Case No. 18-1273

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GARY L. WALKER,

Defendant-Appellee

COLORADO SPRINGS FELLOWSHIP CHURCH,

Movant - Appellant.

On appeal from the
United States District Court for the District of Colorado
Honorable Christine M. Arguello
D. Ct. No. 1:09-CR-00266-CMA/D. Ct. No. 1:15-CV-02223-CMA

APPELLANT'S REPLY BRIEF

Appellant does not seek oral argument.

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GLOSSARY

CSFC ……..Colorado Springs Fellowship Church

AOB.....Appellant Opening Brief

SUMMARY OF THE ARGUMENT

On June 12, 15, and 16, 2017, trial judge Christine Arguello held an evidentiary hearing to consider Walker's claims of religious coercion on him and attorney Solomon (now Lawson). (Docket #1061, 1063, 1064). Walker and former

Colorado Springs Fellowship Church (CSFC) members presumably testified that Walker was allegedly coerced by the voice of God and that Lawson was allegedly controlled by Pastor Banks. On June 28, 2017 the day of the resentencing, Mr. Walker requested that the transcript of the evidentiary hearing be sealed, which was granted by the district court. (Doc. # 1086). Mr. Walker was resentenced from 135 months to 70 months and released from prison on July 7, 2017. (Doc. # 1069, 1082).

On January 12, 2018, CSFC filed a motion challenging the sealing of the evidentiary hearing transcripts of Mr. Walker's habeas proceeding for legitimate concerns regarding its reputation, denial of the public's First Amendment and common law right of access to court proceedings and right to inspect and copy judicial records from those proceedings. (Doc. # 1106). On June 1, 2018, the district court denied CSFC's motion to unseal the transcripts claiming "overwhelming evidence" of Mr. Walker's contention he had "very real safety concerns." (Doc. # 1114). Mr. Walker and his witnesses claimed they feared "retaliatory harassment" from Pastor Banks and CSFC parishioners. *Id*. CSFC request this honorable court allow access to the transcripts due to the lower court's abuse of discretion to restricting access and not allowing an alternative for access.

ARGUMENT

I. CSFC Has Overcome the Strong Presumption in Favor of Public Access

By citing *Davis v. Reynolds*, 890 F.2d 1105 (10th Cir. 1989) in his brief, Mr. Walker, in essence, argues that he made a sufficient showing that he at 54 years-old and his adult witnesses from the evidentiary hearing were vulnerable as 16-year-old rape victims and deserving of the district court's overly broad restriction of judicial records to protect them from the retaliatory harassment from his mother-in-law, ex-wife and former parishioners he called friends for 30 years. Walker also argues that the district court properly concluded that presumption of public access (which is a "strong" presumption" by the way) has been overcome by the compelling interest of preventing harm from him and his witnesses. CSFC argues that Mr. Walker and his witnesses were never vulnerable and were not harassed. The district court's vulnerability, harassment and overall closure analysis lacked the specificity and rigor required under the law to overcome the strong presumption in favor of public access to judicial records. The district court made clear error of judgment in its sealing decisions in this case.

The fact that the government remained silent and didn't throw its support behind Mr. Walker's original sealing request and has chosen not to defend the actions of the court or Mr. Walker on appeal should indicate to this court that it did not believe Mr. Walker and his witnesses were vulnerable or their claims of retaliatory harassment were enough to overcome the strong presumption of public access.

Although the government filed a response brief "to assist the court in understanding the record and the issues" (Doc. # 010110044143, Government Answer Brief, p. 9), the government admits that the district court restricted access to a "great many" judicial records. *Id*. at 14. This admission by the government speaks volumes and lends credibility to CSFC's substantial arguments underpinned by a litany of case law that the district court abused its discretion in its absurdly broad sealing of records to deny CSFC and the public access to them. As we pointed out in our brief, the district court as "the primary representative of the public interest in the judicial process," (AOB, p. 25-26) and the government, "who is the representative not of an ordinary party to a controversy," *Berger v. United States*, 295 U.S. 78, 88 (1935), have a responsibility to ensure that CSFC and the public have access to judicial records in Mr. Walker's habeas proceeding in accordance with the common law right of access as recognized by this court in *United States v. Pickard*, 733 F.3d 1297, 1303 (10th Cir. 2013) "It is clear that the courts...recognize a general right to inspect and copy...judicial records and documents." *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978). These are consonant with the First Amendment right to attend court proceedings. See *Press-Enterprise Co. v. Superior Court of Cal. County of Riverside*, 478 U.S. 1, 8 (1986).

Both appellee Walker and the government agree that the courts "have long recognized common law right of access to judicial records" and that there is "strong presumption in favor of public access," *Pickard*, 733 F.3d at 1302. That strong presumption of openness, however, can be overcome where the countervailing interest is "significant" enough to "heavily outweigh" the public's interest in access to judicial records. Id.; *Colony Ins. v. Burke,* 698 F.3d 1222, 1241 (10th Cir. 2012); *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011). Walker correctly points out that the 10th Circuit will not disturb a district court's sealing decision absent "a definite and firm conviction that the [district court] made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." (Doc. 010110045809, Appellee Answer Brief, p. 13); *Mann v. Boatright*, 488 F.3d 1140, 1149 (10th Cir. 2007). The 10th Circuit will also "review de novo the legal principles that the district court applied in considering" restricting access to judicial records and will conclude that there was an abuse of discretion where "incorrect legal principles" were applied in its sealing decision(s). *Pickard*, 733 F.3d at 1302. Based on the analysis, reasoning and findings in Pickard and Mann, this court should have a definite and firm conviction that the district court abused its discretion based on the specific facts of this case.

The government engages in legal sophistry to suggest that CSFC's motion "contained little to no analysis addressing why their right of public access was not

outweighed by the interests of protecting Mr. Walker and his witnesses" when it knows the district court restricted access to its order (Doc. #1085) with its findings concerning its sealing decision (Doc. no. 1085). Although CSFC doesn't have the benefit of the district court's specific analysis, findings and conclusions, substantive arguments concerning its abuse of discretion can be gleaned from the district court's absurdly broad sealing of judicial records, many of which were done *sua sponte*. The government states that "CSFC's insistence upon obtaining all documents and transcripts pertaining to the 2255 hearing" leaves the district court with "no practical alternative" to its broad sealing decision (Govt. Answer Brief, p. 14). The appellee agrees, contending that CSF did not present the district court with any way to limit its expansive request for unfettered access to 'all documents associated" with the 2255 petition. (Appellee Answer Brief, p. 10).

CSFC would like to remind the government and appellee that the strong presumption in favor of public access "is the starting point" for a court's sealing analysis. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). It is CSFC's contention that the district court abused its discretion from the beginning. The district court's failure to consider alternatives to its exceptionally broad sealing (e.g., redaction) has been held by the 10th Circuit as judicial error. *Pickard,* 733 F.3d at 1304; See also, *Davis*, 890 F.2d at 1110).

II. District Court Findings of Retaliatory Harassment Were Insufficient to Overcome Strong Presumption

The district court claimed its restriction of access to the evidentiary hearing (and many more documents that were not even requested for sealing) was based on "very real safety concerns" about Mr. Walker and his witnesses who it says are "vulnerable" people it needs to protect. (Doc. # 1114, p. 2). Appellee Walker argues that the district court "was within its discretion" to deny CSFC's motion to unseal based on its determination that he, at 54 years-old, and his other adult witnesses who testified at the evidentiary hearing are "vulnerable witnesses" based solely on their unsupported claims that they feared potential retaliatory harassment and intimidation from Pastor Banks and members of the Colorado Springs Fellowship Church they once attended. (Appellee Answer Brief, p. 10-11). Walker contends that he and his witnesses' alleged fears of retaliatory harassment are based on "past experience" which means the district court made a clear error of judgment to restrict access to judicial records on unsupported allegations of past harassment that had no nexus to the actual June 2017 evidentiary hearing. (Doc. 1114). And, there is certainly no nexus now (15 months later) and no credible reason for the district court's position to continue denying access in perpetuity.

Assuming arguendo, Walker and his bunch suffered retaliatory harassment in the past from Pastor Banks and CSFC members, how many harassing incidents

occurred, how frequent was it and what was its severity? These are the types of questions the 10th Circuit asks in determining whether religious, sexual or racial harassment occurred in the workplace. See *Lounds v. Lincare, Inc*., 812 F.3d 1208, 1222 (10th Cir. 2015) (claims of workplace harassment are evaluated on a variety of factors including the frequency of discriminatory conduct, its severity, whether it was physically threatening or humiliating, or a mere offensive utterance. And in determining those factors the plaintiff must show more than a "few isolated" or "sporadic" incidents of harassment). Although this is not a workplace harassment case, the district court's central reason for restricting access to judicial records is predicated solely on protecting Mr. Walker and his witnesses from potential retaliatory harassment and the legitimacy of that reasoning is subject to de novo review by this court in determining whether the district court abused its discretion or applied incorrect legal principles in its sealing decisions. Did the alleged retaliatory harassment take place two, three, five or even seven years ago? If it did happen was it related to them testifying in a court of law about Pastor Banks or the church? How would alleged fears of harassment that happened in the past unrelated to this habeas proceeding be relevant for the district court's sealing consideration?

This court will determine whether the district court was circumspect in analyzing Mr. Walker's harassment claims and made "specific and rigorous findings" about

those claims "before sealing the document or otherwise denying public access." AOB, p. 21; *Bernstein v. Bernstein, Litowitz, Berger & Grossman*, LLP, 814 F.3d 132, 141 (2nd Cir. 2016). Legal standards requiring judges to be specific and rigorous in its analysis signifies deference to the importance the courts have placed on the public's right of access which underscores that judges must be circumspect in its analysis to guard against judicial arbitrariness and arriving at sealing decisions by fiat. As CSFC discusses in its brief, restricting access to judicial records should only be done if there are "exceptional circumstances." AOB, p. 20 (citations in brief). Those exceptional circumstances simply are not present here. Guidance concerning what constitutes harassment is, however, available from 10th Circuit cases involving various type of workplace-related harassment.

It's apparent from resentencing colloquy transcript that Judge Arguello construed an isolated religious admonishment made by Pastor Banks in a letter Mr. Walker (her son-in-law and his spiritual leader for 30 years) as harassment because she found it very offensive, prompting her to publicly call Pastor Banks a "vindictive and mean-spirited prophet of God from the bench. (Doc. #1087, Aplt. App. at p. 21). A mother-in-law pastor admonishing her son-in-law of 30 years who followed CSFC's extensive biblical teaching about God's punishment, as well as his love was not shocked in the least by scripture discussing disease as punishment.

Appellee Walker agrees the district court used the admonishment letter as its reason to restrict access to the evidentiary hearing, claiming the letter was "abusive", a "wish to harm...former congregant[s]" and "an obvious effort to harass and intimidate" Mr. Walker in retaliation for leaving the church. (Appellee Answer Brief, p. 15). However, those claims were wholly undermined by the district court's own words during the resentencing colloquy, stating that Mr. Walker was "cut off, isolated and alienated" from Pastor Banks, his wife and son, codefendants and every CSFC parishioner. (Doc.#1087, Aplt. App. At p.21-23). Given the very general nature of Judge Arguello's order denying CSFC's motion to unseal it is apparent there was little to no analysis, and certainly not the very specific and rigorous analysis required before restricting access to judicial documents as discussed in Bernstein supra. The Supreme Court put it this way: "[W]hether retaliation or harassment has occurred 'depends on a constellation of surrounding circumstances, expectations and relationships." *Vance v. Ball State Univ*., 570 U.S. 421, 466 (2013) (quoting *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75, 81-82 (1998) (Justice Ginsberg dissenting, joined by Justice Breyer, Justice Sotomayor, Justice Kagan).

This court can unequivocally conclude that the district court relied heavily on an isolated religious admonishment letter to justify its broad sealing of judicial records, not on evidence of frequent, severe or physically threatening harassment --

a conclusion that is apparent from the district court's rancorous comments about Pastor Banks during the resentencing colloquy. Assuming arguendo there was actual intent to harass, a few isolated or sporadic incidents would be insufficient to bring an actionable workplace claim in a federal court even where the person alleging harassment is works on the job with alleged culprits eight hours per day, five days per week. Similarly, they should be insufficiently weak to overcome the very strong presumption in favor of public access to judicial records, especially since Mr. Walker and his witnesses don't attend CSFC, and in Mr. Walker's case, he has no contact with Pastor Banks, his ex-wife or son or CSFC parishioners.

III. The District Court Erred in its Determination that Appellee and Witnesses Were Vulnerable

The courts have reserved the sealing of judicial records for when there is a compelling interest in secrecy, as in the case of trade secrets, confidential informants and the privacy of children." *Jessup v. Luther,* 277 F. 3d 926. 928 (7th Cir. 2002). Vulnerability concerns of witnesses to justify sealing of records have been reserved almost exclusively by the courts for cases involving underage children such as those traumatized by rape, not for adult witnesses in a civil habeas proceeding claiming they fear potential or future retaliatory harassment and intimidation from their former Pastor and parishioners, and in Walker's case, his former mother-in-law. *Id*. The district court could have required the witnesses to

produce objective evidence such as police complaints or restraining orders against CSFC in its 37-year existence (which there are none) before taking the extraordinary step of restricting access to judicial records.

Walker and the district court rely heavily on Davis supra. where the government's significant interest of protecting "vulnerable" 16-year-old rape victims from "embarrassment and harm" was appropriately found by the 10th Circuit to heavily outweigh the strong presumption in favor of public access. *Davis*, F.2d at 1009.

The *Davis* court found that the government clearly had a compelling interest in protecting youthful witnesses who are called upon to testify involving sensitive and painful issues, especially those cases involving alleged sexual offenses." *Davis* F.2d at 1110. "The age of the victim and type of offense alleged are valid considerations in weighing...the government's interest in protecting the victim from undue harm." *Id*. "Consideration of a victims age and nature of offense support closure ONLY when they form part of a case-by-case analysis of each individual situation" and "they don't justify an automatic general exclusion of the public in every case involving a young victim and sordid or heinous allegations." *Id*. The district court's broad finding in this case that public testimony "could harm" a particular witness without "inquir[ing] into the complainant's psychological background [and] level of maturity and understanding" are insufficient to overcome the strong presumption in favor of public access. *United States v.*

Galloway, 963 F.2d 1388, 1393 (10th Cir. 1992). The Supreme Court reinforces this in *Globe Newspaper v. Superior Court, 457 U.S. 596 (1989),* where the high court found that protecting the physical and psychological well-being of less mature youthful witnesses was sufficient to overcome the strong presumption of public access. A "normal 16-year-old lacks the maturity of an adult." *Roper v. Potosi Correctional Center,* 543 U.S. 551, 569 (2005); See also *Galloway*, 963 F.2d at 1390 (court approves a partial closure of courtroom during victim's testimony due to victims age and sexual nature of offense); *Douglas v. Wainwright*, 714 F.2d 1532, 1544-45 (11th Cir. 1983) (exclusion allowed of public other than defendants family and press from courtroom to protect a testifying rape victim-witness from insult and embarrassment).

CSFC believes the 10th Circuit's vulnerable victim analysis is relevant in determining whether the district court was rigorous in its closure analysis. To classify a victim as a "vulnerable, the 10th Circuit requires a district court to make "particularized findings of vulnerability" which includes inquiring into a "victims personal and individual vulnerability." *United States v. Brunson*, 54, F.3d 673, 676 (10th Cir. 1995). Two critical factors, which are similar to considerations in Davis, are "age, and physical and mental condition." *Id*. See also *Linstadt v. Keane,* 239 F.3d 191, 195, (2nd Cir. 2000) (court discusses vulnerable witness" standard under New York law used to grant motion for child witness to testify via closed-circuit

television). "[Y]outh is more than a chronological fact. It is the time and condition of life when a person may be most susceptible to influence and psychological damage." *Roper*, 543 U.S. at 569. At 54 years-old Mr. Walker is not vulnerable and neither are his other adult witnesses from the evidentiary hearing, many of whom ages range from 40 to 60 years-old and have had no contact with Pastor Banks or attended CSFC for a decade or more.

The district court made a clear error of judgment in sealing these proceedings, especially, as CSFC points out in its brief, "restricting public access to judicial records is 'rarely the proper protection,' *United States v. Hickey*, 767 F.2d 705, 711 (10th Cir. 1985) (Judge McKay dissenting)). The public's right of access "may give way in certain cases to other rights or interests...Such circumstances will be rare however..." *Waller v. Georgia*, 467 U.S. 39, 45 (1984). Rare indeed, which is why the courts have reserved the closing of proceedings and restricting of access to judicial records for the most "exceptional circumstances" such as young victims, confidential informants and trade secrets, not for Walker and his bunch. *Joy v. North*, 692 F. 2d 880, 893 (2nd Cir. 1982).

IV. Appellee Walker Attempting to Harass Ex-wife and Son

Recent actions by Mr. Walker belies his claims that he fears Pastor Banks, his wife and CSFC members. On August 28, 2017, a vulnerable and fearful Mr. Walker trespassed on the property of his ex-wife, Yolanda and estranged son Kyle who

have expressed they want Mr. Walker to leave them alone. A letter regarding Mr. Walker's trespassing incident and from Mr. Walker's son Kyle was sent to his probation officer, Mr. Joel Nelson (Exhibit A) and to the court. According to Lamont Banks, Executive Director of advocacy organization A Just Cause, who contacted Mr. Nelson by phone to alert him of Walker's harassment, Nelson told him he would tell Mr. Walker to stay away from his ex-wife and son and if Mr. Walker returned to call the police. Additionally, Kyle Walker, in a written affidavit states he doesn't "want to have any contact with [Mr. Walker] whatsoever." (Exhibit B). These letters support the truth of the district court's statements during resentencing colloquy where she said Mr. Walker was "cut off, isolated and alienated. (Doc. 1087, Aplt. App. At p. 21-23).

Additionally, around March 2018, Mr. Walker, knowing that his son Kyle and CSFC members (including Pastor Banks' son-in-law Amos Clark) bowl at a particular bowling alley every Monday, came to the same bowling establishment with former disgruntled church members. It is clear from Mr. Walker's post-release actions he doesn't fear CSFC members, Pastor Banks or her family. The district court's claims of that the 54-year-old Mr. Walker and other adult witnesses were vulnerable and need protecting is a fallacy. Pastor Banks, Walker's ex-wife Yolanda, his son Kyle, his codefendants and CSFC members want absolutely nothing to do with Mr. Walker or the witnesses that testified at this hearing, but

they are deeply concerned with possible reputational damage done in this OPEN proceeding of which they have no access for purposes of defending their good name.

V. District Court Did Not Adequately Weigh CSFC's Reputational Interests

After putting the proverbial 'cart before the horse' by failing to seal the evidentiary hearing prior to the testimony of Walker and his witnesses, the government now argues that both it and the district court dismissed CSFC concerns about their reputation as a legitimate interest, audaciously stating that they "found that limiting access to hearing transcripts served, rather than undermined" the reputational interests of Pastor Banks and CSFC (Government Answer Brief, p. 13-14). Neither the government nor the district court controls the reputational interests of Pastor Banks, CSFC or its members nor can it suppress or dictate how Pastor Banks (a public figure) or CSFC (a public church in the Colorado Springs community for 37 years) chooses to defend their own reputation. "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer,* 383 U.S. 75, 86 (1966). "A right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of essential dignity and worth of every human-being-a concept at the root of any decent system of ordered liberty." *Id*. at 92 (Justice

Stewart concurring); See also *Spencer v. Kemna*, 523 U.S. 1, n.5 (1998); *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 12 (1990).

Based on what the government calls Walker's "self-serving" affidavit (Doc. 922, p. 19) which the government says Walker "asserts little more than that [his mother-in-law Pastor Banks] told him to fire his lawyer, and that he viewed [Pastor Banks] as the voice of God", and testimony about Pastor Banks in OPEN court from Walker and disgruntled former CSFC members, as well as an alleged letter from Pastor Banks admonishing Walker (her son-in-law of 30 years) about how God would punish him and his father with disease for lying on CSFC and her, the district court told Walker during the June 28, 2017 resentencing colloquy that "there was evidence demonstrating the extent of coercion that you and others were subjected to by Pastor Banks and your inability to evade the directions received from her as a result of the duress that was imposed." (Doc. 1087, Aplt. App. at p. 21). The testimony of Walker and his witnesses was so poisonous it prompted the district court to say: "it's hard to fathom how someone who holds herself out to be a prophet of God and as a Christian could be as vindictive and mean-spirited as Pastor Banks." *Id*.

While courts have found reputational interests of innocent third parties a compelling interest for overcoming the public's right of access, restricting access under those circumstances is almost always done at the request of a person seeking

to have court records remain sealed to protect their reputational interests. See *United States v. Amodeo*, 71 F.3d 1044, 1048 (2nd Cir. 1995). In this case, however, CSFC, as an innocent third party, seeks full disclosure of the evidence the district court says shows Pastor Banks' alleged coercion and duress for the purposes of defending its reputation. "[Reputational] interests of innocent third parties...should weigh heavily in the court's balancing equation." *Id*. at 1050-51. CSFC's unsealing request in the interest of its reputation are as vibrant as the privacy interests of those who seek to maintain the sealing of records and deserves the same heavy weight in a court's balancing equation.

CSFC discussed numerous cases in its opening brief that confirms, absent extreme circumstances, restricting access to judicial records once information has been made public are extinguished and weighs strongly against continual denial of access. *Globe Newspaper v. Polaski*, 868 F.2d. 497, 506 n.17 (1st Cir 1989). These were not extreme circumstances and the district court made a clear error of judgment restricting access under Mr. Walker and his witnesses being vulnerable and fearing harassment.

VI. The District Court Relied on Conjecture in its Determination That CSFC Would Use Records for Improper Purposes

Walker points out that the district court denied CSFC access to judicial records after determining the records would "become a vehicle for improper purposes." (Appellee Answer Brief, p. 17) (quoting Nixon 435 U.S. at 598).

Because the right to inspect and copy judicial records "is not absolute, access has been denied where court files might have become a vehicle for improper purposes, such as using court records to "gratify private spite or promote public scandal" for the intended purpose of (1) publicizing painful and sometimes disgusting details of a divorce case, (2) serving as reservoir of libelous statement for press consumption or (3) using as sources of business information that might harm a litigants competitive standing. *Nixon*, 435 U.S. at 598. See also *Hickey*, 767 F.2d at 708. But CSFC asks this court to consider what does the term "might have become a vehicle for improper purposes" really mean and what factors does a district court use to determine such?

Is the court required to give a prediction, which is defined as "to state (what one believes will happen)" or a hypothesis, which is defined as "a supposition based on evidence but not proved; proposed explanation, supported by evidence, that serves as a starting point for investigation?" Or is it conjecture, which is defined as "a guess; supposition; surmise?" Maybe it's equivalent to "I can't give him a driver's license because he might have become a reckless driver?"

To legitimately conclude that CSFC should be denied its common law right of access to judicial records because those records "might have become a vehicle for improper purposes" the district court would have to base its decision on some current or historical fact or evidence, "not based on unsupported hypothesis or conjecture" which was done here. *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1981). See also *United States v. Martin*, 746 F.2d 964, 972 (3rd Cir. 1984); *United States of America, Plaintiff-Appellee, v. Charles Beckham, et al., Defendants-Appellees, v. Post-newsweek Stations, Michigan, Inc., et al., Non-Party Appellants*, 789 F.2d 401 (6th Cir. 1986); *In re National Broadcasting Co., Inc.*, 653 F.2d 609, 616 (D.C. Cir. 1981) ("access may be denied only if...justice so requires"); *United States v. Mitchell*, 511 F.2d 1252, 1261 (DC Cir. 1976).

First the district cannot point to a current or historical fact or evidence to support any conclusion that CSFC would use court records maliciously to spite Mr. Walker or his witnesses. CSFC knows this without access to records because it is aware of its own conduct and has never done it or attempted to do so. Second, the "gratify private spite and promote public scandal" standard established by Nixon was related to "preventing all public scrutiny but did not prevent copying and enhanced dissemination of items already publicly disclosed by admission into evidence at a public session of court." *National Broadcasting Company Inc United States v. O Myers,* 635 F.2d 945, 950 (2nd Cir. 1980). Neither the government nor the appellee

disputes this was a public hearing and records CSFC seeks to inspect was related to matters done in open court which weighs strongly against Mr. Walker's and his witness's testimony remaining sealed. (*Polaski*, 868 F.2d 497 at 506 n.17)..

Once a district court determines whether the judicial records being requested to be unsealed is traditionally open to the public, it must then weigh the "nature and degree of injury" which includes considering not only "the sensitivity of the information but also of how the person seeking access intends to use that information" *Amodeo*, 71 F.3d at 1051. A court should not grant access to it records to "indulge" those who seek to use them for "personal vendettas[.]" *Id*. A personal vendetta is consistent with the *Nixon* court's analogizing that a district court should deny parties access to its records when they are seeking to publicize "painful and sometimes disgusting details of a divorce" for spiteful purposes. *Nixon*, 435 U.S. at 598.

Given CSFC's legitimate reputational interests as an innocent third-party which is universally recognized across all circuits as an interest which weighs heavily in a court's balancing equation related to closure determinations, *Amodeo* supra., how could this district court conclude CSFC intended to use court records for an improper purpose? CSFC certainly didn't tell the court they wanted the records to maliciously spite Mr. Walker and his witnesses. There is no historical evidence of CSFC using court records for an improper purpose because CSFC has never had

matters pending before the court. Perhaps the district court does not like the First Amendment sanctioned reporting by A Just Cause on the Internet or maybe it fears another judicial complaint may be filed on its conduct during this proceeding. The only conclusion that can be drawn is that the district court based its conclusion that CSFC would use court records for improper purposes is based on unsupported hypothesis or conjecture, which would be clear error.

In applying the balancing test, a court must determine the weight of presumption to be given to the specific judicial record. *Amodeo*, 71 F.3d at 1051. If the record is central to the court's adjudication of the matter in performance of its Article III functions, such as the resentencing of Mr. Walker or even its decision to restrict access to court records, the district court must weigh it heavy in the favor of public access. *Id. at 1051*. However, if the judicial record is on the "periphery" of the adjudicative process the presumption of access is "weak" because it "bears only a marginal relationship to the performance of Article III functions." *Id*.

The records from the PUBLIC evidentiary hearing, as well as Mr. Walker's affidavit and his 2255 motion are not periphery and weigh heavily in favor of public access because it was part of what the district court, with full support of the government, alleged was "overwhelming evidence" of Pastor Banks' religious coercion and "evidentiary and legal support" of Mr. Walker and his witnesses fear of retaliatory harassment. (Doc. #1114 p. 1). The district court stated that religious

coercion by Pastor Banks caused Mr. Walker to bow under duress of Pastor Banks to fire his attorney against his will and proceed *pro se*. The district court claimed the religious coercion of Pastor Banks was responsible for attorney Lawson (then attorney Solomon) having a conflict of interest in representing Walker during the sentencing hearing even though the government confirms in its opposition brief to Mr. Walker receiving habeas relief that attorney Solomon "play[ed] no role" in representing Walker during the sentencing hearing. (Doc. #922, p. 19). During the resentencing colloquy the district court told Walker: "Now, during the evidentiary hearing there was evidence demonstrating the extent of coercion that you and others were subjected to by Pastor Banks, and your inability to challenge or evade directions received from her as a result of the duress that was imposed." (Doc. #1087, Aplt. App. at p. 21). "But after your [evidentiary hearing], I have a better understanding of why you did what you did." (Doc. #1087, Aplt. App. at p. 23). In other words, the district court believed that Walker's alleged commission of a crime, the firing of his attorney, Lawson's alleged conflict of interest was Pastor Banks' doing and for that reason, the district court resentenced Walker from 135 months to 70 months. (Docs, 1069, 1079). Walker's 2255 motion was about Pastor Banks, his affidavit was about Pastor Banks, the evidentiary hearing and all its testimony was about Pastor Banks and the district court's adjudication of all matters in the habeas proceeding was wholly predicated on Pastor Banks.

Before concluding, CSFC asks this court to consider the Sixth Circuit case of *Drummond v. Houk,* 728 F.3d 520, 523 (6th Cir. 2013) where the court reviewed partial closure analysis under *Waller v. Georgia*, 467 U.S. 39 (1984). In *Drummond*, the witnesses were testifying against an actual gang member(s) who had committed murder. *Id*.at 530. There was unrest at the courthouse where spectators were being disrespectful to deputies and the court, including a spectator being charged with assault on a peace officer after an altercation in the courthouse and *Drummond* had approached the husband of a potential juror during voir dire. *Id*. at 532. Both witnesses and jurors felt threatened from potential gang retaliation which resulted in a partial closing of the courtroom from the public for several hours. *Id*. at 534. Given these facts, the state trial court found that the "genuine need to protect witnesses testifying against gang members from the deadly threat of retaliation" presented a "substantial reason" for a partial closure under the modified *Waller* test. *Drummond,* 728 F.3d at 530. The Supreme Court of Ohio found that the trial court had properly applied *Waller* and satisfied its four prongs but the 6th Circuit disagreed, finding that the trial court "demonstrated neither an overriding interest nor a substantial reason to close the courtroom" and that a "blanket assertion does not support a substantial interest" under *Waller*. *Drummond* ,728 F.3d at 530.

While the witnesses in *Drummond* said they felt "threatened" by the events at the courthouse the trial court did not identify or inquire into who had threatened them, what was the specific threat they feared, and the record was silent as to whether the witnesses had a "substantial" reason for feeling threatened. *Id*. The 6th Circuit stated that "even if the witnesses had reasonable grounds to feel threatened, it is far from clear how closing the courtroom served to remedy those concerns." *Id.* And although the state court mentioned "incidents" and a "physical altercation," *Id*. The 6th Circuit dismissed them because they occurred on a different day and had no nexus to the proceeding where the witnesses testified. *Id*. at 531.

In the instant case, Mr. Walker and his witnesses alleged general fear of potential retaliatory harassment from his ex-mother-in-law, Pastor Banks, his ex-wife and former friends and parishioners from CSFC can't possibly measure up to the gang-motivated events at the courthouse in Drummond that made both jurors and witnesses feel threatened by possible gang retaliation. And it certainly doesn't qualify as a substantial interest in the 10th Circuit.

While the 10th Circuit has yet to define an exhaustive list of what qualifies as a "substantial interest" it has found that "safeguarding the physical and psychological well-being or a minor" qualifies as a substantial interest and found that factors such as the witness's age and relationship to the person excluded from the courtroom, the nature of the alleged offense, and the harm the witness may reasonably expect

to face without the court's protection are part of the calculus of analyzing the legitimacy of partial closures under substantial interest review. United States v. Christie, 717 F.3d 1156, 1167 (10th Cir. 2013) (analogizing substantial interests in *Globe Newspaper v. Superior Court for Norfolk County*, 457 U.S. 596, 607 (1982) & *United States v. Galloway*, 937 F.2d 542, 546 (10th Cir. 1991)). As discussed earlier, Mr. Walker and his adult witnesses are not vulnerable children and certainly don't need the court's protection even if potential harassment from CSFC was real, which it is not.

VII. The District Court Improperly Denied CSFC Access to the Court records by Clear Error

The district court failed in properly balancing CSFC's reputational interests and instead capriciously denied CSFC access to judicial records based on speculative claims CSFC was interested in using court records for spiteful purposes or at a minimum on the alleged personal admonishment letter sent to Mr. Walker from Pastor Banks while he was in prison. This was clear error. The district court's failure to consider alternatives to restricting access (e.g., redaction) to the evidentiary hearing was a clear error of judgment. See *United States v. Kravetz,* 706 F.3d 47, 63 (1st Cir. 2003) (noting "redaction" is a viable tool "for separating...information from that which is necessary to the public's appreciation of the sentenced imposed"). The district court improperly concluded that Mr. Walker

and his witnesses were "vulnerable" under the rubric of vulnerability established by universal precedent regarding what is sufficient to overcome the strong presumption in favor of public access. This was clear error. The district court's conclusions that potential retaliatory harassment, is sufficient to overcome the strong presumption was clear error, especially when you consider the district court's own words that Mr. Walker was "cut-off, isolated and alienated," which makes harassment impossible. (Doc 1087, Aplt. App. at 22).

VIII. CONCLUSION

Based on the aforementioned we ask this honorable court to unseal judicial records associated with the evidentiary hearing including transcripts of all witness testimony, Mr. Walker's 2255 motion and his affidavit.

Respectfully Submitted, September 24, 2018.

s/ Gwendolyn M. Lawson
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CERTIFICATE OF COMPLIANCE

Pursuant to this document the page limitation complies with Fed. R. App. P., Rule 32(a)(7)(B)(ii) it contains 34 pages and complies with the word limit of 6178 words and the type volume limitation.

/s/ Gwendolyn M. Lawson

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing: (1) all required privacy redactions have been made; (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents; (3) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, CC Cleaner, and according to the program are free of viruses. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after responsible inquiry.

/s/ Gwendolyn M. Lawson

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Opening Brief was filed using CM/ECF filing system which will send notification of such filing to the following e-mail addresses on September 24, 2018 was served on:

James.Murphy3@usdoj.gov
Patricec@lawcc.us
Pcollins@lawcc.us
grafferty@lawcc.us

(*See* Fed. R. App. P. 25(b))

s/ Gwendolyn M. Lawson
Gwendolyn M. Lawson
Signature of Counsel

Case No. 18-1273

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GARY L. WALKER,

Defendants-Appellee

COLORADO SPRINGS FELLOWSHIP CHURCH,

Movant - Appellant.

On appeal from the
United States District Court for the District of Colorado
Honorable Christine M. Arguello
D. Ct. No. 1:09-CR-00266-CMA/D. Ct. No. 1:15-CV-02223-CMA

ATTACHMENTS TO REPLY BRIEF

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Appellant/Movant

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Phone: (855) 529-4252

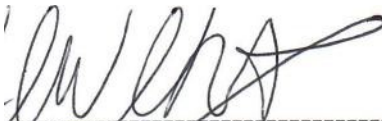
To: Joel Nelson
CC: United States Courthouse Clerk of The Court **Case # 09CR266**

This letter is regarding a conversation had with Mr. Joel Nelson, Parole officer for a Mr. Gary Walker, named is said Case Number: 09CR266.
On Tuesday August 28, 2018 Mr. Walker left a Birthday card on the private property Of Ms. Yolonda Banks-Walker and son Kyle Walker. The concern here is to document said conversation between me and Mr. Nelson regarding the fact that Mr. Gary Walker has no reason to be on the property of Yolonda Banks Walker.
There have been unfounded accusations and untruths made by Mr. Walker that he feared for his life and his safety from the Banks family and those associated with Colorado Springs Fellowship Members and to include the family of Pastor Rose Banks.
This statement is false and has no merit as explained to Mr. Nelson yesterday it falls under trespassing on private property and will not be tolerated. This information serves as documentation of said events that occurred yesterday on the private property of Yolonda Banks-Walker and Kyle Walker. I ask that in the event this reoccurs, that this letter along with a statement from Kyle Walker be filed with file of Case Number: 09CR266.
In closing Kyle Walker is 26 years old and has made the decision not to have a relationship with his father due to the lies and betrayal he feels that came from him, which is stated in the attached statement provided by Kyle Walker. Should you have any further questions regarding this matter, please do not hesitate to contact me.

Sincerely,
Lamont Banks
Executive Director
A Just Cause, Inc.
Cell: (719) 439-5951

I, Kyle Walker, do not desire a relationship with Gary Walker under any circumstances. He has betrayed my family and close friends. His actions and the lies he has told on them are disgusting. The pain he has caused my mother to suffer through his betrayal and lies is truly heart-wrenching. He has lost my respect and trust, and I no longer see him as a father. As a result of his actions, lies, and betrayal, I have decided that I do not want to have any contact with him whatsoever.

August 28, 2018



August 28, 2018

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/s/ Gwendolyn M. Lawson

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I hereby certify that a copy of this Attachments to REPLY Brief was filed using CM/ECF filing system which will send notification of such filing to the following e-mail addresses on September 24, 2018 was served on:

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grafferty@lawcc.us

(*See* Fed. R. App. P. 25(b))

s/ Gwendolyn M. Lawson
Gwendolyn M. Lawson