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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CONSOLIDATED
CASE NOS. 80,419 & 80,432

IN RE: AMENDMENT TO THE
FLORIDA RULES OF JUDICIAL
ADMINISTRATION, PUBLIC ACCESS
TO JUDICIAL RECORDS

AND

IN RE: AMENDMENT TO THE
FLORIDA RULES REGULATING
THE FLORIDA BAR

RESPONSE OF THE TRIBUNE COMPANY

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I.

INTRODUCTION

The Tribune Company **("Tribune"),** publisher of The Tampa Tribune, a newspaper of general circulation in Florida, files this response to proposed amendments to the Rules of Judicial Administration and the Rules Regulating the Florida Bar. The Tribune adopts and incorporates the arguments enunciated by the Florida Press Association and the Florida Society of Newspaper Editors. **However, the** Tribune **files a separate** response to address its specific concerns relating to Paragraphs *8* and 9 of the proposed Florida Rules of Judicial Administration.

Those sections declare the following records confidential:

> *8.* All records made confidential under **the** Florida and United **States** Constitution and Federal law.
>
> 9. All court records presently deemed to be confidential by court rule, Florida Statutes, or common law of the State of Florida.

The Tribune is concerned that proposed rules in Paragraphs *8* and 9 allow lower courts to seal judicial records without the particularized case-by-case analysis that this Court has always **demanded.** Rather than assess the specific harm **that** would befall individuals from the release of judicial records, lower courts could consider these proposed rules **as** creating per se judgments that any privacy interest enunciated by state and federal legislatures or courts outweighs the public's right to be included in the judicial process.

This type of per se analysis would supplant the well established **balancing** test that **protects** an equally important constitutional right -- the public's right of access to judicial proceedings and documents. Apparently, in any situation falling under Paragraphs *8* or 9, these access rights would not even be considered. In other words, these rules impose a presumption that when a court or the legislature has recognized a right of privacy or enacted a confidentiality provision, closure is mandated regardless of whether there **is any** identifiable **harm to** an **individual** or the government. Paragraphs *8* and 9 reverse this Court's and the United States Supreme Court's historical presumption of access to judicial records into a hard and fast rule of closure.

Even if there is a disclosural right of privacy found in the Fourteenth Amendment to the Federal Constitution or Section I, Article 23 of the **Florida** Constitution, that right has never been absolute. The right of disclosural privacy, when recognized, has always been evaluated on a case-by-case basis. The tests used to protect rights' of access traditionally balance legitimate privacy interests against the public's right to know. If Paragraphs *8* and 9 undercut that mandatory case-by-case balancing analysis, the public's right of access to judicial records is endangered to a degree that has heretofore not been known in this State. Because the right of access if of equal constitutional dimension, it must be weighed **in** a balance.

It is ironic that a Florida constitutional amendment designed to enhance public access could become a device that lessens the public's ability to monitor the judicial process. This Court's adoption of these proposed rules in anticipation of the passage of a public records constitutional amendment should be consistent with the proposed amendment. These rules should exemplify the basic proposition that government, including the judiciary, governs best when it is **observed.** These proposed rules should also recognize that exemptions to the broad policy of access should be narrowly tailored and strictly construed. These rules should recognize that a balancing case-by-case approach accommodates any right of privacy as well as the recognized rights of access to judicial records and proceedings.

Therefore, the Tribune requests that this Court not allow closure of judicial records to become a mandatory result without individualized assessments of need. The Tribune requests that this Court maintain the historical presumptions of access that this Court has so zealously **protected over** the years.

II.

ARGUMENT

A. FRAMEWORK OF ANALYSIS FOR THE RIGHT OF ACCESS TO JUDICIAL DOCUMENTS

The First Amendment right of access is well recognized. See, e.g., Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986)(Press-Enterprise II)(public has First Amendment right of access to transcript of closed preliminary criminal hearing); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984)(Press-Enterprise I)(public has First Amendment right of access to transcripts of jury voir dire proceeding closed by court order); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)(public has First Amendment right of access to courtroom during testimony of juvenile victim of sex offenses); and Richmond Newspapers v. Virginia, 448 U.S. 555 (1980)(closure of trial violated First Amendment).

In Florida, Courts have long ensured the public's ability to observe all stages of the judicial process based on both a strong common law presumption of access and the constitutional right. Miami Herald Publishins Co. v. Lewis, 426 So.2d 1, 7 (Fla. 1982); Russell v. Miami Herald Publishins Co., 570 So.2d 979, 982 (Fla. 2d DCA 1990). Even if the right is defined as a common law presumption, it has a weighty history. See Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113, 118 (Fla. 1988)(right to civil divorce records); Bundy v. State, 455 So.2d 330, 337 (Fla.

1984)(access to criminal proceeding); Lewis, 426 So.2d at 7 (access to sealed suppression hearing documents).'/

That is because access to judicial process, including its documents, plays a "significant positive role" in the functioning of the judiciary. Press-Enterprise 11, 478 U.S. at 11-12. In Richmond Newspapers, the Supreme Court held that access contributes "assurance that the proceedings were conducted fairly" and "discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality." 448 U.S. at 569. Furthermore, access promotes the "public acceptance of both the process and its results," "awareness that society's responses to criminal conduct are underway," and the "prophylactic aspects" of community catharsis. Id. at 571.

This Court in Barron recognized that access enhances a court's truth-seeking functions "by stimulating the instinctive responsibility to public opinion, symbolized in the audience and ready to scorn a demonstrated liar," and "by inducing the fear of exposure of subsequent falsities through disclosure informed persons who may . . . hear of testimony from others present." 531 So.2d at 117. Access produces a "wholesome effect" upon all court officers so that "they are more strongly moved to a strict conscientiousness in the performance of duty." Id. Finally, access encourages and increases a respect for the law and secures

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1/ If that right was not considered by Florida courts as a constitutional right in the past, access rights will be elevated into a fundamental right, akin to the First Amendment right, upon passage of the proposed state constitutional amendment.

"a strong confidence in judicial remedies . . . which could never be inspired by a system of secrecy." Id.

The prophylaxis of openness is also recognized in the policies behind the Public Records Act, Chapter 119, Florida Statutes (1991). In fact, public access to governmental records is a substantive right because the Public Records Act "promote[s] open government and citizen awareness of its workings" and, therefore, "enhance[s] and preserve[s] democratic processes." Byron, Harless, Schaffer, Reid & Assoc., Inc. v. State ex rel. Schellenberg, 360 So.2d 83, 97 (Fla. 1st DCA 1978), quashed on other mounds, 379 So.2d 633 (Fla. 1980). This Court admonished lower courts to construe the Public Records Act "to frustrate all evasive devices." Palm Beach v. Gradison, 296 So.2d 473, 477 (Fla. 1974); City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971).[2] Soon this substantive statutory right could become a Florida constitutional right that is even broader than the First Amendment right of access. It logically follows that upon passage of a state constitutional amendment access rights would require more rather than less protection.

Because of the First Amendment's, common law's, Florida Legislature's and, potentially, the Florida Constitution's, special solicitude for the public's right of access to judicial records, the discretion of a court to seal judicial records is

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[2] Gradison and City of Miami are Government In The Sunshine Act case. The principles governing the Sunshine Law are applicable to the Public Records Act. Wood v. Marston, 442 So.2d 934, 938 (Fla. 1982).

delimited by the standards designed to protect the access rights.

The United States Supreme Court established strict standards before closure can occur. The proponent of closure must show that (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, that compelling interest would be harmed; and (3) any limitation on access is "narrowly tailored" to serve that interest. Moreover, the trial court may not accept mere conclusions but must make specific record findings to aid in appellate review. Press-Enterprise 11, 478 U.S. at 14. Public notice and an opportunity to oppose closure are part and parcel of this three-pronged test. Globe, 457 U.S. at 609, n.25 (1982). This Court's common law tests in Barron and Lewis mirror the United States Supreme Court's interpretation of the First Amendment's substantive and procedural requirements. Barron, 531 So.2d 118-19; Lewis, 426 So.2d at 6. See also Florida Freedom Newspapers, Inc. v. McCrary, 520 So.2d 32 (Fla. 1988). Paragraphs 8 and 9 of the proposed rules seem to ignore these protections altogether.

B. PARAGRAPHS 8 AND 9 MAKE CLOSURE AUTOMATIC, WITHOUT CONSIDERING THE COMPELLING NECESSITY FOR THE CLOSURE OR THE BREADTH OF THE CLOSURE.

The Tribune is concerned that the result of Paragraphs 8 and 9 is that judicial records made confidential by state or federal statute or judicial rule will be automatically closed without any finding of compelling necessity, less restrictive alternatives

and a public opportunity to argue against such **closure.**[3]/ Regardless of whether the mandatory closure arises by operation of statute or an enunciation of a right of disclosural privacy based on the Fourteenth Amendment or Article I, Section 23, the blanket closure that would occur -- if Paragraphs 8 and 9 were law -- has never before been accepted.

To meet constitutional and common law muster, access issues must be adjudicated on an individual, case-by-case basis. That **is** the teaching of Globe. In that case, the United States Supreme Court was faced with a Massachusetts statute that automatically excludes the press and the public from **the** courtroom when a minor rape victim testifies. The state justified this automatic closure rule to protect the physical and psychological well-being of minors. Globe, **457 U.S.** at ***608.*** The United States Supreme Court recognized that protecting the well-being of minors is compelling. It held:

> But as compelling as the interest is, it does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.

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[3]/ The Tribune endorses the proposal of the Florida Press Association that condenses Paragraphs 8 and **9** into a single paragraph that incorporates the three-prong compelling interest test.

Id. at 608-09. The United States Supreme Court concluded that closure must occur only after an assessment of individualized harm, a determination of the existence of less restrictive alternatives and effectiveness. 457 U.S. at 608-09.

Even when a Fourteenth Amendment right of disclosural privacy has been recognized, courts have never treated that right as absolute. The United States Supreme Court balances this privacy right against the public interests case by case. Nixon v. Administrator of General Services, 433 U.S. 425 (1977); Whalen v. Roe, 429 U.S. 589 (1977). In fact, the lower federal courts that have recognized this disclosural right of privacy have treated it as a qualified right that requires a balancing of interests. See, e.g., American Civil Liberties Union v. State of Mississippi, 911 F.2d 1066 (5th Cir. 1990); Ramie v. City of Hedwig, 765 F.2d 490 (5th Cir. 1985), cert. denied, 474 U.S. 1062 (1986)(gender and religious beliefs); Barry v. City of New York, 712 F.2d 1554 (2d Cir.), cert. denied, 464 U.S. 1017 (1983)(financial records); United States v. Westinghouse Electric Corp., 638 F.2d 570 (3d Cir. 1980)(medical records); Fadjo v. Coon 633 F.2d 1172 (5th Cir. 1981)(police investigation reports); and Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979)(financial records); Doe v. Borough of Barrington, 729 F. Supp. 376 (D. N.J. 1990)(police identification of persons infected with HIV virus); Shirshekan v.

Hurst, 669 F. Supp. 238 (C.D. Ill. 1987)(background investigations).[4]

This Court **also** recognizes the importance of balancing the privacy and public access interests, That delicate balancing process is the lesson of Barron, 531 So.2d at 118. Paragraph 10 of the proposed rules incorporates this balancing test in other situations. This Court also recognized this balancing approach in Rasmussen v. South Florida Blood Service, *500* So.2d 533 (Fla. 1987), another civil action. That case involved non-public records subpoenaed in the course of civil discovery that would reveal and make public the names of individuals suffering from Acquired Immune Deficiency Syndrome (AIDS).

Barron also suggests that some records could be sealed based on common law privacy standards. Therefore, a court would have to evaluate traditional invasion of privacy principles to

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[4] The existence and limits of a Fourteenth Amendment disclosural right of privacy is by no means established. Borucki v. Ryan, 827 F.2d 836 (1st Cir. 1987). Some courts decline to recognize this right. J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981). Others define it as only that information that reveals the most intimate aspects of human life. Wade v. Goodwin, 843 F.2d 1150 (8th Cir.), cert. denied, 488 U.S. 854 (1988). Others say this right simply does not apply to information in the public record. Hoffman v. McNamara, 630 F. Supp. 1257 (D. Conn. 1986). At this time, the Tribune neither challenges nor accepts the existence of this disclosural right of privacy. The Tribune maintains that Paragraphs 8 and 9 prohibit a court from examining the existence of this right and the right's limits if a statute, judicial rule, or decision makes that information confidential. Because this area of disclosural privacy is so unsettled, mandatory closure rules might unconstitutionally burden the public's right to know without vindicating any cognizable interests. Case-by-case adjudication is clearly called for in all matters where privacy rights and public access rights are potentially in conflict.

determine whether closure would be compelling. If the records involved "one, whether willing or not, [who became] an actor in an occurrence of **public** or general interest," the actor's **rights** of privacy diminish and the person **"emerges** from **his seclusion."** Jacova v. Southern Radio & Television Co., 83 So.2d 34, 36 (Fla. 1955). Similarly, it is well recognized that the occurrence of a crime, the nature of the crime, and the events leading to the prosecution of a criminal are matters of pubic concern and not entitled to privacy protection. Florida Star v. B.J.F., 491 **U.S. 524 (1989);** Valentine **v. CBS**, **698** F.2d 430 (11th Cir. 1983); Cape Publications, Inc. v. Hitchner, 549 So.2d 1374 (Fla. 1989). Regrettably, victims, perhaps, witnesses, are actors in public events and, therefore, not entitled to the types of seclusion they might otherwise enjoy.

At the very least, if Barron's suggestion that **the** existence of the elements of a common law privacy action are sufficient to seal judicial records, there is an obligation to **review** with particularity the content of the court file to determine whether publication would constitute a tortious invasion of privacy. If Paragraphs **8** and **9** are interpreted to avoid this type of analysis, the proposed rules diminish rather than enhance public access rights in contravention of existing precedent and contrary to the spirit of the proposed constitutional amendment.

Press-Enterprise 11, Globe and Lewis demand individualized analysis for each victim, witness, fact, document and proceeding to determine **whether** the intimate nature of the facts to **be**

disclosed, the notoriety and actions of **the** person to whom the **facts** relate, and the overall effect of the publication of those facts create a compelling interest. In other words, there is an obligation to determine an the record whether the elements of a privacy action are present. The public's rights of access have always demanded this type of analysis. Paragraphs ***8*** and ***9*** eschew this type of process and create an irrebuttable rule of closure when there exists a legislative and judicial pronouncement.

C. THERE IS NO CONSTITUTIONAL RIGHT OF PRIVACY **IMPLICATED BY** THE **DISCLOSURE** OF PUBLIC **RECORDS.**

The other difficulty with Paragraphs ***8*** and **9** is that these paragraphs potentially intrude on this Court's previous decisions that rights of privacy guaranteed by Article I, Section 23 of the Florida Constitution are not jeopardized by the release of public records. Such a right of confidentiality in public records has never been enunciated in Florida. In fact, all precedent in this state leads **to** the contrary conclusion.

To the extent that certain judicial records constitute public records within the meaning of Section 119.011, **Florida** Statutes (1991), Article I, Section 23 of the Florida Constitution is simply inapplicable. The constitutional provision states:

> This section shall not be construed to limit **the** public's right to public records and meetings as provided by law.

Thus, the constitution, itself, prohibits engrafting a privacy exception to the Public Records **Act**. Forsberq v. Housinq **Authoritv** of **Miami Beach,** 455 **So.2d** 373 (Fla. 1984); Michel v.

Douslas, 464 So.2d 545 (Fla. 1985); Tribune v. Cannella, 458 So.2d 1075, 1078 (Fla. 1984); and Mills v. Doyle, 407 So.2d 348, 351 (Fla. 4th DCA 1981). This Court's rule making authority should not be used to abrogate the long-established constitutionally predicated right of access to public records.

III.

CONCLUSION

The right of access is predicated on "the common understanding that 'a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.'" Globe, 457 U.S. at 604 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)). Thus, the Supreme Court declared "to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." Globe, 457 U.S. at 604-05.

Without the limiting principles enunciated in Press-Enterprise 11, there is no assurance that free discussion of public affairs will be protected. A court, without these standards, cannot effectively balance the common law, First Amendment and, possibly, state constitutional interests at stake with the interests of a proponent of closure. Consequently, the weakness of Paragraphs 8 and 9 is that they fail to recognize the importance of a case-by-case balancing test and leave the public unprotected -- all in derogation of the special solicitude that

this Court has traditionally had for the public's rights of access to judicial proceedings.

Access promotes acceptance of the judicial system. Only when the public can fully investigate the court files of individuals who come before this court for alleged crimes or civil matters can the public evaluate the fairness with which the court system handles the defendants, the victims and the witnesses. The United States Supreme Court has recognized in Richmond, Press-Enterprise I, Globe, and Press-Enterprise II that sealed court files endanger the reputations of all participants -- the defendants, the victims, the witnesses and the court, itself, by discouraging an open debate on sensitive issues that affect our legal system. This Court in Lewis and Barron have recognized that the importance of opening the courthouse doors so that the public can fully appreciate the workings of its judiciary.

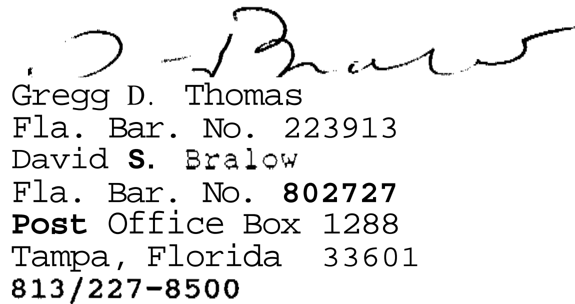
Justice Black in In re Oliver, 333 U.S. 257, 271 (1948), when considering the constitutionality of a closed contempt proceeding, wrote:

> One need not wholly agree with a statement made on the subject (of secret proceedings) by Jeremy Bentham over 120 years ago to appreciate the fear of secret trials felt by him, his predecessors and contemporaries. Bentham said: ". . . suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge, -- that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison

> of publicity, all other checks are af small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate as cloaks than checks; as cloaks in reality, as checks only in appearance.

The Tribune believes that it is the inherent importance of access to the judicial system that requires this case-by-case adjudication. To the extent that proposed Paragraphs *8* and 9 foster mandatory closure, the Tribune respectfully requests that they should be revised to provide a case-by-case balancing of access rights.

HOLLAND & KNIGHT



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