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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

STATE OF HAWAI`I,

vs.

GERHARDT KONIG,

Defendant.

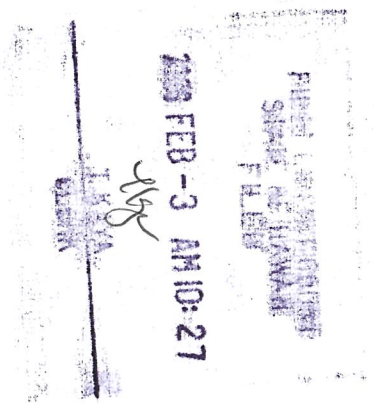
NO 1CPC-25-0000373

PUBLIC FIRST LAW CENTER'S OBJECTION TO DEFENDANT'S MOTION TO SEAL COURT RECORD

HEARING
JUDGE: Hon. Paul K. Wong
DATE: February 5, 2026
TIME: 9:00 a.m.

TRIAL DATE: March 9, 2026

NOTICE OF ELECTRONIC FILING GENERATED BY JEFS



PUBLIC FIRST LAW CENTER'S OBJECTION TO DEFENDANT'S MOTION TO SEAL COURT RECORD

Pursuant to the constitutional right of access provided by the First Amendment to the U.S. Constitution; article I, section 4 of the Hawai`i Constitution; the common law right of access; and Hawai`i Court Records Rule (HCRR) 10.10, nonparty Public First Law Center (Public First) objects to Defendant Gerhardt Konig's motion to seal the "Third Notice of Intent to Use Evidence of Defendant's Other Crimes, Wrongs, or Acts" filed January 23, 2026 by the State of Hawai'i as docket entry 230 (notice of intent).[1]

Defendant argues the notice of intent, filed pursuant to Hawai`i Rule of Evidence (HRE) 404(b), contains information that would impair Defendant's right to a fair trial if disclosed. But Defendant fails to meet the high-bar for sealing judicial records—a standard that carries a strong presumption favoring public access. The mere existence of pretrial publicity or "reputation" concerns does not justify sealing. Any legitimate fair trial concerns can be adequately addressed through the jury selection process.

Even assuming a compelling reason exists, and assuming that interest will be irreparably harmed by disclosure, the Court must consider less restrictive alternatives to complete sealing. Defendant fails to explain why less restrictive measures, such as thorough voir dire, additional peremptory challenges, or jury admonitions cannot adequately address any legitimate concerns.

Accordingly, Public First respectfully asks the Court to deny Defendant's motion to seal or, alternatively, seal the record only until the jury is empaneled (or trial continued).

I. Legal Standards

The Hawai`i Supreme Court has recognized that the public has the right to access judicial proceedings and records, including criminal proceedings. *Grube v. Trader*, 142 Hawai`i 412, 422, 420 P.3d 343, 353 (2018); *accord Oahu Publc'ns, Inc. v. Ahn*, 133 Hawai`i 482, 507, 331 P.3d 460, 485 (2014). There is a "strong presumption that court

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[1] Public First conventionally filed this motion because, if added as an electronic filer to the case, it would have electronic access to the sealed document. HCRR 10.4.

proceedings and the records thereof shall be open to the public." *Grube*, 142 Hawai`i at 428, 420 P.3d at 359.

The right of access includes evidentiary-related criminal proceedings. *United States v. Brooklier*, 685 F.2d 1162, 1170 (9th Cir. 1982) ("it is clear that the considerations supporting the public's qualified right of access to the criminal trial itself apply as well to hearings on motions to suppress evidence"); *accord Civil Beat Law Ctr. for the Pub. Int., Inc. v. Maile*, 117 F.4th 1200, 1208 (9th Cir. 2024) ("As both we and the Supreme Court have recognized, the First Amendment grants the public a presumptive right to access nearly every stage of post-indictment criminal proceedings, including pretrial proceedings, preliminary hearings, voir dire, trials, and post-conviction proceedings, as well as records filed in those criminal proceedings."); *see also State v. Collins*, 340 P.3d 1173, 1175 (Idaho App. 2014) (denying a motion to seal a 404(b) notice because of the strong right of public access).

The proponent of sealing has the burden to overcome the presumption of access. *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465-67 (9th Cir. 1990). As relevant here, the court must make "specific findings" on the record that "the closure is essential to preserve higher values" and that the closure is "narrowly tailored" to serve that interest. *Grube*, 142 Hawai`i at 424-25, 420 P.3d at 355-56; *Ahn*, 133 Hawai`i at 498, 331 P.3d at 476. The court must consider in its findings whether: "(1) the closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *Grube*, 142 Hawai'i at 424, 420 P.3d at 355.

"To qualify as compelling, the interest must be of such gravity as to overcome the strong presumption in favor of openness. . . . [T]he asserted interest must be of such consequence as to outweigh both the right of access of individual members of the public and the general benefits to public administration afforded by open trials." *Id.* at 425-26, 420 P.3d at 356-57.

If a compelling interest exists, "a court must find that disclosure is sufficiently likely to result in irreparable damage to the identified compelling interest." *Ahn*, 133

Hawai`i at 507, 331 P.3d at 485. "It is not enough that damage could possibly result from disclosure, nor even that there is a 'reasonable likelihood' that the compelling interest will be impeded; there must be a 'substantial probability' that disclosure will harm the asserted interest." *Grube*, 142 Hawai`i at 426, 420 P.3d at 357. And if the harm is "fleeting or readily curable through other remedial measures," it is not irreparable harm. *Id.*

If there is a compelling interest and substantial probability of irreparable harm to that interest by disclosure, the court must rule out less restrictive alternatives to sealing. *Ahn*, 133 Hawai`i at 507-08, 331 P.3d at 485-86. The court must "make findings regarding specific alternatives and set forth its reasons for rejecting each." *Grube*, 142 Hawai`i at 427, 420 P.3d at 358.

In rejecting a trial court's bare reference to generic concerns without "specific findings," the Hawai`i Supreme Court emphasized the need for facts and evidence:

> The trial court may not rely on generalized concerns, but must indicate facts demonstrating compelling interest justifying the continued sealing of the documents. Additionally, the court must specifically explain the necessary connection between unsealing the transcript and the infliction of irreparable damage resulting to the compelling interest.

Id. at 424-26, 420 P.3d at 355-57. "In the absence of such details, there is nothing by which the court could have determined that the asserted interest was of sufficient gravity to displace the strong presumption in favor of openness." *Id.*

II. Factual Background

The State charged Defendant with attempted murder in the second degree by indictment filed March 28, 2025. Dkt. 1.

On January 23, 2026, the State filed its third notice of intent. Dkt. 230. On January 25, Defendant filed an emergency motion to seal the notice of intent. Dkt. 232. The Court temporarily sealed the notice the next day and ordered further briefing. Dkt. 239, 251.

Defendant's counsel asserts that the State's notice of intent contains "salacious," "inflammatory," and "defamatory" information that would impair Defendant's

reputation and right to a fair trial if disclosed. Dkt. 232 at 4-7.[2] The State declares that the "substantive evidence" contained in the notice of intent was disclosed to the Defendant last summer. Dkt. 241 at 2-3. The State also claims that it "sanitizes" the notice of intent "as much as possible while still providing the notice of the acts that the state intends to introduce." *Id.*

Trial is currently set to commence March 9. Dkt. 143.

III. The Defendant has not met his burden to seal judicial records.

Defendant's conclusory assertions do not justify sealing the notice of intent. His generic concerns are no different from others rejected previously by courts. *Grube*, 142 Hawai`i at 424-25, 420 P.3d at 355-56; *Ahn*, 133 Hawai`i at 505, 331 P.3d at 483 ("While these reasons are indisputable in the generic sense, they do not as stated provide sufficient justification for a closure of a court proceeding."); *accord Roy v. GEICO*, 152 Hawai`i 225, 342, 524 P.3d 1249, 1267 (App. 2023) (rejecting "[c]onclusory claims" as a basis for sealing).

First, the Hawai`i Supreme Court flatly rejected formulaic "reputation" claims as presented here. *Grube*, 142 Hawai`i at 425, 420 P.3d at 356 ("[S]imply preserving the comfort or official reputations of the parties is not sufficient justification [for closure]."). Assuming that the State had a non-frivolous basis for offering this evidence, Defendant's desire to preserve his reputation while on trial for attempted murder is not a compelling reason for sealing. Access allows the public to understand this Court's ultimate decision on whether the evidence is admissible at trial. *E.g.*, *State v. Rogan*, 156 Hawai`i 233, 241, 573 P.3d 616, 624 (2025) ("The judicial system gains from public access. Because court proceedings are open for all to see, and court records are available for all to read, a transparent approach instills confidence in, and respect for, the judiciary's work.").

Second, the Hawai`i Supreme Court has twice addressed the intersection between public access to court records and the constitutional right to a fair trial in criminal cases. *Ahn*, 133 Hawai`i 482, 331 P.3d 460; *Gannett Pac. Corp. v. Richardson*, 59

[2] Pinpoint citations reference the page of the corresponding PDF.

Haw. 224, 580 P.2d 49 (1978); *see also Breiner v. Takao*, 73 Haw. 499, 835 P.2d 637 (1992) (per curiam) (vacating gag order premised on right to fair trial).

Ahn concerned the first trial of U.S. State Department Special Agent Christopher Deedy for the shooting death of Kollin Elderts. The case involved "[c]onsiderable public attention and media coverage." *Ahn*, 133 Hawai`i at 486, 331 P.3d at 464. The trial court sealed several proceedings and related transcripts concerning inquiry into potential juror misconduct during the jury deliberation phase of trial. The trial court concluded that sealing would preserve a juror's privacy and security, the integrity of a fair and impartial jury decision, and the right of both parties to a fair trial and verdict. *Id.* at 489, 331 P.3d at 467. Such "generalized statements of policy," however, are not adequate alone. *Id.* at 506, 331 P.3d at 484. The Hawai`i Supreme Court explained that "[w]hile these reasons are indisputable in the generic sense, they do not as stated provide sufficient justification for a closure of a court proceeding." *Id.* at 505, 331 P.3d at 483. Instead, there must be specific facts demonstrating that "first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Id.*

In *Gannett Pacific Corp.*, the Hawai`i Supreme Court also required specific facts to demonstrate "a substantial likelihood that [disclosure] would interfere with the defendant's right to a fair trial by an impartial jury," which would include consideration of: "the nature of the evidence sought to be presented; the probability of such information reaching potential jurors; the likely prejudicial impact of this information upon prospective veniremen; and the availability and efficacy of alternative means to neutralize the effect of such disclosures." *Gannett Pac. Corp.*, 59 Haw. at 233-34, 580 P.2d 56-57 (footnotes omitted).

The Hawai`i Supreme Court expressly recognized as viable alternatives to nondisclosure: "voir dire at trial"; "the exercise of peremptory and challenges for cause"; "clear and express admonitions to the jury once selected"; and "such other alternative means as may be available to the defendant and to the court at trial." *Gannett Pac. Corp.*, 59 Haw. at 234, 580 P.2d at 57; *accord Breiner*, 73 Haw. at 506, 835 P.2d

at 641 (noting consideration of alternatives such as "voir dire, jury instructions, jury sequestration or change of venue or postponement"); *State v. Wakinekona*, 53 Haw. 574, 580, 499 P.2d 678, 682 (1972) (holding voir dire of prospective jurors was sufficient to address pretrial publicity concerns).

Here, Defendant provides no evidence for the Court to make specific and detailed findings to support a conclusion that irreparable harm to the asserted compelling interests is substantially probable. Defendant does not provide any facts or explanation as to how a public disclosure would jeopardize the right to a fair trial. Nor has he addressed the available means of neutralizing any effects of pretrial publicity.

Absent more, speculative fair trial concerns about pretrial publicity are not sufficient "compelling interests" to justify sealing judicial records. *E.g.*, *Gannett Pac. Corp.*, 59 Haw. at 233, 580 P.2d at 56 ("pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial"); *Ahn*, 133 Hawai`i at 505, 331 P.3d at 483; *Press-Enter. II*, 478 U.S. at 15 ("right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]"); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976) ("Taken together, these cases demonstrate that pretrial publicity – even pervasive, adverse publicity - does not inevitably lead to an unfair trial."); *United States v. Guerrero*, 693 F.3d 990, 1002 (9th Cir. 2012) ("We have made clear that 'pervasive publicity, without more, does not automatically result in an unfair trial.'"); *Brooklier*, 685 F.2d at 1169 (generalized concerns about "problems of publicity" insufficient to claim prejudice to right to fair trial); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1146 (9th Cir. 1983) (publicity concerns can be resolved by voir dire and clear jury instructions to ensure fair trial); *Seattle Times Co. v. U.S. Dist. Ct for W. Dist.*, 845 F.2d 1513, 1518 (9th Cir. 1988) ("prejudicial publicity is less likely to endanger the defendant's right to a fair trial in a large metropolitan area").

With a population of approximately 1,000,000, the City and County of Honolulu can seat an impartial jury through adequate precautions, notwithstanding pretrial publicity. Numerous cases with a much higher profile have proceeded without difficulty using other precautions.

Lastly, if the court is not inclined to deny the motion to seal outright, Public First respectfully suggests sealing be lifted as soon as the jury is empaneled or the trial date is continued. Fair trial concerns about tainting the jury pool no longer exist when the jury is set and instructed by the Court not to read any news about the case. And in the absence of an imminent trial, fair trial concerns from purported pretrial publicity dissipate significantly. *E.g.*, *Patton v. Yount*, 467 U.S. 1025, 1034 (1984) ("That time soothes and erases is a perfectly natural phenomenon, familiar to all."); *Murphy v. Florida*, 421 U.S. 794, 802 (1975) (no infringement of right to fair trial from pretrial publicity that occurred seven months before jury selection). The Court cannot enter a permanent seal on court records when the purported justification is time limited—as with fair trial concerns. *Grube*, 142 Hawai`i at 427 n.20, 420 P.3d at 358 n.20 ("even assuming that procedural and substantive requirements to seal any of the documents had been met, the court should have scheduled periodic review hearings to determine whether the reasons justifying the sealing continued to apply.").

IV. Conclusion

Public First respectfully requests that this Court uphold the public's right of access to court records and deny Defendant's motion to unseal.

DATED: Honolulu, Hawai`i, February 3, 2026

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