No. SCPW-13-0003250
IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OAHU PUBLICATIONS INC., dba The Honolulu Star-Advertiser, and KHNL/KGMB, LLC, dba Hawaii News Now,

Petitioners,

vs.

THE HONORABLE KAREN S.S. AHN, Circuit Court Judge of the Circuit Court of the First Circuit,

Respondent.

ORIGINAL PROCEEDING
CR. NO. 11-1-1647

CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII

The Honorable Karen S.S. Ahn, Circuit Court of the First Circuit, State of Hawai'i

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS; CERTIFICATE OF SERVICE

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> Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 595 (1980) (Brennan, J., concurring).

On August 26, 2013, the trial judge in *State v. Deedy*, Cr. No. 11-1-1647, closed the proceedings five times without explanation or notice to the public and an opportunity to be heard. (Pet. Ex. A.) In doing so, the lower court disregarded well-established U.S. Supreme Court precedent. Whether or not good cause existed to close the

proceedings—although none appears in the record—the trial court failed to follow basic procedures that assure continued public confidence in the integrity of the state's administration of justice.

This Court has the opportunity to definitively reassert Hawaii's commitment to judicial openness and firmly affix the public's right to attend judicial proceedings in the constellation of fundamental constitutional rights. Every other jurisdiction in the United States has embraced the constitutional dimension of the public's right under either the First Amendment or an "open courts" provision of its state constitution. Yet this Court's holding that rejected a First Amendment claim—although abrogated by U.S. Supreme Court precedent—has never been expressly overruled.[1] Once embraced, three decades of constitutional jurisprudence in other jurisdictions is available for the Court to fashion appropriate procedural safeguards that address the lack of public notice and opportunity to be heard in this case and protect against future cases.

Amici Curiae respectfully request that the Court recognize that the United States Supreme Court has held that the First Amendment imposes standards for courtroom closures that override this Court's holding in *Gannett Pacific* and, with insight from other jurisdictions, consider how the public can be assured adequate notice of proposed courtroom closures and a meaningful opportunity to object.

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[1] "[C]ontrary to petitioners' contention that the conduct of the respondent district court judge in closing the proceedings abridged their First Amendment right to freedom of the press, we find no such denial." *Gannett Pacific Corp. v. Richardson*, 59 Haw. 224, 229, 580 P.2d 49, 54 (1978).

I. U.S. SUPREME COURT DECISIONS AFTER *GANNETT PACIFIC* SET A WELL-ESTABLISHED CONSTITUTIONAL FLOOR TO PROTECT THE PUBLIC'S RIGHT TO ATTEND CRIMINAL TRIALS.

In 1979, the U.S. Supreme Court first acknowledged a First Amendment right of the public to attend a criminal trial that is independent of the Sixth Amendment right of the accused to a public trial.[2] *Gannett v. DePasquale*, 443 U.S. 368, 392-93 (1979). Over the following decade, in a series of cases, the U.S. Supreme Court firmly established the existence and parameters of the public's First Amendment right to observe criminal proceedings. *Press-Enter. Co. v. Superior Ct.*, 478 U.S. 1, 7 (1986) ("*Press-Enter. II*") ("The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness."); *accord Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501 (1984) ("*Press-Enter. I*"); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

As the U.S. Supreme Court explained, the freedoms guaranteed by the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers*, 448 U.S. at 575 (plurality opinion). "By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper*, 457 U.S. at 604. Effective participation in public discourse, however, requires access to information: "Implicit in

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[2] The First Amendment of the U.S. Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Sixth Amendment reads in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

this structural role is not only the principle that debate on public issues should be uninhibited, robust, and wide-open, but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed." *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring) (quotation marks and citation omitted); *see also id.* at 604 (Blackmun, J., concurring) ("[T]he public has an intense need and a deserved right to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, police officers, other public servants, and all the actors in the judicial arena; and about the trial itself."). Accordingly, the First Amendment protections necessarily include "some freedom to listen" because "[t]he 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 . . . be foreclosed arbitrarily." *Id.* at 576-77 (plurality).

The U.S. Supreme Court further recognized that open trials are critical to public confidence in the American judicial system. "[Openness] gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Id.* at 569; *accord Press-Enter. I*, 464 U.S. at 508 ("[T]he sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known."). "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." *Richmond Newspapers*, 448 U.S. at 571 (plurality); *Globe Newspaper*, 457 U.S. at 606

("[P]ublic access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process."). In the end, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572 (plurality).

To preserve these societal values, the U.S. Supreme Court held that "[c]losed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enter. I*, 464 U.S. at 509. "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 510; *accord Globe Newspaper*, 457 U.S. at 606-07. In the limited context when the asserted interest in closure is the accused's Sixth Amendment right to a fair trial, the trial court must find "first, there is 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." *Press-Enter. II*, 478 U.S. at 14.

In addition to the substantive standards, the Court outlined two prerequisites to closure that a court must observe in order to safeguard the public's constitutional right to attend criminal proceedings:

- First, before closing any proceeding, the trial court must explain why it is taking that action. *Id.* at 13 ("[T]he proceedings cannot be closed unless specific, on the record findings are made . . . ."). The record must state

"findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enter. I*, 464 U.S. at 510.

- Second, the trial court must give the public an opportunity to be heard concerning the propriety of closing the proceedings. *Globe Newspaper*, 457 U.S. at 609 n.25 ("[F]or a case-by-case approach to be meaningful, representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion." (quotation marks omitted)).

These constitutional standards have been applied nationally for three decades.

II. HAWAI'I CASELAW HAS YET TO RECOGNIZE A *CONSTITUTIONAL* RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS.

One year before the U.S. Supreme Court acknowledged the public's constitutional right to attend criminal proceedings, this Court established Hawai'i at the forefront of openness in judicial proceedings. In *Gannett Pacific Corp. v. Richardson*, this Court affirmed that the public has a *robust* common law right to attend criminal trials. 59 Haw. 224, 580 P.2d 49 (1978). But the decision also denied a claim under the First Amendment.[3] *Id.* at 229-30, 580 P.2d at 54-55. This Court now should reaffirm Hawaii's enduring veneration of judicial openness by acknowledging the public's constitutional right of access, consistent with other jurisdictions.

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[3] At the time, this Court's decision followed the U.S. Supreme Court's lead in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), decided only a month prior. In *Nixon*, the U.S. Supreme Court recognized a common law right to access judicial *records*, but not a First Amendment right, *id.* at 597-99, 609; this Court addressed judicial records in a companion case to *Gannett Pacific*. *Honolulu Advertiser, Inc. v. Takao*, 59 Haw. 237, 580 P.2d 58 (1978). As described above, the U.S. Supreme Court's subsequent precedent concerning access to judicial proceedings deviated from *Nixon*.

A. This Court Boldly Asserted a Strong Common Law Right of Access Thirty Years Ago in *Gannett Pacific*.

In *Gannett Pacific*, this Court foreshadowed the societal values that the U.S. Supreme Court later would invoke to uphold public access to criminal proceedings. The *Gannett Pacific* court emphasized that "[b]ecause of our natural suspicion and traditional aversion as a people to secret proceedings, suggestions of unfairness, discrimination, undue leniency, favoritism, and incompetence are more easily entertained when access by the public to judicial proceedings are unduly restricted." *Id.* at 230, 580 P.2d at 55. In dispelling such suggestions of unfairness, "openness . . . serves to enhance public trust and confidence in the integrity of the judicial process." *Id.* And although it rejected a First Amendment right, the Court hinted at the importance of public trials to free speech, explaining that "[t]he efficiency, competence, and fairness of our judicial system are matters of legitimate interest and concern to our citizenry, and free access to our courtrooms is essential to their proper understanding of the nature and quality of the judicial process." *Id.*

There are similarities between the First Amendment standard and the common law right recognized by this Court. For example, the *Gannett Pacific* court held that "the factual basis for the court's determination upon which the closure is predicated shall be made apparent on the record." *Id.* at 235, 580 P.2d at 57. Also, for the limited situations when the public's right may conflict with the accused's right to a fair trial, *Gannett Pacific* instructed that the lower court must find "that there is a substantial likelihood that an open hearing as to that part of the proceedings would interfere with the

defendant's right to a fair trial by an impartial jury," including an analysis of "the availability and efficacy of alternative means to neutralize the effect of such disclosures." *Id.* at 233-34, 580 P.2d at 56-57.

B. The Law Regarding Right of Access to Criminal Proceedings Has Evolved Substantially Since *Gannett Pacific*.

Despite some similarities, there are differences between the constitutional right and the common law. Most importantly, absent the limited circumstances of a conflict between the First and Sixth Amendments, the constitutional right requires strict scrutiny of courtroom closures. *Globe Newspaper*, 457 U.S. at 606-07 ("[I]t must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."). In contrast, the common law applies a more deferential balancing test. *In re Estate of Campbell*, 106 Hawai'i 453, 465, 106 P.3d 1096, 1108 (2005) ("[T]he presumption of openness requires the estate to demonstrate that strong countervailing reasons weigh against the public's presumptive right of general access to judicial proceedings and records."); *Honolulu Advertiser, Inc. v. Takao*, 59 Haw. 237, 240, 580 P.2d 58, 62 (1978) ("The matter was addressed to the sound discretion of the respondent district judge, and we do not find his determination to have been capriciously and arbitrarily made." (citations omitted)); *see also, e.g.*, *United States v. Antar*, 38 F.3d 1348, 1357 (3d Cir. 1994) ("In the First Amendment context, . . . our scope of review is substantially broader than that for abuse of discretion."); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1987) ("The common law does not afford as much substantive protection to the interests of the press and public as the First Amendment

does. Under the common law, a trial court's denial of access is reviewed only for abuse of discretion.").[4]

Lower federal courts and state courts also have construed the First Amendment to require docket entry of a motion to seal proceedings sufficiently in advance of the motion's disposition to provide the public notice and an opportunity to object.[5] And, to

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[4] Despite the nominal abuse-of-discretion standard for the common law right of access, some courts have emphasized the importance of public access when applying a less deferential abuse standard. *E.g.*, *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983) ("In light of the important rights involved, the district court's decision is not accorded the traditional scope of narrow review reserved for discretionary decisions based on first-hand observations." (quotation marks omitted)).

[5] *E.g.*, *United States v. Alcantara*, 396 F.3d 189, 199-200 (2d Cir. 2005) ("[I]t seems entirely inadequate to leave the vindication of a First Amendment right to the fortuitous presence in the courtroom of a public spirited citizen willing to complain about closure."); *United States v. Criden*, 675 F.2d 550, 559 (3d Cir. 1982) ("The press should not be expected to 'camp out' in the hallway in order to ascertain whether evidentiary proceedings are being conducted in chambers."); *R.W. Page Corp. v. Lumpkin*, 292 S.E.2d 815, 820 (Ga. 1982) ("A motion for closure shall receive no consideration by a trial court unless it is in writing . . . [and] has been filed with the clerk of the court and posted on the case docket (as notice to the press and the public) for at least one twenty-four hour period in advance of the time when the motion will be heard . . . ."); *Minneapolis Star & Tribune Co. v. Kammeyer*, 341 N.W.2d 550, 558 (Minn. 1983) ("If the public is required to respond on the spot, the hearing would be unlikely to provide any assistance to the court."); *Gannett River States Publ'g Co. v. Hand*, 571 So. 2d 941, 945 (Miss. 1990) ("[A]ny submission in a trial court for closure, either by a party or on the court's own motion, and be it a letter, written motion, or oral motion either in chambers or open court, must be docketed, as notice to the press and public, in the court clerk's office for at least 24 hours before any hearing on such submission . . . ."); *State ex rel. Plain Dealer Publ'g Co. v. Floyd*, 855 N.E.2d 35, 46-47 (Ohio 2006); *State v. Drake*, 701 S.W.2d 605, 608 (Tenn. 1985) ("A motion for a closure order must be made in writing . . . . Such motions . . . cannot be heard until the motion for closure has been on file in the clerk's office for a period of at least three days."); *see also Hearst Newspapers, L.L.C. v. Cardenas-Guillen*, 641 F.3d 168, 183 (5th Cir. 2011) ("The trial court cannot properly weigh the First Amendment right of access against the interests served by closure, nor can it fully consider alternatives to closure, without providing notice and an opportunity to be heard to the press and public.").

the extent a party is permitted to request closure other than by written motion, some courts require *individual* notice prior to closure for those members of the public who have expressed a desire to be present during proceedings.[6] At a minimum, courts require that unwritten motions for closure be made or renewed in open court and that the trial court provide those present in the courtroom an opportunity to object.[7] A few jurisdictions have formalized these requirements in rules of criminal procedure.[8]

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[6] *E.g.*, *United States v. Brooklier*, 685 F.2d 1162, 1168 (9th Cir. 1982); *Washington Post*, 807 F.2d at 390; *Miami Herald Publ'g Co. v. Lewis*, 426 So. 2d 1, 7 (Fla. 1982) ("Implicit in the right of the members of the news media to be present and to be heard is the right to be notified that a motion for closure is under consideration."); *State v. Williams*, 459 A.2d 641, 658 (N.J. 1983) ("Trial courts shall ensure that representative members of the press receive notice of the motion for closure and shall provide appropriate representatives of the press and public the opportunity to participate in the proceedings upon the closure application."); *Soc'y of Prof'l Journalists v. Bullock*, 743 P.2d 1166, 1178 n.15 (Utah 1987) ("To protect against a claim that proper notice was not given, a party seeking closure should serve advance written notice of a closure motion upon the opposing party, the court, and any media representatives who have requested such notice.").

[7] *E.g.*, *Baltimore Sun Co. v. Colbert*, 593 A.2d 224, 229 (Md. 1990) ("Where it is impracticable to give notice in advance of a motion to close a proceeding, those present in the courtroom should be informed that closure is sought, that they have a right to oppose closure, and will be afforded a reasonable opportunity to do so."); *In re Hearst-Argyle Television, Inc.*, 631 S.E.2d 86, 91 (S.C. 2006) ("Regarding notice and an opportunity to be heard, in this case, the trial court identified Appellants' presence in the courtroom, announced his intention to close the courtroom, and asked Appellants if they had any comment."); *accord United States v. Raffoul*, 826 F.2d 218, 225 (3d Cir. 1987) (declining to require individual notice under the circumstances, but requiring "the renewal in open court and before disposition of motions for closure that are made outside the public's hearing"); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Ct.*, 980 P.2d 337, 364-65 (Cal. 1999) (same).

[8] *E.g.*, Conn. Super. Ct. R. 42-49; Minn. R. of Crim. P. 25.01; Local Crim. R. for the W. Dist. of Wash. 53(d) ("[N]otice of presentation to the court of any motion for an order affecting the news media's right to full pretrial coverage of pending or impending criminal proceedings must be served by movant upon designated representatives of the principal public media at least twenty-four hours prior to presentation.").

In *United States v. Brooklier*, the Ninth Circuit confronted a record similar to that presented here. The *Brooklier* district judge conducted a portion of voir dire in open court and then abruptly closed the courtroom to the public. 685 F.2d at 1166. Analyzing the record, the Court of Appeals held:

> The record does not disclose how, when, or by whom the initial suggestion for closure of the voir dire was made or when closure was ordered. . . . Without adopting an inflexible rule, we believe that where a closure motion is not filed of record or made in open court, and when, as here, the court has been made aware of the desire of specific members of the public to be present, reasonable steps should be taken to afford such persons an opportunity to submit their views to the court before exclusion is accomplished. In determining what steps are reasonable, a court should avoid any that might result in material delay in the underlying proceedings. The record does not demonstrate that any steps to provide notice were taken here.

Id. at 1168 (citations omitted).

Ultimately, whatever the differences between the First Amendment and the common law, Hawai'i is the only jurisdiction that has not yet embraced the constitutional importance of the public's right to attend judicial proceedings.[9] Every other jurisdiction in the United States has embraced the constitutional dimension of the right under either the First Amendment[10] or an "open courts" provision.[11] No matter

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[9] This Court, however, has applied the constitutional framework of *Richmond Newspapers* and its progeny to address *a defendant's* due process right to a public hearing before the Administrative Driver's License Revocation Office. *Freitas v. Admin. Dir. of the Courts*, 104 Hawai'i 483, 489, 92 P.3d 993, 999 (2004).

[10] *In re Consol. Publ'g Co.*, 601 So. 2d 423 (Ala. 1992); *Ridenour v. Schwartz*, 875 P.2d 1306 (Ariz. 1994); *Arkansas Television Co. v. Tedder*, 662 S.W.2d 174 (Ark. 1983); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337 (Cal. 1999); *Star Journal Publ'g Corp. v. County Court*, 591 P.2d 1028 (Colo. 1979); *Doe v. Connecticut Bar Examining Committee*, 818 A.2d 14 (Conn. 2003); *Gannett Co. v. State*, 571 A.2d 735 (Del. 1989); *State v. Shipley*, 497 A.2d 1052 (Del. Super. 1985); *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981);

how robust the common law right recognized by this Court, the right of public access to the courtroom deserves respect and deference commensurate with its integral role ensuring an educated discourse on the administration of justice in Hawai'i.[12]

Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1 (Fla. 1982); *R.W. Page Corp. v. Lumpkin*, 292 S.E.2d 815 (Ga. 1982); *Cowles Publ'g Co. v. Magistrate Court of the First Judicial Dist.*, 800 P.2d 640 (Idaho 1990); *People v. LaGrone*, 838 N.E.2d 142 (Ill. App. 2005); *Williams v. State*, 690 N.E.2d 162 (Ind. 1997); *Des Moines Register & Tribune Co. v. Iowa Dist. Ct.*, 426 N.W.2d 142 (Iowa 1988); *Kansas City Star Co. v. Fossey*, 630 P.2d 1176 (Kan. 1981); *Riley v. Gibson*, 338 S.W.3d 230 (Ky. 2011); *In re Maine Today Media, Inc.*, 59 A.3d 499 (Me. 2013); *Buzbee v. Journal Newspapers, Inc.*, 465 A.2d 426 (Md. 1983); *Globe Newspaper Co. v. Commonwealth*, 556 N.E.2d 356 (Mass. 1990); *Booth Newspapers, Inc. v. Twelfth Dist. Ct. Judge*, 432 N.W.2d 400 (Mich. 1988); *Minneapolis Star & Tribune Co. v. Kammeyer*, 341 N.W.2d 550 (Minn. 1983); *Gannett River States Publ'g Co. v. Hand*, 571 So. 2d 941 (Miss. 1990); *State ex rel. Pulitzer Inc. v. Autrey*, 19 S.W.3d 710 (Mo. App. 2000); *State ex rel. Smith v. Dist. Ct. of Eighth Judicial Dist.*, 654 P.2d 982 (Mont. 1982); *In re Search Warrant for 3628 V Street*, 628 N.W.2d 272 (Neb. 2001); *Stephens Media, LLC v. Eighth Judicial Dist. Ct.*, 221 P.3d 1240 (Nev. 2009); *State v. Williams*, 459 A.2d 641 (N.J. 1983); *State ex rel. New Mexico Press Ass'n v. Kaufman*, 648 P.2d 300 (N.M. 1982); *Associated Press v. Bell*, 510 N.E.2d 313 (N.Y. 1986); *Forum Commc'ns Co. v. Paulson*, 752 N.W.2d 177 (N.D. 2008); *State ex rel. The Repository, Div. of Thompson Newspapers, Inc. v. Unger*, 504 N.E.2d 37 (Ohio 1986); *Nichols v. Jackson*, 38 P.3d 228 (Okla. Crim. App. 2001); *Commonwealth v. Long*, 922 A.2d 892 (Pa. 2007); *Providence Journal Co. v. Superior Ct.*, 593 A.2d 446 (R.I. 1991); *In re First Charleston Corp.*, 495 S.E.2d 423 (S.C. 1997); *Associated Press v. Bradshaw*, 410 N.W.2d 577 (S.D. 1987); *State v. Drake*, 701 S.W.2d 604 (Tenn. 1985); *Houston Chronicle Publ'g Co. v. Crapitto*, 907 S.W.2d 99 (Tex. App. 1995); *Kearns-Tribune Corp. v. Lewis*, 685 P.2d 515 (Utah 1984); *State v. Tallman*, 537 A.2d 422 (Vt. 1987); *Daily Press, Inc. v. Commonwealth*, 739 S.E.2d 636 (Va. 2013); *State ex rel. Stevens v. Circuit Court*, 414 N.W.2d 832 (Wis. 1987); *Williams v. Stafford*, 589 P.2d 322 (Wyo. 1979), *abrogated on other grounds by Vaughn v. State*, 962 P.2d 322 (Wyo. 1998); *see also Abood v. League of Women Voters of Alaska*, 743 P.2d 333 (Alaska 1987) (dicta).

[11] *Copeland v. Copeland*, 930 So. 2d 940 (La. 2006); *Associated Press v. State*, 888 A.2d 1236 (N.H. 2005); *Virmani v. Presbyterian Health Servs. Corp.*, 515 S.E.2d 675 (N.C. 1999); *State ex rel. Oregonian Publ'g Co. v. Deiz*, 613 P.2d 23 (Ore. 1980); *Seattle Times Co. v. Ishikawa*, 640 P.2d 716 (Wash. 1982); *State ex rel. Herald Mail Co. v. Hamilton*, 267 S.E.2d 544 (W. Va. 1980).

[12] In *Campbell*, this Court declined to address the novel constitutional question whether the public has a right of access to probate proceedings "protected under both the federal and our state constitutions." 106 Haw. at 465 n.26, 106 P.3d at 1108 n.26; *accord Greater*

CONCLUSION

Amici Curiae respectfully request that the Court overrule *Gannett Pacific* to the extent it held that the public has no First Amendment right to attend criminal proceedings and detail procedures necessary to preserve that right. *See Gannett Pacific*, 59 Haw. at 227, 580 P.2d at 53 ("[I]t appears to us only too clear that the district courts are in immediate need of direction from this court on a procedural and substantive matter of public importance . . . .").[13]

Dated: Honolulu, Hawai'i, October __, 2013

Respectfully submitted,

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New Orleans Broadcasting Ass'n Inc. v. United States, 527 U.S. 173, 184 (1999) ("It is, however, an established part of our constitutional jurisprudence that we do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground."). In contrast to the novel issue in *Campbell*, the Court has "no need to break new ground" in ruling on the constitutional question here because on-point precedent is well established. *See Greater New Orleans Broadcasting*, 527 U.S. at 184.

[13] In light of the significance of the rights involved, several courts have had occasion to set minimum procedures and guidelines to be followed when a party, or a court *sua sponte*, moves to close judicial proceedings. *E.g.*, *R.W. Page*, 292 S.E.2d at 819-20; *Minneapolis Star & Tribune*, 341 N.W.2d at 559-60; *Gannett River*, 571 So. 2d at 945; *Williams*, 459 A.2d at 71-73; *Drake*, 701 S.W.2d. at 608-09.