IN THE SUPREME COURT OF IOWA
No. 24-0029

Robert Teig,
Plaintiff-Appellant,

vs.

Brad Hart, Tyler Olson, Ann Poe, Patrick Loeffler, Dale Todd, Scott Olson, and Ashley Vanorney,
Defendants-Appellees.

Appeal From the Linn County Iowa District Court
CVCV097672
Honorable Andrew B. Chappell, District Court Judge

Appellant's Reply Brief

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STATEMENT OF THE ISSUES

I. WHETHER DEFENDANTS ILLEGALLY CLOSED A JOB INTERVIEW WHEN THEY HAD NO KNOWLEDGE OF PARTICULAR ADVERSE INFORMATION AND NOTHING SAID AT THE MEETING WOULD HAVE CAUSED NEEDLESS AND IRREPARABLE INJURY TO THE JOB APPLICANT'S REPUTATION

II. WHETHER THE COURT ABUSED ITS DISCRETION WHEN IT CLOSED PART OF THE TRIAL AND SEALED THE RECORDING OF THE MEETING WITHOUT CITING ANY LAW AND WITHOUT MAKING ANY FINDINGS SUPPORTING ITS ACTIONS ARGUMENT

ARGUMENT

I. DEFENDANTS ILLEGALLY CLOSED A JOB INTERVIEW

A. *Defendants waived the bulk of their arguments*

Defendants waived arguments because they have not cited caselaw or properly argued issues in their brief.

> We review . . . arguments with the following in mind: "When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived." A party's failure in a brief to cite authority in support of an issue may be deemed waiver of that issue. Iowa R. App. P. 6.903(2)(g)(3) (stating the argument section shall include "[a]n argument containing the appellant's contentions and the reasons for them with citations to the authorities relied on and references to the pertinent parts of the record . . . [and f]ailure to cite authority in support of an issue may be deemed waiver of that issue"). A random mention of an issue, without elaboration or supportive authority, is not sufficient to raise an issue for review. We do not consider conclusory statements not supported by legal argument. *see also United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir. 1991) ("[a] skeletal 'argument', really nothing more than an assertion, does not preserve a claim . . .. Judges are not like pigs, hunting for truffles buried in briefs.").

State v. Martin, No. 2-708/11-1621 (Iowa Ct. App. 2012) (citations omitted), https://scholar.google.com/scholar?scidkt=5059337202855627495&as_sdt=2&hl=en.

Considering issues not properly argued would require the Court "'to assume a partisan role and undertake the [defendants'] research

and advocacy;'" a task this Court should not accept. *State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999) (citation omitted). It also would deprive plaintiff of due process (1) notice and (2) the opportunity to defend. Cf. *Aluminum Co. of America v. Musal*, 622 N.W.2d 476, 479-80 (Iowa 2001).

Defendants brief is filled with one-sentence conclusions presented without analysis or citation. For example:

- "There is plenty of information that could cause needless and irreparable injury to an applicant's reputation that does not rise to the level of the private sexual misconduct and associations with a known felon involved in *Feller I*." Def. Brf. p.23.
- "In most circumstances, the only way a governing body is going to learn particular damaging information regarding an applicant, prior to the interview, is for the applicant to voluntarily self-report that damaging information to the governing body (i.e. their desired future employer or, in Ms. Van Sloten's case, her current employer)." Def. Brf. pp.15-16.
- "Expecting job applicants to volunteer damaging information about themselves to their desired future employer (or, in this case, their current employer), before they even have the chance to present positive information about themselves in an interview, is not reasonable, is unfair to the applicant, and is not required by Section 21.5(1)(i)." Def. Brf. p.16.
- "If anything, a detailed employment interview seems more likely to result in harmful information being disclosed than an employment application and, therefore, is more worthy of protection." Def. Brf. p.17.

All these types of arguments are waived.

B. Purpose of Open Meetings Law

Defendants overstate plaintiff's position when they say he "ignores the specific purpose of the particular section of Chapter 21 at issue in this case." Def. Brf. p.13. Plaintiff's brief discussed §21.5(1)(i) extensively and even proposed a way to "serve[ ] both legislative policy choices of (1) easy public access to the reasons for government decisions (§21.1) and (2) prevention of needless and irreparable injury to reputation (§21.5(1)(i))." Pl. Brf. p.26.

The second may outweigh the first in the right circumstances, but defendants failed to prove those circumstances. In fact, defendants agree there is nothing that would have needlessly and irreparably injured Ms. Van Sloten's reputation if her interview had been public. (Tr. 20:1-12).

With no evidence to show needless and irreparable injury, statements of *Greene v. Athletic Council of Iowa State U.*, 251 N.W.2d 559, 560 (Iowa 1977) take primacy:

> Open meetings statutes are enacted for the public benefit and are to be construed most favorably to the public. This principle is reflected in the liberal construction generally accorded such statutes. [citations omitted].

C. There must be specific facts to show injury

The plain language of §21.5(1)(i) is the starting and ending point in construing chapter 21. Before defendants could close the meeting, they had to determine "a closed session is necessary . . . to prevent needless and irreparable injury to [Ms. Van Sloten's] reputation . . .." This language is not ambiguous.

The first consideration is the phrase "is necessary." "Is" is a present tense state-of-being verb in the indicative mood. That means necessity must exist as a fact at the time of closure and not merely as a possibility. Otherwise, the conditional mood would have been used with a modal verb phrase like "might be" or "could be."

The only fact defendants claim supports necessity is that "interviews can, and sometimes do, result in the unexpected and unpreventable disclosure of damaging information." Def. Brf. p.21. "'Can' is one of the most commonly used modal verbs in English," and is used to show possibility.[1] Possibility does not show necessity. This is

[1] *Advanced English Lessons*, https://www.englishpage.com/modals/can.html#:~:text=%22Can%22%20is%20one%20of%20the,I%20can%20ride%20a%20horse.

especially true when there is only a generalized concern and no specific information that would harm reputation.

Even if mere possibility were acceptable, defendants still failed to prove they complied with chapter 21. Defendants say only that there could be "damaging information." Information has to be more than "damaging." It must be needless and irreparable. Defendants offered no proof that this heightened level of harm was even a non-specific possibility.

Defendants' arguments are circular.

As far as irreparable, they say, "[o]nce the harmful disclosure is made in open session, and live over Facebook, it cannot be undone; at that point, the harm is clearly irreparable." Def. Brf. p.22. It is difficult to respond to an argument that is based upon assuming its own truth. The best response is, "prove it." Defendants do not even attempt to give an example to prove their claim that disclosure = irreparable.[2]

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[2] As an example of disclosure ≠ irreparable, in 2016 Samsung suspended sales of the Galaxy Note 7 phone and announced a recall after a defect caused explosions and fires. *Samsung Galaxy Note 7 Crisis,* http://large.stanford.edu/courses/2017/ph240/bai2/#:~:text=On%20September%202nd%2C%202016%2C%20Samsung,batteries%20sourced%20from%20different%20suppliers. Samsung was ranked #7 in

As to needless, defendants say, "Any such harm suffered by the applicant would be "needless" (i.e. unnecessary) because all that had to be done to prevent it was to close the interview, as requested by the applicant." Id. This has nothing to do with whether injury was needless. For example, if the information were that an applicant had destroyed public documents rather than filing them or embezzled fees rather than depositing them, any injury to reputation would not be needless; it would go directly to job qualifications and suitability. That is the type of information that is important for the public to know in order to understand a hiring decision.

In addition to circular reasoning, defendants use straw man fallacies. They say, "Section 21.5(1)(i) contains no requirement that any sort of factual record be made in open session as to why closure is necessary, nor does it require the governmental body possess any particular piece of information or recite any particular findings in order

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the 2016 Axios Harris Poll 100 Reputation Rankings and #49 in 2017, https://www.theverge.com/2017/2/20/14667182/samsung-corporate-reputation-ranking-apple-google-harris-polls. In 2023, it returned to #7, https://www.axios.com/2023/05/23/corporate-brands-reputation-america. Injury to its reputation was neither irreparable nor needless.

to exercise its discretion to close a job interview." Def. Brf. p.15. That is all true, but it misses the mark. Plaintiff has not argued otherwise.[3]

What chapter 21 does require is that a governmental body not abuse its discretion in closing a meeting. An abuse of discretion occurs when a decision is "not supported by substantial evidence." Cf. *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001). That means the body must possess facts to show, by a preponderance of the evidence, an open session will cause needless and irreparable injury.

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[3] Defendants' reliance on Iowa Public Information Board advisory opinion 21AO:0007, https://ipib.iowa.gov/closed-session-requirements, is misplaced. Months after this lawsuit was filed, the City asked whether a governmental body is required to make an express finding that a closed session is necessary. The Board said, "The language of Iowa Code section 21.5(1)(i) does not state that an express finding is required for the governmental body to enter a closed session." Plaintiff has not claimed an express finding was required.

Defendants leave out what the Board said next. "A governmental body may close a public session upon a proper showing by the individual requesting the closed session. *Feller v. Scott County Civ. Serv. Commn.*, 435 N.W.2d 387, 390 (Iowa App. 1988) (stating that a proper showing by the individual requesting a closed session is required before a board may allow a closed session)." Defendants also do not mention that, on March 23, 2023, the Board interviewed two Executive Director job applicants in a public session. https://ipib.iowa.gov/events/ipib-board-meeting-march-3-2023.

Compare this with proof of reasonable suspicion. Reasonable suspicion requires a showing considerably less than the preponderance of the evidence. *State v. Kreps*, 650 N.W.2d 636, 642 (Iowa 2002) (citations omitted). Yet reasonable suspicion requires proof of "specific and articulable facts." *State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004). It follows that defendants' higher burden of proof likewise can be satisfied only by proof of specific and articulable facts. To compare with chapter 22, when a defendant seeks to demonstrate compliance, "the inquiry should generally turn on objective public facts." *Belin v. Reynolds*, 989 N.W.2d 166, 177 (Iowa 2023). There were and are no objective facts to show needless and irreparable injury from a public hearing.

Defendants are incorrect when they claim the lack of harmful information coming out during the closed session is irrelevant. Def. Brf. pp.18-19. A meeting may be closed only to the extent necessary to protect reputation. Defendants' argument on necessity is that "damaging information" "could have" been disclosed. Def Brf. p.24. The fact that no harmful information was revealed shows there was no reason to close the entire meeting.

Defendants raise another claim not raised below – that the introductory part of the closed session was not a meeting. Def. Brf. p.25. That argument was waived. *State v. Meyers*, 799 N.W.2d 132, 147 (Iowa 2011). It also is contrary to their stipulation that there was a closed meeting that lasted about 40 minutes. The fact that defendants voted to close the meeting "indicates their own determination that the gathering[ ] constituted [a] meeting[ ]." *Olinger v. Smith*, 892 N.W.2d 775, 783 (Iowa Ct. App. 2016).

Defendants also claim, "[a]ll Section 21.5(1)(i) requires of the applicant is that they request a closed session." Def. Brf. p.15. However, Ms. Van Sloten invoked the "needless and irreparable injury" exception. That means she was bound by it, and her request had to be tied to a concern about reputational injury. Otherwise, she was requesting something not allowed by the law.[4]

[4] Defendants raise another straw man argument that they could not ignore the request. Def. Brf. p.19 fn.3. Whether or not true, plaintiff has not claimed they should have ignored it. Defendants should have rejected the request for lack of factual support. Had defendants been concerned about the impact of *Feller*, they should have filed suit to obtain court guidance. §21.6(4).

Defendants later refer to this invocation to argue it was "clear that her concern was damage to her reputation." Def. Brf. p.21. However, she pointed to no specifics. (Tr. 129:22-23). She refers to "the unknown" (125:10) or "a possibility" she was not aware of (128:20-25). She told plaintiff she did not request closure because of concerns for her reputation and that closing meetings was standard practice. (Tr. 348:21-24).

At trial, she admitted that the reason she asked for a closed session was because she did not like being in the public eye:

> Q. [by defense counsel] You -- you testified that you wouldn't have applied for the City Clerk position if you knew your -- if you had known your interview was going to be open; is that accurate?
>
> A. Yes.
>
> Q. Can you just explain why?
>
> A. Yes, I get nervous. I'm kind of an introvert, so I do get a little bit worried about public speaking.

(Tr. 165:11-18). She was "not comfortable" disclosing her qualifications "to the general public" (135:14-15) and testified:

> Q. *** Your job application, was all good stuff in there?
>
> A. In my opinion, yes.

Q. Why keep it secret?

A. Because it's personal information.

Q. Your education, your job experience, that's all personal?

A. Yes.

Q. And the public shouldn't know that?

A. When applying for a job I would say no.

Q. All right. And the same thing for the interview? That's why it needed to be secret, same reasons?

A. Yes.

(Tr. 140:14 - 141:1).

Introversion is not protected by chapter 21.[5]

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[5] In another straw man argument, defendants refer to some unproven "harm [to] the public interest by deterring otherwise qualified applicants from applying for public employment." Def. Brf. p.16. They offered no evidence to support such a claim, and more than one court has rejected this type of speculative argument. See *City of Farmington v. Daily Times*, 210 P. 3d 246, 251-53 (New Mex Ct. App. 2009); *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1324 (Alaska 1982).
Likewise, the argument relating to job applications and chapter 22 is unpersuasive. Section 22.7(18) is general and does not refer to job applications directly. In contrast, §21.5(1)(i) deals specifically with evaluating professional competency as part of hiring. Even if there were conflict or ambiguity between the two, the specific section controls. *Christiansen v. Educational Examiners Bd.*, 831 N.W.2d 179, 189 (Iowa 2013).

D. Substantial compliance is inapplicable

Defendants claim, "[a]t a minimum, Defendants substantially complied with the Open Meetings Law, both with regard to the decision to close the Special Session and the extent of the closing, and that is all that was required of them." Def. Brf. p.28. This conclusory sentence provides no analysis and waives the argument.

In addition, the authority cited is inapplicable. Code §364.6 refers to substantial compliance with "a procedure." *KCOB/KLVN, Inc. v. Jasper Cnty. Bd. of Sup'rs*, 73 N.W.2d 171, 176 (Iowa 1991) dealt with a "procedural irregularity;" "when a technical violation has not harmed the complaining party." We do not have a procedural problem like not recording individual votes on closure. The problem here goes to the very heart of exercise of authority.

This Court has not adopted a substantial compliance standard for anything beyond procedure. It is impossible to adopt such a standard when the issue is whether "a governmental body has violated any provision" of chapter 21. §21.6(3). Defendants either meet their burden to prove compliance with chapter 21 or do not – this is neither horseshoes nor hand grenades.

Defendants went into closed session with

> no statutory basis for closing the session. This was more than a "procedural irregularity," which resulted in the actual exclusion of persons from the meeting. While [they] may well have been unaware that their actions violated IOMA, "[i]gnorance of the legal requirements" of IOMA is "no defense to an enforcement proceeding." Iowa Code §21.6(4).

Olinger, 892 N.W.2d at 784. It would be error to find defendants "substantially complied with the requirements of IOMA." Id.

E. Damages are personal liabilities

As to damages, defendants claim §21.6(3)(a)(3) protects them. That section says:

> A member of a governmental body found to have violated this chapter shall not be assessed such damages if that member proves [they] [r]easonably relied upon a decision of a court, a formal opinion of the Iowa public information board, the attorney general, or the attorney for the governmental body, given in writing, or as memorialized in the minutes of the meeting at which a formal oral opinion was given, or an advisory opinion of the Iowa public information board, the attorney general, or the attorney for the governmental body, given in writing.

Defendants' conclusory argument is:

> At trial, Defendants presented significant evidence in support of their defense pursuant to Section 21.6(3)(a)(3). Defendants also argued that, at a minimum, Defendants substantially complied with the procedure Section 21.6(3)(a)(3) requires for government officials to shield themselves from damages under Chapter 21.

Def. Brf., p.30. This waives their argument on appeal.

Even without waiver, the argument fails as a matter of law.

Defendants do not identify any evidence to support them. There is no opinion in writing, and their brief does not cite any document exhibit number. Plaintiff has combed the transcript, and it appears defendants are relying on their "understanding" that the city attorney's approval of the agenda, exhibit B, meant that "it was okay to go into a Closed Session." (Tr. 100:12).[6]

Exhibit B is the notice for the meeting:

[6] Loeffler, Tr. 100:2-18; Tyler Olson, Tr. 209:25 – 210:1; Todd, Tr. 256:2-19; Hart, Tr. 287:16-19; Scott Olson, Tr. 310:25 – 311:6; Vanorney, Tr. 324:25 – 325:3; Poe, Tr. 339:-15.

"Cedar Rapids is a vibrant urban hometown – a beacon for people and businesses invested in building a greater community now and for the next generation."

NOTICE OF CITY COUNCIL SPECIAL MEETING (Electronic)

The Cedar Rapids City Council will hold an electronic special City Council meeting on Thursday, April 29, 2021 at 4:00 PM. An electronic meeting is being held because a meeting in person is impossible or impractical due to concerns for the health and safety of Council members, staff and the public presented by COVID-19. An electronic meeting is allowed by Iowa Code Section 21.8 and Governor Reynolds' Proclamations of Disaster Emergency.

The meeting may be watched on the City's Facebook page at www.facebook.com/CityofCRiowa/. Members of the public will not be able to attend this meeting in person.

The Cedar Rapids City Council will meet to discuss and possibly act upon the matters as set forth below in this tentative agenda.

AGENDA

1. Interview of City Clerk candidate. Note: May be closed pursuant to Iowa Code Section 21.5(1)(i) (2021).

Anyone who requires an auxiliary aid or service for effective communication or a modification of policies or procedures to participate in a City Council public meeting or event should contact the City Clerk's Office at (319) 286-5060 or cityclerk@cedar-rapids.org as soon as possible but no later than 48 hours before the event.

Agendas and minutes for Cedar Rapids City Council meetings can be viewed at www.cedar-rapids.org.

EXHIBIT B
1

Exhibit B is not a formal or advisory opinion "given in writing."

> Defendant Hart is an attorney. He was asked:
>
> Q. But the document that's in evidence, Exhibit, is it B, you're not saying that was a formal opinion from an attorney, are you?
>
> A. The Agenda, it was not an opinion.

(Tr. 301:18-21). He provided evidence on what a formal opinion is:

> Q. *** Generally, a formal opinion involves the question, a look at the facts, a look at the law, and then some kind of analysis. Would that be a fair overall assessment of a formal opinion?

A. I gave lots of opinions, and -- and, yes, if it was a large transaction and the other side required it, then it would be in writing. But I also gave lots of formal opinions verbally.

Q. But would those formal ones go through that same type of process? Some analysis?

A. Yes.

Q. All right. The Agenda, and the -- that didn't have any kind of analysis in it at all, did it?

A. It was the Agenda.

Q. All right. There was no analysis in it though, was there?

A. It was -- I -- no, it wasn't -- it wasn't – it wasn't an opinion. It was -- it was the -- it was the Agenda of the meeting.

(Tr. 300:3 – 301:12).

The undisputed facts show defendants did not prove their affirmative defense to damages.

On the issue of using public money to pay defendants' liabilities under chapter 21, Defendants claim:

> Plaintiff's claims fall within the broad definition of "tort" provided for in Chapter 670. Therefore, the City of Cedar Rapids' duty to indemnify under Section 670.8 clearly applies in this matter.

Def. Brf. p.33.

Defendants misstate the definition of tort:

> A "tort" under Chapter 670 is defined to include "actions based upon…breach of duty, whether statutory or other duty or denial or impairment of any right under any…statute…" Iowa Code §670.1(4).

Def. Brf. pp.32-33.

> The correct definition is
>
> "Tort" means every civil wrong which results in **wrongful death** or **injury to person** or **injury to property** or **injury to personal or property rights** and includes but is not restricted to actions based upon negligence; error or omission; nuisance; breach of duty, whether statutory or other duty or denial or impairment of any right under any constitutional provision, statute or rule of law.

Code §670.1(4) (emphasis supplied).

A violation of chapter 21 does not involve wrongful death, injury to person, injury to property, or injury to personal or property rights. It involves public, not personal, rights. The Sunshine Laws provide public access to allow public scrutiny, cf. *Rathmann v. Bd. of Dirs. of the Davenport Cmty. Sch. Dist.*, 580 N.W.2d 773, 777 (Iowa 1998); *Iowa Civil Rights Comm'n v. City of Des Moines*, 313 N.W.2d 491, 495 (Iowa 1981). They can be enforced by the Iowa Attorney General or a county attorney; offices that do not provide legal representation for private interests.

The differences in damages also show there is no tort action. The remedy under chapter 670 is damages payable to the plaintiff. See §670.4A, §670.5. Under chapter 21, damages go to the government. §21.6(3)(a). Chapter 670 is used to impose damages against a municipal body, §670.2, and chapter 21 does not allow assessment of damages against the government.

Chapter 21 provides a statutory cause of action separate from a tort action. In *Ferguson v. Exide Technologies, Inc.*, 936 N.W.2d 429, 435 (Iowa 2019) the Court held, "when a civil cause of action is provided by the legislature in the same statute that creates the public policy to be enforced, the civil cause of action is the exclusive remedy for violation of that statute."

Chapter 21 created the right to public access and the cause of action to enforce that right.[7] Chapter 21 is the exclusive remedy for an open meeting violation, and nothing in chapter 670 applies.

Chapter 21 also provides the exclusive remedy for shifting payments from an individual to a government agency.

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[7] Iowa's "'sunshine laws' are creatures of . . . statutes unknown to the common law." *Knight v. Iowa District Court*, 269 N.W.2d 430, 433 (Iowa 1978).

Section 21.6(3)(a) says damages shall be assessed against a "member of the governmental body' and not against the government body. That is a "personal liability." *City of Postville v. Upper Explorerland Reg'l Planning Comm'n*, 834 N.W.2d 1, 7 (Iowa 2013). Costs and attorney fees "shall be paid by those members of the governmental body who are assessed damages."

When damages are imposed, there is no basis to move payment to the government. But if there is a defense to damages, payment of costs and attorney fees are paid "from the budget of the offending governmental body." §22.6(3)(b). This exclusive remedy means indemnification is not allowed and damages must stay with the person violating the law. *Inclusio unius est exclusio alterius.* It also means costs and fees can only be paid from public funds when §22.6(3)(b) applies.

Iowa Constitution article III, section 31 prohibits the use of public money for private purposes. There is no public interest in indemnifying defendants when they violate the law and harm the public interest.

II. THE COURT ABUSED ITS DISCRETION WHEN IT CLOSED PART OF THE TRIAL AND SEALED THE RECORDING OF THE MEETING

A. Plaintiff preserved error for review

Defendants claim plaintiff waived his objections to the recording being filed under seal because he did not file an objection after the Exhibit Management Order was filed. Def Brf. p.36. Defendants cite no law to support their argument.

Plaintiff filed an August 30 exhibit list with the video listed as exhibit 2 and a note "(public access requested)." D0191. Plaintiff's September 1 pretrial brief asked that "the closed session video be made part of the public evidence." D0196, p.5. Defendants filed a September 1 motion to close the trial while the video was being played, D0198, and plaintiff resisted that motion on September 6, D0202. The court issued an order on September 5 that the motion to close would be heard at the trial. D0200.

At trial, the issue was argued and the court sealed the recording. (Tr. 58:18-19). Plaintiff's December 10 motion to reconsider, D0250, asked the court to reconsider and "order that the recording is public or

set out the basis for its ruling prohibiting public access to this evidence." (p.1).[8]

Plaintiff objected before, at, and after trial to the recording being sealed, and the Court denied those objections. "Once the court rules definitively on the record – either before or at trial – a party need not renew an objection . . . to preserve a claim of error for appeal." Iowa R. Evid. 5.103(b).

Under *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) a party must raise an issue and the district court must rule on it before this Court will consider the issue on appeal. That is what happened here.

B. Closing part of the trial was improper

Defendants claim, "the district court did not, in fact, close any portion of the trial." Def. Brf. p. 38. The Court excluded everyone but

[8] There was no problem with "jurisdiction to entertain" plaintiff's request to correct the error, Def Brf. p.36. A court always has the power to correct its own errors "as long as the court has jurisdiction of the case and the parties involved." *Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393, 396 (Iowa 1988). Defendants' citation to *State ex rel. Miller v. Santa Rosa Sales & Mktg., Inc.*, 475 N.W.2d 210, 213-14 (Iowa 1991) is irrelevant because it dealt with timeliness of an appeal not with preservation of error.

the parties, counsel, and a witness from the courtroom while the recording was played and the witness was being questioned.

Pages 58-59 of the transcript show:

> MR. TEIG: Your Honor, essentially you're closing the courtroom at this point?
>
> THE COURT: So here – here's what I'll tell you. I'm not closing the courtroom other than I'm saying that if we're not going to have members of the public and Ms. Chavez – it's a semantic question. And I don't mean to dodge it. It doesn't appear as though I have to close it. And -- but I will tell you I'm not sure I'd have the same ruling if I had -- that if this was a media case or if -- or if I had a room full of members of the public. Is that fair?
>
> MR. TEIG: The only reason I say, if it is a de facto closing, at some point you will need to make the closing findings. I'm not saying you have to do it now because just of practicalities.
>
> THE COURT: Yeah.
>
> MR. TEIG: I'm just thinking of record.
>
> THE COURT: No. Yeah, and I'm all for thinking of record. What I'm telling you is that I'm going to admit the exhibit under seal. The witness, as a party, will be allowed to see it. He was there.
>
> MR. TEIG: Yeah.
>
> THE COURT: And for ease of proceeding, I'm going to allow you to just play it for him whereas I could have him review it in camera and then maybe ask questions about it. But it's easier just to -- just to play it.

After a break, pages 60-62 show:

> THE COURT: * * * I want to clarify my -- at least -- whether it's clarifying or not, make sure my ruling is clear. With respect to Exhibit 2, or at least the non public portions of the meeting that are in Exhibit 2, I'm not making them public. I don't think that, ultimately, they need to be played in a public trial. At least I haven't been convinced thus far. The Defendants don't resist admitting that document under seal. I'm the trier of fact, so I certainly can see it. And for purposes of allowing the examination of Mr. Loeffler, who otherwise would probably have to either recall what was said at the meeting or we would have to go through the extremely tedious process of refreshing his recollection by showing him portions of the video in camera so that he could answer the questions that Mr. Teig wishes to ask, and we don't have members of the public here in the courtroom, I've elected to just allow Mr. Teig to play that, whatever portions he thinks are necessary for Mr. Loeffler so that he can then answer Mr. Teig's questions about that.
>
> I'm not -- I don't think I've changed my ruling, but I -- I wanted to make sure I had explained it adequately for the record.
>
> * * *
>
> Mr. Teig, do you understand my ruling? Do you have any questions? Do you want to make any further record about that?
>
> MR. TEIG: No, and I don't need to re-urge my objections. It's pretty clear that it should be public, so that's fine.
>
> At that point City Attorney Vanessa Chavez was in the courtroom.

She had not entered an appearance, and the Court had said:

> But I would also say that if Ms. Chavez is going to be contributing to the case I would -- I would just as soon have her at counsel table rather than running from the other side of the bar.
> Fair, Ms. Chavez?
>
> MS. CHAVEZ: Yes, sir.

(Tr. 52:6-12).

At p.57, the Court had said, "she hasn't appeared, so she can leave," and at pp.61-62 the transcript shows:

> MR. TEIG: Oh, Ms. Chavez.
>
> THE COURT: Oh, yeah. Yeah, I think it's all fair if we're going to -- if the whole point we're doing this is because it's easier, we don't have members of the public. If Ms. Chavez wants to file an appearance at some point, she's welcome to come join us. But, yes, I think whatever is good for the goose is good for the gander. We'll have her step out.
>
> MS. CHAVEZ: Yes, sir.

Whatever the semantics, this was closure of the courtroom. "Closed proceedings are rare and are granted 'only for cause shown that outweighs the value of openness.' *** The justification for denying access to a trial must be a weighty one." *State v. Farnum*, 397 N.W.2d 744, 747 (Iowa 1986). The court did not identify reasons that outweighed the value of openness. Closing the trial and sealing the recording were improper.

Defendants do not address the law plaintiff cited. They say, "arguably, Plaintiff does not even have standing to raise the claims he asserts . . . because he has not suffered any injury as a result of the public not having access to the confidential recording of the closed meeting." Def. Brf. p.40. Defendants did not raise this issue in the district court, so it was waived.

It also ignores plaintiff's rights to submit evidence at a public trial under the First and Fourteenth Amendments to the U.S. Constitution and Article I, Section 7 of the Iowa Constitution. See generally *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-76 (1980):

> "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston* v. *Bellotti,* 435 U. S. 765, 783 (1978). Free speech carries with it some freedom to listen. "In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'" *Kleindienst* v. *Mandel,* 408 U. S. 753, 762 (1972). What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted. "For the First Amendment does not speak equivocally . . .. It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges* v. *California,* 314 U. S. 252, 263 (1941) (footnote omitted).

Plaintiff has the freedom to speak so others may listen.

Defendants say, the "decision was well within the court's discretionary powers, particularly in light of Section 21.5(5)(b)(1) and the fact that the closed session recording was not even relevant to Plaintiff's case." Def. Brf. p.41. This argument was not raised below, so was waived; especially because defendants did not object to admission based on relevance. (Tr. 55:19 - 56:16).

C. Sealing the recording was improper

Defendants argue, "[n]owhere in Chapter 21 did the Iowa Legislature give Plaintiff the right to . . . admit the confidential recording as a public exhibit, particularly considering such publication and public admission were not necessary parts of his enforcement proceeding."[9] Def. Brf. p.39. This misses the mark on several levels.

First, §21.5(5)(b)(1) allows disclosure "for use in that enforcement proceeding," and does nothing to limit that use. "If the sealed records are of probative value in these cases, they ordinarily will surface and become public in an enforcement trial." *Telegraph Herald, Inc. v. City*

[9] Again, any relevance objection was waived.

of Dubuque, 297 N.W.2d 529, 535 (Iowa 1980). This is like every other piece of evidence.

Second, the question is not whether chapter 21 gives a right to use the recording as a public exhibit. That right comes from the common law, evidence rule 5.402 (relevant evidence is admissible), and code §602.1601 ("All judicial proceedings shall be public, unless otherwise specially provided by statute . . .."). The question is whether Chapter 21 specifically prohibits use as a public exhibit. It says nothing about using the recording only under seal.

"[T]he courts of this country recognize a general right to inspect and copy . . . judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). "[H]owever, . . . the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." Id. "[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." Id. at 599. This is where language in §21.5(5)(b)(1) becomes instructive.

That section calls for a similar balancing of interests. "[T]he court shall weigh the prejudicial effects to the public interest of the disclosure of any portion of the minutes or recording in question, against its probative value as evidence in an enforcement proceeding." The court conducted that balancing and determined the entire recording should be disclosed. Defendants do not challenge that finding, and a similar weighing shows the recording should be public.

Critical interests are served by open judicial proceedings and evidence. "'The operations of the courts and the judicial conduct of judges are matters of utmost public concern,' *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839, (1978), and '[t]he common-law right of access to judicial proceedings, an essential component of our system of justice, is instrumental in securing the integrity of the process.' This right 'includes the right to inspect and copy public records and documents.'" *Romero v. Drummond Co., Inc.*, 480 F. 3d 1234, 1245 (11th Cir. 2007) (citation omitted).

The question is what establishes good cause to overcome this right. Using the words of §21.5(5)(b)(1), that involves "weigh[ing] the

prejudicial effects to the public interest" of making the recording public in trial. Here, there is no prejudice to any public interest.

There are two public interests involved. One is the overarching interest in "assur[ing] . . . that the basis and rationale of governmental decisions . . . are easily accessible to the people." §21.1. The second is the interest in "prevent[ing] needless and irreparable injury to [an] individual's reputation." §21.5(1)(i). Neither is harmed by public access here.

Public access does not harm the interest in easy access. Quite the opposite – it provides access that has been denied.

Public access also does not harm the interest in preventing injury to reputation. The court's December 3 decision found:

> no negative information revealed itself during Van Sloten's interview . . . nothing said by Van Sloten or any of the Council Members during the interview would have negatively impacted Van Sloten's reputation in any real way.

D0248, p.4.

Defendants argue, "[o]nce the public sees the confidential recording of the closed session, the damage is done," but they do not show damage to any public interest. Def. Brf. p. 39. There is no public

interest in closure merely for closure's sake. Closure must be necessary to prevent needless and irreparable injury.

It was defendants' burden to prove a compelling reason to seal the record in contravention of the common law and statutory rights to public access. Iowa R. App. P. 6.904(3)(e) (burden of proof). Failing that, they have attempted to shift the burden to plaintiff by setting up straw man arguments such as: "[p]laintiff has cited no authority to support the proposition that the court does not have authority to control access to its own records under the circumstances of this case." Def. Brf. p.41. Plaintiff has cited the law and shown how it does not support defendants' claims. The failure to cite authority lies with defendants.

Neither defendants nor the court cited any law warranting closing part of the trial or sealing the recording. The "court failed to offer legal or evidentiary support or any explanation for [its decisions]. Therefore, the . . . court's order is not supported by substantial evidence." *K.C. v. Iowa District Court for Polk County*, 6 N.W.3d 297, 303 (Iowa 2024). Those orders were abuses of discretion.

CONCLUSION

Plaintiff asks the Court to reverse the district court and (1) find defendants violated chapter 21, (2) impose a $100 penalty, plus fees and costs, against each defendant to be paid personally and not to be paid or reimbursed from public funds, (3) and order that the recording of the closed session be unsealed.

REQUEST FOR ORAL ARGUMENT

Plaintiff requests oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(i)(1) because it contains 6,168 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(g)(1) because it was prepared using Century Schoolbook 14-point font.

CERTIFICATE OF SERVICE

This brief was electronically filed and served using EDMS on June 24, 2024.

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