than in chambers. Due to the current social distancing guidelines, friends and family members outside the immediate family will not be permitted to attend until further notice...(Fourth Circuit): In the event of an in-person proceeding, only the parties to the cases and necessary witnesses shall be allowed in the building. (Criminal Court): All inmate cases will continue to be heard via videoconference, on the record, unless otherwise specifically ordered. (General Sessions Criminal): ...only essential persons in the courtroom. Essential persons are defined to be the judge, court staff, ADAs, defense attorneys, and the defendant(s). (Civil Division) Only essential persons will be allowed in the courtroom. Essential persons are defined to be the judge, court staff, and litigants, their attorneys, and relevant witnesses. (Knox County Juvenile Court): Only parties and their attorneys shall be allowed to enter the building.	no	no	no	n/a
7th Judicial District (Anderson)	no	unclear	That each Judge of each Court shall ensure that there are a maximum of no more than 10 people in a courtroom at any time as it pertains to attorneys and litigants plus the necessary court personnel, such as the Judge, court reporter, security and the clerk while physical distancing is to be maintained.	no	no	no	n/a
8th Judicial District (Campbell, Claiborne, Fentress, Scott, Union)	no	not clear, but implied	With the reopening all courthouses and facilities will have clear signage to ... stay in the designated areas until notified, and no entry permitted until their particular case is called... Any person present for court will notify the entry personnel of their presence and the reason for attendance. The name will be taken and the person will be sent back out of the facility to wait for their case.	no	no	no	n/a
9th Judicial District (Loudon, Meigs, Morgan, Roane)	no	yes	The only persons allowed to enter and be seated in the gallery of the courtroom will be the parties, their attorneys, victims, and witnesses.	no	no	no	n/a
10th Judicial District (Bradley, McMinn, Monroe, Polk)	no	yes	Court officers and other staff shall ensure only litigants and attorneys are allowed past the security checkpoint in the front lobby of the courthouses. Witnesses will only be allowed to enter the courthouse when called in for their testimony at the court hearing. ...Court security will also be provided a court docket in order to ascertain and/or record the person's name, contact number, and business with the court. (Municipal Courts): (Vonore): The courtroom will be limited solely to defendant and/or their attorney. All other person(s) must remain in their vehicles at all times unless instructed to appear before the court. (Athens and Etowah): Social distancing will be observed by having an officer present at the entry door at all times who will collect the cell phone numbers of person(s) appearing and will call them into the courtroom in groups of 5. (Etowah): Only a group of 3 will be allowed inside the courtroom at a time. No other persons will be permitted to enter the court other than the defendant, unless they are with legal representation (i.e. their lawyer) or unless the defendant is a juvenile, which can be accompanied by 1 parent/legal guardian.	no	no	no	n/a

11th Judicial District (Hamilton)		yes	(Circuit and Chancery Courts): Only the attorneys, parties, and witnesses necessary to be present in person will be permitted in the courtroom at any one time... No extraneous persons will be permitted in the courtroom. (Criminal Court)...the Court will permit only the following persons to be present in the courtroom during any in-person proceeding: the immediate parties to the action and their counsel; persons allowed to attend by virtue of Tenn. Const. art. 1 § 35(c); permitted media as approved below; and personnel essential to the functioning of the court. (General Sessions Court): The only persons allowed in the HCGSC criminal or civil courtrooms...are the following: (1) judges and administrators; (2) parties to a case; (3) court clerks; (4) probation employees; (5) district attorneys; (6) public defenders; (7) other civil or criminal attorneys; (8) witnesses; (9) security officers; (10) media; (11) maintenance and sanitation officers, and other necessary persons as determined by HCGSC. (Municipal Court) (Collegedale): ...we will not allow any unnecessary personnel into the courtroom. We will allow one parent for juvenile drivers and one person to assist someone who due to age or physical infirmity requires assistance for mobility or to address another infirmity. We intend to otherwise allow only defendants and witnesses into the courtroom. (Red Bank): ...every attempt will be made to keep non-essential people out of the courtroom. (Soddy-Daisy) However, no one will be allowed to enter into the courtroom, except as specifically granted permission by the Court, as is constitutionally necessary. (Chattanooga) We will not allow any unnecessary personnel into the courtroom. We will allow one parent for juvenile drivers and one person to assist someone who due to age or physical infirmity requires assistance for mobility or to address another infirmity.	(Criminal Court): Members of the public and media may attend video conference proceedings as a room "participant." The Court may "mute" the microphone of any person, including media representatives, who are not parties to the immediate proceeding. Media may also attend any in-person proceeding upon approval by the Criminal Court consistent with Tennessee Supreme Court Rule 30.	no	yes	(Signal Mountain Town Court) We expect to reasonably accommodate spectators and those accompanying parties for any given case. When the limit of 10 persons in court has been reached, others will be asked to remain outside the courtroom.
13th Judicial District (Clay, Cumberland, DeKalb, Overton, Pickett, Putnam, White)	no	yes	(Civil Matters): In the event permission to proceed in person is granted, only the judge, the clerk, the attorneys, the parties, security personnel, necessary witnesses, and the court reporter (if any) will be allowed in the courtroom. (Criminal Matters): In the event a judge grants permission to proceed in person as outlined in the immediately preceding paragraph, only the judge, the clerk, the attorneys, the defendant, security personnel, necessary witnesses, victim, and the court reporter (if any) will be allowed in the courtroom.	no	no	no	n/a
14th Judicial District (Coffee County)	no	yes	In a first move toward normalcy, Courtrooms can be utilized for dockets and in-person hearings with no more than 10 people in a courtroom at any given time (e.g., litigants, attorneys, etc.) plus the necessary court personnel (e.g., judge, court reporter, security, clerk, etc.), while physical distancing is to be maintained. ... Court officers and other staff shall ensure only litigants (check the docket) and attorneys are allowed past the security screens in the front lobby.	no	no	no	n/a
15th Judicial District (Jackson, Macon, Smith, Troup, Wilcox)	no	yes	(Courtroom Procedure - Chancery - All Counties / Criminal Court - All Counties) The Sheriff's office will make available deputies to stand at the door to inquire of those attending, their name, to obtain their cell number and direct the person to remain in their vehicle until summoned, name of their attorney and to provide a copy of the "Notice to Persons Coming to the Court. Each deputy will have a copy of the court docket listing the names of all persons scheduled to be in court. (Macon and Smith Counties) On all days that court is scheduled to be in session, a Court Officer will be stationed at the entrance to the Justice Center parking lot with a copy of the Court Docket listing the names of all persons scheduled to be in court for that Docket. The Court Officer will stop each vehicle to determine the name of the person coming to court and verify that the person is scheduled to be in court...The Court Officer will direct all occupants to remain inside the vehicle until notified further. When the time for the court session to begin has arrived, the Court Officer shall provide the information obtained from the arriving parties to the Judge....The Judge will determine when, and if, each party can enter the courtroom....Only parties to a case shall be allowed to enter the courtroom. Other persons coming to the parking lot who are not parties, victims or necessary witnesses, and have no business to conduct...shall be directed to either remain in their vehicle or leave. (Jackson and Troup Counties): Only Plaintiffs, Defendants, attorneys, clerks, court officers and court personnel will be permitted in the building. (Macon and Smith Counties) On all days that court is scheduled to be in session, a Court Officer will be stationed at the entrance to the Justice Center parking lot with a copy of the Court Docket listing the names of all persons scheduled to be in court for that Docket. The Court Officer will stop each vehicle to determine the name of the person coming to court and verify that the person is scheduled to be in court...The Court Officer will direct all occupants to remain inside the vehicle until notified further. When the time for the court session to begin has arrived, the Court Officer shall provide the information obtained from the arriving parties to the Judge....The Judge will determine when, and if, each party can enter the courtroom. (General Sessions) (Wilson County): Only attorneys, litigants, and essential witnesses will be allowed in the courthouse. No friends, family, or other emotional support persons will be allowed to enter the courthouse. (Jackson County): ...only...the defendant, the victim and necessary witnesses shall be allowed in the courtroom. (Macon County and Smith County) The judge will determine when, and if, each party can enter the courtroom. (Municipal Courts) (generally, most required to wait outside until called in for their case, and only litigants allowed... Gainsboro has continued all court until August 2020).	no	no	no	n/a

16th Judicial District (Rutherford, Canon)	no	yes	Rutherford County Judicial Center: Only attorneys, clients and others directly involved in a case will be allowed entry into the Rutherford County Judicial Center building... No minors will be allowed in the Rutherford County Judicial Center building without leave of Court. (Cannon County Courthouse): Only attorneys, clients and others directly involved with the case will be allowed entry into the building. (Town of Smyrna Judicial Building) Only defendants will be allowed in the courtroom. Any and all others shall remain in their vehicles. (Rutherford County Circuit Criminal): No one other than attorneys, officers, litigants, or defendants will be allowed entry into courtroom without leave of court. While open courts are a very basic and important part of the American judicial system, this requirement shall be stayed until the expiration of this crisis. (Circuit Civil and Chancery) Court security personnel will be provided with a docket of each day's cases which shall list the parties so they may inquire to the person's identity. Security will also ask other individuals wishing to enter whether they are a witness prior to granting access. The Judge, prior to calling the docket, will survey those individuals in the courtroom to ensure they are a party, lawyer, or a testifying witness. Anyone who does not meet these criteria will be required to exit the building immediately. Security shall be called and all non-qualifying individuals shall be escorted from the building. (LaVergne Municipal Court): City Hall lobby will be closed to the public (until June 10)... Those persons on the docket will remain in their vehicles in the parking lot. Those persons on the docket will remain in their vehicles in the parking lot. (Woodbury Municipal Court): Only people cited into court and their attorney will be permitted in the courtroom. (Rutherford County Clerk and Master): If it is necessary for the public to enter the office, they would be allowed in one (1) person (attorney plus client) at a time.	no	no	no	n/a
17th Judicial District (Bedford, Lincoln, Marshall, Moore)	no	yes and no	(Bedford County, Moore County, Marshall County, Lincoln County - circuit, criminal, chancery): CST (Courthouse Security Team) will be supplied a docket in order to ascertain and/or record the person's name, contact number and business with the court... If sufficient seating capacity exists after priority seating, the courtroom will be open to the general public...(Bedford County General Sessions Civil Court) Only parties to the litigation for a particular case shall be allowed in the courtroom. (Bedford County General Sessions Criminal Court): Only defendants, alleged victims, attorneys and court staff shall be allowed in the courtroom for the purpose of preserving space for necessary parties. (Bedford County Juvenile Court): Only attorneys, juveniles and their parents and/or guardians, alleged victims, parents accused in dependency and neglect proceedings, court staff and Department of Children's Services staff/Service Providers may gain admittance inside the courtroom.	no	no	yes	(Circuit, Criminal, Chancery): If sufficient seating capacity exists after priority seating, the courtroom will be open to the general public.
18th Judicial District (Sumner)	no	yes	(Sumner County Juvenile Court): Only attorneys and parties to the specific action called by the court shall be allowed in the courtroom during a hearing. Witnesses will be called to the courtroom, as needed. No children (other than those called as witnesses), onlookers, supporters, or other non-parties shall be allowed in the courthouse or the courtroom. (Sumner County Courthouse - Chancery and Circuit): The number of persons in the courthouse shall be limited to essential personnel necessary to conduct court business, including court staff and clerk's office personnel, court security officers, the parties, their attorneys, and necessary witnesses. Persons having business with the clerk's office shall go directly to and from that office, after being properly screened. (General Sessions): Children (other than those called as witnesses) onlookers, reporters, or other non-parties shall not be allowed in the Courthouse or in the courtroom. (Municipal Courts had various plans, some that request people not to bring along extra people who don't need to be there, others making no mention of limitations. One allows adult defendants to have family/friends there.)	no (reporters are specifically excluded from General Sessions courts)	no	no	
19th Judicial District (Montgomery & Robertson Counties) -	no	yes (but provision for the media)	Courtroom admission for cases on the docket shall be limited to the parties...attorneys, defendants and authorized court personnel. Victims may be present in the courtroom but may be restricted to one support person.	Courtroom admission requirements shall not be applied...to preclude media coverage of any proceeding consistent with Rule 30 of the Rules of the Supreme Court.	no	no	n/a
20th Judicial District (Davidson County)	no	yes and no	(General Procedures): Support persons (family/friends of litigants/witnesses) shall be permitted in the courtroom only at the discretion of the judge. (Circuit Courts except 3rd, 4th, 7th): The lawyers will be advised to tell their clients that relatives and other interested parties who are not witnesses, unless specific permission is granted by a particular judge, will not be allowed to attend in order to minimize the number of people in the courthouses/court rooms. (2nd Circuit Court for criminal and probate): Only those members of the public be admitted into the courthouses that are absolutely necessary to conduct business. (7th Circuit): In light of limitations on the number of persons permitted in the Courtroom, members of the general public will not be permitted to be in attendance during in-person proceedings. (Juvenile Court): We will limit admission to the Juvenile Justice Center to attorneys, parties and their children, and persons needing Clerk/Court assistance and their children...(General Sessions): Only those members of the public be admitted into the courthouses that are necessary to conduct business.	Courtroom admission requirements shall not be applied in a manner to preclude media coverage of any proceedings consistent with Rule 30 of the Tennessee Supreme Court Rules. Since each Court will be conducting their respective proceedings in various manners including, but not limited to, telephone conferencing, video conferencing, live streaming, etc., in the event any media outlet or any member of the public wishes to watch and/or listen to any particular Court proceedings, that person(s) must contact a staff member of that particular Court in order to determine how to watch and/or listen to the requested Court proceeding.	yes, public included (see Column E, provision for news media, which describes proceedings conducted by telephone, video conferencing, etc...)	yes	(General Procedures): Support persons (family/friends of litigants/witnesses) shall be permitted in the courtroom only at the discretion of the judge. (Chancery Court): (includes "observers" among those required to maintain social distancing within the courthouse.)

21st Judicial District (Hickman, Lewis, Perry, Williamson)	yes in 3 of the 4 counties	yes (but provisions for media)	(Williamson County) Admission to all courthouses and courtrooms will be limited to Court personnel and courthouse employees, those filing matters and/or pleadings with the Clerk of the Court, and/or litigants, witnesses, and counsel for scheduled Court hearings.	(Williamson County): Courtroom admission requirements shall not be applied in a manner to preclude media coverage of any proceedings consistent with Rule 30 of the Rules of the Tennessee Supreme Court. (General Sessions and Juvenile Courts of Hickman, Lewis and Perry Counties): Understanding that public access to the court is of utmost importance to the public and our judicial system, one location in every courtroom will be reserved for media, and one member of the media will be allowed into court proceedings on a first come basis. Current media credentials shall be presented before access will be granted	no	no	n/a
22nd Judicial District (Giles, Lawrence, Maury, Wayne)	no	yes (but provision for the media)	Admission to all Courthouses will be limited to Court personnel and essential Courthouse employees, those filing matters and/or pleadings with the Clerk of the court and/or litigants and counsel for scheduled Court hearings.	Courtroom admission requirements shall not be applied in a manner...to preclude media coverage of any proceeding consistent with Rule 30 of the Rules of the Supreme Court.	no	no	n/a
23rd Judicial District (Cheatham, Dickson, Houston, Humphreys, Stewart)	no	yes	Only parties, witnesses and attorneys will be allowed into the courtroom.	no	no	no	n/a
24th Judicial District (Benton, Carroll, Decatur, Hardin, Henry)	yes	yes (but provision for media)	(1) Attendance at in-person court proceedings will be limited to the parties, their counsel, court personnel, and witnesses.	Understanding that public access to the court is of utmost importance to the public and our judicial system, one location in every courtroom will be reserved for media, and one member of the media will be allowed into court proceedings on a first come basis. Current media credentials shall be presented before access will be granted.	maybe	maybe	(b) Exceptions to those who may attend an individual court proceeding can be made on a case by case basis by the Judge.
25th Judicial District (Fayette, Hardeman, Lauderdale,McNairy, Tipton)	no	yes	Security will be instructed to limit access to the courtroom to only those who have cases pending on that particular day.	no	no	no	n/a
26th Judicial District (Chester, Henderson, Madison)	yes	yes (but provision for media)	Attendance at in-person court proceedings will be limited to the parties, their counsel, court personnel, and witnesses.	B. Understanding that public access to the court is of utmost importance to the public and our judicial system, one location in every courtroom will be reserved for media, and one member of the media will be allowed into court proceedings on a first come basis. Current media credentials shall be presented before access will be granted.	maybe	maybe	(b) Exceptions to those who may attend an individual court proceeding can be made on a case by case basis by the Judge.
27th Judicial District (Obion, Weakley)	no	yes (but provision for media)	Subject to the safety protocols identified below, the Court will permit only the following persons to be present in the Courtroom during "in-person" proceedings: the immediate parties to the action and their counsel; persons allowed to attend by virtue of Tennessee Constitution Art. 1, §35 (c) - Victims of Criminal Offenses; permitted media as approved below; and personnel essential to the functions of the Court	2. MEDIA REQUESTS Members of the media may attend any "in-person" court proceeding consistent with Tennessee Supreme Court Rule 30, under the Court's "safety protocols":	no	no	n/a
28th Judicial District (Crockett, Gibson, Haywood)	no	yes (but provision for media)	Subject to the safety protocols identified in other parts of this order, each Court will permit only the following persons to be present in the Courtroom during "in-person" proceedings: 1. the immediate parties to the action and their counsel; 2. persons allowed to attend by virtue of Tennessee Constitution Art. 1, §35 (c) - Victims of Criminal Offenses; 3. permitted media as approved below; and 4. personnel essential to the functions of the Court 2. MEDIA REQUESTS Members of the media may attend any "in-person" court proceeding consistent with Tennessee Supreme Court Rule 30, under the Court's "safety protocols":.....MUNICIPAL COURTS: Court officers and other staff shall ensure only litigants (check the docket) and attorneys are allowed past the security screens at court building entrances. No one other than attorneys, officers, litigants, or defendants will be allowed entry into courtroom without leave of court. While open courts are a very basic and important part of the American judicial system, this requirement shall be stayed until the expiration of this crisis;	2. MEDIA REQUESTS Members of the media may attend any "in-person" court proceeding consistent with Tennessee Supreme Court Rule 30, under the Court's "safety protocols":	no	no	n/a
29th Judicial District (Dyer, Lake Counties)	no	yes	Signs announcing who will be allowed to attend a court proceeding should be posted outside the building entrance. ... A court docket that includes the names of the parties, counsels, and the time set for each case will be provided each day to local officials. This docket is to be used to regulate entrance into the building.	no	no	no	n/a

30th Judicial District (Shelby)	no	yes (but provision for media)	<p>(General Rules) 6. Only litigants will be allowed in the courthouse. No spectators or friends will be permitted in the Courthouse....10. These general procedures are applicable to all Courts in the 30th Judicial District. These general procedures control, even if any individual Court plans contain procedures in conflict with these general procedures. (Chancery Court): No spectators, friends, or other individuals who have no Courthouse business be permitted in the Courthouse. a. Pursuant to approval by the Shelby County Sheriff's Office, Courthouse security personnel shall inform anyone attempting to enter the Courthouse that entry is restricted to those with business and/or case(s) and signs to this effect will be posted at the entryway prior to entry. (Probate Court) Support personnel will be permitted at the discretion of the judge. (General Sessions Civil Court): Only litigants and lawyers appearing on the docket will be allowed in the courtroom...No spectators, friends or other individuals who have no Courthouse business will be permitted in the Courthouse. (Criminal Court): 3. ...The courtroom deputies will control access to the courtroom and only allow those persons whose cases are being handled at any particular time admittance... 4. Additional persons who accompany a defendant to court will not be allowed into the building unless that person is a witness needed for a hearing and whose presence has been requested by counsel. A defense support person will be allowed. Victims and support persons will be allowed but th enumber must be limited to what is necessary. The press will be allowed entry if they abide by Rule 30 of the Tennessee Supreme Court and they pass the screeing questions. (Germantown Municipal Court): Only defendants on the docket will be allowed into the buiding. No spectators, children, support persons or groups will be allowed to accompany defendants for any reason. (Shelby County Sheriff's Office Plan for Reopening the Courts, All Courthouses): Only people directly impacted by litigation will be allowed entry (litigants, victims, witnesses). Children who are not involved in the litigation will not be allowed entry.</p>	<p>(Chancery Court): Media requests for access to court proceedings must be directed to the Clerk and Master (as is our current procedure). Media access will be permitted in compliance with court rules. Social distancing and maximum capacities will be considered in determining the extent of media access inside the courtroom. (Probate Court): Because of the nature of the matters handled in Probate, it is rare that the media seeks access to hearings. Media access will be allowed in compliance with the law and the Court rules. (General Sessions Civil Court): Media requests for access to court proceedings will need to be directed to the Judge's administrative office staff (as is our current procedure). Media access will be allowed to the extent that it is now, at the discretion of the judge and in compliance with court rules. Social distancing and maximum capacities will be considered in determining the extent of media access inside the courtroom. (Criminal Court): 4. ... The press will be allowed entry if they abide by Rule 30 of the Tennessee Supreme Court and they pass the screeing questions.</p>			
31st Judicial District (Van Buren, Warren)	no	yes	<p>Only litigants/defendants appearing on the docket will be permitted into the courthouses. No spectators or support groups will be permitted entry. Clerks in each county will post a notification on the exterior of the courthouse that only the litigants or defendants will be permitted into the courthouse.</p>	no	no	no	n/a

Exhibit B



BACKGROUND AND LEGAL STANDARDS – PUBLIC RIGHT TO ACCESS TO REMOTE HEARINGS DURING COVID-19 PANDEMIC¹

On March 13, 2020, the Supreme Court of Texas and Court of Criminal Appeals issued the First Emergency Order Regarding the COVID-19 State of Disaster and authorized all courts in Texas in any case – civil or criminal – without a participant’s consent to: 1) conduct any hearing or court proceeding remotely through teleconferencing, videoconferencing, or other means; and 2) conduct proceedings away from the court’s usual location *with reasonable notice and access to the participants and the public.*² This emergency order’s recognition of the public’s right to reasonable notice and access to court proceedings, both civil and criminal, is consistent with traditional practice in Texas state courts and with federal and state precedent as discussed below.

The 6th Amendment of the Constitution of the United States affords defendants the right to a public trial, including all phases of criminal cases. Texas extends that right through the 14th Amendment to juvenile justice cases brought under Chapter 54 of the Texas Family Code.³

The Supreme Court has also held that the press and public have a similar, independent right under the 1st Amendment to attend all criminal proceedings in both federal and state courts.⁴ Although the Supreme Court has never specifically held that the public has a First Amendment right of access to *civil* proceedings,⁵ federal and state courts that have considered the issue have overwhelmingly held

¹ The Office of Court Administration wishes to thank District Judge Roy Ferguson (394th) for primary authorship on this document.

² The Third Emergency Order Regarding the COVID-19 State of Disaster amended the First Emergency Order to remove the requirement that the court conduct the proceedings in the count of venue.

³ Texas courts have recognized the juvenile’s right to public proceedings in quasi-criminal juvenile justice cases under the 14th Amendment and Section 54.08 of the Texas Family Code. Article 1, Section 13 of the Texas Constitution states that “All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law.” Courts construing this provision interpret it to prohibit the erection of barriers to the redress of grievances in the court system. So, the phrase “open courts” in Section 13 does not appear to mean “public trial.”

⁴ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (establishing that the 1st Amendment to the United States Constitution guarantees the public a right of access to judicial proceedings).

⁵ Although the holding is specific to the criminal case, the constitutional analysis in *Richmond Newspapers* applies similarly to civil cases. As Chief Justice Burger in the majority opinion opined, “What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.” *Id.* at 576. In his concurrence, Justice Stevens wrote, “[T]he First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the judicial branch[.]” Justice Brennan added, “Even more significantly for our present purpose, [...] open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous ‘checks and balances’ of our system, because ‘contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power[.]’” *Id.* And Justice Stewart specifically addressed the issue of civil cases, saying, “the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal.” *Id.* at 599.

that there is a public right to access in civil cases under the 1st Amendment.⁶ Courts must ensure and accommodate public attendance at court hearings.⁷ However, although constitutional in nature and origin, the right to public and open hearings is not absolute, and may be outweighed by other competing rights or interests, such as interests in security, preventing disclosure of non-public information, ensuring a fair trial, or protecting a child from emotional harm.⁸ Such cases are rare, however, as the presumption of openness adopted by the Supreme Court must be overcome in order to close hearings to the public.⁹ In some instances, improper or unjustified closure of court proceedings constitutes structural error, requiring “automatic reversal and the grant of a new trial.”¹⁰

The Texas Family Code expressly authorizes the limiting of public access by agreement in contested hearings involving SAPCR claims and rights.¹¹ If supported by appropriate findings made on the record, the court may limit attendance at the hearing to only those persons who have a direct interest in the suit or in the work of the court.¹² But because the constitutional right at issue belongs to the public rather than the parties, all closures or restrictions of public access to such hearings must satisfy the same heightened standards handed down by the Supreme Court in *Waller* regarding criminal cases – even when agreed to by the parties. Thus, while the court may consider the parties’ agreement while evaluating a request for closure, that agreement alone is not sufficient to warrant closure. The 1st Amendment right belongs to the public – not to the parties; the parties cannot waive it by agreement.

It is the court’s affirmative burden to ensure meaningful and unfettered access to court proceedings. In fulfilling this burden, the court must take all reasonable measures necessary to ensure public access.¹³ Lack of access to a single hearing (suppression), or even a portion of a single hearing (voir dire), is enough to mandate reversal and a new trial. At this time, the movement of the general public is limited by the executive branch through the governor and various county judges. Shelter-in-place orders and prohibitions on non-essential travel prevent members of the general public from viewing hearings in the courthouse. While hearings in courthouses are no longer mandatory under the First Emergency Order Regarding the COVID-19 State of Disaster, the emergency order requires “reasonable notice and access to the participants and the public.” Even if a judge is physically in a courtroom for the virtual hearing, it is the court’s burden to ensure public access to each hearing and take reasonable measures to remove barriers thereto. There is no reasonable access to the public for a hearing, whether remote or physically located in a courthouse, when emergency measures are in place that would require the public to commit a jailable criminal offense to attend the hearing in person in a courtroom.¹⁴ For the duration of this crisis and while these emergency orders are in effect, courts must find a practical and effective way to enable public access to virtual court proceedings. Choosing not to provide reasonable and meaningful public access to remote court proceedings at this time may equate to constitutional error and mandate reversal.

⁶ See *Doe v. Santa Fe Indep. School Dist.*, 933 F. Supp. 647, 648-50 (S.D. Tex. 1996) (discussing 3rd, 6th and 7th Circuit decisions and concluding that the right of the public to attend civil trials is grounded in the First Amendment as well as the common law).

⁷ See *Lilly v. State*, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012).

⁸ See *United States v. Osborne*, 68 F.3d 94, 98-99 (5th Cir. 1995).

⁹ See *In re A.J.S.*, 442 S.W.3d 562 (Tex. App.—El Paso 2014, no pet.)(discussing open courts in juvenile cases).

¹⁰ *Id.* (citing *Steadman v. State*, 360 S.W.3d 499, 510 (Tex.Crim.App. 2012)(violation of 6th Amendment right)).

¹¹ Tex. Fam. Code § 105.003(b).

¹² Tex. Fam. Code. § 105.003.

¹³ See *Lilly*, 365 S.W.3d at 331.

¹⁴ See Executive Order GA-14 (March 31, 2020) and Tex. Gov’t Code § 418.173.

Under the standards established by the United States Supreme Court, the protective measures employed must be limited to those necessary to protect an overriding interest and no broader. The trial court must consider all reasonable alternatives to closing the proceeding and make findings in open court on the record adequate to support the closure.¹⁵ The court must weigh the totality of the circumstances in making these fact specific findings. For this reason, no standing order or global rule for closure of specific categories of hearings may be preemptively issued by a court without running afoul of the requirement to provide the public with access to court proceedings.

The court should not close the entirety of a hearing from public view in order to protect a single witness or topic of testimony. Because the court must apply only the least restrictive measures to protect the overriding interest, only specific portions of a hearing or trial that meet this exacting burden may be conducted outside of the public view, and that only in rare cases. Appellate courts have reversed judgments when a single less-restrictive solution existed but was not considered on the record.¹⁶

Courts should strongly consider employing protective measures short of interrupting or terminating the live stream. Federal courts, including the Fifth Circuit, have held that a partial closure of a proceeding – limiting access rather than excluding the public – does not raise the same constitutional concerns as a complete closure from public access.¹⁷ To employ a less-restrictive measure (for example, temporarily obscuring video but not audio, or not displaying exhibits through screen share,¹⁸ providing a phone number for the public to access the audio of the proceeding only, or providing a link that permits certain members of the public only to view the hearing either through a YouTube private link or a link to the Zoom meeting), the court need only find a “substantial reason” for the limitation and employ a restriction that does not exceed justifiable limits.¹⁹ Terminating or interrupting the livestream without an alternative means for the public to view the hearing – even temporarily – would constitute a complete closure, and the higher burden would apply.

It bears mentioning that this is not a new issue created by video hearings or public livestreaming. Sensitive and embarrassing testimony is entered in every contested family law hearing yet rarely merits closure or clearing of courtrooms. Child protection cases categorically involve evidence that is or may be damaging or embarrassing to the child. Commercial disputes commonly involve protected internal corporate operations. Rarely – if ever – have such trials been closed to the public. Such testimony should not now be evaluated differently simply because more people may exercise their constitutional right to view court proceedings than ever before. Public exercise of a constitutional right does not change the court’s evaluation of whether that right should be protected. Nor should courts erect barriers or hurdles to public attendance at hearings to discourage public exercise of that right. On the contrary, courts are required to take whatever steps are reasonably calculated to accommodate public attendance. Closure of courtrooms is constitutionally suspect and risky and should be a last resort.

¹⁵ *Waller v. Georgia*, 467 U.S. 39, 48, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

¹⁶ See *Cameron v. State*, 535 S.W.3d 574, 578 (Tex.App.—San Antonio 2017, no pet.)

¹⁷ *United States v. Osborne*, 68 F.3d 94, 98-99 (5th Circ. 1995).

¹⁸ The Supreme Court has ruled that the media does not have a First Amendment right to copy exhibits. *Nixon v. Warner Communications*, 435 U.S. 589 (1978).

¹⁹ *A.J.S.*, 442 S.W.3d at 567 (citing *Osborne*, 68 F.3d at 94, and applying the 6th Amendment *Waller* and “substantial reason” standards to 14th Amendment public rights).

Exhibit C

NITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Robson Xavier Gomes

v.

Civil No. 20-cv-453-LM

U.S. Department of Homeland
Security, Acting Secretary et al.

Public Access Findings

I. Background

This hearing is taking place during the public health emergency caused by the COVID-19 outbreak. All parties to this proceeding, including the court, are appearing remotely via video. The court's protocols for this hearing are laid out in Standing Order 20-7 (March 23, 2020). I find that conducting this hearing via video—under the unique circumstances presented by the COVID-19 pandemic—is the best way to ensure the safety of the litigants, court personnel, and the public at large. All findings made in the court's prior standing orders are incorporated herein. See Standing Order 20-5 (Mar. 20, 2020).¹

This suit has been provisionally certified as a class action for the purpose of conducting expedited bail hearings for class members. The hearing held today will be an individual bail hearing for class member, Marcus Giotto. Mr. Giotto and

¹ All the court's Standing Orders regarding the COVID-19 outbreak can be found here: <http://www.nhd.uscourts.gov/court-response-coronavirus-disease-covid-19>.

counsel for all parties in this class action have consented in advance to conducting this proceeding via video.

Before convening this video hearing, I carefully considered the public's and press's First Amendment rights to in-person access to court proceedings. See [Bucci v. United States](#), 662 F.3d 18, 22 (1st Cir. 2011) (citing [Waller v. Georgia](#), 467 U.S. 39, 48 (1984)). This Order details my findings.

II. Partial Rather Than Total Closure

I first find that this video-hearing constitutes a partial, rather than total, closure of these proceedings. I so find because the goals of public access will still be achieved: this proceeding is not being held in secret and the public, including members of the press, maintains the opportunity to observe this proceeding in real time. See [Richmond Newspapers, Inc. v. Virginia](#), 448 U.S. 555, 593-97 (1980) (Brennan, J., concurring) (discussing the functions of public access to court proceedings, including ensuring that procedural rights are respected and that justice is afforded equally, maintaining public confidence in the administration of justice, promoting accurate fact-finding, and enabling the public to act as a check on judicial power); see also [Bucci](#), 662 F.3d at 22 (discussing benefits of openness in criminal proceedings). Under the extraordinary circumstances presented by the continuing COVID-19 pandemic, the court finds this partial closure is necessary.

III. Findings in Support of Necessity for this Partial Closure

A. First, the court finds that protecting the health and safety of the public and the parties to this proceeding from the spread of COVID-19 is a substantial interest that would be jeopardized and prejudiced if the court did not impose this partial closure.

Since the first announced case in New Hampshire on March 2, 2020, the state has reported 3,239 confirmed cases of COVID-19.² So far, 142 deaths have been attributed to the disease in this state. Further, in New Hampshire approximately 3,325 people are being monitored for signs of COVID-19 infection, over 37,216 total tests have been reported (both positive and negative test results), and community-based transmission has been confirmed.³ Nationally, the number of confirmed cases has grown to over 1,408,636 with 83,425 cases resulting in death.⁴

Given the contagious nature of the virus and the exponential growth in cases, COVID-19 presents an enormous danger to the health and safety of the public, including the litigants, security and court personnel involved in this proceeding. The court's interest in preventing the spread of COVID-19 and preserving the health of all hearing participants, including the public, is a weighty and substantial

² New Hampshire Department of Health and Human Services, COVID-19, <https://www.nh.gov/covid19/> (last visited 5:50 a.m. May 13, 2020); New Hampshire Public Radio, <https://www.nhpr.org/post/updated-tracking-covid-19-cases-and-testing-new-hampshire#stream/0> (last visited 5:50 a.m. May 13, 2020).

³ New Hampshire Department of Health and Human Services, COVID-19, <https://www.nh.gov/covid19/> (last visited 5:50 a.m. May 13, 2020); New Hampshire Public Radio, <https://www.nhpr.org/post/updated-tracking-covid-19-cases-and-testing-new-hampshire#stream/0> (last visited 5:50 a.m. May 13, 2020); Real Clear Politics, <https://www.realclearpolitics.com/> (last visited 5:50 a.m. May 13, 2020).

⁴ Real Clear Politics, <https://www.realclearpolitics.com/> (last visited 5:50 a.m. May 13, 2020).

interest that would likely be prejudiced if the court were not to impose this partial closure. See [United States v. Smith](#), 426 F.3d 567, 572-73 (2d Cir. 2005) (finding that U.S. Marshal's policy after September 11th of requiring unknown visitors to court to produce photo identification constituted partial closure of courtroom that was justified by substantial interest of promoting security and preventing terrorism).

B. Second, I find that this partial closure of court proceedings is narrowly-tailored to protect public health and safety and is less restrictive than the court's current in-court hearing protocols.

Allowing the public to observe these proceedings through videoconference allows an unlimited number of members of the public to observe the proceedings while, at the same time, protecting the health of all involved by limiting the potential exposure of the public, parties, and court staff to COVID-19.

Importantly, I find that, in light of the court's current restrictions on the number of people permitted in the courtroom, providing public video access is less restrictive than holding an in-person hearing which only a limited number of people can attend. Further, via video, even individuals who would have otherwise been prohibited from entering the courthouse—for example, people who have tested positive for COVID-19—now have access (even though virtual) to the proceedings. See Standing Order 20-9 (Mar. 20, 2020) (prohibiting certain individuals from entering the courthouse, including people diagnosed with or exposed to someone diagnosed with COVID-19). Providing the public access to this proceeding via video

is the least restrictive means of protecting the substantial interest of public health and safety. See [United States v. Alimehmeti](#), 284 F. Supp. 3d 477, 490 (S.D.N.Y. 2018) (granting partial closure of courtroom to protect identity of undercover agents: courtroom was closed to public during undercover agents' testimony but audio of testimony was live-streamed into different courtroom during partial closure and transcripts of testimony were made available to public promptly).

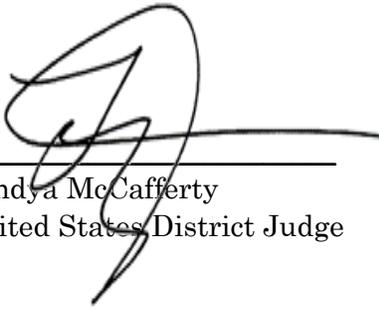
C. Third, I have considered reasonable alternatives to this partial closure.

On March 26, 2020, I conducted an in-person change of plea hearing in accordance with the court's protocols. See Standing Order 20-6 (Mar. 20, 2020). Nearly everyone in the courtroom was wearing masks and/or gloves, they were separated by 6 feet, and total numbers did not exceed 10. There was an over-flow courtroom with one person watching the hearing—that person was a member of the prosecution team. There were numerous court security officers and members of the USMS, as well as court staff in attendance. Even with the court's in-court protocols and precautions, it was clear to me that the measures could not ensure the safety of security officers, litigants, and court personnel from potential exposure to the virus. On balance, the risk of harm to everyone involved in an in-court hearing is too great—especially when a hearing via video is so readily available.

Conclusion

In sum, the court finds that in this case a partial closure of court proceedings is necessary in that today’s hearing will be conducted by video conference. This partial closure is justified by the substantial interest of protecting public health and safety from the spread of COVID-19 and is narrowly tailored to protect that interest. The public maintains the opportunity to observe these proceedings in full by video.

SO ORDERED.



Landya McCafferty
United States District Judge

Date: May 13, 2020

cc: Counsel of Record.