

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

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JENNIFER SCOTT <i>Appellant,</i> v. CITY OF LAKEWOOD <i>Appellee.</i>	Case No.: CV-17-885796 Judge Brendan Sheehan CV17885796  101378131
WINDOW 3 CLERK OF COURTS CUYAHOGA COUNTY	
MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE	

Brian Bardwell moves for an order allowing him to file the attached amicus curiae brief in support of Appellant Jennifer Scott.

Brian Bardwell is an open-government advocate. He has 15 years of experience as a professional journalist for local and national media outlets and is now a third-year law student at the Case Western Reserve University School of Law. He spent two years as the Executive Director of Citizens for Sunshine, an organization he founded to improve compliance with the Ohio Public Records Act.¹ The University of Virginia has published his research on causes of noncompliance with the Act, and various legal organizations have invited him to lecture on open-government issues, including the Cleveland Academy of Trial Attorneys, the Cleveland Employment American Inn of Court, the Ohio State Bar Association, and the ACLU of Ohio, which called him "one of Ohio's greatest champions of transparency."

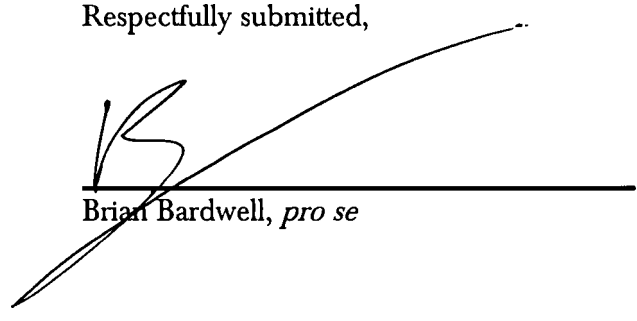
As a journalist and open-government advocate, Bardwell has a strong interest in protecting his and the public's right under the First Amendment to access governmental proceedings. He has made and continues to make extensive use of the various mechanisms

¹ R.C. 149.43.

for enforcing that right, including requests for public records, attendance at public meetings, and sitting in on court proceedings.

The continuation and inevitable expansion of practices such as the City's in closing the hearing below would have a crippling effect on him and similarly situated government watchdogs in their efforts to exercise their rights to the freedom of speech and of the press.

Respectfully submitted,



Brian Bardwell, *pro se*

CERTIFICATE OF SERVICE

I certify that on November 13, 2017, I served the foregoing document as provided Civ.

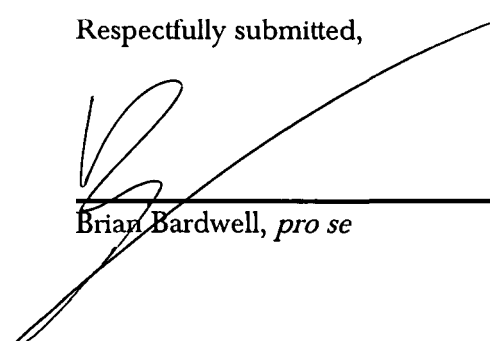
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Respectfully submitted,



Brian Bardwell, *pro se*

IN THE COURT OF COMMON PLEAS

JENNIFER SCOTT <i>Appellant,</i> v. CITY OF LAKEWOOD <i>Appellee.</i>	Case No.: CV-17-885796 Judge Brendan Sheehan
BRIEF OF AMICUS CURIAE BRIAN BARDWELL IN SUPPORT OF APPELLANT JENNIFER SCOTT	

CUYAHOGA COUNTY, OHIO

ISSUE PRESENTED

The First Amendment requires that limits on public access to quasi-judicial proceedings satisfy strict scrutiny.¹ The City of Lakewood expelled journalists and residents from an adversarial administrative hearing that forced a woman to choose between her dog and her status as a resident of the city. Did the City satisfy strict scrutiny when it closed the hearing without relying on any governmental interest or considering any less-restrictive alternatives?

SUMMARY OF ARGUMENT

The City's efforts to expel a well-behaved dog have generated intense public interest. Whatever their feelings on pit bulls, virtually everyone in Lakewood knows what it means to say, "I'm With Charlie." Hundreds of supporters have turned out at city council meetings to heap scorn and derision on the city's ham-handed attempts to end dog bites by banning a few relatively scary-looking dogs. A petition supporting Charlie has more than 70,000 signatures.² The pit bull ban was the subject of a candidates' forum leading up to

¹ *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir.2002).

² Martha L, *I Stand with Charlie the Pit Bull*, Care2 Petitions (<https://www.thepetitionsite.com/927/067/119/i-stand-with-charlie-the-pitbull/>) [<https://perma.cc/7CU6-SVHT>].

this year's City Council election.³ Charlie is the subject of regular coverage in online, print, and broadcast media, and his story has attracted national and international media attention.⁴ A member of the mayor's cabinet who administers a private Facebook group with nearly 6,000 members has prohibited any further discussion of Lakewood's pitbull ban in that forum.⁵

All of this is to say that the people of Lakewood are actively engaged on this issue and using it to evaluate who they want representing them in city government.⁶ Their right to know what their representatives are doing—in this case and in any other—is not just fundamental, but foundational in a democratic government. Regardless of what actually happens there, the simple fact that the government conducts public business in private breeds distrust among the voters, whose job is to monitor their representatives and whose natural assumption is that the government should have nothing to hide so long as it is not abusing its power.

But despite an unbroken line of authority recognizing that openness is the only way to ensure fair adjudications, the government in this case refused to allow the public—or even members of the media as their representatives—into a hearing to adjudicate the breed of a dog living in the city. Over Ms. Scott's objections and with the support of the government's lawyers, the hearing officer took the affirmative step of ejecting the public from the hearing room. No one knows why.

By shrouding her hearing in secrecy and shielding herself from scrutiny, the hearing officer cut off the public's right to know how the government was enforcing a law of intense public interest, how it was applying admittedly subjective criteria for separating residents from their property, and how it was handling an issue that voters had signaled would be determinative in their decisions on how to vote when incumbent members of City Council stood for re-election.

³ Tristan Rader, *End BSL - Lakewood City Council Meet & Greet*, FACEBOOK, <https://www.facebook.com/events/156561198264930/> [<https://perma.cc/QC4H-NAAD>].

⁴ Arin Greenwood, *What is a pit bull? (Hint: It's not actually a dog breed)*, TODAY, Oct.27, 2017.

⁵ Finance Director Jennifer Pae denies operating the page in her official capacity.

⁶ City Council declined to take any action to address citizens' concerns with its ordinance. Only one incumbent was re-elected on November 7.

LAW & ARGUMENT

*Detroit Free Press v. Ashcroft*⁷ is a dead ringer for this case.

In that case, the government sought to hold deportation hearings in secret for certain “special interest” cases purportedly related to terrorism. The chief immigration judge ordered the closure and sealing of all such cases, but the Sixth Circuit rejected the secrecy order, holding that the public had a First Amendment interest in attending the hearings and that the government had not articulated sufficient grounds to overcome that interest.

The circumstances of *Detroit Free Press* track the facts in this case almost perfectly, and its First Amendment analysis demonstrates that the City’s decision to hold a secret hearing violated the rights of the people who were tossed out of the hearing room, the reporters and observers who were barred from ever coming in, and every member of the public who cares about the case.

While the Court *needs* only one case to guide its analysis of how the City’s secret hearing violated the First Amendment, it would have a wealth of cases to support such a decision. In contrast, the City *has* only one case to resist that finding. In discouraging the public from attending, the city relied on *Smith v. Cleveland*,⁸ a decision that predated the bulk of the development of the right-of-access doctrine and whose analysis is plainly inadequate in light of subsequent federal precedent.

Detroit Free Press can neatly walk this Court through the First Amendment analysis that the hearing officer should have considered before ejecting the public. That analysis proceeds in three steps: First, it asks whether the *Richmond Newspapers/Press-Enterprise* analysis is applicable to the hearing. If so, it then asks whether keeping the hearing open would satisfy the “experience and logic” test. If so, it finally asks whether the limitations imposed on access survive strict scrutiny.

This Court should use the *Detroit Free Press* analysis, vacate the City’s administrative determination, and remand to the hearing officer for an open adjudication of the Plaintiff’s rights.

⁷ 303 F.3d 681 (6th Cir. 2002).

⁸ 94 Ohio App.3d 780 (8th Dist.1994).

I. Access to the hearing was governed by *Press-Enterprise II*

The First Amendment provides the public with a general right of access to at least some government information.⁹ While there is plenty of dicta to the effect that the First Amendment is not a general grant of access to government,¹⁰ the Sixth Circuit differentiates that line of cases from those governing access to administrative proceedings.¹¹

Especially in the context of the adjudication of citizens' rights, the public's right to observe the government's conduct—either as a litigant or a fact-finder—has been essentially unquestioned for centuries.¹² While the Sixth Amendment protects this right for criminal defendants, the First Amendment protects it for the press and public, who have an equivalent interest in ensuring the fairness of judicial proceedings. Since the U.S. Supreme Court announced this right with respect to criminal cases,¹³ the principle has been almost universally recognized as applying to civil cases, as well.¹⁴

This right is not limited to Article III courtrooms; it applies with equal force to state-court proceedings, and it also requires, under *Detroit Free Press*, that quasi-judicial administrative hearings be conducted in the open. On its way to finding that deportation

⁹ *Detroit Free Press*, 303 F.3d at 695 (“[I]t is clear that the Court has since moved away from its position in *Houchins* and recognizes that there is a limited constitutional right to some government information.”).

¹⁰ *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (“The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”); *McBurney v. Young*, 569 U.S. 221, 232 (2013) (“The Constitution itself is [not] a Freedom of Information Act.”); *Northern Kentucky Chiropractic v. Ramey*, 106 F.3d 401 (6th Cir.1997) (“The First Amendment is not a Freedom of Information Act.”).

¹¹ *Detroit Free Press*, 303 F.3d at 699 (“The Government rests its argument regarding the inapplicability of the *Richmond Newspapers* two-part test to deportation proceedings on cases that we find readily distinguishable.”).

¹² *Gannett Co. v. DePasquale*, 443 U.S. 368, 420 (1979) (“[T]here is little record, if any, of secret proceedings, criminal or civil, having occurred at any time in known English history.”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (“[H]istorically both civil and criminal trials have been presumptively open.”).

¹³ *Id.*

¹⁴ *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177–79 (6th Cir.1983); *Westmoreland v. Columbia Broadcasting Sys., Inc.*, 752 F.2d 16, 22 (2d Cir.1984); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir.1984); *In re Continental Ill. Secs. Litig.*, 732 F.2d 1302, 1308 (7th Cir.1984); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir.1983).

proceedings were subject to a First Amendment analysis, the Sixth Circuit relied on several characteristics that are equally applicable here.

As with immigration, dangerous-dog policy is set broadly by the jurisdiction's legislative body, with enforcement delegated to its executive, who then delegates to the chief law enforcement officer, who in turn delegates to hearing officers. Like "special interest" immigration cases, the City articulates "no definable standards" to determine what dogs are dangerous.¹⁵ Although a dangerous-dog determination "is not technically a criminal proceeding, it visits a great hardship on the individual."¹⁶

Like a deportation hearing, a dangerous-dog determination "although administrative, is an adversarial, adjudicative process."¹⁷ An adverse outcome "can be the equivalent of banishment or exile."¹⁸ It "is commenced with a 'Notice to Appear,' ... a charging document or complaint-like pleading."¹⁹ The notice must be served personally or by mail.²⁰ "[T]he government bears the burden of establishing its allegations by 'clear and convincing evidence.'"²¹ "[R]emovability must be based on reasonable, substantial, and probative evidence."²² "A respondent also has the right to be represented by counsel of his own choosing."²³ "In addition to the non-citizen's right to retain counsel, a deportee also

¹⁵ *Detroit Free Press*, 303 F.3d at 692.

¹⁶ *Id.* at 696.

¹⁷ *Id.*

¹⁸ *Id.* Compare LCO 506.13 ("shall issue an order for the owner or custodian to remove any dangerous animal from the City").

¹⁹ *Detroit Free Press*, 303 F.3d at 698. Compare LCO 506.09(b) (requiring service of the dangerous-dog determination and hearing).

²⁰ *Detroit Free Press*, 303 F.3d at 698. Compare LCO 506.09(b) (requiring residential service of the notice of hearing); R.C. 955.222(B) ("the person shall notify the owner, keeper, or harborer of that dog, by certified mail or in person").

²¹ *Detroit Free Press*, 303 F.3d at 698. Compare R.C. 955.222 ("At the hearing, the person who designated the dog as a nuisance dog, dangerous dog, or vicious dog has the burden of proving, by clear and convincing evidence, that the dog is a nuisance dog, dangerous dog, or vicious dog.").

²² *Detroit Free Press*, 303 F.3d at 698. Compare LCO 506.09 (requiring consideration of "all substantial, reliable and probative evidence accepted for review").

²³ *Detroit Free Press*, 303 F.3d at 698. Compare Tr. 268 ("You have a right to appear with or without counsel.").

has a right to be present at the hearing.”²⁴ “The non-citizen also has an opportunity to examine the evidence against him, present evidence on his behalf, and cross-examine witnesses.”²⁵ “The government, on its part, is represented by a trial attorney.”²⁶

As with deportation hearings, the City’s closure of the dangerous-dog determination did not limit access to “government-held *investigatory* information” but rather to “information relating to a governmental *adjudicative* process.”²⁷ While “the inapplicability of certain rules of evidence or civil procedure does nothing to alter our conclusion,”²⁸ the parties here stipulated to the use of the Rules of Evidence,²⁹ making this hearing even more like a court hearing than a deportation hearing.

Smith v. Cleveland, the sole case the City pointed to to support closure does little to support its case, and it does even less in light of *Detroit Free Press*. There, the court of common pleas denied access to a police officer’s disciplinary hearing, and the Eighth District affirmed, holding that a “Safety Department hearing” was an administrative proceeding that had historically been closed.³⁰ But *Detroit Free Press* now demands a more nuanced approach, rejecting decisions that rest “solely on the label we give the event” or on the idea of “a line ... drawn between judicial and administrative proceedings.”³¹ Instead of the name or purpose, the reviewing court should instead focus on the *character* of the proceeding.³²

²⁴ *Detroit Free Press*, 303 F.3d at 698. Compare Tr. 268 (“You have a right to appear.”).

²⁵ *Detroit Free Press*, 303 F.3d at 698. In this case, the plaintiff was permitted to examine all evidence, present her own case, and cross-examine the City’s witnesses.

²⁶ *Detroit Free Press*, 303 F.3d at 698. In this case, the city was represented by Law Director Kevin Butler.

²⁷ *Id.* at 699.

²⁸ *Id.*

²⁹ Tr. 44.

³⁰ *Smith*, 94 Ohio App.3d at 788.

³¹ *Detroit Free Press*, 303 F.3d at 695.

³² The court may have nonetheless reached the correct outcome in *Smith*, but given the deficiencies now apparent in light of *Detroit Free Press*, it should not be surprising that Ohio’s appellate courts—including the Eighth District itself—have never cited it in the nearly quarter-century since it was decided.

When the public seeks access to administrative proceedings, the government is precluded from arguing that *Press-Enterprise II* is not applicable; it is limited instead to arguing that providing access to the hearing would fail the experience and logic test laid out in that case.³³

II. Access to the hearing satisfies the experience and logic test

Determining whether the First Amendment right of access attaches to a proceeding requires the court to consider first whether, based on its characteristics, the proceeding is the kind that has “historically been open to the press and general public” and more importantly, whether “public access plays a significant positive role in the functioning of the particular process in question.”³⁴ Because the City’s dangerous-dog determinations are—like deportation hearings—the functional equivalent of judicial proceedings, both these tests support a right of access.

A. Experience supports an open hearing

“[T]he case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. ... [A] tradition of accessibility implies the favorable judgment of experience.”³⁵ As when deciding whether the experience and logic test applies, a reviewing court should not limit itself to the specific proceeding in question as named or characterized by the government; instead, it must “look to other proceedings *that have the same effect*.”³⁶

The effect of a dangerous-dog determination is to decide whether a citizen may keep or must part with her property. In almost any other context, it would be unimaginable to strip a citizen of her right to property through secret proceedings. Whether the question is eminent domain, conversion, civil forfeiture or theft, the answer—historically and recently, locally and nationally—is to determine an individual’s claim to property with the doors wide open.

³³ *Detroit Free Press*, 303 F.3d at 696 (“[W]e find that there is no basis to argue that the test itself does not apply.”).

³⁴ *Press-Ent. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 8 (1986).

³⁵ 448 U.S. at 589.

³⁶ *Detroit Free Press*, 303 F.3d at 702.

The *Richmond Newspapers* line of cases provided an extensive treatment of the historic openness of judicial proceedings generally. As *Detroit Free Press* notes, hearings to order the banishment of individuals from England to the colonies—an analogous, but admittedly weightier consequence—were open to the public as far back as 1718.³⁷ Court proceedings such as these remain open to this day, and even 15 years ago, *Detroit Free Press* noted the general trend toward opening administrative hearings to the public.³⁸

Lakewood's own experience also supports openness. City meetings with similar effects, such as interpreting and applying the city's laws, or asserting control over residents' property rights, are already open to the public, under both city ordinances and the state's Open Meetings Act³⁹:

- City Council has the authority to initiate proceedings to appropriate property.⁴⁰ The City requires that Council meetings be open to the public.⁴¹
- The Board of Building Standards and Building Appeals has the authority to make orders "relating to the location, ... removal or demolition of any building or other structure."⁴² The City requires that its meetings be open to the public.⁴³
- The Board of Zoning Appeals has the authority to decide whether zoning laws limit residents' use of their property.⁴⁴ The City requires that its meetings be open to the public.⁴⁵
- The City's Control Board, Planning Commission, Citizens Advisory Committee and similar public bodies are also open to the public.⁴⁶

³⁷ *Id.* at 702 ("[T]he English criminal courts could enter an order of transportation or banishment as a sentence in a criminal trial. ... [T]hese types of criminal proceedings have historically been open.").

³⁸ *Detroit Free Press*, 303 F.3d at 703 ("It bears note that the history of administrative proceedings is briskly evolving to embrace open hearings.").

³⁹ R.C. 121.22.

⁴⁰ Lakewood Second Amended Charter, Art. XVII, Section 2.

⁴¹ Lakewood Second Amended Charter, Art. III, Section 5; Lakewood Codified Ordinances, 109.01(a).

⁴² Article XIV, Section 2.

⁴³ L.C.O. 109.01(a).

⁴⁴ Lakewood Second Amended Charter, Art. XIII, Section 2(1) .

⁴⁵ L.C.O.109.01(a) .

⁴⁶ L.C.O.109.01(a) .

And while the development is too recent to govern the outcome of this case, it is worth noting that Lakewood voters on November 7 approved a new city charter that for the first time explicitly exhorts their representatives "to behave legally and ethically following principles of open government."⁴⁷

In the absence of an argument that (impermissibly) limits the scope of the inquiry specifically to dangerous-dog determinations that are held under the City's ordinances, all the relevant history suggests that society long ago reached a consensus on the need to hold quasi-judicial proceedings in the open before they can legitimately strip a citizen of her property.

Because experience supports an open hearing, the court must next consider whether the same conclusion is supported by logic.

B. Logic supports an open hearing

In evaluating the logic prong, a party protesting closure does not need to prove that the question before the court "bears upon public issues."⁴⁸ While the presence of journalists and observers indicates that this is the case is here, the real question for the court is "whether access to a particular government process is important in terms of that very process."⁴⁹

This is not a difficult question. Because a dangerous-dog determination is an adjudicatory process that attempts to deprive citizens of their property, the analysis of whether logic supports openness is no different than it would be in any almost any courtroom proceeding. Although the *Richmond Newspapers* line of cases were specifically addressing various proceedings in criminal contexts, their analysis is equally applicable to civil proceedings such as this one.

The Supreme Court has recognized the manifold benefits of publicity, noting in particular its ability to promote the appearance of justice, restrain abuses of power by exposing adjudicators to contemporaneous criticism, and facilitating reliable factfinding.⁵⁰

⁴⁷ Lakewood Third Amended Charter, Section 8.1.

⁴⁸ *Richmond Newspapers, Inc.*, 448 U.S. at 589.

⁴⁹ *Id.* at 589.

⁵⁰ *Id.* at 589-92.

The Sixth Circuit elaborated on these benefits when considering the analogous administrative proceedings in question in *Detroit Free Press*. As in that case, public access to the dangerous-dog determination would have “act[ed] as a check on the actions of the Executive by assuring us that proceedings are conducted fairly”⁵¹ and “ensure[ed] that government does its job properly.”⁵² These considerations are especially important, the Sixth Circuit found, when those whose rights are in jeopardy are not entitled to a lawyer at government expense, as was the case here.⁵³

These are not the only benefits of an open proceeding. The Sixth Circuit also observed that openness is beneficial to administrative hearings because it “enhances the perception of integrity and fairness”⁵⁴ and because it “helps ensure that ‘the individual citizen can effectively participate in and contribute to our republican system of self-government.’”⁵⁵

All these considerations weigh in favor of openness for administrative adjudications of almost any kind, and the City’s dangerous-dog determinations are no exception. In this case, where the hearing was held shortly before an election in which the city’s breed-specific legislation was one of the most hotly debated issues, the public would have especially benefitted from a process that checks executive authority and allows the catharsis that can only come from public participation.

Both experience and logic support holding the hearing in public.

III. Complete closure of the hearing fails strict scrutiny

Because “the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.”⁵⁶ As with most other rights flowing from the right to free speech, the right is subject to limitations, so long as they satisfy strict scrutiny.⁵⁷

⁵¹ *Detroit Free Press*, 303 F.3d at 703.

⁵² *Id.* at 704.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* (citing *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604 (1982).)

⁵⁶ *Press-Enterprise Co.*, 478 U.S. at 9.

⁵⁷ *Id.* at 13; *Detroit Free Press*, 303 F.3d at 705.

It is not possible for the City's complete closure of the hearing to satisfy that test, as there is nothing in this record for the Court to strictly scrutinize. Before denying access to proceedings protected by the First Amendment, the hearing officer was required to make "specific, on the record findings" explaining exactly how strict scrutiny is satisfied.⁵⁸ In this case, no such findings were ever made. The government never identified any objective—let alone a compelling one—that it believed it could advance by litigating this case in secret. And the record is devoid of any indication that the hearing officer ever considered any alternatives to closure.

The City's only argument in favor of closing the hearing was that "[a]dministrative hearings under Ohio law are not typically meetings that are open to the public."⁵⁹ This is not an accurate statement of the law.⁶⁰ Even if it were, preserving a tradition of secrecy cannot, in a democracy, be a compelling governmental interest. Instead, it is more like the rationale offered in *Detroit Free Press*, where the only on-the-record justification for closure was that the presiding judge had once been instructed to close proceedings by another judge.⁶¹

And even if secrecy for secrecy's sake were a compelling governmental interest, that interest was not adopted by the hearing officer, who at no point said that closing the hearing was actually intended to serve any purpose at all. The closest she came were her repeated invocations of the hearing's fact-finding purpose, but even there, she actually

⁵⁸ 478 U.S. at 13.

⁵⁹ Tr. 10.

⁶⁰ R.C. 121.22 (mandating that meetings of any "board, commission, committee, council, agency, authority, or similar decision-making body" are "public meetings open to the public at all times"). See also, e.g., *Froehlich v. Ohio State Med. Bd.*, 2016-Ohio-1035, ¶ 26, 61 N.E.3d 568, 576 (applying Open Meetings Act to administrative hearing before the Ohio State Medical Board); *Carrelli v. Ginsburg*, 956 F.2d 598, 606 (6th Cir.1992) (finding that administrative hearings before the Ohio State Racing Commission "are generally public"); Michael DeWine, Administrative Law Handbook, Office of the Ohio Attorney General (2016), 41, <http://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Legal/AdministrativeLawHandbook.aspx> [<https://perma.cc/K362-AMCA>] ("Unless an agency has a specific law to the contrary, all administrative hearings are open to the public.").

⁶¹ *Detroit Free Press*, 303 F.3d at 709.

acknowledged—as has every court to consider the question—that the hearing should be *open* for fact finding.⁶²

In light of the City's complete failure to identify any interest served by a secret dog trial, it should not be surprising that the hearing officer made no effort to explain how kicking out the press constituted the least-restrictive option for advancing that interest. Even the most generous reading of the transcript—that the hearing was closed to aid the fact-finding mission—moves the City no closer to satisfying strict scrutiny. On the contrary, courts are in unanimous agreement that “[p]ublicizing trial proceedings aids accurate factfinding.”⁶³

The City has failed to explain how closing its dangerous-dog determinations constitutes the least-restrictive means of advancing any compelling governmental interest. “Therefore, it impermissibly infringes on the ... First Amendment right of access.”⁶⁴

IV. Remedies

Because the City proceeded with a hearing in violation of the First Amendment right of access, the court must invalidate any decision it reached behind the veil of secrecy.

Not least because of its effect on the fact-finding function, the failure to maintain an open hearing is a structural error that casts doubt on the legitimacy of the entire proceeding. Closure “infects the whole trial process,”⁶⁵ so a party who objects at trial and raises the issue on appeal “generally is entitled to ‘automatic reversal’ regardless of the error’s actual ‘effect on the outcome.’”⁶⁶

⁶² Tr. 17:

MR. CALABRESE: I assume you are not going to open the hearing.

HEARING OFFICER: Yes, I am not going to open the hearing to media at this time.

MR. CALABRESE: Or the public?

HEARING OFFICER: No, or the public, correct. This is really a fact finding and I want it to be open for both sides to be able to present their facts and their testimony.

⁶³ See, e.g., *Richmond Newspapers, Inc.*, 448 U.S. at 596.

⁶⁴ *Detroit Free Press*, 303 F.3d at 705.

⁶⁵ *State v. Alexander*, 2004-Ohio-5525, ¶ 28 (7th Dist. Carroll), 2004 WL 2340039.

⁶⁶ *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1910 (2017).

The presence of structural error therefore requires the court to vacate any portion of the proceedings affected by the closure. While this most frequently happens under the Sixth Amendment in the context of criminal trials, the Supreme Court held in *Waller v. Georgia*⁶⁷ that the analysis proceeds the same way under the First and Sixth Amendments.⁶⁸ That may mean reversal of the verdict following a full trial,⁶⁹ but it may be more limited if the error was more limited. In *Waller*, for instance, the closure of a suppression hearing only necessarily required only a new suppression hearing. If the hearing resulted in the different evidence being suppressed, the defendant should receive a new trial, as well; if the same evidence were suppressed, the defendant was not entitled to the windfall of a new trial.

Here, the error infected the entire process. The hearing officer closed the hearing, over objection, at the outset of the proceeding and refused to allow the press or public to return, despite numerous subsequent objections.

The court should vacate the hearing officer's decision and remand the case for a new determination, with orders to either make the required findings justifying closure or permit public access as required by the First Amendment.

CONCLUSION

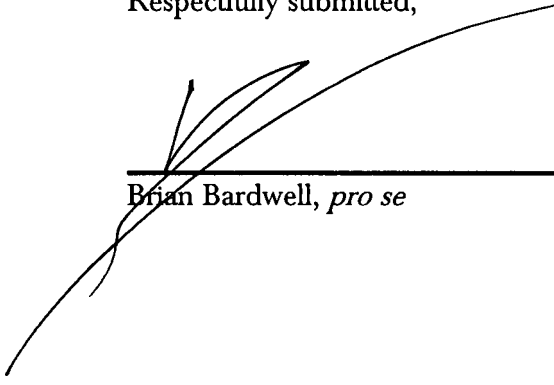
The City's dangerous-dog determinations are similar in character and consequence to judicial proceedings that have historically been open to the public because of the salutary effects of publicity. Its failure to justify its complete closure of those hearings therefore violates the First Amendment. The court should vacate the hearing officer's decision and remand for a new hearing, open to the public.

⁶⁷ *Waller v. Georgia*, 467 U.S. 39 (1984).

⁶⁸ *Waller*, 467 U.S. at 47 ("[W]e hold that under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press-Enterprise* and its predecessors.").

⁶⁹ See *id.*

Respectfully submitted,



Brian Bardwell, *pro se*