IN THE CIRCUIT COURT FOR KNOX COUNTY, TENNESSEE

STATE OF TENNESSEE,	)	
***ex rel.* HERBERT H. SLATERY III,**	)	
ATTORNEY GENERAL and REPORTER	)	
	)	
Plaintiff	)	
	)	
	)	
vs.	)	**No. 1-173-18**
	)	
	)	
PURDUE PHARMA, L.P.	)	
	)	
Defendant	)	

MEMORANDUM OF LAW, CITATIONS OF AUTHORITY AND ARGUMENT IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE FILED ON BEHALF OF DEBORAH W. FISHER, INDIVIDUALLY, AND AS EXECUTIVE DIRECTOR OF THE TENNESSEE COALITION FOR OPEN GOVERNMENT, AND JACK McELROY, INDIVIDUALLY, AND AS EXECUTIVE EDITOR OF THE KNOXVILLE NEWS SENTINEL, A PART OF USA TODAY NETWORK - TENNESSEE, TO OPEN AND UNSEAL ALL PROCEEDINGS, RECORDS, EXHIBITS AND OTHER MATERIALS OF ANY KIND IN THIS CAUSE

In support of the Motion for Leave to Intervene and to Open and Unseal all Proceedings, Records, Exhibits and Other Materials of any Kind in this Cause, the Intervenors, Deborah W. Fisher, a citizen and resident of the State of Tennessee, individually, and as Executive Director of the Tennessee Coalition for Open Government, and Jack McElroy, a citizen and resident of the State of Tennessee, individually, and as Executive Editor of the Knoxville News Sentinel, a part of USA Today Network - Tennessee, submit the attached Memorandum of Law, Citations of Authority and Argument:

STANDING TO INTERVENE

Your Intervenors have standing to intervene and seek the relief outlined in this Intervening Petition and this document and the denial of such intervention would be contrary to the law. *Knoxville News Sentinel v. Huskey*, 982 S.W.2d 359 (Ct. Crim. App. 1998) (permission to appeal denied 1998); *Ballard v. Herzke*, 924 S.W.2d 652; *State v. James*, 902 S.W.2d 911; *State v. Drake*, 701 S.W.2d 604.

RECOGNITION OF COMMON LAW RIGHT TO JUDICIAL RECORDS

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, . . . Every free man has an undoubted right to lay what sentiments he wishes before the public; to forbid this, is to destroy the freedom of the press; . . . *IV Blackstone's Commentaries*, 151, 152.

There has always been a presumed right of the public and the press to have access to criminal trials in this country, and such right in fact predates the United States Constitution. See *United States v. Mitchell*, 551 F.2d 1252, 1266 (D.C. Cir. 1976) (*rev'd on other grounds sub nom.*) Indeed, the public right of access to criminal trials is so clearly entrenched in our judicial system that, in 1948, the U. S. Supreme Court said the right was so secure that the court was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." *In re Oliver*, 333 U.S. 257, 268, 68 S. Ct. 499, 504 92 L. Ed. 682 (1948) (footnote omitted). In fact, the U.S. Supreme Court has recognized an absolute right of the press to report on matters transpiring in an

open court setting. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).

Although for literally hundreds of years U.S. courts have recognized a common law right to inspect judicial records, that right was not clearly defined until the U.S. Supreme Court case of *Nixon v. Warner Communications Inc., et al*, 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978). *Nixon* involved the tape recordings of conversations made in former President Richard Nixon's White House office and in the Executive Office Building. 435 U.S at 593, 98 S. Ct. at 1309.

Nixon is significant for its recognition of the common law right of access to the tapes. It established unequivocally that there is a presumptive common law right of access to copy and inspect judicial records. 435 US at 597, 98 S. Ct. at 1312.[1] *Nixon* established a common law starting point for access - there is a general right to inspect and copy judicial records and documents unless access could become a vehicle for improper purposes. 435 US at 598, 98 S. Ct. at 1312.

Shortly after *Nixon* was decided, three circuit courts of appeal applied the common law right of access involving the inspection and copying of evidentiary videotapes in the so called "Abscam" trials.[2] In the first case, the

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[1] There had been earlier U. S. decisions recognizing a common law right of access to criminal trials. See *In re Oliver, supra.* See also *State v. Hensley*, 75 Ohio St. 255, 257, 79 N.E. 462, 463-64 (1906) ("[T]he people have the right to know what is being done in their courts"); *E. W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 162, 125 N.E.2d 896, 900 (1955) ("It can never be claimed that in a democratic society the public has no interest in or does not have the right to observe the administration of justice.")

[2] "Abscam" was the name given an undercover FBI operation where federal agents and a paid informant exposed certain public officials accepting bribes. Agents recorded the officials taking bribes on audio and video tapes, which

Second Circuit recognized a strong presumption in favor of public access to judicial records by affirming the district court's decision allowing access to the tapes. *United States v. Myers (In re National Broadcasting Co.)*, 635 F.2d 945 (2d Cir. 1980). The court stated that the strong presumption of openness to our courts outweighed any fear of violating the rights to a fair trial of other Abscam defendants who were not yet on trial. *Id.* at 952-54. The Third Circuit also ruled that broadcasters should be allowed to copy the tapes, and said the proper standard of review was to rebalance the appropriate interests of the parties as opposed to an abuse of discretion standard. *United States v. Criden (In re National Broadcasting Co.)*, 648 F.2d 814, 817-19 (3d Cir. 1981). Finally, in *United States v. Jenrette (In re National Broadcasting Co.)*, the Court of Appeals for the District of Columbia applied a balancing test weighing the right of public access against the defendants' rights to a fair trial in a potential re-trial. 653 F.2d 609, 614-17 (D.C. Cir. 1981). The court ruled in favor of the broadcasters and reversed the district court's decision to refuse public access to the tapes. *Id.* at 620-21.

The important aspect of the Abscam decisions is that all three courts applied a balancing test, and granted the press access even though the defendants' argued three different ways in which their rights could be prejudiced. Although not reaching the issue, the Supreme Court in *Nixon* said that it "normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the

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were later played into evidence during criminal trials. Members of the media requested the right to copy the tapes for public broadcast. *See United States v. Myers (In re Nat'l Broadcasting Co.)*, 635 F.2d 945 (2d Cir. 1980).

courts." 435 U.S. at 602. The task of weighing of the interests was done in the Abscam cases, and, as shown by the results, the weight of the importance of public access was more than the possible threat of an unfair trial advanced by the defendants.

Although not a criminal case, soon after the Abscam decisions, the Sixth Circuit discussed the limited nature of exceptions to the common law right of access in *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983). *Brown & Williamson* involved the appeal of a cigarette makers suit against the FTC in a preenforcement challenge to proposed changes affecting cigarettes. *Id.* at 1168.

In discussing the common law right of access, the court noted only two areas where there is not an absolute right of access. First, in similarity with time, place and manner restrictions on speech, the courts may limit access to keep order and dignity in the courtroom. *Id.* at 1179. Second, the common law recognizes exceptions to the right of access to protect competing interests, such as the right to a fair trial.[3] *Id.*

Obviously, content-based limitations are the most serious impingements upon the right of access, and the court noted hardest to overcome, as there is a "strong common law presumption in favor of public access to court proceedings and records." *Id.* Applying the balancing test of

[3] The argument that press access would harm a defendant's right to a fair trial is one almost universally made by those seeking to limit the Press' access. This argument, however, is somewhat misleading. Certainly, the right to a fair trial and freedom of the press are important constitutional concerns. As Justice Black observed, "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." *Bridges v. California*, 314 U.S. 252, 260 (1941). But it is the prosecution's burden to provide a fair trial, not the accused. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

weighing the public's common law right of access against a competing interest advanced by a party, the court rejected Brown & Williamson's argument that release of the information would harm the company's reputation. *Id.* Such a harm was not sufficient to overcome the presumption of complete public access to court proceedings. *Id.*

As shown by *Brown & Williamson*, the common law right of access is not one specifically bestowed upon the press. The common law right of access belongs to the public, and the common law right of access of the press stems from being members of the public. Indeed, the common law right of access is afforded to every member of the public, including the accused in a criminal case. "The right to a fair trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enterprise Co. v. Superior Court of Cal.* (Press Enterprise II), 478 U.S. 1, 7, 106 S. Ct. 2735, 2739, 92 L. Ed. 2d 1 (1986). In *In re Special Grand Jury* (for Anchorage Alaska), the subjects of a special grand jury investigation petitioned for access to certain court records regularly maintained for the grand jury. 674 F.2d 778, 779 (9th Cir. 1982). The District Court denied the motion on the theory that, because they had not been indicted, the movants lacked standing to raise issues concerning the grand jury. *Id.* The Ninth Circuit reversed, citing the common law right of access to public records. *Id.* at 780. The court stressed the openness of access to records by any member of the public:

> The importance of public access to judicial records and documents cannot be belittled. We therefore hold that, as members of the public, the appellants have a right, subject to the rule of grand jury secrecy, of access to

> the ministerial records in the files of the district court having jurisdiction of the grand jury. Absent specific and substantial reasons for a refusal, such access should not be denied.

Id. at 781.

Although -- as recognized by *Nixon* -- the common law right of access had been assumed yet not frequently discussed by the courts, various federal and state courts have applied the right in later decisions. In *Newman v. Graddick*, the Eleventh Circuit found that there was no reason to prevent a newspaper from publishing lists of prisoners thought to be the least deserving of further incarceration given the historic common law right to access of judicial records. 696 F.2d 796 (11`" Cir. 1983). Likewise, the Connecticut Supreme Court refused to deny a newspaper access to a transcript of a criminal trial still pending appeal. *State v. Ross*, 208 Conn. 156, 543 A.2d 284, 15 Media L. R 1993 (1988) ("Once a transcript becomes part of a court file, it becomes a court record to which the public and hence the press undoubtedly have a right of access."). Similar results have been reached by many other state and federal courts. *See generally Gannett River States Pub. Co. v. Hand*, 571 So. 2d 941, 18 Media L. R. 1516 (Miss. 1990); *In re Application by John Hancock Mut. Life Ins. Co.*, 81 Misc. 2d 269, 366 N.Y.S.2d 93 (1975).

The Sixth Circuit Court of Appeals, in considering a petition for writ of mandamus involving actions of the United States District Court in Knoxville, in the sua sponte closing of an entire case file, opined regarding the obligation of a court to protect the public's right of access to judicial records. *In re The Knoxville*

News-Sentinel Company, Inc., 723 F.2d 470 (6th Cir. 1983), 10 Media L. Rep. 1081. In that case, Circuit Judge Martin observed:

> . . . The [d]istrict [c]ourt's discretion is circumscribed by a long-established legal tradition. This long-established legal tradition is the presumptive right of the public to inspect and copy judicial documents and files. The recognition of this right of access goes back to the Nineteenth Century, when, in Ex Parte Drawbraugh, 2 App.D.C. 404 (1894), the D.C. Circuit stated: "Any attempt to maintain secrecy, as to the records of this court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access. Id. at 474 (citations omitted)
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> . . . First, we note the failure of the district court to afford the press a reasonable opportunity to state their objections to its protective order. . . . Representatives of the press and the general public must be given an opportunity to be heard on the question of their exclusion. Id. at 474 (citations omitted)
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> The Third and Ninth Circuits have extended this right to be heard to cases where requests for closure are made to the trial judge in writing or during in-chambers conference when members of the public are not present. Both of these courts have required that reasonable steps be taken to afford the public and press an opportunity to submit their views on the question of their exclusion before a closure motion is acted upon.
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> . . . The importance of the rights involved and interests served by those rights require that the public and press be given an opportunity to respond before being denied their presumptive right of access to judicial records. Id. at 475 (citations omitted)
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> In order to protect this right to be heard, the most reasonable approach would be to require that motions to seal be docketed with the clerk of the district court. The records maintained by the clerk are public records. If a party moves to seal a document, or the entire court record, such a motion should be made sufficiently in advance of any hearing on or disposition of the [motion to seal] to afford interested members of the public an opportunity to intervene and present their views to the court.
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> . . . Only the most compelling reasons can justify non-disclosure of judicial records. Id. at 475, 476 (citations omitted)

In amplification of the foregoing principles, the Tennessee Supreme Court, speaking through Chief Justice Anderson, in 1996 examined the rights of parties to question court orders sealing documents and the responsibilities of courts in addressing closure issues and challenges thereto. *Ballard v. Herzke*, 924 S.W.2d 652 (Tenn. 1996).

Protective orders were established to strike a balance between public and private concerns. In order to establish a good cause for entry of a protective order under Rule 26(c), the moving party must show that disclosure will result in a clearly defined injury to the party seeking closure. Broad allegations of harm unsubstantiated by specific examples or articulated reasoning do not amount to a showing of good cause nor do mere conclusory allegations. The burden of justifying confidentiality of each and every document sought to be covered by a protective order is on the party seeking the order. *To facilitate an effective*

appellate review, trial courts should articulate on the record findings supporting its decision. Ballard, supra, at 658, 659. (emphasis supplied)

> Factors in the balance weighing *against* a finding of good cause include: (1) the party benefitting from the protective order is a public entity or official; (2) the information sought to be sealed relates to a matter of public concern; and (3) the information sought to be sealed is relevant to other litigation and sharing it would promote fairness and efficiency. Id. at 658.

As shown by the preceding cases, the common law has always recognized the right of public access to judicial proceedings and records, and has always viewed the openness of criminal trials as being an essential element of our judicial system. Courts must apply a balancing test when a party seeks to limit access: the strong tradition of public openness versus the reason advanced by the party attempting to limit access. And as also shown by the preceding cases, the weight afforded the public's right to access can only be overcome by a stronger competing interest in closure.

The reputation of a business is not an adequate reason to impose the drastic measures of sealing records or prohibiting public access to records generated in litigation.[4] A prior restraint on speech that is premised merely on protecting business interests fails First Amendment scrutiny.[5]

FIRST AMENDMENT RIGHT TO ACCESS

In addition to the common law right of access as discussed in *Nixon* and its progeny, the courts have also recognized the inherent right specifically afforded the media by the First Amendment. In fact, arguably the

[4] *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983).
[5] *Coulter v. Gerald Family Care*, 964 A.2d 170, 186 (D.C. 2009).

courts have recognized an additional constitutional right of access afforded the press which derives from and expands upon the public's common law right of access.

The leading case recognizing the First Amendment right of the press to access to criminal trials is *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814 (1980). *Richmond Newspapers* concerned the action of a Virginia court of closing a murder trial on the motion of the defendant, despite the lack of a reason cited therefor.

The Supreme Court began its analysis with a lengthy recitation of the history of open trials in the United States and England, dating back to the days before the Norman Conquest. 448 U.S. 564-65, 100 S. Ct. at 2821. The court concluded that "the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." 448 U.S. at 569, 100 S. Ct. at 2823. The court further commented on the need of open trials and the effect they have on society in general:

> Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural, yearning to see justice done - or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner (or) in any covert manner." . . . It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best

> has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," . . . and the appearance of justice can best be provided by allowing people to observe it.

448 U.S. at 571-72, 100 S. Ct. at 2824 (citations omitted). The court went on to observe that, as time progressed, the media assumed the role of reporting information concerning trials when the majority of society was no longer able to acquire that information through firsthand observation or word of mouth. 448 U.S. at 572-73, 100 S. Ct. at 2825.

Even though there is a long tradition of openness of criminal trials, the State of Virginia had argued that there was no provision guaranteeing the public's right to attend criminal trials in either the Constitution or the Bill of Rights. 448 U.S. at 575, 100 S. Ct. at 2826. The Supreme Court disagreed.

The First Amendment "prohibits governments from `abridging the freedom of speech, or of the press.'" *Id.* Recognizing that criminal trials have always been open to the public, the court held that the First Amendment prohibits the government from denying that right. *Id.* While the First Amendment does not, by itself, grant a new right of access, it guarantees the existing right that had always been in place:

> 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.
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> The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.

448 U.S. at 576-77, 100 S. Ct. at 2827.

Given that the First Amendment right of access is prefaced on the common law right, the limitations on the common law right also apply under the First Amendment. *See Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 102 S. Ct. 2613, 2622, 73 L. Ed. 2d 248 (1982) (citing Richmond Newspapers).[6] However, the circumstances under which the press can be denied access are extremely limited:

> [T]he State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest.[7]

Id. 2620 (citations omitted). The court, in *Globe Newspaper*, found a provision of a Massachusetts statute providing exclusion of the public from trials of specified sexual offenses involving minors to be a violation of the First Amendment as being overly broad and running "contrary to the very foundation of the right of access recognized in *Richmond Newspapers*: namely, `that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."' *Id.* at 2622 (citations omitted).

The openness of criminal trials extends beyond the mere accessibility of the courtroom to the public, but, importantly, to access to court

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[6] For example, the U. S. Supreme Court has held that disclosure of transcripts of a grand jury should only occur in those cases where the need for disclosure outweighs the public interest in keeping such proceedings secret. *Douglas Oil Co. of Cal., et al v. Petrol Stops Northwest, et al*, 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed. 156 (1979).

[7] The similarity to the test recognized by *Nixon* of weighing competing interests, with the recognition of the importance of free, unrestricted public access should be noted.

documents filed in connection therewith. *See Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). In *Press-Enterprise*, the petitioner, a newspaper, sought access to the transcript of a preliminary hearing in a criminal case. The defendant, a nurse charged with 12 counts of murder, argued that the release of the transcript would result in prejudicial pretrial publicity which would inhibit his right to a fair trial. 478 U.S. at 4-5, 106 S. Ct. at 2738. The court stated that when the right to a fair trial is asserted by the accused as the basis for denying access, there must be a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure "cannot adequately protect the defendant's fair trial rights." 478 U.S. at 15, 106 S. Ct. at 2743 (emphasis added). As shown by the Supreme Court in *Press Enterprise* (and also by the Courts of Appeal in the Abscam decisions), the importance of the right to a fair trial can only outweigh the importance of the public's interest in access to criminal judicial proceedings when the defendant can prove that his rights will be adversely affected. A mere allegation of the potential for such act is insufficient.[8]

There have been a myriad of federal and state cases both interpreting and expanding upon the First Amendment right of access. The Sixth Circuit, for example, has found that the First Amendment right of access applies to issues not germane to the underlying criminal trial, such as disqualification proceedings involving a judge. *United States v. Presser*, 828

[8] See n. 4, *supra*.

F.2d 340 (6th Cir. 1987). The Ninth Circuit has held that the First Amendment right of access applies to pretrial release documents. *Seattle Times Co. v. United States Dist. Court for Western Dist. of Washington*, 845 F.2d 1513 (9th Cir. 1988). Likewise, the right of access has been held to apply to findings of a district court in regard to a defendant's motion for a reduction of sentence. *CBS, Inc. v. United States District Court for the Cent. Dist. of California*, 765 F.2d 823 (9thCir. 1985). Federal courts have also vacated orders excluding the public and media from the voir dire of prospective jurors. *United States v. Peters*, 754 F.2d 753 (7th Cir. 1985).[9]

The First Amendment right of access is not a remedy exclusive to the federal courts. The Alabama Supreme Court applied the same reasoning as the federal courts in ruling that the First Amendment provides a right of access to pretrial proceedings in criminal actions in *Ex parte Consolidated Pub. Co., Inc.*, 601 So. 2d 423 (Ala. 1992).[10]

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[9] The prohibition of prior restraints upon the press is illustrative of both the importance of a free press, and the overall theme of this Brief – courts are increasingly expanding the level of public access to judicial records. For example, the Sixth Circuit upheld the sanctity of the First Amendment principle that the press cannot be subjected to a prior restraint by a trial court "absent the most compelling circumstances." *Proctor & Gamble Co. v. Bankers Trust Co., et al*, 78 F.3d 219, 221 (6th Cir. 1996). In that case, Proctor & Gamble filed a complaint against Bankers Trust claiming a loss of more than $100 million due to alleged fraud. *Id.* at 222. Amid widespread interest in the case by the press, the parties could designate certain discovery documents as "confidential" and file them under seal. *Id.* *Business Week* Magazine obtained some of the documents that were filed under seal. *Id.* Without notice to *Business Week*, the district court entered an Order prohibiting the magazine from publishing the documents without the consent of the court. *Id.* The Sixth Circuit overturned the District Court's orders. *Id.* at 225. The Court began its analysis by pointing out the heavy burden the Appellees had to overcome. "[W]e ask whether *Business Week's* planned publication of these particular documents posed such a grave threat to a critical government interest or to a constitutional right as to justify the District Court's three injunctive orders." *Id.* The Court also commented on the protective order entered by the Court, saying that the discretion to issue a protective order under Fed. R. Civ. P. 26(c) must be limited and "is circumscribed by a long-established legal tradition which values public access to court proceedings." *Id.* at 227 (citing *Brown & Williamson* at 1177). "Rule 26(c) allows the sealing of court papers only 'for good cause shown' to the court that the particular documents justify court-imposed screcy." *Id.* at 227.

[10] The issue of the openness of pretrial proceedings in criminal cases has been extensively litigated, and almost universally held open. *See Sacramento Bee v. United States District Court*, 656 F.2d 477 (9th Cir. 1981), cert. den. 456 U.S. 983, 102 S.Ct. 2257, 72 L.Ed.2d 861 (1982); *Phoenix Newspapers, Inc. v. Jennings*, 107 Ariz. 557, 490

The cases cited concerning the First Amendment show two things: 1) just as under the common law right, access to court proceedings by the press is a strong public interest that cannot be overcome without the showing of the probability of substantial harm to the party seeking closure; and 2) courts have expanded the type of access afforded to the press to all phases of and documents connected with criminal and civil proceedings.

Tennessee courts have placed the same high burden and applied the same type of balancing tests as other state and federal courts. In *State v. James*, 902 S.W.2d 911, 913 (Tenn. 1995), the Court said:

> The nature and purpose of juvenile proceedings are different from those involved in criminal proceedings. Despite such differences, we believe that an approach that balances the public's interests in open judicial proceedings and the litigants' right to a fair trial should be applied in deciding whether to close juvenile proceedings.

It is significant to note that the court placed the same high burden on the party seeking closure in *James* despite the fact that it was a juvenile proceeding, which is typically considered a more sensitive type case and, therefore, more prone to closure. The Tennessee Supreme Court later discussed the burden in *Ballard v. Herzke*, 924 S.W.2d 651 (Tenn. 1996). In

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P.2d 563 (Ariz. 1971); *Shiras v. Britt*, 267 Ark. 97, 589 S.W.2d 18 (Ark. 1980); *Star Journal Pub. Corp. v. County Court*, 197 Colo. 234, 591 P.2d 1028 (Colo. 1978); *State v. Burak*, 37 Conn. Sup. 627, 431 A.2d 1246 (Conn. Sup. 1981); *United States v. Edwards*, 430 A.2d 1321 (D.C. App. 1981); *Miami Herald Pub. Co. v. Lewis*, 383 So.2d 236 (Fla. App. 1980); *R. W. Page Corp. v. Lumpkin*, 249 Ga. 576, 292 S.E.2d 815 (Ga. 1982); *Gannett Pacific Corp. v. Richardson*, 59 Hawaii 224, 580 P.2d 49 (1978); *State v. Porter Superior Court*, 274 Ind. 408, 412 N.E.2d 748 (Ind. 1981); *Ashland Publications Co. v. Asbury*, 612 S.W.2d 749 (Ky. App. 1980); *Patuxent Pub. Corp. v. State*, 48 Md. App. 689, 429 A.2d 554 (Md. Sp. App. 1981); *Keene Pub. Corp. v. Cheshire County Superior Court*, 119 N.H. 710, 406 A.2d 137 (N.H. 1979); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St.2d 457, 351 N.E.2d 127 (Ohio 1976); *Commonwealth v. Hayes*, 489 Pa. 419, 414 A.2d 318 (Pa. 1980); *Rapid City Journal v. Circuit Court*, 283 N.W.2d 563 (S.D. 1979); *Herald Ass'n, Inc. v. Ellison*, 138 Vt. 529, 419 A.2d 323 (Vt. 1980); *Federated Publications v. Kurtz*, 94 Wash.2d 51, 615 P.2d 440 (Wash. 1980); *State ex rel. Herald Mail Co. v. Hamilton*, 165 W.Va. 103, 267 S.E.2d 544 (W. Va. 1980); *Williams v. Stafford*, 589 P.2d 322 (Wyo. 1979).

Ballard, the court, in dealing with a motion to rescind a protective order, stated that the party seeking closure must establish "good cause." *Id.* at 658. The court squarely put the burden on the party seeking closure. "Mere conclusory allegations are insufficient. The burden of justifying the confidentiality of each and every document sought to be covered by the protective order is on the party seeking the order." *Id.* (citing *Cippolone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986)). The court then went on to stress the importance of the trial court's balancing "one party's need for information against the injury that would allegedly result if disclosure is compelled." *Id.*

> The First Amendment rights of the press are always of great public interest and are of vital importance to the administration of justice in this state. As a result, the appellate courts of this state have zealously guarded the First Amendment rights of the print and electronic media. *State v. Montgomery*, 929 S.W.2d 409, 414 (Tenn. Crim. App. 1996).
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> The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights . . .
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> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.[11]
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> The First Amendment rights of the press are always . . . of vital importance to the administration of justice . . .[12]

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[11] *In Re The Charlotte Observer (a Division of the Knight Publishing Co. and Harold Publishing Co.)*, petitioner, 921 F.2d 47, 49, 18 M.L.R. 1365 (CCA 4th, 1990).

[12] *State v. Montgomery*, 929 S.W.2d 409, 414, 24 M.L.R. 2172 (Tenn. Crim. App. 1996).

In *Columbia Broadcasting Systems, Inc. v. U. S. Dist. for the Cent. Dist. of California,* the Ninth Circuit Court of Appeals noted at page 1177:

> The First Amendment informs us that the damage resulting from a prior restraint – even a prior restraint of the shortest duration – is extraordinarily grave . . . the burden on the [party seeking the restraint] is not reduced by the temporary nature of the restraint . . . The loss of the First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.

The court further noted that the proper review of an order challenging or restricting right of expression under the First Amendment was de novo, observing:

> A question is reviewed de novo when 'the inquiry involved . . . goes well beyond the facts of the case and requires consideration of the abstract legal principles that inform constitutional jurisprudence.'[13]

As Mr. Justice Black observed in *New York Times Co. v. United States,*[14] any system of prior restraints comes to the court bearing a heavy presumption against constitutional validity.[15] This case involved the now famous Pentagon Papers issue which further involved the publication by the newspaper of allegedly classified information obtained by the newspaper involving interests of national security and foreign policy. Newspapers had been enjoined by the trial court at the request of the United States. The Supreme Court struck down the restraining orders and vacated them and, speaking through Mr. Justice Black, observed:

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[13] *Columbia Broadcasting Systems, Inc. v. U.S. Dist. Court for the Cent. Dist. of California,* 729 F.2d 1174, 1179, 10 M.L.R. 1529 (CA 9th (Cal.) 1984).
[14] 403 U.S. 714, 91 S.Ct. 2140 (1971).
[15] *Id.*, 91 S.Ct. 2140, 2141.

> Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.
>
> The press was to serve the governed, not the governors. The government's power to censor the press was abolished so that the press would remain forever free to censure the government. The press was protected so that it could bare the secrets of government and inform the people.
>
> No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this nation for all time.[16]

Mr. Justice Brennan, supporting the decision of the court, after careful consideration of the issues noted:

> The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise . . . But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.[17]

The United States Supreme Court has noted that, historically, both civil and criminal trials have been presumptively open. In order for any proceeding to be closed, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced. *King v. Jowers*, 12 S.W.3d 410 (Tenn. 1999).

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[16] *Id.*, 91 S.Ct. at 2142, 2143, 2144.
[17] *Id.*, 91 S.Ct. at 2147-2148.

TENNESSEE PRECEDENT

Four Tennessee constitutional provisions bear on the issue of the right of access to judicial records and proceedings.

No person in Tennessee shall be deprived of any liberties or privileges except pursuant to the law of the land.[18]

All courts in Tennessee shall be open and every person shall have remedy by due course of law and right and justice administered without denial or delay.[19]

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, right, and print on any subject, being responsible for the abuse of that liberty . . .[20]

The three above referenced sections of the Tennessee Constitution are all a part of Article I. Article I of the Tennessee Constitution is known as the Declaration of Rights. As a Declaration of Rights and as being the first Article in our present Constitution, its position indicates the importance of its protections to the citizens in the minds of the drafters of the Constitution at the time of its ratification. The Declaration of Rights, being the first Article of our present Constitution, was also the first Article of the Constitution of 1834.

> The Declaration of Rights hereto prefixed is declared to be a part of the Constitution of this State, and shall never be violated on any pretense whatever. And to

[18] Tenn. CONST., Art. I, §8.
[19] Tenn. CONST., Art. I, §17.
[20] Tenn. CONST., Art. I, §19.

> guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate.[21]

The above quoted provision is contained in all of the Constitutions of this state. It assures that the protections and guarantees contained in the Declaration of Rights is and will remain the fundamental law of this state.[22]

In 1985, the Tennessee Supreme Court recognized a presumption of openness in criminal proceedings.[23]

If a document or other material meets the criteria set forth in T.C.A. §10-7-503 and is not within the categories of confidential records listed in T.C.A. §10-7-504, then the document is presumed to be open to the public. *Memphis Publ'g. Co. vs. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994). Evidence in general is deemed to be a "public record". *State v. Cawood*, 2004 Tenn. LEXIS 252 (Tenn. 2004).

The Tennessee Constitution provides explicitly that courts are presumptively open. That openness extends to judicial records as well. There is a general right to inspect and copy public records and documents, including judicial records and documents. The Constitution of the United States and Tennessee presume that there is a right of access to proceedings and documents which have been historically open to the public and the disclosure of which would serve a significant role in observing the functioning of the

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[21] Tenn. CONST., Art. XI, §16.
[22] *State v. Staten*, 46 Tenn. 235 (1869); *State v. Denton*, 46 Tenn. 539 (1869); *Harrison, Pepper & Co. v. Willis*, 54 Tenn. 36 (1871).
[23] *State v. Drake*, 701 S.W.2d 604 (1985).

process. *In re NHC -- Nashville Fire Litig.,* 293 S.W.3d 547, 37 Media L. Rep. 1363 (Tenn. App. 2007).

When a document is "filed under seal", the general meaning is that the document in question is filed with the clerk as part of the court's record, but the clerk and parties are prohibited from showing the document to anyone not a party to the lawsuit. Any closure of the records must be accompanied by an order which itself should be narrowly tailored to accommodate competing interests without unduly impeding the free flow of information. *Knoxville News-Sentinel v. Huskey,* 982 S.W.2d 359, 363 (Tenn. App. 1998).

When as in this case a court is considering lifting or modifying a protective order, the party seeking to maintain confidentiality must designate the documents alleged to be confidential and then establish that good cause exists with respect to those documents. To establish good cause, the moving party must show that disclosure will result in a clearly defined injury to the party seeking the closure and that broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not amount to a showing of good cause. Mere conclusory allegations are insufficient. The burden of justifying the confidentiality of **each and every document** sought to be covered by a protective order is on the party seeking the order. *In re NHC -- Nashville Fire Litig.,* 293 S.W.3d 547, 562; *Ballard v. Herzke,* 924 S.W.2d 652 (Tenn. 1996). (emphasis supplied)

The reasons for sealing judicial records must be compelling with the burden of demonstrating the compelling reason placed upon the party

seeking to prevent public access. *Baugh v. UPS*, 2012 Tenn. App. LEXIS 900. The presumptive right of access by citizens to judicial records attaches to those materials which properly come before the court in the course of an adjudicatory proceeding and which are relevant to that adjudication. The right of access extends to materials on which a court relies in determining the litigant's substantive rights. *State v. Cobbins*, 2015 Tenn. Crim. App. LEXIS 78.

The printing presses shall be free to every person to examine the proceedings of any branch of government and no law shall ever be made to restrain that right. This is part of the Declaration of Rights contained in our Constitution. Those rights shall never be violated on any pretense whatever.[24]

The Tennessee Constitution is in many ways stronger in its language than the Constitution of the United States.

> Without question, the protections afforded Tennessee citizens by the Tennessee Constitution's Declaration of Rights share the contours of the protections afforded by the United States Constitution's Bill of Rights.
>
> ***
>
> It is equally without question, however, that the provisions of our Tennessee Declaration of Rights . . . differ from the federal Bill of Rights in marked respects.
>
> ***
>
> These protections contained in our Declaration of Rights are more particularly stated than those stated in the federal Bill of Rights.

[24] Tenn. CONST., Art. I, §19; Tenn. CONST., Art. XI, §16.

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Tennessee's guarantees of free speech and free press are similarly more descriptive than the federal grant. The verbal expression of these basic freedoms in our constitution is infused with a strong sense of individuality and personal liberty: 'The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print of any subject, being responsible for the abuse of that liberty.'

While these differences in language and expression have yet to give rise to recognition of a substantial difference in protection of speech, this Court has not foreclosed the possibility that our constitution might offer greater protection to speech in certain contexts. See e.g., *Davis-Kidd Booksellers*, 866 S.W.2d at 525. . . Art. I, §19 'should be construed to have a scope at least as broad as that afforded those freedoms by the first amendment of the United States Constitution'. (emphasis added) That this Court has seen fit to leave this door open speaks of our recognition of a potentially greater state protection.

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Today, we remain opposed to any assertion that previous decisions suggesting that synonymity or identity of portions of our constitution and the federal constitution requires this Court to interpret our constitution as coextensive to the United States Constitution. 'Tennessee constitutional standards are not destined to walk in lock step with the uncertain and fluctuating federal standards and to not relegate Tennessee citizens to the lowest levels of constitutional protection, those guaranteed by the national constitution.' *State v. Black*, 815 S.W.2d 166, 193 (Tenn. 1991) (Reid, C.J., concurring in part and dissenting in part). We have said time and again that:

As to Tennessee's Constitution, we sit as a court of last resort, subject solely to the qualification that we may not impinge upon the minimum level of protection established by Supreme Court interpretations of the federal constitutional

> ***guarantees. But state supreme courts, interpreting state constitutional provisions, may impose higher standards and stronger protections than those set by the federal constitution. It is settled law that the Supreme Court of a state has full and final power to determine the constitutionality of a state statute, procedure, or course of conduct with regard to the state constitution, and this is true even where the state and federal constitutions contain similar or identical provisions.*** (emphasis supplied)

Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1 (Tenn. 2000).

The publication by a newspaper in the dissemination of information about a prior criminal proceeding to which a candidate was a party, but which had been previously ordered expunged, formed a basis for an allegation of violation of privacy and federal civil rights as well as the tort of outrageous conduct.[25]

The Tennessee Court of Appeals, Western Section, in Fann, observed:

> Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts . . .
>
> We hold that *The Review Appeal*'s receipt of the information, including the expunged material, was not unlawful. As will be addressed more thoroughly in a separate part of this opinion, Tennessee also has not taken steps to proscribe the 'receipt' of this type of information. Tennessee's expungement statute speaks only in terms of its 'release.' We further hold that the newspaper articles clearly concerned 'a matter of public significance' as the truthful information concerned a candidate for public office. Nor do we find

[25] Fann v. City of Fairview, 905 S.W.2d 167, 172 (Tenn. App. 1994).

> a need to further a state interest of the highest order by sanctioning *The Review Appeal* for its receipt and subsequent publication of this information. As held in *Florida Star*, any punishment imposed on a newspaper for publishing truthful information lawfully obtained must be narrowly tailored to a state interest of the highest order . . . where the government fails to police itself in disseminating information, the imposition of damages against the press for the subsequent publication is not a narrowly tailored means of safeguarding anonymity.[26]

In order to comply with established law in Tennessee and in order to justify the closure of a trial or access to the content of any file in the litigation, any party seeking closure must demonstrate the following:

1. an overriding interest likely to be prejudiced;

2. the closure must be no broader than necessary to protect that interest;

3. the trial court must consider reasonable alternatives to closure; and

4. the trial court must make findings adequate to support that closure.[27]

CONCLUSION

As the authorities cited and discussed herein amply demonstrate, there exists no basis in law or fact to justify any Order, either temporarily or permanently, sealing or restricting public access to any record in this case, any exhibits introduced or any material relating thereto. Such an Order would, in

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[26] Id. at 172.
[27] State v. Drake, 701 S.W.2d 604, 608.

the opinion of the Intervenors, exceed all permissible constitutional, statutory and precedental authority.

Respectfully submitted, this 21ST day of May, 2018.

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CERTIFICATE OF SERVICE

Comes now Richard L. Hollow, attorney for Intervenors, and certifies that a true and exact copy of the Memorandum of Law, Citations of Authority and Argument in Support of Motion for Leave to Intervene has been served upon the following counsel by placing it in the United States Mail, postage prepaid:

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This 21ST day of May, 2018.

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