No. 17-117989-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Linus L. Baker,
Appellant-Plaintiff,

v.

Katherine Stocks, in her Official Capacity as Official Custodian of Records for the Tenth Judicial District,
Appellee-Defendant.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF KANSAS IN SUPPORT OF APPELLANT

Appeal from the District Court of Johnson County, Kansas
Honorable Robert Fairchild, Senior Judge,
District Court Case No. 2017-CV-0000027

STEPHEN DOUGLAS BONNEY, NO. 12322
NOLAN WRIGHT, Legal Intern Receipt 4850
ACLU FOUNDATION OF KANSAS
6701 W. 64th Street Suite #210
Overland Park, KS 66202
Tel.: (913) 490-4102
Fax: (913) 490-4119
Email: dbonney@aclukansas.org
Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE

Founded in 1920, the American Civil Liberties Union (hereafter "ACLU") is a non-profit, nonpartisan organization with approximately 1.75 million members nationwide. The ACLU is dedicated to the principles of liberty and equality enshrined in the Constitution of the United States. The American Civil Liberties Union Foundation of Kansas (hereafter "ACLU-KS") is an affiliate of the national ACLU and has more than 9,000 members statewide. Over the past fifty years, the ACLU-KS has participated, either as direct counsel or as *amicus curiae*, in numerous cases in Kansas's state and federal courts to advocate for a broad interpretation of constitutional rights and liberties.

This case presents an important issue involving the principle that records of public court proceedings must be open in order to ensure public confidence in the judicial branch of government. The ACLU-KS has regularly litigated such issues. *See, e.g., Barnes v. Corrections Corporation of America*, 2009 U.S. Dist. LEXIS 133124, *19-21 (D. Kan. Aug. 27, 2009) (unsealing FLSA settlement agreement on motion of intervenor Prison Legal News); *Fish v. Kobach*, 2017 U.S. Dist. LEXIS 165208 (D. Kan. 2017) (unsealing discovery documents and deposition testimony submitted to federal judge in support of dispositive motions).

In this brief, the ACLU-KS will argue that the audio recordings of proceedings held in open court must be open to inspection by members of the press and the general public because such recordings are part of the official court file. Because the press and members of the general public have a right of access to records of proceedings held in

open court but are not represented by either party to this case, *amicus* will attempt to provide the Court of Appeals with information about how the ruling below adversely affects our nation's firm commitment to open court records and the right of the people and the press to understand the administration of justice. *Amicus* thus hopes to give the Court a more robust perspective for its consideration of the issues presented by this case.

STATEMENT OF FACTS

Appellant Linus "Baker filed an open records request with [Appellee] Stocks [the Court Administrator for the Tenth Judicial District] seeking a copy of the digital audio recording of the proceedings in [*McCormick v. McCormick*,] Case No. 15CV05502, a case in which Baker was neither a party nor counsel for a party." *Baker v. Hayden*, Case No. 2017CV000027 (Dist. Ct. of Johnson County, June 12, 2017), slip op. at 1. After an exchange of emails, phone calls, and letters, Appellee "Stocks denied Baker's requests for a copy of the recording," *id.*, but – while the case was being litigated before the district court – Appellee gave Appellant "a copy of the recording he requested," *id.* at 7. *McCormick* was a civil case, and the requested recording related to testimony taken in open court on September 4, 2015. Appellant's Opening Brief at 4.

ARGUMENTS AND AUTHORITIES

I. This Case is Not Moot.

Sometime after Plaintiff Baker filed suit in district court but before the district court heard oral argument on Defendant's motion to dismiss, Defendant Stocks gave

"Baker a copy of the recording he requested." *Baker v. Hayden*, Case No. 2017CV000027 (Dist. Ct. of Johnson County, June 12, 2017), slip op. at 7. Based on that voluntary compliance with Baker's request for a copy of the audio recording of the underlying court proceedings in *McCormick*, Defendant argued that the case was moot, and the district court so held without much legal analysis. *Id.*

It is well established that "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case[.]" *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968). "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of Earth, Inc., v. Laidlaw Environ. Serv., Inc.*, 528 U.S. 167, 190 (2000). "The burden is a heavy one." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). In cases like this one, furthermore, "a public interest in having the legality of the practices settled[] militates against mootness." *Id.* at 632. *See also Commitee for the First Amendment v. Campbell*, 962 F.2d 1517, 1524 (10th Cir. 1992) (claim of mootness "must be weighed against the possibility of recurrence and the public interest in having the case decided"). Dismissal "on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought." *Adarand Constructors v. Slater*, 528 U.S. 216, 224 (2000).

Even though Defendant Stocks voluntarily gave Plaintiff Baker a copy of the recording he had requested, Defendant continued to litigate the merits of the underling claims. Moreover, Appellee continues to argue that Appellant has no legal right to the

audio recording before this Court. Thus, Defendant's voluntary compliance with Baker's request for a copy of the audio recording does not make it "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of Earth, Inc.*, 528 U.S. at 190. In fact, it is clear that – should a member of the general public or a reporter request a similar audio recording of proceedings held in open court in the Tenth Judicial District – Defendant Stocks would deny such request. For that reason, Defendant has not met the formidable burden placed upon her, and this case is not moot.

In addition, the Kansas Supreme Court has repeatedly recognized a public importance exception to the mootness doctrine. *See, e.g.*, *Smith v. Martens*, 279 Kan. 242, 244–45, 106 P.3d 28, 32 (2005); *State v. Hilton*, 295 Kan. 845, 850–51, 286 P.3d 871, 875 (2012), *rev'd on other grounds*, 301 Kan. 991, 349 P.3d 475 (2015); *Bd. of Cty. Comm'rs v. Duffy*, 259 Kan. 500, 504, 912 P.2d 716, 719 (1996). In *Smith*, the Court held that, if a case is the subject of real controversy, is of statewide interest and importance, and is capable of repetition, an appellate court may consider the appeal and render an opinion despite a claim of mootness. *Smith*, 279 Kan. at 244–45, 106 P.3d at 32. In *Hilton*, furthermore, the Court held that, in order to avoid dismissal based on mootness, an issue need only be a concern of public importance and capable of repetition. *Hilton*, 295 Kan. at 850, 286 P.3d at 875. The Court went on to define public importance as "something more than that the individual members of the public are interested in the decision of the appeal from motives of curiosity or because it may bear upon their individual rights or serve as a guide for their future conduct as individuals." *Id.* at 851, 286 P.3d at 875 (internal quotations omitted).

In *Smith*, the Court decided a challenge to the constitutionality of the Protection from Stalking Act, K.S.A. 2003 Supp. 60-31a01 *et seq.*, even though the protection from stalking order at issue had expired as to the appellant. *Smith*, 279 Kan. at 244, 106 P.3d at 32. In holding that the challenge fell within an exception to the mootness doctrine, the Kansas Supreme Court stated that "[t]he constitutionality of the [Protection from Stalking] Act, on its face, is a matter of public importance capable of repetition. We therefore elect to entertain this issue." *Id.* at 245, 106 P.3d at 32.

Because this case involves the right of the people and the press to obtain information about the functioning of the courts, this case involves a matter of clear public importance that is capable of repetition. Thus, the Court of Appeals should decide the important issues underlying this dispute.

For the reasons cited above, this case is not moot.

II. The public and the press have a common law right to inspect and obtain copies of electronic recordings of court proceedings.

A. Access to electronic recordings enhances press coverage of court proceedings and augments the public's understanding of the administration of justice.

In many states, courts rely on digital audio technology to record court proceedings. Lee Suskin, et al., *Making the Record: Utilizing Digital Electronic Recording*, NAT'L CTR. FOR ST. CTS. 7–8 (Sept. 2013). Six states (Alaska, Indiana, New Hampshire, Oregon, Utah, and Vermont) and three territories (Guam, the Northern Mariana Islands, and Puerto Rico) "use audio digital recording to make the record in all or most of their general jurisdiction court sessions." *Id.* In Kansas, district courts have the option to

"provide for the electronic sound recording of court proceedings by use of equipment which meets specifications approved by the Supreme Court." KAN. S. CT. R. 360.

Expanding access to electronic recordings enhances press coverage of court proceedings and offers "several benefits of such coverage, including greater public access to the courts and educating the public on the judicial system, among others." U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. SUPREME COURT: POLICIES AND PERSPECTIVES ON VIDEO AND AUDIO COVERAGE OF APPELLATE COURT PROCEEDINGS 28–31 (2016). In addition, it has long been understood that electronic recordings of witness testimony and court proceedings have "attributes unknown to other forms of evidence, such as the ability to capture the shades of meaning that come with inflection, emphasis and other qualities of speech." Peter R. Roper, *Sound Recording Devices Used as Evidence*, 9 CLEV. ST. L. REV. 523, 525 (1960). "[O]bserving trials and hearings provides information necessary to form impressions of the judge and other courtroom actors. … Lawyers use these impressions to anticipate judicial behavior and construct their presentations in the way most likely to resonate with the judge." Jordan M. Singer, *Judges on Demand: The Cognitive Case for Cameras in the Courtroom*, 115 COLUM. L. REV. SIDEBAR 79, 86 (2015). For these reasons, access to audio and video recordings of court proceedings allows the public and the press to understand court proceedings as if they had been present in the courtroom in real time and in ways that would be impossible based on a review of cold paper records, such as transcripts of trials and hearings.

B. Kansas has a long tradition of opening its courts to the public, and our nation's courts have long recognized that records of proceedings held in open court are open to public inspection and copying as a matter of common law.

In Kansas, court proceedings have long been open to the public, and the Kansas Code of Civil Procedure specifically provides that "[a]ll trials on the merits must be conducted in open court and . . . in a regular courtroom." Kan. Stat. Ann. 60-104 (2014). The Kansas Supreme Court has explained that "the reason for requiring all court proceedings to be open, except where extraordinary reasons for closure are present, is to enhance the public trust and confidence in the judicial process and to insulate the process against attempts to use the courts as tools for persecution." *Kansas City Star Co. v. Fossey*, 230 Kan. 240, 247, 630 P.2d 1176, 1181 (1981).

Moreover, the press has a First Amendment right to cover court proceedings and judicial decision-making. "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field." *Sheppard v. Maxwell*, 384 U.S. 333, 349-350 (1966). As the United States Supreme Court explained in *Press Enterprise v. Superior Court*, 464 U.S. 501 (1984) (*Press Enterprise I*):

> The open trial . . . plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

464 U.S. at 508. And the Court has recognized that press coverage and the fact that official records are open to the public and the press help insure that the people are well-informed about the workings of their courts.

> In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-492 (1975).

The Sixth Amendment gives criminal defendants a constitutional right to a "public trial." U.S. CONST. AMEND. VI; *Waller v. Georgia*, 467 U.S. 39, 45 (1984) (in order to close a courtroom to the public court must expressly find that some overriding interest compels closing the courtroom). *See also State v. Cox*, 297 Kan. 648, 658, 304 P. 3d 327, 332-35 (2013). In addition, the First Amendment guarantees the public – including the press – a right of access to criminal trials and court records in criminal cases. *See, e.g., Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (criminal trials); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (criminal trials); *Press Enterprise v. Superior Court* ("*Press Enterprise I*"), 464 U.S. 501 (1984) (criminal jury selection); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press Enterprise II*) (criminal preliminary hearing).

In Kansas, the tradition of opening court proceedings to the public and the press also extends to civil cases. "[T]he news media was quite properly permitted to report proceedings which took place in open court. The need for the public to know what is going on in an ouster proceeding is substantial, and certainly outweighs the remote possibility of prejudice to parties in this civil proceeding." *State ex rel. Tomasic v. Cahill*, 222 Kan. 570, 579, 567 P. 2d 1329, 1336 (1977).

In addition to being able to attend proceedings held in open court, the public and the press also enjoy a well-established common law right to inspect and copy public records, including judicial records and documents. *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978). "The public has a fundamental interest in understanding disputes that are presented to a public forum for resolution." *Sibley v. Sprint Nextel Corp.*, 254 F.R.D. 662, 667 (D. Kan. 2008). The interests of the public in open court records "are presumptively paramount[.]" *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1980). Moreover, courts may only seal judicial documents when the "'countervailing interests heavily outweigh the public interests in access.'" *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007) (quoting *Rusford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)), *cert. denied*, 128 S.Ct. 897 (2008). The burden of proof rests heavily upon the party seeking to rebut the presumption that court files and records are open for public inspection and copying. *Id.*

The Kansas Supreme Court has long recognized the public's common law right to inspect and copy court records. *Stephens v. Van Arsdale*, 227 Kan. 676, 684–89, 608 P.2d 972, 979–83 (1980); *State v. Stauffer Comms.*, 225 Kan. 540, 543–46, 592 P.2d 891,

893–95 (1979). In *Stephens v. Van Arsdale*, the Wichita Eagle Beacon sued the Sedgwick County District Court Clerk over the "denial to plaintiffs of access to certain court files of criminal proceedings." 227 Kan. at 677, 608 P.2d at 974. In that case, the Kansas Supreme Court acknowledged that the public has a common law and statutory right to review and inspect court records. *Id.* at 686, 608 P.2d at 980–81. Ultimately, the Kansas Supreme Court ordered the Sedgwick County District Court Clerk to permit the inspection of the case files except where the conviction had been expunged pursuant to Kansas law. *Id.* at 694, 608 P.2d at 986.

C. The district court erred in holding that there is no common law right giving the public access to electronic recordings of proceedings held in open court.

Here, the district court held that "Baker has no . . . common law right to the recordings." *Baker v. Hayden*, Case No. 2017CV000027 (Dist. Ct. of Johnson County, June 12, 2017), slip op. at 7. That holding is clearly wrong. In *Stephens v. Van Arsdale*, the Kansas Supreme Court recognized that the public has a common law right to inspect and copy court records, holding that "[t]he right of the public to access to public records for public inspection is based in our common law." 227 Kan. at 686, 608 P.2d at 981. Even if, as the district court held below, the Kansas Open Records Act (the KORA) does not require production of the audio recordings of court proceedings, the legislature's adoption of the KORA did not supplant the common law right of the public to inspect and

obtain copies of court records.[1] As the Kansas Supreme Court plainly stated in *Stephens v. Van Arsdale*, the "common law right to inspect public records has been buttressed in many states by statutory codification." *Id.*, 608 P.2d at 981. The Court's use of the word "buttressed" indicates that the common law right of public access to court records remained firmly in place after the Kansas legislature adopted an open records statute.

In its KORA analysis, the district court focused exclusively on Kansas Supreme Court Rules 3.03, 360, 362, and 363 in holding that audio recordings of court proceedings are only available "to allow counsel to determine the accuracy of the prepared transcript and to permit the person certifying the transcript to correct any errors that the parties or court determine exist in the transcript." *Baker v. Hayden*, Case No. 2017CV000027 (Dist. Ct. of Johnson County, June 12, 2017), slip op. at 6. In essence, the district court considered the paper transcript generated by the court reporter to be the only official

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[1] The district court held that Kan. Stat. Ann. 45-221(a)(1) [erroneously cited by the district court as "K.S.A. 2016 Supp. 45-219(a)(1)"] "exempts the recording Baker seeks from disclosure other than [b]y using the procedure for requesting a transcript described in the court rules." *Amicus* believes the district court's analysis was faulty because the Supreme Court Rules the court relied upon do not constitute an exemption from the general rule that the courts must disclose public records, but *amicus* is not advancing a statutory argument here because the KORA specifically provides that public agencies are not required to provide copies of audio and other electronic recordings pursuant to the KORA's disclosure requirements "unless such items or devices were shown or played to a public meeting of the governing body thereof." Kan. Stat. Ann. 45-219(a). Although *amicus* would argue that the electronic recording exception is bad public policy for the reasons set forth in a blog post by Maxwell E. Kautsch, *Revising KORA: Copying audio and video records*, Kautsch Law, L.L.C. http://kautschlaw.com/2015/09/25/revising-kora-disclosing-copies-of-audiovideo-records/, amending statutes is for the Kansas legislature, not for the courts.

court record of the underlying court hearing in *McCormick*. That holding is clearly inconsistent with Kansas Supreme Court Rule 3.01, which expressly states that the court record includes all original papers and exhibits filed in the district court, the court reporter's notes and transcripts of all proceedings, entries on the appearance docket maintained by the district court clerk's office, and "*any other court authorized record of the proceedings, including an electronic recording*." KAN. S. CT. R. 3.01(a)(1-4) (2007) (emphasis added).

Appellant contends that "[t]he Kansas Supreme Court has determined that audio recordings of court hearings are not subject to disclosure (except that counsel of record in the cases at issue may listen for purposes of correction of a transcript)," citing KAN. S. CT. R. 362. Appellee's Brief at 11-12. But Rule 362 imposes no such stricture on disclosure of audio recordings of court proceedings. Rather than being prohibitory, Rule 362 permits review for a specific purpose. The Court should not use that permissive rule to create out of whole cloth an absolute prohibition on public and press access to electronic recordings of proceedings held in open court. This is especially so because Supreme Court Rule 3.01(a)(3) provides that electronic audio recordings of court proceedings are part of the official court record. Because such recordings are part of the court record, the public (including Appellant here) and the press have a common law right to inspect and obtain copies of such court records.

For these reasons, the Court of Appeals should reverse the district court's holding that Appellant had "no . . . common law right to the recordings."

CONCLUSION

For these reasons, the Court of Appeals should reverse the decision of the district court and hold that the public and the press have a common law right to inspect and obtain copies of electronic audio recordings of proceedings held in open court in civil cases in Kansas.

Respectfully Submitted,

/s/Stephen Douglas Bonney
STEPHEN DOUGLAS BONNEY, NO. 12322
NOLAN WRIGHT, Legal Intern Receipt 4850
ACLU FOUNDATION OF KANSAS
6701 W. 64th Street Suite #210
Overland Park, KS 66202
Tel.: (913) 490-4102
Fax: (913) 490-4119
Email: dbonney@aclukansas.org

Counsel for Amicus Curiae ACLU of Kansas

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2018, the foregoing Brief for Amicus Curiae ACLU Foundation of Kansas in Support of Appellant was filed electronically with the Clerk of the Appellate Courts using the Kansas eFlex system, which will send a notice of electronic filing to all counsel of record in this case, specifically Linus L. Baker, counsel for Appellant, and Stephen Phillips, counsel for Appellee.

/s/Stephen Douglas Bonney
STEPHEN DOUGLAS BONNEY
KS BAR NO. 12322