20-2744

In the
United States Court of Appeals
For the Second Circuit

HARTFORD COURANT COMPANY, LLC,

Plaintiff-Appellee,

– v. –

PATRICK L. CARROLL, III, in his Official Capacity as Chief Court Administrator of the Connecticut Superior Court, ANN-MARGARET ARCHER, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

(See inside cover for continuation of caption)

BRIEF OF *AMICUS CURIAE* FLOYD ABRAMS INSTITUTE FOR FREEDOM OF EXPRESSION IN SUPPORT OF PLAINTIFF-APPELLEE

DAVID A. SCHULZ
MICHAEL M. LINHORST
CHARLES CRAIN
SARA SAMPOLI (LAW STUDENT)
EMILY WANG (LAW STUDENT)
YALE LAW SCHOOL
MEDIA FREEDOM & INFORMATION ACCESS CLINIC
Attorneys for Amicus Curiae Floyd Abrams Institute for Freedom of Expression
127 Wall Street
New Haven, Connecticut 06511
(203) 432-4992
david.schulz@yale.edu

APPELLATE INNOVATIONS
(914) 948-2240

15197

– and –

KAREN A. BERRIS, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, ROBERT BURKE, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, ANTONIO D'ADDEO, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, RALPH DAGOSTINE, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, CYNTHIA DEGOURSEY, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, JILL DRISCOLL, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, CAROLINE FARGEORGE, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, DAVID S. GAGE, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, ERIC R. GROODY, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, LISA C. GROODY, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, TAMMY FLUET, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, RICHARD L. HAAS, JR., in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, KERRI HALL, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, WILLIAM M. HOEY, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, JUDITH LEE, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, LAURA A. LEIGH, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court,

Defendants-Appellants,

(See inside cover for continuation of caption)

– and –

DEBORA KASZUBA NEARY, Cara Parkinson, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, BRANDON PELEGANO, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, GINA PICKETT, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, JAMES QUINN, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, JENNIFER ROBINSON, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, MARK SHEA, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, ROY SMITH, JR., in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, GIOVANNI SPENNATO, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, GEOFFREY STOWELL, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, HARALABOS VALASSIS, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, JULIE VANAM, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, ROBERT A. WILOCK, II, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court, BRANDI YANAVICH, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court and MARCI YOUNG, in their respective Official Capacities as Chief Clerks and Deputy Chief Clerks in the Judicial District and Geographical Area courts of the Connecticut Superior Court,

Defendants-Appellants,

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae Floyd Abrams Institute for Freedom of Expression states that it is an unincorporated association organized within Yale Law School, that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

Dated: November 10, 2020

By: */s/ David A. Schulz*
David A. Schulz

Counsel for Amicus Curiae
Floyd Abrams Institute for
Freedom of Expression

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

PRELIMINARY STATEMENT 2

ARGUMENT 4

I. THE FIRST AMENDMENT RIGHT OF PUBLIC ACCESS SAFEGUARDS THE INTEGRITY, FAIRNESS, AND LEGITIMACY OF CRIMINAL PROSECUTIONS 4

A. The First Amendment Access Right Is a Structural Element of Our Constitution That Supports the Proper Functioning of Government 4

B. Public Access to Criminal Prosecutions Advances Criminal Justice Goals and Allows the Public to Exercise Meaningful Oversight 7

1. Public access to criminal prosecutions furthers fundamental goals of the criminal justice system 7

2. The same criminal justice goals support the public's right of access to the proceedings of juveniles in criminal court 9

II. A DESIRE TO PROTECT THE PRIVACY OF JUVENILES IS INSUFFICIENT TO JUSTIFY A COMPLETE AND CATEGORICAL DENIAL OF THE FIRST AMENDMENT ACCESS RIGHT 14

A. The Blanket Denial of Public Access Mandated by Connecticut's Amended Transfer Act Is Prohibited by *Globe* 15

B. Trial Courts Are Well Suited to Conduct the Interest Balancing and Narrow Tailoring the First Amendment Access Right Requires 17

C. Connecticut's Categorical Closure Law Is Out of Step with the Practices of Other States....20

CONCLUSION....23

CERTIFICATE OF COMPLIANCE....24

CERTIFICATE OF FILING AND SERVICE....25

TABLE OF AUTHORITIES

Cases **Page(s)**

Globe Newspaper Co. v. Superior Court for Norfolk Cty.,
457 U.S. 596 (1982).....*passim*

Hartford Courant Co. v. Pellegrino,
380 F.3d 83 (2d Cir. 2004) 5, 8

In re N.Y. Times,
834 F.2d 1152 (2d Cir. 1987) 18

N.Y. Civil Liberties Union v. N.Y.C. Transit Authority,
684 F.3d 286 (2d Cir. 2012) 5, 7

Press-Enterprise Co. v. Superior Court,
464 U.S. 501 (1984) ("*Press-Enterprise I*").....*passim*

Press-Enterprise Co. v. Superior Court,
478 U.S. 1 (1986) ("*Press-Enterprise II*").....5, 14, 18

Richmond Newspapers Inc. v. Virginia,
448 U.S. 555 (1980).....*passim*

State v. Buchanan,
No. K10KCR18341220S, 2018 WL 6016717 (Conn. Super. Ct.
Oct. 25, 2018) 20

United States v. Alcantara,
396 F.3d 189 (2d Cir. 2005) 11

United States v. Doe,
63 F.3d 121 (2d Cir. 1995) 9, 12

United States v. Erie Cty.,
763 F.3d 235 (2d Cir. 2014) 7

Waller v. Georgia,
467 U.S. 39 (1984).....18

Westmoreland v. Columbia Broadcasting Sys., Inc.,
752 F.2d 16 (2d Cir. 1984) 5

Statutes

Conn. Gen. Stat. § 10-233h 17

Conn. Gen. Stat. §§ 46b-127 ..... 11, 12, 20

Conn. Gen. Stat. § 46b-133 16

N.J. Stat. Ann. § 2A:4A-62 21

N.Y. Crim. Proc. Law § 720.15 21

N.Y. Crim. Proc. Law § 720.20 21

Other Authorities

Conn. Practice Book § 42-49 19

H.B. 7045, 2017 Reg. Sess. (Conn. 2017) 12

Jacey Fortin, *Chrystul Kizer, Teen Charged with Killing Sexual Abuser, Is Released on Bond*, N.Y. Times (June 23, 2020) 13

J.M Michele Thomas & M. Wilson, Social Justice Brief: The Color of Juvenile Transfer: Policy & Practice Recommendations (Nat'l Ass'n of Social Workers 2017) 12

Kelan Lyons, *Juvenile Justice Advocates: Let's 'Raise the Age' Again*, Conn. Mirror (Feb. 10, 2020) 12

N.J. Ct. R. 1:38-1 22

N.J. Ct. R. 1:38-3 22

INTEREST OF AMICUS CURIAE[1]

The Floyd Abrams Institute for Freedom of Expression at Yale Law School promotes freedom of speech and freedom of the press, access to information, and government transparency. The Abrams Institute has a significant interest in defending robust constitutional protections for the right of access to government proceedings, a right critical to the proper functioning of our democracy.

As an institution dedicated to the protection of First Amendment freedoms, we write to (1) underscore the important First Amendment interests served by the access to criminal proceedings that Connecticut's recent amendments to its Juvenile Transfer Act would prohibit, (2) clarify the constitutional standards protecting these interests and how they are violated by the Juvenile Transfer Act amendments, and (3) identify how other states have adequately addressed the privacy concerns that motivate the Connecticut amendments without violating the First Amendment access right. The widespread experience of other states—and even the past experience in Connecticut—reveals that courts are well-equipped to mediate the competing interests presented when juveniles are tried in regular criminal courts without the need for the indiscriminate, mandatory denial of access.

---

[1] Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4)(E), the Abrams Institute certifies that no person or entity, other than amicus curiae, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a)(2) with the consent of all parties.

PRELIMINARY STATEMENT

In denying public access to all aspects of the criminal prosecution of a juvenile defendant transferred to regular criminal court, the amended Connecticut Juvenile Transfer Act violates the public's qualified First Amendment right of access. The district court correctly held that the constitutional access right attaches to criminal court proceedings and that the statute's confidentiality mandate is not narrowly tailored to achieve a compelling governmental interest. This holding is plainly correct, mandated by controlling Supreme Court precedent, and should be upheld.

The First Amendment right of access is a structural component of the U.S. Constitution. It supports the proper operation of government institutions and is essential for meaningful democratic oversight. That the constitutional access right extends to criminal court proceedings is established beyond peradventure. In criminal prosecutions, public access "enhances the quality and safeguards the integrity of the factfinding process," and in so doing provides "benefits to both the defendant and to society as a whole." *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 606 (1982). These benefits exist whether the defendant in criminal court is an adult or a minor. Public access enhances the functioning of the proceedings, promotes the fair application of the law, and enables the public to exercise meaningful oversight of both the operation of the

criminal courts and the use of the state's power to transfer minors from juvenile proceedings to criminal courts.

Given its importance to our system of self-government, the right of access to criminal proceedings may not be abridged unless strict standards are met. Any limitation on the right must be supported by factual findings establishing a compelling interest that can only be protected by limiting the access right, and any limitation then imposed must be both narrowly tailored and effective in safeguarding that interest. As amended to require closure of all criminal court proceedings involving juveniles, Connecticut's Juvenile Transfer Act is not narrowly tailored to serve a compelling governmental interest. Rather, its categorical approach requiring closure in all cases is fatally overbroad—failing to recognize that privacy interests can be protected effectively on a case-by-case basis. As the Supreme Court held in *Globe*, the constitutional access right demands such a fact-specific approach when the protection of privacy is the basis for limiting the public access right.

Other states effectively balance public access against competing privacy interests without violating the First Amendment. To our knowledge, no other state imposes the mandatory closure of transferred cases now required by Connecticut. Experience in other states and Connecticut's own past experience demonstrate that trial courts are well-suited to protect juvenile privacy interests on a case-specific

basis. Courts can weigh privacy concerns against the access right and tailor any necessary access restriction to accommodate the unique interests of juveniles tried in criminal court without unnecessarily sacrificing transparency and accountability.

ARGUMENT

I
THE FIRST AMENDMENT RIGHT OF PUBLIC ACCESS SAFEGUARDS THE INTEGRITY, FAIRNESS, AND LEGITIMACY OF CRIMINAL PROSECUTIONS

The public's First Amendment right of access is key to the proper functioning of our courts and to public acceptance of the verdicts they render. The access right helps to ensure that proper procedures are followed, lawyers perform diligently, and litigants and witnesses are treated fairly. It facilitates the finding of the truth by deterring perjury and publicizing issues so those with relevant knowledge may come forward. And it is key to preserving public confidence that justice is being done. The impact of shrouding criminal prosecutions in secrecy is great, affecting the functioning of our criminal justice system and public acceptance of its legitimacy.

A. The First Amendment Right of Access Is a Structural Element of Our Constitution That Supports the Proper Functioning of Government

Forty years ago, the Supreme Court recognized that the First Amendment's guarantees of free speech, free press, and free assembly necessarily convey a qualified right of public access to certain governmental proceedings and

information that extends specifically to criminal trials. *See Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980). "Open trials," the Court wrote, "assure the public that procedural rights are respected, and that justice is afforded equally." *Id*. at 595 (Brennan, J. concurring).

Since that landmark decision, the Court has repeatedly and unequivocally reaffirmed its holding, striking down a state law imposing blanket closure to certain trial testimony based on a witness's age, *Globe*, 457 U.S. 596 (1982), and affirming that the access right extends to jury selection and preliminary hearings in criminal prosecutions, *Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*") (jury selection); *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*") (preliminary hearings). This Court, in turn, has strongly enforced the constitutional access right and applied it beyond the criminal justice system to, for example, civil trials, *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984), judicial records and docket sheets, *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004), and certain types of administrative proceedings, *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286 (2d Cir. 2012).

The First Amendment right of access is a structural right that serves important values at the heart of our democracy. As Justice Brennan noted in his seminal concurrence in *Richmond Newspapers*, the right reflects the First

Amendment's "*structural* role . . . in securing and fostering our republican system of self-government." 448 U.S. at 587 (Brennan, J. concurring); *see also Globe*, 457 U.S. at 604 (explaining that "the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government"). The ability to observe what our government is doing, particularly in the context of adjudicating the guilt or innocence of criminal defendants, promotes public trust and enables accountability over our institutions. *Richmond Newspapers*, 448 U.S. at 572 ("People 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."); *see also Press-Enterprise I*, 464 U.S. at 508 ("Openness thus enhances . . . the appearance of fairness so essential to public confidence in the [justice] system."). Access also provides the public with the information it needs to make informed decisions about how its government should function. *See Globe*, 457 U.S. at 605 (the First Amendment ensures that the "constitutionally protected 'discussion of governmental affairs' is an informed one").

The public's right to observe, discuss, and evaluate important government proceedings is a bedrock principle of democracy. Indeed, this Court has affirmed that the access right underpins the functioning of our constitutional system on multiple occasions. For example, in holding that the access right attaches to

compliance reports prepared pursuant to a settlement agreement, this Court emphasized that "[t]he notion that the public should have access to the proceedings and documents of courts is integral to our system of government." *United States v. Erie Cty.*, 763 F.3d 235, 238-39 (2d Cir. 2014). In extending the access right to an agency's administrative hearings, this Court underscored "the importance of access to public participation and to government accountability—values . . . that are central to democracy." *N.Y. Civil Liberties Union*, 684 F.3d at 299.

B. Public Access to Criminal Prosecutions Advances Criminal Justice Goals and Allows the Public to Exercise Meaningful Oversight

The important interests served by the constitutional access right are indisputably advanced by public access to criminal prosecutions, whether the defendant is an adult or a minor.

1. *Public access to criminal prosecutions furthers fundamental goals of the criminal justice system.*

"Secrecy is profoundly inimical" to criminal proceedings. *Richmond Newspapers*, 448 U.S. at 595 (Brennan, J. concurring). In recognizing that the First Amendment conveys a right to observe criminal trials, the Supreme Court has emphasized two overarching principles underpinning the logic of such access, and these apply just as much to the prosecution of a minor as to the prosecution of an adult.

First, public access serves as a check against government abuse, ensuring fair application of the law and enabling constituents to monitor whether judges and prosecutors are adhering to democratically legitimate procedures. *See id.* at 596 (Brennan, J. concurring) ("Public access . . . acts as an important check, akin in purpose to the other checks and balances that infuse our system of government."). More specifically, public access "play[s] a fundamental role" in assuring criminal defendants "fair and accurate adjudication of guilt or innocence," *id.* at 593 (Brennan, J. concurring), helps prevent against miscarriages of justice by "aid[ing] accurate factfinding," *id.* at 596 (Brennan, J. concurring), ensures that jurors are "fairly and openly selected," *Press-Enterprise I*, 464 U.S. at 509, and demonstrates to the public that "justice is afforded equally," *Richmond Newspapers*, 448 U.S. at 595 (Brennan, J. concurring). The Supreme Court has praised the open trial's ability to "discourage[] perjury, the misconduct of participants, and decisions based on secret bias or partiality," *Richmond Newspapers*, 448 U.S. at 569 (citing Hale and Blackstone), and the Second Circuit has noted that docket sheets alone have "been used to reveal potential judicial biases or conflicts of interest," *Pellegrino*, 380 F.3d at 95.

Second, public access to criminal trials ensures the public has the information needed to make informed decisions about the performance and policies of the criminal justice system. *See Globe*, 457 U.S. at 605 (the First

Amendment ensures that the "constitutionally protected 'discussion of governmental affairs' is an informed one"); *see also United States v. Doe*, 63 F.3d 121, 126 (2d Cir. 1995) ("Free access of the press and public to criminal proceedings informs the populace of the workings of government and fosters more robust democratic debate."). Shielding criminal proceedings from public scrutiny hampers public understanding and debate on matters of great public importance. Open criminal proceedings, on the other hand, provide the public with "an opportunity . . . for understanding the [justice] system in general," *Richmond Newspapers*, 448 U.S. at 572, which in turn enables the public to develop informed opinions on the relative merits of criminal justice policies and proposals. Secret criminal proceedings also frustrate the "community therapeutic value" of the criminal justice system, which provides a legitimate outlet for society's "urge to retaliate and desire to have justice done." *Press-Enterprise I*, 464 U.S. at 508-09. The "therapeutic value" of open proceedings is particularly salient in the context of "[c]riminal acts, especially violent crimes." *Id*. That value, along with the broader public need to make informed decisions about the criminal justice system, is hampered when the public is kept out of criminal proceedings.

2. *The same criminal justice goals support the public's right of access to the proceedings of juveniles in criminal court.*

In light of overwhelming Supreme Court and circuit precedent affirming the essential role of the access right in our criminal justice system, the district court

was plainly correct in finding that Connecticut's amended Juvenile Transfer Act cannot be squared with the First Amendment right. For one, the proceedings of transferred juvenile defendants in regular criminal court are materially indistinguishable from the proceedings in *Richmond Newspapers*, as Appellee has demonstrated. *See* Brief of Pl.-Appellee, ECF No. 60, at 23. The district court was plainly correct in recognizing that "the age of the defendant does not alter the fundamental nature of the proceeding in a Transferred Matter, which becomes a criminal prosecution once the transfer occurs." Order Granting Prelim. Inj., JA45. Unlike delinquency proceedings in juvenile courts, the proceedings in criminal courts may be resolved by juries, result in a criminal record and end with jail time in adult correctional facilities. These factors underscore the importance of vigorous enforcement of the public access right in the prosecution of juveniles in regular criminal court to maintain the systemic safeguards provided by the First Amendment access right.

Indeed, public access to the proceedings involving juveniles transferred to criminal court serves *precisely* the same structural democratic purposes as public access to criminal trials of adult defendants. Many of the benefits of public access may even apply with greater force to transferred matters.

One benefit of open trial cited by the Supreme Court is the ability for the public to "vindicate the concerns of the victims [of criminal acts, especially violent

crimes] and the community in knowing that offenders are being brought to account for their criminal conduct." *Press-Enterprise I*, 464 U.S. 509. Because transfer to criminal court in Connecticut is limited to particularly serious offenses, Conn. Gen. Stat. §§ 46b-127(a)-(b), the "community therapeutic value" of public access is particularly strong in this context. While it is no doubt true that "the system of processing does not determine adulthood," Decl. of Megan Kurlychek, JA 141, the Connecticut legislature has established that youth accused of serious felonies are to be tried in adult courts and subject to adult punishment in adult correctional facilities. The state concedes that these cases involve only "the most serious crimes," Defs.-Appellants' Brief, ECF No. 51, at 2—the kind which are "extremely significant to victims of crimes, to family members of victims, and to members of the community in which the crime occurred." *United States v. Alcantara*, 396 F.3d 189, 198 (2d Cir. 2005). The public has a strong interest in the outcome of these cases and in ensuring that proper procedures are followed.

Public access to the proceedings of juveniles tried in criminal court also enables the public to debate the merits of the Connecticut's juvenile transfer process and monitor how it is being implemented by prosecutors. Access can shine a disinfecting light on any systemic inequalities in law enforcement and raise the specter of structural reform in the state's criminal justice system. *See Alcantara*, 396 F.3d at 199 ("[T]he ability to see the application of [particular]

laws in person is important to an informed public debate over these laws."). Until 2007, Connecticut was one of only three states that automatically transferred 16- and 17-year-olds to regular criminal court for felonies and minor offenses alike. Kelan Lyons, *Juvenile Justice Advocates: Let's 'Raise the Age' Again*, Conn. Mirror (Feb. 10, 2020). Today, as a result of lobbying efforts by youth justice advocates, transfer is limited to juveniles charged with certain felonies, Conn. Gen. Stat. §§ 46b-127(a)-(b), and there have been recent efforts to "raise the age" in Connecticut even higher, to 21 years old. *See* H.B. 7045, 2017 Reg. Sess. (Conn. 2017). Under the current law, transfer affects only a subset of juveniles in the justice system, but it disproportionately impacts youth of color. J. M. Michele Thomas & M. Wilson, Social Justice Brief: The Color of Juvenile Transfer: Policy & Practice Recommendations 1 (Nat'l Ass'n of Social Workers 2017), *available at* http://cfyj.org/images/pdf/Social_Justice_Brief_Youth_Transfers.Revised_copy_09-18-2018.pdf. In order for Connecticut residents to have a "robust democratic debate" about the future of Connecticut's transfer process, *Doe*, 63 F.3d at 126, they must be able to observe who it impacts and how it affects them.

In individual cases, too, access can help defendants by aiding in accurate factfinding and drawing public scrutiny to specific instances of injustice. Public scrutiny can root out trumped up charges against the innocent and identify prosecutorial misconduct. *Richmond Newspapers*, 448 U.S. at 596 (Brennan, J.

concurring) (identifying the "urgent" public interest in avoiding "[a] miscarriage of justice that imprisons an innocent accused"). It can also draw "key witnesses unknown to the parties" out of the woodwork. *Id.* at 596-97 (Brennan, J. concurring). Juvenile defendants and the public both share an interest in accurate factfinding; both suffer when transferred proceedings are conducted in secret.

Public access can also highlight instances where prosecutorial or judicial action may not comport with our societal understandings of justification and excuse. For example, in the case of Chrystul Kizer, a teenage victim of sex trafficking charged with first-degree intentional homicide after killing her abuser in self-defense, the media attention highlighted the "ways the criminal justice system has failed to protect black women and girls" and exerted pressure on the judge to reduce the bond for her release. Jacey Fortin, *Chrystul Kizer, Teen Charged With Killing Sexual Abuser, Is Released on Bond*, N.Y. Times (June 23, 2020). As a result of the media attention, Ms. Kizer—who had been transferred to regular criminal court in Wisconsin—was released on bond funded by a Chicago bail fund, a result that likely would not have occurred but for media coverage of her case. *Id.*

In sum, the logical principles underpinning the First Amendment access right overwhelmingly support Appellee's position in this case: the public has a qualified right of access to transferred matters in Connecticut, and the Juvenile Transfer Act's blanket ban is a clear violation of that right.

II.
A DESIRE TO PROTECT THE PRIVACY OF JUVENILES IS INSUFFICIENT TO JUSTIFY A COMPLETE AND CATEGORICAL DENIAL OF THE PUBLIC'S FIRST AMENDMENT ACCESS RIGHT

Given the significance of the access right to our constitutional democracy, the Supreme Court has imposed strict limitations on when, where, and how the public access right may be abridged. A party seeking closure will prevail only if "specific, on the record findings" demonstrate that closure is essential to prevent harm to a compelling government interest, that there is a lack of reasonable alternative protections, and that the closure is narrowly tailored to serve that interest. *Press-Enterprise II*, 478 U.S. at 13-15. The findings supporting a limitation on access must be "specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 9-10 (quoting *Press-Enterprise I*, 464 U.S. at 510).

The requirement for a compelling need to limit the access right, and the obligation to narrowly tailor a limited and effective remedy, means that "a *mandatory* closure rule" is generally prohibited. *Globe*, 457 U.S. at 608. Proper application of the right demands a case-by-case approach. *See, e.g.*, *id.* (striking down a state law mandating the automatic closure of court proceedings during the testimony of minor sexual assault victim witnesses); *Press-Enterprise I*, 464 U.S. at 509 (stating that the right can only be overcome "for cause shown that outweighs the value of openness"); *Press-Enterprise II*, 478 U.S. at 13-14 (noting

that the access right can be overcome only by "specific, on the record findings . . . that closure is essential to preserve higher values and is narrowly tailored to serve that interest") (citation and internal quotation marks omitted).

Connecticut's mandatory closure of criminal proceedings involving juveniles fails to satisfy these constitutional requirements.

A. The Blanket Denial of Public Access Mandated by Connecticut's Amended Transfer Act Is Prohibited by *Globe*

The amended Act's blanket denial of public access to regular criminal proceedings involving minor defendants directly contradicts the Supreme Court's holding in *Globe* striking down a similar legislative mandate intended to protect juveniles. In that case, the Court agreed with the Commonwealth of Massachusetts that "safeguarding the physical and psychological well-being of a minor" witness was indeed a compelling government interest, but nevertheless found unconstitutional a mandatory closure rule imposed by the legislature to categorically abridge the access right as a means of protecting that interest. Because "the circumstances of [any] particular case may affect the significance of the interest" in the minor's well-being, the Court held that a categorical restriction of the access right was impermissible. Rather, a trial court must be permitted to determine, "on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim." *Globe*, 457 U.S. at 608.

So too here. The First Amendment right of access to criminal proceedings requires that the closure of a criminal proceeding to protect a juvenile defendant's privacy interests must be narrowly crafted and can only properly be imposed on the basis of case-specific facts.

The Court's reasoning in striking down the statute in *Globe* applies fully to Connecticut's Juvenile Transfer Act. Under the amended Act, the trial court performs no case-by-case analysis to justify closure because the proceedings are automatically closed, regardless of the facts of the case. Indeed, the mandatory rule in the amended Act manifestly ignores case-specific factors that would weigh in favor of public access. For example, the amended Act requires closure "even if the [minor] does not seek the exclusion of the press and general public," even when the minor "would not suffer injury" by public proceedings, and even though "the names of the [defendant may] already [be] in the public record." *Globe*, 458 U.S. at 608.

Multiple Connecticut statutes permit juvenile defendants' names and photographs to be shared with members of the public. *See, e.g.*, Conn. Gen. Stat. § 46b-133(a) (permitting the release of the name, photograph, and custody status of any child arrested for the commission of a class A felony or capital felony); *and* Conn. Gen. Stat. § 10-233h (requiring the police to notify the school in event of a student's arrest for violation of Class A misdemeanors, felonies, and violations of

§ 53-206c). A case-by-case analysis, as mandated by *Globe*, would take into account relevant factors like whether certain information has already been made publicly available, or whether the minor would suffer injury by the presence of the press or the general public. The amended Act, however, does not permit consideration of these factors because it applies uniformly to all transferred cases regardless of the unique circumstances in each case.

Globe recognized that trial courts, not the legislature, are the proper bodies to assess possible overriding interests in transferred matters, balance such interests against the public's access right, and narrowly tailor any closure to address the interests. The amended Juvenile Transfer Act's blanket ban wholly neglects the "circumstances of the particular case" and fails to meet the constitutional requirements of *Globe* and *Press-Enterprise II.*

B. Trial Courts Are Well Suited to Conduct the Interest Balancing and Narrow Tailoring the First Amendment Access Right Requires

Trial courts are the proper entities to conduct the fact-specific inquiries required for determining whether closure orders are warranted and narrowly tailored. As noted, all closure determinations must be supported by specific written findings articulating the overriding interests necessitating a denial of access—a fact finding requirement that trial courts, rather than the legislature, are well-equipped to satisfy. *Globe*, 457 U.S. at 607-609; *see also Waller v. Georgia*, 467 U.S. 39, 48 (1984) (articulating the same process for closure proceedings

under the Sixth Amendment). Moreover, trial courts, unlike the legislature, can narrowly tailor closure orders to address privacy interests without unnecessarily compromising the public interest in disclosure. *See Press-Enterprise II*, 478 U.S. at 14-15 (requiring that lower courts contemplate "alternatives short of complete closure" to meet the narrow tailoring requirement).

Unlike the amended Act's undifferentiated approach to sealing or closing all records in transferred matters, courts are able to adopt narrowly tailored alternatives to address valid overriding interests. Such narrow tailoring ensures that even if some degree of closure or sealing is found to be necessary to protect overriding interests, the First Amendment's expectation of openness is not wholly abandoned. For example, in *In re N.Y. Times*, the Second Circuit required the district court to make specific findings as to the scope and nature of the privacy interests at stake, balance those articulated interests against the First Amendment right of access, and tailor the redactions of the judicial records at issue accordingly. 834 F.2d 1152 (2d Cir. 1987).

Trial courts in Connecticut are already experienced in conducting the fact-specific inquiries outlined in *Globe* and *Press-Enterprise I* and *II*, which has been the standard practice in Connecticut since long before the amendment of the Juvenile Transfer Act. Before the Act's amendment, transferred matters in criminal court were subject to Sec. 42-49 of the Connecticut Practice Book like all

other proceedings in criminal court. Those sections of the Practice Book provide that criminal records and proceedings are open by default. Practice Book § 42-49. If a closure order is deemed "necessary to preserve an interest which is determined to override the public's interest in attending such proceeding," a judge may order closure after "first consider[ing] reasonable alternatives to any such order and [ensuring] any such order shall be no broader than necessary to protect such overriding interest." Practice Book § 42-49.

Although courts, not legislatures, are the proper entities for ordering closure of criminal proceedings, the Connecticut legislature is not powerless to amend the Act to recognize the privacy interests of juveniles. The Connecticut legislature could, if it so chose, amend the transfer process to require courts overseeing transferred cases to actively consider whether privacy interests in a given case would justify some limitations on access prior to the finalization of transfer.

In some respects, this was the process already established for *discretionary*—but not automatic—transfers prior to the Act's amendments. To finalize a discretionary transfer to the criminal docket, the juvenile court must find that "the best interests of the child and the public will not be served by maintaining the case in the superior court for juvenile matters." Conn. Gen. Stat. §§ 46b-127(a)(3) and (b). Courts have recognized that overriding privacy interests may affect the "best interests of the child" determination in certain cases. *State v.*

Buchanan, No. K10KCR18341220S, 2018 WL 6016717, at *7 (Conn. Super. Ct. Oct. 25, 2018) (holding that the possibility of a "confidential disposition without a criminal record" was "one of the factors that [the court] may consider in determining . . . whether a 'youth would be better served' by being treated as a juvenile" (quoting Conn. Gen. Stat. § 46b-127(f) (current version at Conn. Gen. Stat. § 46b-127(g))).

Because no hearing is provided for automatic transfers, unlike discretionary transfers, juvenile courts are unable to weigh individual privacy interests in those cases. Conn. Gen. Stat. §§ 46b-127(a)(1). But it is within the legislature's power to require that *all* transfer cases—both discretionary and automatic—receive a hearing prior to transfer finalization. Such a hearing would enable the court to determine, on a case-by-case basis, whether some limitations on access would be appropriate even before the juvenile's case is moved to the regular criminal docket. Because the closure requirement of the amended Transfer Act is mandatory and not based on specific factual findings, however, the district court correctly found it to be unconstitutional.

C. Connecticut's Categorical Closure Requirement is Out of Step with the Practices of Other States

While the practice of transferring certain matters from juvenile to criminal court is commonplace across the United States, to our knowledge Connecticut alone engages in the total, mandatory denial of access to the records and

proceedings of such matters. Other states have implemented far less restrictive alternatives to Connecticut's new mandatory closure law that adequately address the privacy concerns motivating the Connecticut amendments.

Some states mandate that all transferred proceedings in criminal court are open to the public. *See, e.g.*, Compl., JA72 ¶ 31 n.2 (citing laws from California, Indiana, Maryland, Maine, Pennsylvania, South Dakota, Virginia, and West Virginia treating transferred matters in regular criminal court as open to the public). Other states have adopted procedures short of categorical closure to protect juvenile privacy interests while still preserving the public's right of access to the extent possible. New York's system, for example, permits courts to close the records and proceedings of only a subset of juvenile offenders tried in criminal court and, upon a conviction, permits these records to remain sealed only upon a determination that continued sealing would serve the interests of justice. N.Y. Crim. Proc. Law §§ 720.15, 720.20. New Jersey takes a different approach, relying on expungement as a primary way of ensuring both courtroom access and juvenile privacy and rehabilitation. N.J. Stat. Ann. § 2A:4A-62. Outside of case-specific sealing orders and expungement, court records for juvenile matters moved to regular criminal court remain open for public inspection. N.J. Ct. R. 1:38-1; 1:38-3.

Other states, including Connecticut itself before passage of the Juvenile Transfer Act, have demonstrated that narrower alternatives are both easily implemented and fully able to balance the competing interests in court openness and juvenile privacy. Courts routinely tailor any denial of access to address the specific interests presented in a given transferred matter and make use of post-conviction sealing and expungement practices to ensure access to courtroom records and proceedings while protecting the reputation and rehabilitation of the juvenile offender. Upon finding the amended Juvenile Transfer Act's categorical approach to closure unconstitutional, Connecticut courts may then engage in the common—and constitutionally mandated—practice of making such records and proceedings open by default and closed only after the trial court has made specific findings and contemplated alternatives to complete closure.

CONCLUSION

Connecticut's amended Juvenile Transfer Act violates the First Amendment right of access. In its place, Connecticut courts are fully able to protect any overriding interests in individual juvenile transferred matters on a case-by-case basis while still robustly preserving the public's rights.

Dated: November 10, 2020

Respectfully submitted,

/s/ David A. Schulz
David A. Schulz
Charles Crain
Michael Linhorst
Sara Sampoli (law student)
Emily Wang (law student)
MEDIA FREEDOM & INFORMATION ACCESS CLINIC
YALE LAW SCHOOL[2]
P.O. Box 208215
New Haven, CT 06520

Counsel for Amicus Curiae Floyd Abrams Institute for Freedom of Expression

[2] This brief has been prepared by a law student clinic associated with the Abrams Institute for Freedom of Expression at Yale Law School, but does not purport to represent the school's institutional views, if any.

CERTIFICATE OF COMPLIANCE

I certify that this Brief of Amicus Curiae Abrams Institute in Support of Plaintiff-Appellee complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because it contains 5,015 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, in 14 point Times New Roman font.

Dated: November 10, 2020

By: */s/ David A. Schulz*
David A. Schulz

Counsel for Amicus Curiae
Floyd Abrams Institute for
Freedom of Expression

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2020, I caused this Brief of Amicus Curiae Abrams Institute to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system, which will send notice of such filing to all counsel of record as registered CM/ECF users.

Dated: November 10, 2020

By: */s/ David A. Schulz*
David A. Schulz

Counsel for Amicus Curiae
Floyd Abrams Institute for
Freedom of Expression