IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CIVIL RIGHTS CORPS, Plaintiff v. JUDGE DORETTA L. WALKER, in her official capacity, and CLARENCE F. BIRKHEAD, in his official capacity, Defendants.	Case No. 1:24-cv-943

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE THE FIRST AMENDMENT CLINIC AT DUKE LAW SCHOOL, OTHER LAW SCHOOL CENTERS AND CLINICS, LAW SCHOLARS, INDIVIDUALS AND ORGANIZATIONS CONCERNED ABOUT THE FAMILY REGULATION SYSTEM, COURT WATCH GROUPS, CIVIL RIGHTS ORGANIZATIONS, AND LEGAL SERVICE PROVIDERS IN SUPPORT OF PLAINTIFF CIVIL RIGHTS CORPS' MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to Local Civil Rule 7.5(b), the First Amendment Clinic at Duke Law School, other law school centers and clinics, law scholars, individuals and organizations concerned about the family regulation system, court watch groups, civil rights organizations, and legal service providers (collectively "Movants") respectfully move the Court for leave to file a brief as amici curiae in support of Plaintiff's motion for a preliminary injunction.

As this Court has recognized, whether leave to file an amicus brief will be granted turns on its "utility" in that "a motion for leave to file an amicus curiae brief should not be granted unless the court deems the proffered information timely and useful." *Kadel v. Folwell*, No. 1:19-CV-272, 2022 U.S. Dist. LEXIS 64912, at *3-4 (M.D.N.C. Apr. 7, 2022) (quotation marks and citation omitted); *see also, Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20-CV-457, 2020 U.S. Dist. LEXIS 213082, at *8 (M.D.N.C. July 8, 2020) (granting leave to file an amicus brief where amicus "demonstrated a special interest in the outcome of the suit" and where "the matters discussed in the brief [we]re relevant to the case's disposition" and the motion was timely).

Movants are individuals and nonprofit, nonpartisan organizations that are deeply concerned about the curtailment of the First Amendment and a lack of transparency in North Carolina's dependency courts. Movants set forth below (1) their respective statements of interest that explain their expertise and experience on this issue; (2) why an amicus brief is desirable, including why the matters asserted are relevant to the disposition of the case; and (3) why the motion is timely. A copy of the proposed Brief of Amici Curiae is attached hereto as Exh. 1 and a proposed order granting leave to file the brief is annexed hereto as Exh. 2.

MOVANTS' STATEMENTS OF INTEREST

Law School Centers and Clinics

The **Aoki Center for Critical Race and Nation Studies** ("Aoki Center") is a legal research and education center housed at the University of California, Davis School of Law. By fostering multi-disciplinary scholarship and practice that critically examine the law through the lens of race, ethnicity, indigeneity, citizenship, and class, the Aoki Center seeks to deepen our understanding of issues that have a significant impact on our culture and society and support initiatives that drive positive change. Our work has a special interest in legal analysis and policy recommendations that include supporting transparent court procedures to make our judicial system accessible to all. The Aoki Center does not represent the official views of the University of California.

The **Center for Law, Equity and Race (CLEAR)** was established by Northeastern University School of Law in 2021 to address challenges from the role of the law and legal systems in creating and perpetuating racial inequalities and disparities. CLEAR addresses the challenge by providing interdisciplinary, hands-on advocacy, learning opportunities, research, legislative engagement, and community outreach. As a result, CLEAR has a strong interest in ensuring that there is fair treatment throughout all components of the legal and justice system. CLEAR

does not, in this brief or otherwise, represent the official views of Northeastern University or Northeastern University School of Law.

The **First Amendment Clinic at Duke Law School** advances and defends freedoms of speech, press, assembly, and petition through court advocacy. The Clinic serves as an educational resource on free expression and press rights and provides law students with the real-world practice experience to become leaders on First Amendment issues. The Clinic engages in advocacy and representation across the country and has an interest in promoting open courts and government transparency.

The **Fred T. Korematsu Center for Law and Equality** ("Korematsu Center") is a non-profit organization based at the University of California, Irvine School of Law. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of over 120,000 Japanese Americans, the Korematsu Center works to advance social justice for all. It has a special interest in ensuring fair treatment in our nation's courts. The Korematsu Center does not, in this brief or otherwise, represent the official views of the University of California.

Law Scholars

Sarah Katz is a Clinical Professor of Law at Temple University Beasley School of Law and a Senior Fellow with the Stoneleigh Foundation, working on a

project titled Achieving Racial Justice for Families Through Legal Education and Advocacy. Katz directs and teaches the newly created Family Justice Clinic at Temple Law, which advocates in solidarity with families whose family stability and integrity have been harmed by state intervention. Her scholarship focuses on trauma aware and antiracist legal education and advocacy.

Allison Korn is a Clinical Professor of Law at Duke Law School and Director of the Health Justice Clinic. Her teaching and scholarship focus on law, policy, and practices that impact vulnerable individuals' and communities' access to justice. Previously, she was a Clinical Professor and Assistant Dean at UCLA Law School. She also served as a Clinical Teaching Fellow at the University of Baltimore School of Law and as a Staff Attorney at Pregnancy Justice and the Bronx Defenders.

Heather E. Murray is the Associate Director of the Cornell Law School First Amendment Clinic and the Managing Attorney of the Clinic's Local Journalism Project. In addition to co-teaching the Clinic's seminar on free speech and freedom of the press, she manages all aspects of the Cornell Local Journalism Project. Prior to the Clinic and to stints at two international law firms, she worked as a journalist at local newspapers in New York. She is a member of the advisory committee of ProJourn, a pro bono initiative for journalists that is housed at the Reporters Committee for Freedom of the Press.

Clare R. Norins is a Clinical Associate Professor and director of the First Amendment Clinic at the University of Georgia School of Law. Her legal practice and scholarship focuses on issues of free expression and government transparency. Previously, she was assistant director of the University of Georgia Equal Opportunity Office, and before that served as an assistant attorney general for the State of New York focusing on civil rights enforcement. She joins this brief in her personal capacity. Institutional affiliation provided for identification purposes only.

Elizabeth Scott is the Harold R. Medina Professor Emerita of Law and a leading authority on juvenile justice. She has written extensively on juvenile crime and delinquency; adolescent decision making; and marriage, divorce, cohabitation, and child custody. In her research, she takes an interdisciplinary approach, applying behavioral economics, social science research, and developmental theory to family/juvenile law and policy issues. Scott is the chief reporter for the American Law Institute's Restatement on Children and the Law, a continuation of her decades of work to codify and clarify U.S. law and shape the way lawyers, courts, and lawmakers think about children's rights.

Lisa Washington is an assistant professor of Law at the University of Wisconsin-Madison. Her research focuses on the intersection of family law, the criminal legal system, and the immigration system. Prior to joining the University of Wisconsin, Professor Washington worked at The Bronx Defenders in New York

City, where she was a fellow in the criminal defense practice and later became a staff attorney in the family defense practice. She also co-directed the Mainzer Family Defense Clinic at Cardozo School of Law.

Individuals and Organizations Concerned About the Family Regulation System

Abortion Care Network is a nonprofit, member-based association for independent abortion clinics and their allies. We are the only organization dedicated to the care, support, and sustainability of independent abortion clinics. Together, we work to ensure the rights of all people to access respectful, dignified abortion care.

The **Beyond Do No Harm Network** is a group of US-based health care providers, public health workers, impacted community members, advocates, and organizers working across racial, gender, reproductive, migrant and disability justice, drug policy, sex worker, and anti-HIV criminalization movements to address the harm caused when health care providers, public health researchers and institutions facilitate, participate in and support criminalization. We are interested in this litigation because this lawsuit could create a pathway for legal remedies to challenge the criminalization of community members, civil rights organizations and activists who are trying to speak out about the system.

Elephant Circle is a birth justice nonprofit that is rooted in Colorado with national reach. Our approach is rooted in the belief that community care, legal resources, and health system navigation support can counter this isolation, and build

the individual and community power that is necessary to bring about systemic and sustainable change for birth justice. It works with families and providers throughout the perinatal period and beyond to recognize, disrupt, and seek accountability for discrimination and systemic oppression in the context of healthcare, legal and family policing systems.

Through community education, narrative shift, and litigation, **Emancipate NC** supports North Carolina's people as they free themselves from mass incarceration and structural racism in the legal system. Emancipate NC has engaged actively in advocacy to reform the foster care and child welfare systems in North Carolina since 2020.

Give Us Back Our Children is a network of mothers, grandmothers, others facing the child welfare system and supporters. For nearly two decades, we have worked against unjust removals of children because of conflating poverty with neglect, sexism, racism, disability discrimination, domestic violence, the dismissal of the critical bond between mothers and children, and more. We advocate for families, including court accompaniment and know your rights information, build public awareness, change unjust policies and practices, and campaign for a care income, welfare, housing and other resources for mothers and families so they are less vulnerable to the child welfare and criminal justice systems. Our experience has been that closed family court is not in the best interest of the child, lacks transparency

and accountability, hides discrimination and biases, and works against family preservation and reunification, including by excluding family support systems such as ourselves. GUBOC is part of the international Support Not Separation network, and is coordinated by Global Women's Strike and Women of Color/GWS.

Mining For Gold (MFG)'s vision is to actualize a society where we flourish without racialized oppression and carceral restrictions to reclaiming humanity. The mission is to communally nurture freedom dreams, by establishing necessary relationships with those most impacted by federal and state policies and practices. We hold a collective capacity to use every human resource within our grasp to abolish all institutions sanctioned by the state to destroy our people, and we must work to realign our accountable relationships with co-strugglers who share similar values and together create nuanced entry points for shared political commitment to movement ecosystems.

The **MJCF Coalition** is a grassroots, antiracist organization created by and for individuals directly impacted by the family policing system (Child Welfare - Child Protective Services) nationwide. We are dedicated to fostering a supportive, healing community for children, parents, and kinship caregivers through our comprehensive services. Our mission is to drive positive change through education, advocacy, and policy reform, addressing the systemic issues that adversely affect vulnerable communities. We join this amicus brief because it supports a vital challenge to the

unconstitutional practice of closed courts in dependency proceedings. Community members deserve to know what happens in these courts, especially when it involves life-altering decisions about families.

Movement for Family Power (MFP) is a national, abolitionist movement hub and incubator, cultivating and harnessing community power to end family policing and build a world where all families can thrive. As an organization that resources and supports grassroots organizers and lived experts on the frontlines of dismantling the family policing system, MFP has a vested interest in ensuring that the system does not operate in secret and families aren't forced to be silent and isolated. Open dependency courts is one way to safeguard family integrity.

The National Council for Incarcerated and Formerly Incarcerated Women and Girls is a non-profit organization led by Black formerly-incarcerated women. Family unification is at the core of The National Council's work. The group has sponsored legislation that requires a judge to justify a carceral sentence for the primary caretaker of young children, a family-friendly law that has passed in states as diverse as Massachusetts and Tennessee. It has also fought for compassionate release from federal prison for women whose children are at-risk. The National Council therefore has a strong interest in making the North Carolina dependency court system more transparent.

The **North Carolina Survivors Union** is a community-led statewide grassroots organization made up of people who are directly impacted by drug use. Our mission is to improve the lives of people who have been targeted by the war on drugs by (1) organizing, growing and strengthening community-led grassroots groups; (2) educating, mobilizing and advocating for policies and programs grounded in harm reduction, healing, and disability justice; and (3) providing direct services in areas where high-risk communities are denied even the most basic services. We work with pregnant people who have been targeted by the family regulation system due to drug use and are concerned about a lack of transparency in family courts.

NYC Family Policy Project's mission is to explore and build evidence – through original research, data and policy analysis – for the policy visions of parents and young people impacted by the child welfare system in New York City. FPP is interested in this litigation because we have seen first-hand the impact of open courts and broader forms of child welfare system transparency in New York City and support opening of the courts and increased transparency related to child welfare nationwide. Families in New York City have latitude to bring whomever is important to them into the courtroom for support, court-watching and accountability. Journalists can witness proceedings. Advocacy groups can connect with families and court-watch. All of this transparency strengthens protections for families involved in family court and has not led to privacy violations for children and families.

The Reimagine Child Safety Coalition is a group of advocates, organizations, and impacted families united against the family regulation system, based in Los Angeles, California. The Coalition envisions a world in which all communities and families have the resources and support that they need to thrive; a world in which the safety of children is not determined by the economic status of their families, and parents are not deemed "unsafe" or "unfit" based on the color of their skin or because they have experienced gender-based violence. The Coalition believes that the current child welfare system lacks transparency and accountability, and that open dependency hearings would permit the public to see the inequity that so many of our families suffer in closed courts.

Southern Coalition for Social Justice ("SCSJ") is a 501(c)(3) nonprofit organization founded in 2007 in Durham, North Carolina. SCSJ partners with communities of color and economically disadvantaged communities across the South to defend and advance their political, social, and economic rights through legal advocacy, research, and communications. SCSJ's Justice System Reform uses impact litigation and direct representation, among other tools, to promote social, economic, and racial justice by focusing on directly affected communities who bear the brunt of inequitable, racist, and overly punitive systems. Included in that work is the representation of people and their loved ones directly impacted by the policing and surveillance of families. This case presents issues directly tied to SCSJ's

interests in fighting against a system that surveils, criminalizes, and punishes disproportionately Black, Latinx, and low-income children and families.

Starting Over, Inc. is a nonprofit co-powering with system impacted individuals, families, and communities to build power for and within our communities by providing direct services, mutual aid, organizing, and leadership tools to the people. Starting Over's "Family Reunification, Equity, and Empowerment" project is interested in this case because it can potentially provide a level of transparency that we currently don't have and can create a precedence for a presumption that transparency is required. The fact that the courts are closed to the public is questionable and creates a sense of secrecy that is detrimental to public trust.

Survived & Punished (S&P) is a national coalition that includes victim advocates, survivors, organizers, attorneys, policy experts, scholars, and currently and formerly incarcerated people. S&P organizes to de-criminalize efforts to survive domestic and sexual violence, support criminalized survivors and their children, and end gender violence, including in family regulation and criminal legal systems. We share concerns about persecution and abuse of power in family courts, particularly in any formal or informal contexts of closed courts, which only increase vulnerability for children and families.

The upEND Movement is a collaborative initiative committed to abolishing the child welfare system, which operates as a family policing system based on surveillance and separation. We advocate for a reimagined society that truly supports children, families, and communities in safe and thriving environments. We are signing onto this amicus brief to demand transparency and accountability within the child welfare system, aligning with the broader movement for civil rights and justice. By supporting this litigation, we stand alongside civil rights groups and organizers in challenging systemic practices, including gag orders that silence community members and activists working to hold this system accountable. A federal court decision affirming the public's right to observe dependency proceedings would be a critical step toward transparency and could pave the way for addressing the criminalization of those advocating for change.

Village Arms is a Christ-centered organization that supports African American families impacted by child protection. We are interested in this case because we believe that public access to family courts will benefit children and families.

Victoria Copeland has a Ph.D and masters degree in Social Welfare with a specialization in child and family well-being. Her work has focused on the intersection of disability, racial, and economic justice. She has worked with families impacted by the child welfare system for eight years, and believes in protecting their

rights to fair and equitable treatment in dependency hearings, including safeguards against systemic biases.

Kaela Economos, MSW, is an adjunct professor and the Social Work Supervisor in the Criminal Defense and Family Defense Clinics at the Fordham University School of Law. Before joining Fordham, she led the Family Defense Social Work Practice at Brooklyn Defender Services and spearheaded the founding of their Community Office. She is honored to work on behalf of parents and families in a field that she considers one of the most important and overlooked social justice issues in the contemporary United States.

Qiana Johnson is the founder of Life After Release Inc, an organization led by women who were formerly incarcerated that supports people involved in criminal and family legal systems. She is organizing to hold prosecutors and courts accountable including by courtwatching and building alternative community supports. She is also a local community organizer with Black Lives Matter DC, a national trainer with Silicon Valley Debug, Participatory Defense and a proud member of the National Council for Incarcerated and Formerly Incarcerated Women and Girls.

Shawn Koyano is a Black queer mother, survivor, and advocate for survivors and families seeking community, belonging, and healing from violent systems. Her

work is centered and grounded in Black feminist radical care, abolition, and dreaming of possibilities for families to be safe and whole.

Lisa Sangoi is an attorney and movement leader who has co-led a number of advocacy and organizing campaigns to roll back laws, policies, and practices that punish parents. She has provided legal representation to women targeted by the child protection and criminal legal systems through trial and appellate advocacy, and regularly consults on related child welfare cases, legislation, and trainings throughout the country. Her writing has been published in academic journals, print media and advocacy reports, and she presents often on injustices in foster care systems. She founded and co-directed Movement for Family Power, an organization committed to harnessing community power to end family policing and build a world where all families can thrive, and has previously worked at Mothers Outreach Network, NYU Law Family Defense Clinic, National Advocates for Pregnant Women, Incarcerated Mothers Law Project, and Brooklyn Defender Services Family Defense Practice.

Mashai Small is a mother whose children were taken from her in closed courtrooms, where she could not benefit from family or community support. She experienced first hand the struggle of secret hearings, riddled with legal improprieties, and the impact on herself and her family. Small has also led efforts to challenge state systems that criminalize Black parents and break families apart as a

leader of the ArrestCPS Campaign, and has organized and participated in community courtwatching efforts to support other families going through closed hearing processes.

Court Watch Groups

The **Abolitionist Law Center (ALC)** is a non-profit public interest organization led by people directly impacted by the criminal punishment system. ALC uses advocacy, public education, and litigation to protect the rights and well-being of people who encounter the criminal punishment system and to dismantle Pennsylvania's racist, classist mass incarceration system. In 2020, ALC launched a Court Watch program to observe and evaluate the justice system for trends and patterns that inform and illuminate the problem of overpopulation, medical, physical and mental health and disability neglect, youth incarceration and damning demographics of mass incarceration. Staffed by volunteers, Court Watch serves to illuminate the workings of the courtroom through observation, data collection, and public reporting to hold the system accountable to the needs of our communities. ALC's ultimate vision is to replace the current policing and carceral system with community-driven, equitable, and holistic transformative justice systems.

Operation Stop CPS engages in court watching in North Carolina to build support for families impacted by the family policing system. We have seen firsthand how the community is shut out of family court proceedings.

Legal Service Providers and Civil Rights Organizations

The **American Civil Liberties Union of North Carolina Legal Foundation** (ACLU-NCLF) is a non-profit organization that regularly defends the constitutional rights of North Carolinians. ACLU-NCLF has over 22,000 members statewide and has served as direct counsel and amicus curiae in numerous cases involving First Amendment rights. ACLU-NCLF's First Amendment advocacy focuses heavily on defending North Carolinians' rights to protest, to assemble, and to share and receive information. *See, e.g.*, *Packingham v. North Carolina*, 582 U.S. 98 (2017); *Sharpe v. Winterville Police Dep't*, 59 F.4th 674 (4th Cir. 2023); *Farm Lab. Org. Comm. v. Stein*, 56 F.4th 339 (4th Cir. 2022); *ACLU of N. Carolina v. Stein*, No. 1:23CV302, 2024 WL 3203185 at *13 (M.D.N.C. June 26, 2024); *Norris v. City of Asheville*, 721 F. Supp. 3d 404 (W.D.N.C. 2024); *Doe v. Univ. of N. Carolina Sys.*, No. 1:23-CV-00041-MR, 2023 WL 8246155, at *2 (W.D.N.C. Nov. 28, 2023); *Allen v. City of Graham*, No. 1:20-CV-997, 2021 WL 2223772, at *1 (M.D.N.C. June 2, 2021); *Nat'l Ass'n for Advancement of Colored People Alamance Cnty. Branch v. Peterman*, 479 F. Supp. 3d (M.D.N.C. 2020); *Kinsley v. Ace Speedway Racing, Ltd.*, 386 N.C. 418, 904 S.E.2d 720 (2024); *Durham Cnty. Dep't of Soc. Servs. v. Wallace*, 907 S.E.2d 1 (N.C. Ct. App. 2024). Accordingly, the resolution of this case is a matter of substantial interest to ACLU-NC and its members.

The **Bronx Defenders** is a nonprofit provider of innovative, holistic, client-centered criminal defense, family defense, immigration and civil legal services, and social work support to low-income people in the Bronx. The attorneys, social workers, and parent advocates in BXD's Family Defense Practice represent parents and caregivers in proceedings alleging child abuse or neglect and termination of parental rights proceedings in New York City Family Court, Bronx County. BXD has represented approximately 15,000 parents and caregivers and represents an additional 1,200 parents each year.

Founded in 1966, the **Center for Constitutional Rights** ("CCR") is a national, nonprofit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Ensuring that governments operate transparently has been central to CCR's decades-long work, and ensuring that activists and organizers can hold governments accountable is a central tenet of both our litigation and advocacy. CCR has supported the right of community members to film law enforcement (amicus brief in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011)), and our Open Records Project uses FOIA requests to assist our clients in shining a much-needed light on government agencies to hold them accountable to the public. CCR also moved to intervene in *U.S. v. Marzook*, 2006 WL 5439801 (N.D. Ill. 2006), arguing in opposition to the government's motion to close portions of a suppression hearing to

the public. CCR has been instrumental in stopping the forced separation of families by the government, including in cases such as *Al Otro Lado, Inc. v. Mayorkas*, No. 23-CV-1367-AGS-BLM, 2024 WL 4370577 (S.D. Cal. Sept. 30, 2024) and *Al Otro Lado v. Exec. Off. for Immigr. Rev.*, 120 F.4th 606 (9th Cir. 2024), seeking to stop the separation of immigrant parents from their children. CCR has used open records litigation to support advocates working to end family policing, and works in close coalition with parents impacted by the family regulation system.

Community Legal Services of Philadelphia provides free legal assistance to low-income individuals on a broad range of civil matters, including public benefits, landlord/tenant, utilities, mortgage foreclosure, employment and other areas of great need in Philadelphia. For more than 30 years, the Family Advocacy Unit (FAU) of Community Legal Services has provided high quality, multidisciplinary representation to hundreds of parents each year in Philadelphia dependency and termination of parental rights proceedings. As part of its mission, the FAU works to ensure that families involved with the child welfare system receive the due process to which they are entitled and have meaningful access to justice.

The **Harris County Public Defender's Office (PDO)** provides zealous legal representation to indigent individuals facing criminal charges, aiming to ensure fair treatment and justice within the legal system. Dedicated to upholding constitutional rights and advocating for due process, the PDO serves as a crucial advocate for

individuals who may otherwise face barriers to equitable representation. The PDO is interested in this litigation concerning public access to courtrooms because transparency and openness are essential to safeguarding rights, maintaining accountability, and fostering public trust in the judicial system. Ensuring that court proceedings remain accessible aligns with the office's mission to protect due process and promote an impartial justice system for all.

The **Harvard Legal Aid Bureau ("HLAB")** is a student-run civil legal aid non-profit organization committed to providing free representation to low-income and marginalized communities in the Greater Boston area, including representation for families who are facing investigations and involvement from Massachusetts' family regulation agency. Students and staff aim to provide these services in a way that responds to the systemic racial, social, and economic inequalities that are the causes and consequences of poverty. HLAB supports this brief to provide greater protections to families experiencing interventions by the state, specifically in protecting the rights of families facing the most extreme form of interventions when children are removed from their homes and parents are facing the termination of their parental rights.

If/When/How: Lawyering for Reproductive Justice is a nonprofit organization that works to transform the law and policy landscape through advocacy, legal support, and organizing, so all people have the power to determine if when and

how to define, create, and sustain families with dignity and to actualize sexual and reproductive wellbeing on their own terms. This vision of reproductive justice includes a right to access comprehensive, voluntary, and non-punitive health care, and to be free from stigma, criminal penalties, and child welfare interventions based on one's pregnancy outcomes.

Youth Represent is a nonprofit legal services and advocacy organization that uses direct legal representation, policy advocacy, peer education, and other tools to build power and opportunity for Black, Latiné, and other youth of color who the criminal legal and family policing systems harm the most. We provide direct legal services to young people up to age 26 in New York. We also co-coordinated the Youth Justice Research Collaborative, which trained researchers to observe criminal and family court proceedings to monitor the implementation of New York's Raise the Age law. Youth Represent supports increased transparency in dependency proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1 and Local Rule 7.5(e), counsel for Movants certifies that the First Amendment Clinic at Duke Law School and their co-amici are not publicly held corporations, do not have parent corporations, and no publicly held corporation owns 10 percent or more of their stock.

REASONS WHY THE AMICUS BRIEF IS DESIRABLE AND IS RELEVANT TO THE DISPOSITION OF THE CASE

Community members are being excluded from dependency proceedings in North Carolina, resulting in the curtailment of these individuals' First Amendment rights and a lack of transparency and accountability within North Carolina's family court system. Public access to the courts is a core feature of democracy, and critical to the transparency and accountability within the legal system. In the criminal context, there is a well-reasoned and well-established right of public access to proceedings based on concerns about judicial error, government misconduct, tyranny, and persecution. These concerns apply with equal force to dependency proceedings, given the destructive impact of family separation on children's well-being and the state's disproportionate focus on scrutinizing and separating Black families.

Movants seek to assist this Court by providing historical and contemporary examples of open dependency proceedings, describing the important protections that open dependency proceedings offer children and families, and addressing the importance of access to court as a site of civic engagement. For the reasons set forth herein, movants respectfully requests that the Court grant leave to file the accompanying amicus brief.

THE MOTION IS TIMELY

This Court's rules require an amicus brief to be filed "within the time allowed for the filing of the brief of the party supported, or within such time as the Court may allow in its order permitting the amicus brief." Local Rule 7.5(c). Here, the proposed amicus brief supports the Plaintiffs' motion for preliminary injunction, which had no set due date. Further, given amici's insights and expertise regarding the First Amendment and family courts, amici have demonstrated a special interest in the outcome of the suit and have provided information that is timely and relevant to this Court's decision of Plaintiffs' motion.

CONCLUSION

Movants respectfully request that the Court grant this Motion for leave to file an amici curiae brief as soon as possible so that respondents have time to review it before their deadline to respond to Plaintiffs' Motion. Consistent with Local Rule 7.5, Movants conditionally file their Brief of Amici Curiae with this Motion, along with a proposed order. Counsel for Movants have conferred with counsel for the parties concerning their positions on this Motion. Plaintiff does not oppose this Motion. Movants reached out to counsel for Defendants on the morning of December 12, 2024, and have not received a response at the time of this filing on December 13, 2024.

Respectfully submitted, this 13th day of December 2024.

/s/ Sarah Ludington

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**Appearing by special appearance pursuant to L.R. 83.1(d) pending.

CERTIFICATE OF SERVICE

I certify that the foregoing motion is being served on all parties of record by the Court's ECF system on the date of filing, this 13th day of December 2024.

/s/ Sarah Ludington
Sarah Ludington

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CIVIL RIGHTS CORPS, *Plaintiff* *v.* JUDGE DORETTA L. WALKER, in her official capacity, and CLARENCE F. BIRKHEAD, in his official capacity, *Defendants.*	Case No. 1:24-cv-943

BRIEF OF AMICI CURIAE THE FIRST AMENDMENT CLINIC AT DUKE LAW SCHOOL, OTHER LAW SCHOOL CENTERS AND CLINICS, LAW SCHOLARS, INDIVIDUALS AND ORGANIZATIONS CONCERNED ABOUT THE FAMILY REGULATION SYSTEM, COURT WATCH GROUPS, CIVIL RIGHTS ORGANIZATIONS, AND LEGAL SERVICE PROVIDERS IN SUPPORT OF PLAINTIFF CIVIL RIGHTS CORPS' MOTION FOR A PRELIMINARY INJUNCTION.

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INTEREST OF AMICI CURIAE

Amici curiae[1] include law school centers and clinics, law scholars, individuals and organizations concerned about the family regulation system, court watch groups, civil rights organizations, and legal service providers. Amici are concerned about the curtailment of the First Amendment and a lack of transparency in North Carolina's dependency courts. Amici submit this brief to emphasize that public access to the courts is a core feature of democracy, and critical to transparency and accountability within the legal system. In the criminal context, there is a well-reasoned right of public access to proceedings based on concerns about judicial error, government misconduct, tyranny, and persecution. These concerns apply with equal force to dependency proceedings, given the destructive impact of family separation on children's well-being and the state's disproportionate focus on scrutinizing and separating Black families. Moreover, open courts encourage informed civic engagement, which strengthens democracy. For the reasons discussed herein, this Court should grant Plaintiffs' motion for a preliminary

[1] Consistent with L.R. 7.5(d): no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no person or entity other than amici or their counsel made a monetary contribution for preparation or submission of this brief. Complete statements of interest and the disclosure statement required by L.R. 7.5(e) are included in the motion for leave to file this amicus brief.

injunction.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The right of public access to courts is a cornerstone of the United States legal system and critical feature of a strong democracy. Court proceedings have historically been open to the public because a person's most sacred liberty interests cannot "be safely entrusted to secret inquisitorial processes," *Chambers v. Florida*, 309 U.S. 227, 237 (1940), and because "[f]ree speech carries with it some freedom to listen." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980). In other words, public access to courts not only protects against unwarranted government intrusion, but also encourages an informed and engaged citizenry.

This case offers the opportunity to ensure that the right of public access that generally applies to proceedings affecting other fundamental rights likewise is afforded in dependency proceedings. Amici seek to assist the Court by providing critical context about the importance of transparency in family courts.

First, amici address the reasoning that has supported a right of public access to courts, including dependency proceedings. Amici describe examples of open dependency jurisdictions, which still permit courts to protect the confidentiality of

[2] Amici express gratitude to Boston University School of Law students Peter Dickson and Sadie Keller for their research and drafting contributions to this brief.

children or close courtrooms under limited circumstances where a compelling state interest overrides the presumption of public access.

Second, amici address the protections that public access to dependency proceedings affords children and families. Open courts promote transparency regarding the actions of family court attorneys and judges, allowing the public to hold those actors accountable for adhering to applicable legal standards. Transparency and accountability are especially salient in the family court context given the historical use of family separation during slavery and as part of the forced removal and assimilation of indigenous peoples.

Third, amici address the importance of access to courts for the purpose of civic engagement. Public observation of court proceedings benefits not only the families who seek transparency and solidarity, but also observers who seek democratic engagement with the systems and structures that operate in the name of "the people." This facet of civic society invites improvement of our legal system and should be encouraged.

ARGUMENT

I. The right of public access to courts is a cornerstone of the United States legal system and extends to dependency proceedings.

Judicial proceedings affecting fundamental rights have historically been open to the public. Courts recognize that transparency serves two important goals: it guards against persecution and error, and it supports free speech—which

encompasses the "freedom to listen." *See Richmond Newspapers*, 448 U.S. at 576. For these reasons, some of the earliest dependency courts were open to the public, and many jurisdictions have established a presumption of openness in dependency proceedings today. These examples illustrate the wisdom and feasibility of ensuring a right of public access to dependency proceedings.

A. The reasoning supporting a public right of access to other proceedings likewise supports a right of access to dependency proceedings.

There is an established right of public access to many types of court proceedings, both civil and criminal. *See*, *e.g.*, *Richmond Newspapers*, 448 U.S. at 576 (criminal trials); *Press-Enter. Co. v. Superior Ct. of Cal., Riverside Cnty.*, 464 U.S. 501 (1984) (voir dire proceedings); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (deportation proceedings); *In re Astri Inv., Mgmt. & Sec. Corp.*, 88 B.R. 730 (D. Md. 1988) (creditors' meetings). This right of access to court is generally grounded in the First Amendment and common law and reflects the premise that openness of courts benefits both participants in court proceedings and observers of those proceedings. This reasoning likewise supports a right of public access to dependency proceedings.

(1) Public access to courts guards against persecution and error.

Public access to criminal courts guards against the weaponization of courts for the purpose of corruption or persecution. *See Chambers*, 309 U.S. at 237

(discussing "knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes"). As the U.S. Supreme Court has explained, "distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet," which all "symbolized a menace to liberty." *In re Oliver*, 333 U.S. 257, 268–69 (1948). Public access to courts is "a safeguard against any attempt to employ our courts as instruments of persecution," since "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Id.* at 270.

Public access to courts is not only a check against judicial abuse of power, but arguably *the only* effective check against such abuse. As explained by philosopher and jurist Jeremy Bentham:

> Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.

Id. at 271 (quoting 1 Jeremy Bentham, *Rationale of Judicial Evidence* 524 (1827)); *see also Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 606 (1982) ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society

as a whole."). For these reasons, closing criminal proceedings to the public, even for a limited time, must be justified by an "overriding interest" and narrowly tailored to serve that interest. *Richmond Newspapers*, 448 U.S. at 581.

The rights at stake in criminal proceedings are akin to the rights at stake in dependency proceedings, where children may be rendered permanent strangers to their biological parents and become wards of the state. *See Santosky v. Kramer*, 455 U.S. 745, 762 (1982) ("In New York, the factfinding stage of a state-initiated permanent neglect proceeding bears many of the indicia of a criminal trial."); *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 42 (1981) (Blackmun, J. dissenting) ("The method chosen by North Carolina to extinguish parental rights resembles in many respects a criminal prosecution."). "Few forms of state action are both so severe and so irreversible." *Santosky*, 455 U.S. at 759. Accordingly, "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *M.L.B. v. S.L.J.*, 519 U.S. 102, 103 (1996) (quoting *Santosky*, 455 U.S at 774 (Rehnquist, J., dissenting)); *see also Zablocki v. Redhail* [sic],[3] 434 U.S. 374, 384 (1978) ("[T]he right 'to marry, establish a home and bring up children' is a

[3] The Court misspelled Roger Red Hail's last name, a too-common occurrence in cases involving Native American parties. *See* Tonya L. Brito, R. Kirk Anderson & Monica Wedgewood, *Chronicle of a Debt Foretold*: Zablocki v. Red Hail (1978), *in* THE POVERTY LAW CANON: EXPLORING THE MAJOR CASES 232, 254 n.1 (Marie A. Failinger & Ezra Rosser eds. 2016).

central part of the liberty protected by the Due Process Clause . . . .") (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Likewise, children have an interest in their own safety and happiness, and the state has an interest in supporting the welfare of children. *Santosky*, 455 U.S at 790 (Rehnquist, J., dissenting). The stakes of dependency proceedings cannot be overstated.

Concerns about abuse of power in the family court context are well-founded. *See, e.g., McKeiver v. Pennsylvania*, 403 U.S. 528, 544 (1970) ("[T]oo often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged."). Family courts are especially susceptible to judicial abuse and error given judges' wide discretion and ambiguous directive to act in the "best interest of the child[]." *See Duchesne v. Sugarman*, 566 F.2d 817, 828, n.24 (2d Cir. 1977) (stating, in reference to the "best interest of the child[]" standard, that "(o)f all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive" because "those who torment us for our own good will torment us without end for they do so with the approval of their own conscience") (quoting Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 645 (1977)).[4] Family separation has long

[4] *See also* Richard A. Warshak, *Parenting by the Clock: The Best Interest-of-the-Child-Standard, Judicial Discretion, and the American Law Institute's 'Approximation Rule*,' 41 U. BALT. L. REV. 83, 86 (2011) (noting that best interest of the child standard "serves as a conduit for personal biases to influence outcomes"); Mary McDewitt Gofen, *The Right of Access to Child Custody and*

perpetuated race-and-class-based subordination in the United States, including through slavery, the separation of Indigenous families, and the frequent conflation of poverty and neglect in child welfare cases. *See infra* Part II.B. These experiences illustrate the wisdom of our legal system's fundamental "distrust for secret trials," *Oliver*, 333 U.S. at 268–69, and supports the need for public access to dependency proceedings.

(2) Public access to courts is critical to a well-informed public.

The presumptive openness of criminal trials is grounded not only in the rights of the accused, but also the rights of observers. Early colonial charters reflect this premise: "the first public-trial provision to appear in America spoke in terms of the right of the public, not the accused, to attend trials." *Gannett Co. v. DePasquale*, 443 U.S. 368, 421 (1979) (Blackmun, J., concurring in part). Further, the First Amendment affords the public a "freedom to listen," which is derived from the rights of free speech, press, and assembly. *Richmond Newspapers*, 448 U.S. at 599 n.2 (Stewart J., concurring in the judgment) (citing *Kleindienst v. Mandel*, 408 U.S. 753 (1972)). The freedom to listen "is one of only a few places in constitutional jurisprudence where community participation is intimately tied to the interests of

Dependency Cases, 62 U. CHI. L. REV. 857, 857 (1995) (stating that the "bests interests of the child" standard is "ambiguous and sometimes results in judicial abuse").

individuals accused of crimes, reflecting an ideal of regular and meaningful audience interaction as part of a functioning system of punishment."[5]

The "freedom to listen" recognizes that public access to courts promotes understanding of the law and civic participation. The right to open discourse on governmental affairs requires public access to information about those affairs. *Globe Newspaper*, 457 U.S. at 604–05. Open courts allow the public to witness legal proceedings in action without being filtered by the parties, the media, or politicians. Observers can gain valuable insights into the challenges, limitations, and benefits of our laws and systems. This access produces a more informed electorate.

Public access to legal proceedings also increases confidence in their outcomes. The openness of courts "fosters an appearance of fairness, thereby heightening public respect for the judicial process—an essential component in our structure of self-government." *Id*. at 606; *see also Richmond Newspapers, Inc*., 448 U.S. at 572 (quoting J. Wigmore, Evidence § 1834, p. 438 (J. Chadbourn rev. 1976) ("Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy."). This access "facilitate[s] a different kind of democratic legitimacy . . . a righteous and necessary democratic

[5] JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION 79 (2023).

battle between contrasting ideas, and measurements, of justice."[6] The freedom to listen and the societal benefits this freedom entails further support a right of public access to dependency proceedings.

B. Dependency proceedings were historically open to the public, and openness of dependency proceedings enables their proper functioning.

"To determine whether a particular adjudicatory forum should be presumptively open to the public, courts ask whether the forum has historically been open and whether openness enables its proper functioning." *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 290 (2d Cir. 2012). When it comes to dependency proceedings, both questions may be answered affirmatively.

(1) A historical analysis of dependency courts supports a right of public access to dependency proceedings.

Despite the popular misconception that dependency proceedings have always been closed, public access to dependency courts has roots in common law and was an intentional component of early versions of these courts. The juvenile court system in the United States was an outgrowth of the English Chancery Courts, which were charged with "a general right delegated by the crown as *pater patriae* so to interfere in particular cases for the benefits of such [infants] who are incapable to protect

[6] *Id.* at 84.

themselves."[7] Chancery court hearings were held in open court, though later had private components.[8] This practice aligned with common law doctrine ensuring the right to inspect and copy judicial records,[9] and the right of public access to criminal trials, *see supra* Part I.A.

Against this backdrop, it is unsurprising that the first juvenile court, established in Chicago in 1899, was open to the public.[10] The reasoning that animated open access to early dependency proceedings mirrors the reasoning that has supported a right of access to criminal courts: the idea was that transparency would promote the legitimacy of proceedings.[11] While some advocates proposed

[7] Samuel Broderick Sokol, *Trying Dependency Cases in Public: A First Amendment Inquiry*, 45 UCLA L. REV. 881, 905 (1998) (quoting John David Chambers, *A Practical Treatise on the Jurisdiction of the High Court of Chancery over the Persons and Property of Infants* 2 (London, Saunders & Benning 1842); *see also* Jan L. Trasen, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?* 15 B.C. THIRD WORLD L.J. 359, 369 (1995); Gofen, *supra* note 4, at 866.

[8] Sokol, *supra* note 7, at 907-09.

[9] Ronald D. May, *Public Access to Civil Court Records: A Common Law Approach*, 39 VANDERBILT L. REV. 1465, 1467 (1986).

[10] David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in A CENTURY OF JUVENILE JUSTICE 42, 43 (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus, & Bernardine Dohrn. eds., 2002) [hereinafter "Tanenhaus, Evolution"].

[11] *See id*. at 62-63 (noting that supporters of the first juvenile court used the "public nature" of dependency proceedings to "explain the rehabilitative mission of the court" and establish its "legitimacy").

closed courts, legislators ultimately rejected a bill provision that would have excluded the public from these proceedings.[12]

Closed dependency proceedings were still not common as late as 1912.[13] In 1910, Judge Harvey H. Baker, presiding over Boston's juvenile court, wrote that juvenile courts across the nation were moving towards limiting public access, but doing so to various degrees.[14] He cautioned against full closure, since a private hearing represented a "radical departure from the hard-won and long-established principle of full publicity in court proceedings" and could shield from public view the "carelessness, eccentricities, or prejudices of an unfit judge."[15] By 1910, private hearings were not the unanimous approach to protecting children and their families and even Baker, a leading proponent of private hearings, was not certain of their efficacy.[16]

By the 1920s, there had been movement towards closed dependency proceedings.[17] Closure was driven in part by reformers who challenged poor and

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[12] David S. Tanenhaus, *Imagining a Children's Court*, in JUVENILE JUSTICE IN THE MAKING 3, 20-21 (2004) [hereinafter "Tanenhaus, Imagining"].
[13] Tanenhaus, Evolution, *supra* note 10 at 61-65.
[14] *Id*.
[15] *Id*. at 64 (quoting Harvey H. Baker, *Private Hearings: Their Advantages and Disadvantages*, 36 ANN. ACAD. POL. & SOC. SCIENCE 80 (1910)).
[16] *Id*.
[17] *See id.* at 64 (noting that private hearings had become standard practice by the 1920s); Barbara White Stack, *The trend toward opening juvenile court is now gaining momentum*, PITTSBURGH POST-GAZETTE, September 23, 2001, *available at* https://jjie.org/2010/02/25/the-trend-toward-opening-juvenile-court-is-now-

immigrant parents' abilities to meet their responsibilities and believed courts should intervene to "socialize and control their children."[18] Court closure enabled judges to have full control and privacy to dictate family matters.

The common misconception that dependency proceedings have always been closed derives from an over-reliance on research on family courts conducted in the 1920s, after courts had been closed. Research from the 1970s relied on these studies to make "generalizations about 'the progressive juvenile court,' including the assumption that private hearings had always been one of the distinguishing features of juvenile justice."[19] Missing from the narrative was the "controversial and long process of limiting public access to the juvenile court."[20]

(2) Contemporary examples illustrate that the open courts foster more functional dependency proceedings.

Beginning in the 1980s, a trend to reopen family courts emerged.[21] This was inspired in part by the expansion of due process rights in the adult criminal context in the 1960s and 1970s and the application of procedural fairness—rather than the

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gaining-momentum/ (last visited December 12, 2024) (discussing states that have opened dependency proceedings since 1980, when Oregon was the first to do so).

[18] Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. KY. L. REV. 189, 189 (2007).

[19] David S. Tanenhaus, *Building a Model Court*, in JUVENILE JUSTICE IN THE MAKING 23, 53 (2004).

[20] *Id.*

[21] White Stack, *supra* note 17 ("Over the past 20 years, states have begun opening juvenile courts, and over the next 20, the trend is likely to continue.").

parens patriae ideal—in juvenile courts.[22] In 2005, the National Council of Juvenile and Family Court Judges ("NCJFCJ") issued a resolution favoring presumptively open dependency proceedings.[23] The NCJFCJ's analysis balanced the need to protect children, the strong privacy interests in family life, and the functioning of the court system, and resolved that open court proceedings:

> will increase awareness of the critical problems faced by juvenile and family courts and by child welfare agencies in matters involving child protection, may enhance accountability in the conduct of these proceedings by lifting the veil of secrecy which surrounds them, and may ultimately increase public confidence in the work of the judges of the nation's juvenile and family courts. [24]

Decades into the movement to re-open family courts, the NCJFCJ's analysis appears to have borne out: according to a 2021 survey of courtroom trends by two judges, "the states that have opened proceedings have not reported that doing so adversely

[22] *See* Barry C. Feld, *My Life in Crime: An Intellectual History of the Juvenile Court*, 17 NEV. L. J. 299, 306 (2017) (noting that ABA standards for juvenile justice "responded to the Supreme Court's due process decisions, eschewed juvenile courts' parens patriae ideology and rehabilitative ideal" and advocated "procedural parity with adults, including mandatory appointment of counsel and the right to a jury trial").

[23] Resolution No. 9, NCJFCJ 68th Annual Conference: July 17-20, 2005, Pittsburgh, PA, https://www.ncjfcj.org/wp-content/uploads/2019/08/in-support-of-presumptively-open-hearings.pdf.

[24] *Id.*

affected the operation of their courts. In other words, the doors were opened, but the sky did not fall."[25]

The openness of dependency proceedings enables their proper functioning. Durham County's practice of secrecy when it comes to dependency proceedings contradicts the growing national trend toward transparency.

II. Access to dependency proceedings protects the interests of children and families by promoting transparency and accountability, critical safeguards against bias.

A right of access to dependency proceedings is necessary to shed light on the actions of family court attorneys and judges, which are otherwise shrouded in secrecy and shielded from accountability. Scrutiny of legal proceedings allows the public to monitor the extent to which judicial system actors are promoting fairness and adhering to applicable legal standards. *See, e.g.*, *Press-Enterprise Co. v. Superior Ct. of Cal.*, 478 U.S. 1, 7 (1986) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed.").[26] The protections offered by a right of access to dependency proceedings are especially important given the well-documented history of racism, classism, sexism, and ableism in the family regulation context.

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[25] Jay D. Blitzman & Steven F. Kreager, *Transparency and Fairness: Open the Doors*, 102 MASS. L. REV. 38, 42 (2021).

[26] *See also* Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. L. REV. 1 (2001) (noting that open courtrooms "place our system of justice before the public and thus make it accountable").

A. Transparency and accountability protect rather than harm children and families.

Public scrutiny of family courts provides critical protection by guarding against misconduct and error in individual cases. By contrast, closed dependency proceedings foster an environment where errors and misconduct occur in the shadows.[27]

One way that public access to courts promotes transparency and accountability is through what social scientists call "the observer effect," which refers to the idea that "people change their behavior when they know they're being watched."[28] For example, a group of Philadelphia organizers annually engage in an action that involves observing bail hearings over a 24-hour period, allowing them to compare bail hearing outcomes on that day to outcomes on days without the presence of courtwatchers. Over two years of data, "the watchers found that during the 24-hour action, magistrates set cash bail less frequently than they did on other days of the year."[29] This data illustrates the observer effect, suggesting that the presence of

[27] Richard Wexler, *Civil Liberties Without Exception: NCCPR's Due Process Agenda for Children and Families*, National Coalition for Child Protection Reform, https://nccpr.org/solutions-due-process/ (last updated May 2022) (arguing that the lack of accountability in family courts, coupled with the "virtually unchecked power" of Child Protective Services cannot protect children).
[28] SIMONSON, *supra* note 5 at 65.
[29] *Id.*

an audience can hold system actors accountable and remind judges and prosecutors of their responsibility to ensure fairness.[30]

By contrast, a lack of public access to dependency proceedings creates conditions in which mistakes and misconduct go unredressed, harming children and families.[31] As the NCJFCJ has advised, "increas[ing] public awareness of the critical problems faced by juvenile and family courts and by child welfare agencies in matters involving child protection, may enhance accountability in the conduct of these proceedings by lifting the veil of secrecy which surrounds them[.]"[32] In other words, public access to dependency proceedings mitigates the risk of judicial misconduct and error by creating pathways for redressing harm, and serving as a prophylactic check against unwarranted government intervention.[33]

Even the specter of transparency encourages officials to maintain high ethical standards and follow legal procedures, thus minimizing wrongful removals and

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[30] Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2184 (2014).

[31] *See, e.g.*, Erik Ortiz, *'One Disaster After Another': How a Family Court Judge Failed Families*, NBC NEWS (July 30, 2021, 9:27 PM), https://www.nbcnews.com/news/us-news/one-disaster-after-another-how-family-court-judge-failed-families-n1275562 (discussing PA judge who was suspended after an investigation revealed that the judge engaged in a pattern of scolding parents and issuing unfair dependency judgments).

[32] Resolution No. 9, NCJFCJ 68th Annual Conference: July 17-20, 2005, Pittsburgh, PA, https://www.ncjfcj.org/wp-content/uploads/2019/08/in-support-of-presumptively-open-hearings.pdf.

[33] Wexler, *supra* note 27.

safeguarding the rights of all parties. Reflecting on open courts in New York, a former chief judge of the New York Court of Appeals remarked that "sunshine is good for children."[34] Indeed, since New York opened its dependency court doors in 1997, the number of children in foster care decreased. In the 1990s, the number of children entering foster care fluctuated from around 9,000 to around 16,000, and roughly 44 percent of children who first entered foster care while under age 12 in 1994 were still in care at the end of 1998.[35] By 2024, the number of children in foster care was down to under 6,500, a historic low.[36] This result followed the establishment of several community groups who engaged in court watching, as well as reporting by journalists and academics.[37] Moreover, open family courts led to

[34] Barbara White Stack, *Open Justice: Little girl's murder brought New York's juvenile court proceedings into the light*, PITTSBURGH POST-GAZETTE, Sept. 24, 2001 (quoting Judge Judith Kaye).

[35] Timothy Ross, *A System in Transition: An Analysis of New York City's Foster Care System at the Year 2000*, Vera Institute of Justice 2 (June 2001), https://www.vera.org/downloads/publications/a-system-in-transition-an-analysis-of-new-york-citys-foster-care-system-at-the-year-2000/legacy_downloads/153_223.pdf.

[36] Press Release, New York City Administration for Children Services ("ACS"), As Part of 'National Foster Care Month,' NYC Administration For Children's Services Recognizes Foster Parents, Family Members, Child Welfare Professionals & All Community Members Who Support Children & Teens In Foster Care (May 2, 2024), https://www.nyc.gov/assets/acs/pdf/PressReleases/2024/nfcm.pdf.

[37] *See, e.g.*, TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK'S CHILD WELFARE SYSTEM (2016) (providing an analysis of the family regulation system in New York based in part on court observation).

greater funding for repairs for family facilities and raised fees paid to lawyers who defend indigent parents.[38]

Even in jurisdictions with open dependency proceedings, there are mechanisms to protect the confidentiality of children, and courtrooms may be closed under limited circumstances where a compelling state interest overrides the presumption of public access.[39] In New York, a presumption of public and media access to dependency proceedings can be overcome "on a case-by-case basis by an overriding interest that closure is essential to preserve higher values."[40] Judges can impose other safeguards to protect privacy interests. *See In re State-Record Co., Inc.*, 917 F. 2d 124, 129 (4th Cir. 1990) (holding that court erred by sealing criminal docket where there was a "reasonable suggestion" to instead redact select documents); *In re Knight Pub. Co.*, 743 F.2d 231, 235 (4th Cir. 1984) (holding that court erred by closing courtroom without making findings to support closure or considering alternatives, and it was error to seal records without considering the alternative of "excising the documents and releasing them to the public, coupled with

[38] Wexler, *supra* note 27 (describing the changes in New York after family courts were opened to the public).
[39] *See* Blitzman & Kreager, *supra* note 25, at 42 (discussing state limitations on publicity in juvenile courtrooms); Tanenhaus, *Evolution*, *supra* note 10 at 64 (same).
[40] New York State Unified Court System, "Access to Court Records: Family Proceedings," (quoting *Globe Newspaper*, 457 U.S. at 608), https://ww2.nycourts.gov/sites/default/files/document/files/2018-05/AccessToCourtRecords.pdf.

an admonition to the jury not to listen to news media or discuss the case with others"); *Matter of Rajea T.*, 165 N.Y.S.3d 647, 652 (App. Div. 2022) (finding lower court could have conditioned court attendance on nondisclosure of confidential information); *In re S Child.*, 532 N.Y.S.2d 192, 200 (Fam. Ct. 1988) (requiring press not to print children's names or provide info that could identify their residence or identity); *In re M.F.*, 819 N.Y.S.2d 210 (Table), 2006 WL 1540285, at *3 (Fam. Ct. 2006) (holding that less restrictive alternatives to court closure included: instructing the press to refrain from printing name of respondent, limiting the press and public to a designated area, limiting the press to one reporter, excluding audio-visual equipment and sketch artists, and redacting transcripts). Accordingly, the protections offered by open dependency proceedings far outweigh any risk of harm.

B. A right of access to family courts is especially important given the long history of racism, sexism, and classism in the family regulation system.

Transparency and accountability are especially important in dependency proceedings given the well-documented history of unwarranted family separations based on race, class, disability, religion, and other forms of discrimination in the United States.[41] This legacy casts a shadow on modern-day family court proceedings, adding another dimension to the need for public access and scrutiny.

[41] *See, e.g.*, Robyn M. Powell, *Legal Ableism: A Systematic Review of State Termination of Parental Rights Laws*, 101 WASH. U. L. REV. 423, 438–47 (2023);

During slavery, families were torn apart to maximize profits and solidify the dehumanizing treatment of individuals as property.[42] Similarly, as acknowledged by Congress when it passed the Indian Child Welfare Act in 1978, "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." *Haaland v. Brackeen*, 599 U.S. 255, 265 (2023) (quoting 92 Stat. 3069, 25 U.S.C. § 1901(4)). As the U.S. Supreme Court explained, "Congress found that many of these children were being 'placed in non-Indian foster and adoptive homes and institutions,' and that the States had contributed to the problem by 'fail[ing] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.'" *Id*. (quoting §§ 1901(4), (5)).

The separations of enslaved and Indigenous families not only harmed impacted parents and children, but also enacted community harm through forced assimilation and cultural erasure. *See, e.g.*, *id*. (quoting Testimony of the Tribal Chief of the Mississippi Band of Choctaw Indians, Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on

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Vicki Lens, *Judging the Other: The Intersection of Race, Gender, and Class in Family Court*, 57 FAM. CT. REV. 72, 74–76 (2019).

[42] Ndjuoh MehChu, *Help Me to Find My Children: A Thirteenth Amendment Challenge to Family Separation*, 17 STAN. J. C.R. & C. L. 133, 162–63 (2021); Rachel Johnson-Farias, *Uniquely Common: The Cruel Heritage of Separating Families of Color in the United States*, 14 HARV. L. & POL. REV. 535 (2020).

Interior and Insular Affairs, 95th Cong., 2d Sess., 193 (1978)) ("Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People.").

Racist, classist, and ableist stereotypes continue to infect decisions regarding parental fitness. Many dependency proceedings involve allegations of child neglect, a legal standard that often conflates symptoms of child neglect with symptoms of poverty.[43] There are racial disparities in all outcomes of the family regulation system, and they are most acute in regards to the "death penalty of the family-policing system," the termination of parental rights.[44] Biased judgments, coupled with systems of over-policing and surveillance, contribute to the creation of a modern-day "Jane Crow" system, effectively criminalizing communities of color

[43] For example, in North Carolina in 2022, 84% of entries into foster care involved allegations of child neglect, 90% of cases did not involve an allegation of physical abuse, and 96% of cases did not involve an allegation sexual abuse. *See* U.S. Dep't of Health and Human Services, Administration for Children and Families, *Adoption and Foster Care Analysis and Report System ("AFCARS") Report: North Carolina* 3 (2023). *See also* DOROTHY E. ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES--AND HOW ABOLITION CAN BUILD A SAFER WORLD 27 (2022) (describing how "investigators interpret conditions of poverty—lack of food, insecure housing, inadequate medical care—as evidence of parental unfitness").

[44] ROBERTS, *supra* note 43 at 29 (noting that Black and Indigenous children "are more than twice as likely as white children to experience the termination of both parents' rights").

through discriminatory child welfare practices.[45] Similar dynamics target parents with disabilities.[46]

In this context, public access to dependency proceedings becomes not just a matter of transparency but an instrument for challenging inequity. Public scrutiny allows communities to monitor proceedings, identify and challenge discriminatory practices, and hold the system accountable for upholding the best interests of all children.

III. Public access to dependency proceedings is critical to freedom of speech.

As discussed *supra*, Part I.A.2, public access to courts implicates the rights not only of those who are in court proceedings, but also those who seek to observe those proceedings. Court "[o]bservation is meant to have an effect not just on individuals, but also on the wider public's sense of what is right and what they should and should not do. It is meant to further democracy itself."[47] Public access to dependency proceedings facilitates the freedom to listen and, in so doing, supports the democratic function of society.

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[45] Stephanie Clifford and Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow'*, N.Y. TIMES, July 21, 2017, https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html; Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1486 (2012).
[46] Powell, *supra* note 41, at 438–47.
[47] SIMONSON, *supra* note 5, at 79.

Public access to courts is necessary for civic engagement and public understanding of the law, which promotes informed advocacy and policymaking regarding needed changes to our systems and institutions. Indeed, court observation in the criminal context has led to important changes in that system. "Sporadic organized courtwatching initiatives have existed for decades, and likely for as long as there have been criminal courts."[48] These initiatives are not inherently "pro-defendant."[49] Indeed, "in the 1990s, a number of groups began to watch criminal court in support of prosecutions for domestic violence."[50] Public scrutiny exerts a pressure on the institutions that claim to represent "the People" to fulfill the obligations of that promise.

Public access to court proceedings can improve the functioning of the court system itself. In 2017, a coalition in Illinois "monitored the implementation of a new judicial rule . . . mandating that a judge could set money bond only when the person had the ability to pay the amount necessary to secure their release."[51] Court observers saw that the "rate of pretrial release almost doubled and the use of monetary bond dropped by half" but that courts were still imposing unaffordable bond in many

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[48] *Id*. at 59.
[49] *Id* (citing Legal Momentum, *A Guide to Court Watching in Domestic Violence and Sexual Assault Cases* (2005), https://www.legalmomentum.org/sites/default/files/kits/).
[50] *Id*.
[51] *Id*. at 81.

cases.[52] The coalition published this data on their website, "modeling the openness they were demanding from the court system itself."[53] As a result of these efforts, "Chicago's criminal court began to release its own data online for the first time."[54] In this example, public access to court resulted in not only transparency from the act of court watching, but from the resulting policy changes that court watching inspired.

A right of access to dependency courts is aligned with a growing movement to de-mystify legal systems, creating more expansive pathways for civic engagement.[55] The act of witnessing legal proceedings emphasizes the public's vested interests in those proceedings.[56] Thus, access to courts encourages public viewers to decide whether existing laws and policies reflect their will, or whether those laws should be changed. In this respect, open courts are an essential feature of democracy and necessary to the evolution of society.

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[52] *Id*.
[53] *Id*.
[54] *Id*.
[55] *See*, *e.g.*, Rachel López, *Participatory Law Scholarship*, 123 COLUM. L. REV. 795 (2023); Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 268–70 (2019); Raj Jayadev, Albert Cobarrubias Justice Project, *Participatory Defense–Transforming the Courts Through Family and Community Organizing*, acjusticeproject.org/about/purpose-and-practice/ (last visited December 12, 2024).
[56] *See* Sokol, *supra* note 7 at 927 (noting that "the public is essentially a party to all dependency cases"); Trasen, *supra* note 7 at 379 (discussing the public's interest in dependency proceedings given that public money funds family courts and judges are government officials).

Finally, public access to dependency proceedings would allow advocates to accompany people who are navigating the family regulation system. Family, friends, and community members may engage in "participatory defense" efforts to support people who are challenging state intervention and seeking to keep their families together.[57] Secrecy disadvantages people when they are fighting for what is dearest to them: their families. A right of access to dependency hearings would allow advocates to observe the proceedings and better assist to those involved, thereby benefitting North Carolina families.

CONCLUSION

For these reasons, amici urge the Court to grant Plaintiff's motion for a preliminary injunction.

Respectfully submitted, this 13th day of December 2024.

/s/ Sarah Ludington

[57] Janet Moore, Marla Sandys, Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALBANY L. REV. 1281, 1282–83 (2015); *see also* Family Reunification, Equity & Empowerment (FREE) Project, https://www.startingoverinc.org/free ("The FREE Project supports families facing child dependency court and the child welfare system through free resources, court support, and strategy to advocate for family reunification").

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*Appearing by special appearance pursuant to L.R. 83.1(d)

**Appearing by special appearance pursuant to L.R. 83.1(d) pending.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies as follows:

1. In compliance with Local Rule 7.3(d)(1), this brief contains 6237 non-excluded words.

2. This brief complies with the form requirements set forth in Local Rule 7.1(a).

December 13, 2024

/s/ Sarah Ludington
Sarah Ludington

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2024, the foregoing was filed electronically with the Clerk of Court through the CM/ECF system. I further certify that all parties required to be served have been served.

/s/ Sarah Ludington
Sarah Ludington

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CIVIL RIGHTS CORPS, Plaintiff v. JUDGE DORETTA L. WALKER, in her official capacity, and CLARENCE F. BIRKHEAD, in his official capacity, Defendants.	Case No. 1:24-cv-943

(PROPOSED) ORDER ON MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE THE FIRST AMENDMENT CLINIC AT DUKE LAW SCHOOL, ET AL., IN SUPPORT OF PLAINTIFF CIVIL RIGHTS CORPS' MOTION FOR A PRELIMINARY INJUNCTION

Before the Court is the December 13, 2024, Motion by the First Amendment Clinic at Duke Law School, et al., seeking leave to file an amicus brief in support of plaintiff Civil Rights Corps' motion for a preliminary injunction. Upon consideration of the motion, and seeing that it comports with Local Rule 7.5, the Court hereby **GRANTS** the motion. The brief of Amici Curiae conditionally filed with their motion shall be entered on the docket.

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UNITED STATES DISTRICT JUDGE