DISSENTING OPINION OF ACOBA, J.
WITH WHOM RAMIL, J., JOINS

I would grant the motion for reconsideration filed by Petitioners KITV-4 and the Honolulu Star Bulletin (Petitioners), set aside the order denying the petition, and require that Respondents The Honorable Colleen Hirai, Judge of the Circuit Court of the First Circuit, State of Hawai‘i (the court); Trustees of the Estate of James Campbell, Deceased; Beneficiaries of the Estate of James Campbell, Deceased; and Ashford & Wriston, a Law Partnership (Respondents) answer the petition.

This case may be akin to Gannett Pac. Corp. v. Richardson, 59 Haw. 224, 580 P.2d 49 (1978). There, the district court "close[d] to the public the preliminary hearing" in a criminal case. Id. at 225, 580 P.2d at 52. "Representatives of the news media" petitioned this court for a writ of prohibition to issue to the district court judge prohibiting him from doing so. Id. This court identified closure of the court proceedings as constituting that species of "rare and exigent circumstances," id. at 227, 580 P.2d at 53, that "warrant the exercise of this court's supervisory jurisdiction over the lower courts" under Hawai‘i Revised Statutes (HRS) § 602-4, id. at 226-27, 580 P.2d at 53, "as well as the exercise of [this] court's discretionary power to issue its writ of prohibition" under HRS § 602-5. Id. at 227, 580 P.2d at 53. Even the presence of "the additional avenue of appeal from the circuit court's denial of the

petition," id. at 236 n.10, 580 P.2d at 58 n.10, was not an obstacle to jurisdiction inasmuch as this court believed that the trial courts were "in immediate need of direction from this court on a procedural and substantive matter of public importance[.]" Id. at 227, 580 P.2d at 53. I believe, then, that jurisdiction over closure orders may be exercised under HRS § 602-4 (1993)[1] as authorized by Gannett, or by treating Petitioners' petition for writ under HRS § 602-5(4) (1993)[2] as one for prohibition rather than mandamus,[3] or under HRS § 602-5(7) (1993),[4] which authorizes

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[1] HRS § 602-4 provides that "[t]he supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law."

[2] HRS § 602-5(4) states as follows:

> The supreme court shall have jurisdiction and powers as follows:
> . . . .
> (4) To exercise original jurisdiction in all questions arising under writs directed to courts of inferior jurisdiction and returnable before the supreme court, or if the supreme court consents to receive the case arising under writs of mandamus directed to public officers to compel them to fulfill the duties of their offices; and such other original jurisdiction as may be expressly conferred by law[.]

[3] Because the nature of the remedy requested is more appropriately characterized as one for a writ of prohibition, prohibiting the court from enforcing its order, I would treat Petitioners' petition as a writ of prohibition. This court has similarly recharacterized pleas for extraordinary writs due to the nature of the claim involved or the nature of the relief granted. See, e.g., In re John Doe, 67 Haw. 466, 469, 691 P.2d 1163, 1165 (1984); State ex rel Marsland v. Town, 66 Haw. 516, 523, 668 P.2d 25, 29-30 (1983). Other courts have also recharacterized writs from mandamus to prohibition, see, e.g., Mosley v. Nevada Comm'n on Judicial Discipline, 22 P.3d 655, 663 (Nev. 2001) (Leavitt, J., concurring in part and dissenting in part); State ex rel. Dispatch Printing Co. v. Louden, 741 N.E.2d 517, 522 (Ohio 2001); Kinder v. State, 779 So.2d 512, 514 (Fla. App. 2000); State ex rel. Justice v. Board of Education of the County of Monongalia, 539 S.E.2d 777, 782 (W.Va. 2000); State ex rel. Ranger Fuel Corp. v. Lilly, 267 S.E.2d

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the making of orders to promote justice in matters pending before us.

Without reaching the merits of the case, the impetus for entertaining the petition would arise from the well-established common law right to inspect and copy public records. See Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978). "[T]he public does generally have the right, established by the common law, to inspect and copy public records and documents, including judicial records." Honolulu Advertiser, Inc. v. Takao, 59 Haw. 237, 239, 580 P.2d 58, 61 (1978). Thus, court records are public records, and are available to the public in general, including news reporters, unless a specific exception makes certain records non-public. See In re Estate of Hearst, 136 Cal. Rptr. 821 (Cal. Ct. App. 1977). Our jurisprudence distrusts secrecy in judicial proceedings and favors a policy of

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435, 436 (W.Va. 1980); Ex parte Segrest, 718 So.2d 1, 3-4 (Ala. 1998); State ex rel. Ohioans for Wildlife Conservation v. Taft, 1998 WL 635799 at *2 (Ohio App. 1998), and from prohibition to mandamus. See In re School Asbestos Litigation, 921 F.2d 1310, 1313 (3rd Cir. 1990), cert. denied, 499 U.S. 976 (1991); State ex rel. Lutz v. Mason, 2001 WL 755825 (Ohio App. 2001).

[4] Under HRS § 602-5(7), the supreme court also has jurisdiction and power

> [t]o make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it.

maximum public access to proceedings and records of judicial tribunals. See id. at 824-25.

The considerations underlying the public right of access to court records are similar to those which underpin the right to open court proceedings. In Gannett, this court stated:

> The reasons underlying the policy of open and public administration of justice are clear and compelling. Because of our natural suspicion and traditional aversion as a people to secret proceedings, suggestions of unfairness, discrimination, undue leniency, favoritism, and incompetence are more easily entertained when access by the public to judicial proceedings are unduly restricted. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges. Thus, the openness which serves as a safeguard against attempts to employ our courts as instruments of persecution also serves to enhance public trust and confidence in the integrity of the judicial process. Such trust and confidence is a vital ingredient in the administration of justice under our system of jurisprudence. The efficiency, competence, and fairness of our judicial system are matters of legitimate interest and concern to our citizenry, and free access to our courtrooms is essential to their proper understanding of the nature and quality of the judicial process.

59 Haw. at 230, 580 P.2d at 55. As presented in the petition and based on the record before us, in sealing court records in this case, the court precluded access to what are normally considered public records.[5] In doing so, the court apparently relied on the

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[5] The present case is distinguishable from Honolulu Advertiser, Inc. v. Takao, 59 Haw. 237, 580 P.2d 58 (1978). In that case, at issue was the right of a criminal defendant weighing against the public's right to open judicial records. See id. at 239-40, 580 P.2d at 61. The petitioners, representatives of the news media, sought to prevent the sealing of transcripts of the preliminary hearing of a criminal defendant and require the district court to deliver to the petitioners a copy of the transcript. See id. at 237-38, 580 P.2d at 60. The district judge in Takao correctly weighed the right of the press and public to public records against the defendant's right to a fair trial, and considered other alternatives to ordering the transcript of the preliminary hearing sealed until after the trial. See id. at 239-40, 580 P.2d at 61-62. The district court noted that, should the transcript of the hearing be released, there was a substantial likelihood that

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rules of court having to do with intervention. See Exhibit A to Petitioners' Appendix at 2-3. Petitioners sought to intervene under Hawai'i Rules of Civil Procedure Rule 24, see Exhibit C to Petitioners' Appendix at 309, and the court relied upon the strict language of that rule in finding that Petitioners did not qualify for either mandatory or permissive intervention. See Exhibit A to Petitioners' Appendix at 2-3.

Third-party intervention by Petitioners may not be central to the issue here. See Gannett, 59 Haw. at 235, 580 P.2d at 57-58. Rather, it is the general public's right of access that is raised by the petition, founded upon our judicial policy of the open and public administration of justice. See id. at 230, 580 P.2d at 55. In adhering to the strict rules of intervention in denying Petitioners access, the court may not have considered that policy, inasmuch as it is not embodied in the rules the court considered.

Accordingly, the court's order, insofar as it affected the public's access to court records, may be too broad. See Sapienza v. Hayashi, 57 Haw. 289, 294, 554 P.2d 1131, 1135 (1976) (finding that allowing a trial court's impermissibly overbroad order to be appealed "would work upon the public irreparable

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the defendant would be prejudiced. See id. In denying the petitioners' writs, this court found that the district court did not abuse its discretion due to the conflict with the defendant's right to a fair trial. See id. at 240-41, 580 P.2d at 62.

harm"); Gannett, 59 Haw. at 236, 580 P.2d at 58 (finding that "there was an insufficient basis for [the court's] closure order"). Because of the paramount importance of maintaining open access to our courts and the evident failure of the court to determine the effect of such a policy in its order, "the facts and circumstances of this case [may] warrant the exercise of this court's supervisory jurisdiction over the lower court[] . . . ."[6] Id. at 227, 580 P.2d at 53.

While questions of closure have arisen most often in criminal cases, see, e.g., Gannett, supra; Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the considerations favoring public access in those settings pertain as well to civil proceedings. See Gannett Co. v. DePasquale, 443 U.S. 368, 386-87 n.15 (1979) (noting that "many of the advantages of public criminal trials are equally applicable in the civil trial context"); Brown & Williamson Tobacco Corp. v. Federal Trade Commission, 710 F.2d 1165, 1179 (6th Cir. 1983) (stating that "[t]he policy considerations discussed in Richmond Newspapers apply to civil as well as criminal cases" and that "[c]ivil cases

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[6] In Gannett, the petitioners sought relief by way of a writ of prohibition. This court indicated that it had jurisdiction to correct the closure order under its general supervisory power of by way of writ of prohibition. Thus, either approach would be appropriate for this case and, as pointed out, HRS § 602.5(7) establishes an independent ground for jurisdiction. Although Petitioners seek relief by way of a writ of mandamus, in cases where the trial courts have issued overbroad or closure orders, this court has issued writs of prohibition to restrain the court from exceeding its jurisdiction. See Sapienza, 57 Haw. at 293, 554 P.2d at 1135; Gannett, 59 Haw. at 227, 580 P.2d at 53.

frequently involve issues crucial to the public -- for example, discrimination, voting rights, antitrust issues, government regulation, bankruptcy, etc.”). The fact that this case arises in probate court does not, in and of itself, exempt it from the general open policy attending judicial cases.

> [N]o statute exempts probate files from the status of public records, and . . . when individuals employ the public powers of state courts to accomplish private ends, such as the establishment and supervision of long-term testamentary trusts, they do so in full knowledge of the possibly disadvantageous circumstance that the documents and records filed in the trust will be open to public inspection.

In re Hearst, 136 Cal. Rptr. at 824.

Jurisdiction, as described by the statutes, would permit us to remand this case to the court to determine whether particular factors in the case overcome the presumption favoring public access and to fashion an order appropriate to the facts and circumstances, if it were warranted.[7]

In my view, we should reconsider the denial of the petition and order Respondents to answer the petition. We must act promptly in this matter, for as Justice Menor, writing for

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[7] In determining whether a judicial proceeding or record may be closed to the public or placed under seal, it has been held that the trial court should weigh the competing interests of the parties, such as protecting the privacy of third parties or the attorney-client privilege, against the strong common law presumption in favor of the public’s right of access. See Brown & Williamson Tobacco Corp., 710 F.2d at 1179. It has also been suggested that factors to be considered would include: (1) whether a specific statute exempts the proceeding or record from the status of public proceedings or records; (2) the legitimate interest of the public in access to the information; (3) the right of the parties to confidentiality under a showing of good cause or necessity; (4) the ability of the court to seal only those portions of the records requiring confidentiality or only temporarily. See In re Hearst, 136 Cal. Rptr. at 824-25.

the court in Gannett explained, "[p]ublic trust and confidence in the integrity of the judicial process . . . is a vital ingredient of the administration of justice under our system of jurisprudence." 59 Haw. at 230, 580 P.2d at 55.