IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:24-cv-943

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

DECLARATION OF DAVID S. TANENHAUS IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I, David S. Tanenhaus, declare as follows:

1. I am an expert on the history of juvenile justice and the James E. Rogers Professor of History and Law at the William S. Boyd School of Law. I make this declaration based on personal knowledge. If called as a witness, I could and would testify competently to the facts stated herein.

Background and Qualifications

2. I have a Ph.D. in U.S. History with distinction from the University of Chicago (1997) and have written or co-edited six books on the history of juvenile justice, including *A Century of Juvenile Justice* (University of Chicago Press, 2002), *Juvenile Justice in the Making* (Oxford University Press, 2004), and *The Constitutional Rights of Children: In re Gault and Juvenile Justice* (University Press of Kansas, 2011). I have taught American legal and constitutional history at the University of Nevada, Las Vegas (UNLV) since August 1997, and have been the James E. Rogers Professor of History and

Law at the William S. Boyd School of Law since January 2002.

3. I am internationally recognized as a leading historian of American juvenile justice and have a forthcoming essay about the history of the field in the journal *Crime & Justice* (University of Chicago Press, 2025). My scholarship about American juvenile justice during the Progressive Era (c. 1890 to 1920) uses primary sources, such as case files, government publications, legal cases, legislative histories, manuscript collections, and newspaper articles, to show that these courts were "works-in-progress" and that many of so-called defining features of "Progressive juvenile justice," including hearings from which the public were excluded, were later additions.

4. I have not been compensated for writing this report and my conclusions are consistent with my published scholarship on this topic. I have not previously testified as an expert at trial or in a deposition. A true and correct copy of my CV is attached hereto as **Exhibit A**.

Summary of Analysis and Findings

5. Plaintiff Civil Rights Corp has asked me to provide opinions and analysis regarding the following:

a. The origins of juvenile dependency courts in the United States;

b. Whether juvenile dependency courts have historically been open or closed to the public;

c. Whether juvenile dependency courts in North Carolina have historically been open; and

d. The historical accuracy of Justice William Rehnquist's concurring opinion in *Smith v. Daily Mail Publishing Co.* that "[i]t is a hallmark of our juvenile

justice system in the United States that virtually from its inception at the end of the last century its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity." 443 U.S. 97, 107 (1979) (citing H. Lou, Juvenile Courts in the United States 131–133 (1927); Geis, Publicity and Juvenile Court Proceedings, 30 Rocky Mt.L.Rev. 101, 102, 116 (1958)).

6. I conclude that there is a history of open hearings in the American system of juvenile justice and that Justice Rehnquist misread the sources that he cited for his proposition about public exclusion from juvenile court proceedings. A close reading of the scholarship of Herbert H. Lou and Gilbert Geis—Justice Rehnquist's own cited sources—supports this finding. Moreover, Justice Rehnquist appears to have been focused on juvenile *delinquency* proceedings, rather than the juvenile *dependency* hearings that I address here.

The First Juvenile Dependency Court, Which Was the Model for Other U.S. Dependency Courts, Was Open to the Public

7. The first dedicated juvenile dependency court was established in Illinois in 1899. Since its passage in 1899, Illinois's An Act to Regulate the Treatment and Control of Dependent, Neglected, and Delinquent Children has been publicly recognized as the world's first juvenile court legislation and it served as model legislation for the adoption of juvenile courts across the United States during the first decades of the twentieth century.[1]

8. The question of whether juvenile court hearings should be open or closed to

[1] Elizabeth J. Clapp, *Mothers of All Children: Women Reformers and the Rise of Juvenile Courts in Progressive Era America*. (University Park: Penn State University Press, 1998).

the public was explicitly considered in Illinois in 1899, and after public debate, legislators decided that juvenile courts should be open to protect the children and families subject to their jurisdiction.

9. In 1899, the sponsors of that Act proposed excluding from the courtroom "all persons not officers of the court or witnesses, and those having a direct interest in the case being heard."[2] This language, however, was stripped from the original legislation because opponents of Children's Aid Societies and Orphan Trains[3]—the precursors to the modern foster care system—argued that secret hearings could lead to various evils, including child trafficking. These critics of family separation objected to the idea that a court with the power to declare children "dependent," to remove those children from their parents or legal guardians, and to grant custody and control over them to private associations, should operate in "secrecy."

10. Critics were concerned that given the enormous power of the new court to assume custody and control over "dependent children," secret hearings could lead to abuse, including abuse by so-called "child saving" associations that might profit from the system. A newspaper article titled "Child Slaves" quoted a lawmaker who declared, "The mother who permitted her little one to appear on the street not washed, curled, and combed to suit the critical inspection of an 'association' practicing philanthropy at $50 a

[2] Timothy D. Hurley, *Origin of the Illinois Juvenile Court Law: Juvenile Courts and What They Have Accomplished* 28 (3d ed. 1977).

[3] These early charity organizations, like the Children's Aid Society, were founded "to help destitute children," and reasoned that orphaned or neglected children in crowded Eastern cities would receive better care with "good-hearted" families in the Midwest. *See* Andrea Warren, *The Orphan Train*, Wash. Post (1998). As a result, between 1854 and 1929, around 200,000 American children were sent west to find foster homes and, notably, fill labor shortages in the farming industry at the time. *Id.*

head would be in danger of losing her child."[4] To secure passage of the Illinois Juvenile Court Act, which became model legislation in the United States and abroad, its sponsors were forced to remove the controversial proposed language about closed hearings.[5]

11. As a result, juvenile court hearings in Chicago were open to the public and the press published stories about cases, which included children's names and addresses. In addition, in Chicago spectators came to the juvenile court to witness sensational dependency cases, such as the William Lindsay case, which involved a large family inheritance and culminated in an Illinois Supreme Court decision, *Lindsay v. Lindsay*, 100 N.E. 892 (1913).[6] An example of a packed juvenile court session in 1905 is depicted below.

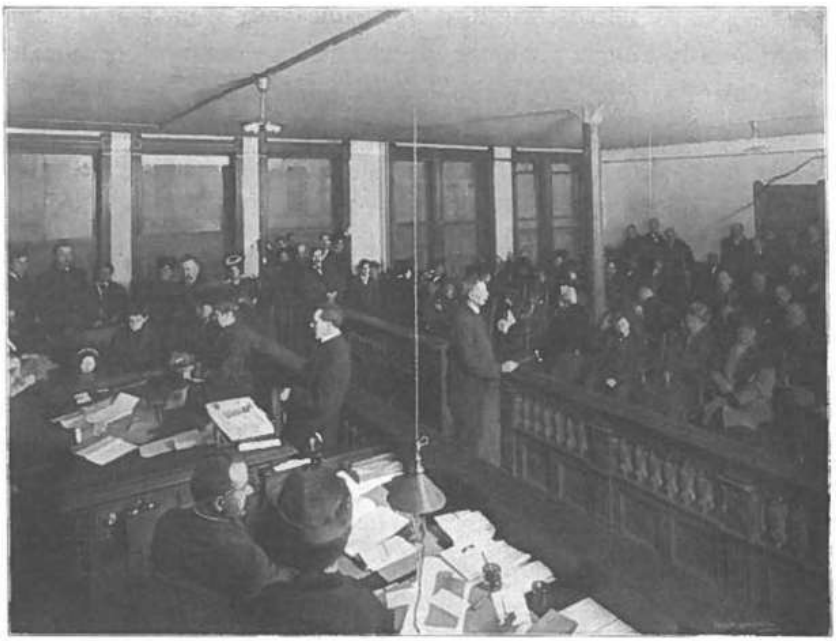

Fig. 2.1 Juvenile Court in Session. From Cook County Charity Service Report, Fiscal Year 1905. Courtesy of The University of Chicago Libraries.

[4] *Child Slaves*, Chicago Daily Inter-Ocean (Feb. 28, 1899).
[5] 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, 62 (Margaret K. Rosenheim et al. ed., 2002).
[6] David S. Tanenhaus, *Juvenile Justice in the Making* 23–54 (2004).

Until the 1960s, Juvenile Dependency Courts Remained Generally Open in the United States

12. There is a long history of openness in juvenile dependency courts since 1899.

13. While there were periodic debates about closing juvenile *delinquency* hearings, even those hearings remained generally open.[7] Indeed, the idea of publicly attended delinquency hearings was a part of popular culture. For example, the entire second act of Frederick Ballard's Broadway play *Young America* (1917) takes place in a juvenile courtroom, included stage directions for seating "spectators and witnesses." The 1932 Hollywood movie *Young America*, based on Ballard's play, begins in a packed juvenile court room in a small city.

14. While there were periodic debates about dependency court hearings should be open or closed, it was generally believed that they should remain generally open precisely because the decisions that these courts made mattered so much. As Roscoe Pound famously noted in 1939,

> The powers of the Star Chamber were at trifle in comparison with those of our juvenile courts and courts of domestic relations. The latter may bring about a revolution as easily as did the former. It is well known that too often the placing of a child in a home or even in an institution is done casually or perfunctorily or even arbitrarily.[8]

The debate has also included considerations of how to best ensure that there is public

[7] *See, e.g.*, Harvey H. Baker, *Private Hearings: Their Advantages and Disadvantages*, 36 Annals of Acad. of Pol. & Soc. Sci. 80 (1910).
[8] Roscoe Pound, "Foreword," in Pauline V. Young, *Social Treatment in Probation and Delinquency: Treatise and Casebook for Court Workers, Probation Officers and Other Child Welfare Workers* xxvii (1939).

oversight of this extraordinary exercise of state power.

15. A prominent 1939 treatise on U.S. juvenile legal systems, Gilbert Cosulich's *Juvenile Court Laws of the United States* (2d ed. 1939), explained that at that time only six states and the District of Columbia required the exclusion of the general public from juvenile dependency hearings.[9] And in 20 jurisdictions judges were not even given the statutory authority to close dependency proceedings in particular cases. In other words, despite the debates of the time, such court proceedings remained open to the public in much of the nation.[10]

There Was a Movement in the 1960s to Close Juvenile Dependency Courts, But Courts Are Reverting Back Towards Their Original Openness

16. In the 1960s, the National Conference of Commissioners on Uniform State Laws recommended closing dependency proceedings.[11] At that point, some states passed laws that either presumptively closed dependency proceedings to the public, or closed them full stop, without providing any mechanism for the public to seek access.

17. The tide shifted again in the 1980s, when states that had closed their dependency courts began re-opening them. Oregon led the return to open dependency courts in 1980, with Michigan and New York following soon after, followed by Florida in 1994 and Minnesota in 1998.

18. Reflecting this trend to return to openness, the National Council of Juvenile

[9] Gilbert Cosulich, *Juvenile Court Laws of the United States* 50 (2d ed. 1939)
[10] *See id.*

[11] *Proceedings in Committee of the Whole Uniform Juvenile Court Act*, Uniform Juvenile Court Act at 73–74 (July 29, 1968).

and Family Court Judges, an organization that "identifies problems within our nation's juvenile and family courts and formulates ways of improving practice in order to enhance justice," issued a resolution in 2005 in support of presumptively open hearings. The Council acknowledged that "the public has a legitimate and compelling interest in the work of our juvenile and family courts" and stated that "open court proceedings will increase 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, and may ultimately increase public confidence in the work of the judges of the nation's juvenile and family courts."[12]

Juvenile Dependency Courts in North Carolina Have Historically Been Open

19. Thanks to the digitization of newspapers, historians can more easily study local press coverage of juvenile court cases to examine how these courts operated in the early twentieth century. I used the website *newspapers.com* to review press coverage of juvenile courts in North Carolina after the state enacted a juvenile court law in 1919.[13] The North Carolina law, unlike the pioneering Illinois legislation, did include language permitting closed hearings at the judge's discretion:

> Sessions of the court shall be held at such times and in such places within the county as the judge shall from time to time determine. In the hearing of any case coming within the provisions of this act the general public may be excluded and only such persons admitted thereto as have a direct interest in

[12] *68th Annual Conference Resolution No. 9*, Nat'l Ctr. for Juv. Just. (July 20, 2005), https://www.ncjfcj.org/wp-content/uploads/2019/08/in-support-of-presumptively-open-hearings.pdf.
[13] An Act to Create Juvenile Courts in North Carolina, 1919 Gen. Assemb., Reg. Sess (N.C. 1919).

the case.[14]

20. But the historical record demonstrates that dependency and delinquency proceedings were generally open. For instance, North Carolina newspapers in 1919–1920 commonly reported on juvenile court cases,[15] printed children's names,[16] and described alleged offenses.[17] Newspapers also provided accounts of open hearings. For example, on May 30, 1920, the *Greensboro Daily News* published an article that began: "An open session of the juvenile court was held yesterday afternoon with Judge M. W. Gant presiding. Judge Gant stated owing to the large number of offenders and the seriousness of many of the charges he decided that an open session was appropriate."[18] As the paper noted, "After all the evidence had been brought out Judge Gant invited the boys' parents—most of all of the parents being present—to make any suggestions as to the punishment they thought proper. A few of the parents made short talks in which they said they desired to co-operate with the court juvenile court authorities in every way to prevent further mischief."[19] Judge Gant then placed all the boys on probation. Thus, North Carolina has a long tradition of public hearings in its juvenile courts.

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[14] *Id.* § 4.
[15] *See, e.g.*, *Boy 11 Years Old in Juvenile Court*, Asheville Citizen Times (Oct. 22, 1919).
[16] *See e.g.*, *Colored Girl Charged with Murder of Boy: Laura Haizlip To Be Given Hearing in Juvenile Court—Shot Tom Gyyn, Colored*, The Sentinel (July 10, 1919).
[17] *See, e.g.*, *Judge Leatherwood. First Juvenile Court Held Monday—Three Boys Tried for Housebreaking—Next Offense Will Send Them to the Reformatory*, Carolina Mountaineer & Waynesville Courier (Apr. 10, 1919).
[18] *Large Number of Youths Face Juvenile Court*, Greensboro Daily News (May 30, 1920).
[19] *Id.*

Justice Rehnquist Inaccurately Characterized the History of the Juvenile Justice System in *Smith v. Davis*

21. I have been asked to evaluate the historical accuracy of the following U.S. Supreme Court precedent from 1979, in which Justice Rehnquist characterized the history of delinquency proceedings as follows:

> It is a hallmark of our juvenile justice system in the United States that virtually from its inception at the end of the last century its proceedings have been conducted outside of the public' full gaze and the youths brought before our juvenile courts have been shielded from publicity. *See* H. Lou, Juvenile Courts in the United States 131–133 (1927); Geis, Publicity and Juvenile Court Proceedings, 30 Rocky Mt.L.Rev. 101, 102, 116 (1958). This insistence on confidentiality is born of a tender concern for the welfare of the child, to hide his youthful errors and "'bury them in the graveyard of the forgotten past.'" *In re Gault,* 387 U.S. 1, 24–25 (1967).

Smith v. Daily Mail Pub. Co., 443 U.S. 97, 107 (1979). I have also been asked to evaluate whether this is a fair characterization of dependency proceedings, as opposed to the delinquency proceedings at issue in the opinion.

22. The first sentence in the statement from Justice Rehnquist's concurring opinion in *Smith v. Davis* implies that juvenile court hearings have been closed to the public from the late nineteenth century to the 1970s. His statement does not tell us precisely when these hearings were closed to the public, who constituted the public, or how they were excluded. Justice Rehnquist cited Herbert H. Lou's *Juvenile Courts in the United States*, which was published in 1927 by the University of North Carolina Press and later reprinted by Arno Press in 1972. Justice Rehnquist also cited an article by the criminologist Gilbert Geis from the 1950s about newspaper coverage of juvenile delinquency cases.

23. In my opinion, Justice Rehnquist's two cited sources do not reliably stand

for the proposition that juvenile courts historically held closed proceedings. In fact, both of these sources confirm the opposite: that dependency proceeding were generally open until the 1960s.

24. The first cited source is Herbert H. Lou's *Juvenile Courts in the United States*.[20] Lou was a Chinese scholar who came to the United States in the 1920s and wrote his dissertation at Columbia University under the supervision of Raymond Moley. The University of North Carolina Press published his dissertation as a book in 1927. It served as the standard history of American juvenile justice until the 1960s.[21]

25. Lou did not contend that juvenile courts had always been closed proceedings and he cautioned against holding secret hearings. In the section titled "Privacy of Hearings," Lou noted that "the exclusion of the public from hearings of children's cases is generally recognized as a fundamental feature of juvenile-court procedure."[22] But it is critical to understand what he meant by "the exclusion of the public." He explained that "exclusion" did not mean a closed courtroom. Instead, "[r]epresentatives of social agencies, students and others who have a general interest in the problems of the court are usually admitted."[23] Thus, scholars, lawyers in the area, and advocates were permitted to attend. He explained why: "It is to the advantage of the court to permit acquaintance with its work that will win the understanding and cooperation of the community and free the court from the suspicious criticism of holding

[20] Herbert H. Lou, *Juvenile Courts in the United States* (University of North Carolina Press, 1927),
[21] David S. Tanenhaus, "The Many Histories of American Juvenile Justice," in *Crime & Justice* (University of Chicago Press, forthcoming 2025).
[22] Lou, *supra*, at 132.
[23] *Id.*

'star chamber sessions.'"[24] Lou noted that while courts strived to provide privacy; they did *not* operate in secret: "Undue privacy may be as injurious to the work of the court as undue publicity. Privacy should not appear to be secrecy."[25]

26. The second source that Justice Rehnquist cited in *State v. Daily Mail Publishing Co.* is Gilbert Geis's 1958 law review article.[26] Geis drew on the authoritative summary of juvenile court laws (which I rely on above) prepared by the National Probation Association and compiled by Gilbert Cosulich, a law professor and legal assistant to the Association. Geis describes Cosulich's work as a "very comprehensive survey of the juvenile court law in 1939." Geis notes that "Cosulich found that the public was excluded from juvenile courts by law in seven jurisdictions, and could be excluded in twenty-four additional jurisdictions."[27] Geis explained that little had changed from the late 1930s to mid-1950s. He then added, "At present, however, the situation is in great flux," especially with regard to "private hearings and newspaper publicity."[28]

27. In conclusion, Justice Rehnquist did not characterize the history of juvenile justice accurately in his concurring opinion in *Smith v. Daily Mail Publishing Co.*

[24] *Id.*
[25] *Id.*
[26] Gilbert Geis, *Publicity and Juvenile Court Hearings*, 30 Rocky Mountain L. Rev. 101 (1958).
[27] *Id.* at 116–117.
[28] *Id.* at 117.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed on this 22 day of November, 2024, at Las Vegas, Nevada.

David S. Tanenhaus

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and have verified that such filing was sent electronically using the CM/ECF system to the following: **Judge Doretta L. Walker**.

I hereby certify that I have mailed the document to the following non-CM/ECF participants: **Clarence F. Birkhead**, through his counsel as listed below:

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Respectfully submitted,

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