THOMPSON COBURN LLP

One US Bank Plaza
St. Louis, MO 63101

314 552 6000 main
314 552 7000 fax
thompsoncoburn.com

Mark Sableman
314 552 6103 direct
msableman@thompsoncoburn.com

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VIA E-MAIL: betsy.aubuchon@courts.mo.gov

Betsy AuBuchon, Clerk
Supreme Court of Missouri
Post Office Box 150
Jefferson City, MO 65102

Re: Court closures

Dear Ms. AuBuchon:

The Missouri Broadcasters Association and the Missouri Press Association, by their counsel, request that the Supreme Court create a procedural rule, consistent with current law, that governs the unusual circumstances when court hearings, files, or proceedings are closed to the public, in the absence of specific statutory authority for such closures.

MBA and MPA raised this issue at the most recent meeting of the Missouri Press-Bar Commission and were encouraged by that Commission to make this submission.

Missouri courts are generally expected to conduct their affairs in public. "Missouri courts of justice shall be open to every person."[1] By statute, "the sitting of every court shall be public and every person may freely attend same"[2] and "all trials upon the merits shall be conducted in open court and so far as convenient in the regular courtroom."[3] Records of Missouri trial courts are presumed to be open, although there are some specific statutory exceptions, such as for juvenile proceedings, paternity decisions, and others.[4] And appellate court opinions "shall be public records."[5]

This Court and the court of appeals have recognized that a court closure is an extraordinary situation, and that it should occur rarely, under proper procedural and substantive safeguards.

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[1] Mo.Const., Art. I §14.

[2] Mo.Rev.Stat. § 476.170.

[3] Mo.Rev.Stat. § 510.200.

[4] *See* Court Operating Rule 4.24.

[5] Mo.Const., Art. V §12.

However, current Court rules allow court records or proceedings to be closed by court order. This exception to presumptive openness, in Operating Rules 2 and 4.24, is currently framed in broad language. Court Operating Rule 2, governing access to judicial records, begins with a presumption of openness: "Records of all courts are presumed to be open to any member of the public for purposes of inspection or copying…"[6] but it goes on to list as exceptions not only the specific statutory exemptions, but also records "that are confidential by . . . court order." Operating Rule 4.24, in addition to the 18 specific exemptions, also classifies as "confidential" "any other record sealed, expunged, or closed by . . . order of a court of record for good cause shown."

The "good cause shown" standard of Rule 4.24, and the unqualified reference in Rule 2 to making records secret "by … court order," may lead trial courts to believe that their records and proceedings can be made secret at their discretion. That, however, would be contrary to established law.

In *Pulitzer Publ'g. Co. v. Transit Cas. Co.*, 43 S.W.3d 293 (Mo. 2001), in the context of a receivership proceeding, this Court noted the undisputed truism that "there is a common law right of public access to court and other public records" and a "presumption in favor of open records."[7] The Court emphasized that even as to the "court order" exception of Operating Rule 2, trial courts must apply the presumption of openness and understand its policy foundation: that "Justice is best served when it is done within full view of those to whom all courts are ultimately responsible—the public."[8] After reviewing decisions of other states, this Court ruled "that the presumption cannot be overcome absent a compelling justification that the records should be closed."[9]

Similarly, in *Brewer v. Cosgrove,*[10] the Court of Appeals for the Eastern District held that "the presumption of openness cannot be overcome absent a compelling justification that the records should be closed," and "sealing the entire file will almost never be justified."[11] The court noted in *Brewer* that having courts act in public promotes public understanding and confidence, including public recognition of the legitimacy of the judicial system. Repeating this Court in *Pulitzer*, the court noted "[J]ustice is best served when it is done within full view of those to whom all courts are ultimately responsible: the public."[12]

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[6] Operating Rule 2.02.

[7] *Id*. at 300.

[8] *Id*. at 301.

[9] *Id*. at 302.

[10] 498 S.W.3d 837, 841–42 (Mo. App. E.D. 2016).

[11] *Id.* at 842.

[12] *Id*.

Accordingly, even when the subject of the litigation is embarrassing, "parties are not entitled to litigate in private even if both agree with the request to do so"; sensitive information can generally be handled through a variety of means short of closure of a proceeding.[13]

Substantively, we understand *Pulitzer v. Transit Casualty* and *Brewer v. Cosgrove* to teach that:

- All court proceedings, except those for which there is some statutorily imposed confidentiality are presumed to be open to the public.[14]
- No court proceeding or records can be hidden from the public without at least a showing of compelling circumstances.[15]
- The paramount public interest in openness cannot be overcome simply by the desire of private litigants for confidentiality, even as to embarrassing matters.[16]

Procedurally, we understand *Pulitzer v. Transit Casualty* and *Brewer v. Cosgrove* to teach that in cases of proposed court closures:

- A public hearing is required.
- There must be adequate public notice and a meaningful right for the public (including the news media) to object.
- The trial court must make detailed findings, on the record, regarding a proposed closure of proceedings or records.[17]

These requirements from the caselaw do not appear in Operating Rules 2 and 4.24, although Rule 2.04(e) does provide, "Access to case records as provided by Court Operating Rule 2.04 shall not be restricted in anticipation of a jury trial without a court order setting

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[13] *Id*.

[14] *Pulitzer Publ'g. Co. v. Transit Cas. Co.*, 43 S.W.3d 293 (Mo. 2001); *Brewer v. Cosgrove,* 498 S.W.3d 837, 841–42 (Mo. App. E.D. 2016).

[15] *Id*.

[16] *Brewer v. Cosgrove,* 498 S.W.3d 837, 841–42 (Mo. App. E.D. 2016).

[17] *State ex rel. Pulitzer, Inc. v. Autrey*, 19 S.W.3d 710, 713 (Mo. App. 2000). *Accord*, *Brewer v. Cosgrove,* 498 S.W.3d 837, 841–42 (Mo. App. E.D. 2016) (court seeking to seal court records must "identify specific and tangible threats to important values in order to override the importance of the public right of access"). *See also* *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) ("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. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."); *San Jose Mercury News v. United States Dist. Ct.,* 187 F.3d 1096, 1102 (9th Cir. 1999) (cited in *Pulitzer Publ'g Co. v. Transit Cas. Co.*) (recognizing a strong presumption in favor of public access that can be overcome only by "compelling reasons and specific factual findings").

forth specific written findings supporting a compelling justification to restrict access."

Our research to date, while incomplete, indicates that various Missouri trial courts have made their records and/or proceedings secret without following these standards. In one case of which we know, litigation of interest to the national financial community, and the media covering that industry, had been closed.[18] Another totally closed case came to the attention of a highly respected law professor, and appears to have involved an order, of questionable constitutionality, directing a non-party to remove published material from the Internet.[19] In yet another case, the family of a murder victim felt excluded from and frustrated by the judicial system when the case of their sister's murder was sealed for more than a year before trial, and they were prohibited from speaking about the case.[20] A case claiming that police assaulted a patron outside a St. Louis bar, an incident that got wide public and media attention, was closed.[21] A case involving an alleged sexual assault of a student at a high school, in which the school district itself was a defendant, was sealed.[22] In multiple civil cases, files in cases of significant public interest were sealed after trial and verdict.[23] Most recently, the St. Louis *Post-Dispatch* reported that a high-profile lawsuit

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[18] *American Century Investment Management v J.P. Morgan Invest LLC,* (Jackson Cty. Circuit Ct. No. 1116 CV 21103, 2012). The case was filed under seal and still cannot be accessed by the public on CaseNet.

[19] *See* St. Louis County Circuit Court, Case Nos. 14SL-PN00246-02 and 14SL-PN05215 (hereafter, *Spear v. Quinn*). The court order, purportedly from this case, that directs an Internet takedown, can be found in the record of UCLA Professor Eugene Volokh's unsuccessful attempt to gain access to the case file. *See Spear v. Quinn*, Motion to Intervene and Unseal (June 11, 2021) and Affidavit of Eugene Volokh. That purported order was at one point sent to Google, which in turn sent the order to the public Lumen Database, which collects and publishes internet takedown demands, especially ones that seem to threaten free speech. The purported Missouri circuit court order is thus available to the public solely on the Lumen website, not on Missouri's CaseNet. The Court of Appeals affirmed the trial court's refusal of Professor Volokh's motion, and this court denied transfer. *B.W.S. v. J.L.Q.,* Missouri Court of Appeals, Eastern Division, No. ED 109891 (Sept. 10, 2021); *B.W.S. v. J.L.Q.*, Missouri Supreme Court, No. SC 99369 (Dec. 21, 2021).

[20] Chris Hayes, "Silenced by the courts for years, two women speaks out about the murder of their sister," Oct. 7, 2022, Fox2News, available at Silenced by the courts for years, two women speaks out about the murder of their sister (fox2now.com).

[21] *S.D. v. Glide Investments, LLC,* No. 1922-00877 (St. Louis City) (Petition available as exhibit in related federal case, *Safeco Ins. Co. v, Schmitt,* No. 4:20-CV-01482).

[22] Joel Currier, "Want To Know About A Lawsuit Alleging Sex Assault At Hazelwood Central? Tough. Judge Says It's Secret," *St. Louis Post-Dispatch* (Oct. 24, 2017), available at https://www.stltoday.com/news/local/nothing-to-see-here/want-to-know-about-a-lawsuit-alleging-sex-assault-at/article_5077046f-ea5c-51c6-9de3-0f9f427f83b4.html.

[23] *E.g., Doe v. Board of Police Commissioners,* No. 14CY-CV00343 (Clay Cty. 2015) ($1.5 million post-trial settlement in AIDS exposure case after $1.24 million jury verdict; case is closed although some facts have come out on plaintiff's lawyer's website and in public city documents; *see* Meredith Corporation's Petition for Writ of Prohibition, Case No. WD79157 (Nov. 12, 2015); *Stillwell v. BNSF*

between two prominent lawyers had been closed to public view.[24]

As these examples show, in many cases not only have case documents and hearings become secret; the actual existence of the case has become effectively secret, too. In many cases, even when the correct case name or number is keyed into CaseNet, the user is informed that no matches were found. This invisibility even of case names and the existence of cases that have been put under a restrictive security level is a itself a serious restriction that impedes public oversight of the courts.

It is possible that trial courts have recently resorted to secrecy more frequently because Missouri's CaseNet system explicitly includes a "Security Level 5" which can readily be used to remove cases from public visibility in the system, even in situations not covered by statutorily authorized confidentiality.[25] If that is so, and the existence of Security Level 5 is viewed by some trial courts as an invitation for it to be used, that further suggests a need for this Court to more clearly prescribe the limitations of its use.

MBA and MPA ask that this Court clarify its rules and make explicit the exacting substantive standards and procedural steps that must be followed before any Missouri court proceedings or records can be closed. In addition to the requirements noted at page 3 above, we further suggest that any order imposing confidentiality on court proceedings or records (outside of statutorily prescribed situations) should be required to be public, and to explain the compelling reasons identified, and findings made, so that the scope and basis for the imposed secrecy are known.[26]

Railway Co., No. 11PU-CV00129 (Pulaski County Circuit Court) (Oct. 21, 2015 verdict in a train collision; case remains sealed seven years later); *Trust Company of the Ozarks v. Central Trust Company*, No. 1331-CC00422 (Greene County Circuit Court) (verdict for $2 million over a canceled life insurance policy for the widow of a man who died in a plane crash; entire file sealed after settlement); *Marshall v. Gateway Emergency Physicians LLP*, No. 20AO-CC00117-01 (Jasper County Circuit Court) (July 2022 defense verdict in a medical malpractice case; docket is inaccessible on CaseNet as of the date of this letter, although earlier proceedings, before change of venue to Newton County, are fully available under case no. 20AO-CC00117).

[24] Jacob Barker, "Lawsuit targeting lawyer sealed from public view," *St. Louis Post-Dispatch*, Nov. 12, 2022, available at https://www.stltoday.com/news/local/crime-and-courts/lawsuit-targeting-prominent-st-louis-lawyer-sealed-from-public-view/article_c4068956-86c5-5e14-97c8-b59a446d9e72.html.

[25] The "security levels" do not appear in published court rules, but they seem to have been set by the Office of State Court Administrator, when the CaseNet electronic docket system was established. OSCA's Automated System Security Guidelines sets five security levels. Level 3 is for "Confidential Information," Level 4 for "Juvenile, Mental Health and Drug Abuse Information, and Level 5 for "Sealed Information." Automated System Security Guidelines (mo.gov) There are apparently nine Security Levels in the CaseNet system.

[26] This would address the special problem, as in *Spear v. Quinn*, where an order from a secret proceeding may affect third parties. It is also consistent with the practice in paternity cases, when the final order in a confidentiality proceeding is published. Moreover, court orders have a special

Finally, we suggest that procedures be established to allow subsequent review of confidential proceedings by researchers, journalists, or other persons acting in the public interest. The procedures should be available even after a case is terminated.[27] This would allow researchers, journalists, and public interest groups to perform their essential watchdog function. Our government is built on checks and balances and there should be adequate procedure for reviewing confidential proceedings so that such proceedings are not misused, and so that mistakes or unsupported decisions can be found and corrected.

As the United States Supreme Court has noted, "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." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572, 100 S. Ct. 2814, 2825, 65 L. Ed. 2d 973 (1980). "Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enterprise Co. v. Superior Ct. of California, Riverside Cnty.*, 464 U.S. 501, 509, 104 S. Ct. 819, 823, 78 L. Ed. 2d 629 (1984) (footnote omitted).

We respectfully suggest that a clarification by this Court of Missouri's standards for closure of court proceedings and records would support these principles of judicial openness and legitimacy, without impacting the rare circumstance where a closure may be appropriate.

We understand that this issue may be addressed through different approaches, but we suggest the most direct method would be to modify Court Operating Rule 4.24 as follows:

First, place the current content of Rule 4.24 under a new subsection (a), and modify current subsection (1)(s) as follows:

> *s) Any other record sealed, expunged, or closed by statute~~,~~ or Supreme Court Rule ~~or order of a court of record for good cause shown~~.*

Then, add a new subsection (b) substantively as follows:

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importance because they can have continuing or lasting effects, and hence they should be available to the public . That is probably one reason why, before modern record keeping tools, circuit courts maintained large ledger books in which were written the operative clauses of all court orders. And if in some extraordinary circumstances, portions of court orders were determined to be so confidential that they could not be published, redaction of confidential material could probably solve that problem, while also preventing the problem of circulation of fake orders.

[27] The Missouri Court Clerk Handbook currently provides in section 100.09 that "A court order shall be required to open records that have been sealed." Researchers should have an opportunity to obtain such an order, and neither the termination of the case nor the unavailability of the trial judge should prevent them from obtaining one.

(b) No court record or file, or court proceeding, not covered by subsection (a) may be closed by court order except in the following circumstances:

(i) The court shall address the proposed closure in a public hearing, with adequate public notice and a meaningful right for members of the public to be heard.

(ii) Closure may be ordered only upon compelling circumstances. The desire of private litigants for confidentiality, even as to embarrassing matters, shall not so qualify. The court shall make detailed findings as to the basis of any closure ruling, and at least (a) some explanation of the basis for the closure, and (b) the operative command of the ruling, shall be maintained in the public court file.

(iii) Closure shall be no more extensive than necessary based on the circumstances presented, and all other matters in the proceeding shall remain open to the public. When the compelling circumstances giving rise to the need for a court's closure order have passed, those matters shall be reopened.

(iv) Members of the public, including journalists and researchers, shall have the right under this rule to seek reconsideration of closure orders, and to seek examination of such matters, and appropriate corrective orders, including orders restoring documents or files to the public record, whether or not the case is active..

Thank you for the Court's consideration of this request.

Very truly yours,
THOMPSON COBURN LLP

By 
Mark Sableman

Counsel for the Missouri Broadcasters Association

OF COUNSEL:

Jean Maneke
Maneke Law Group, L.C.
2345 Grand Blvd #1600
Kansas City, MO 64108

Counsel for the Missouri Press Association

cc: Mr. Mark Gordon
Mr. Mark Maassen

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