No. 88036-1

SUPREME COURT OF THE STATE OF WASHINGTON

AARON HUNDTOFTE and KENT ALEXANDER,
Plaintiffs,

v.

IGNACIO ENCARNACIÓN and N. KARLA FARÍAS,
Defendants/Petitioners,

v.

KING COUNTY SUPERIOR COURT OFFICE OF JUDICIAL ADMINISTRATION,
Intervenor/Respondent.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties. The ACLU strongly supports the constitutional requirement that court proceedings generally should be open to the public. It also recognizes the competing civil liberties interests—privacy, public oversight of government, and the right to fully participate in society—involved in access to court records. The ACLU has participated in numerous cases involving access to public records (including court records) as *amicus curiae*, as counsel to parties, and as a party itself. The ACLU also has participated in legislative and rule-making procedures surrounding access to a wide variety of public records.

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether a court may order redaction of a party's name from SCOMIS in order to protect privacy interests of the party while continuing to allow access to the underlying records for purposes of public oversight.

STATEMENT OF THE CASE

The parties' briefs have adequately presented the case. Only a few points bear repeating as they are relevant to the argument below:

Mr. Encarnación and Ms. Farías were good tenants; they paid their rent consistently and had no problems with their landlord or neighbors. Shortly after they renewed their lease in July 2009 for a one-year term, the apartment building was sold. The new landlords chose to violate the terms of the lease and attempted to terminate the tenancy. When the tenants insisted on enforcing their lease, the landlord's response was to file an unlawful detainer action. The evidence shows that the action was not justified, as the parties eventually settled on terms favorable to the tenants.

Unfortunately, other potential landlords used the court index system (SCOMIS) to discover that the tenants had been involved in an unlawful detainer action. Those potential landlords used the mere existence in the index of an unlawful detainer action involving the tenants to categorically deny the tenants' application for housing, regardless of the merits or outcome of the action. The tenants therefore moved to temporarily redact their names from SCOMIS, replacing them with initials. They presented proof that this redaction was the least restrictive means of solving the problem. The trial court, in an open hearing, followed the steps specified in GR 15 and *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). The court concluded that redaction was authorized by the law and facts presented, and issued an order to that effect. On appeal the Court of Appeals reversed, holding that the redaction

was unconstitutional. *See Hundtofte v. Encarnación*, 169 Wn. App. 498, 280 P.3d 513 (2012).

ARGUMENT

Through no fault of their own, the tenants here were hauled into court; as found by the trial court, they "were not culpable and did nothing improper." CP at 730. The judicial process functioned properly, and the tenants obtained a favorable settlement—so one could easily think that justice was done. But the most widely disseminated documentation of the court action does not show the resolution; it is merely an index of the case and shows that the tenants were defendants in an eviction action. Tenant screening companies use that sparse documentation to limit housing opportunities for any prospective tenant that has been an eviction defendant, regardless of the merits. In reality, therefore, these innocent tenants face a continuing injustice; they have now discovered that their housing opportunities are severely limited because the original, unfounded, claim of their former landlord is viewed by prospective landlords.

There is a simple method to end this injustice: temporary redaction of the tenants' names from SCOMIS, the index often used by tenant screening companies. The trial court recognized this and, after carefully balancing the private and public interests, ordered such a redaction. The

Court of Appeals held that such redaction violates Article 1, Section 10, based on a conclusion that "nothing distinguishes [their case from any others] who were also not ultimately evicted" and a belief that the redaction therefore amount to *de facto* sealing of all unlawful detainer cases. *Hundtofte,* 169 Wn. App. at 502.

Amicus respectfully suggests that the Court of Appeals used an overly cramped interpretation of Article 1, Section 10. A better interpretation grounded in text, history, and this Court's precedent would recognize that the *Ishikawa* balance of interests does not require that a privacy interest be unique, and that the standard for redaction of names in indices is different from that for closure of court proceedings. Both privacy and public oversight can be accommodated, with neither outweighing the other. *See, e.g.,* Access to Justice Technology Principles § 3 (adopted Dec. 3, 2004).

Article 1, Section 10 commands that justice shall be administered openly. If left uncorrected, the decision of the Court of Appeals will transform this into a command that injustice shall be perpetuated indefinitely.

A. Redaction of Names in Indices Need Not Be Supported by Unique Facts

The Court of Appeals based most of its decision on a belief that redaction is "appropriate only under the most unusual circumstances." *Hundtofte*, 169 Wn. App. at 507 (quoting *In re Detention of D.F.F.*, 172 Wn.2d 37, 41, 256 P.3d 357 (2011)). This standard has previously been used only when considering closure of court *proceedings*; it has never before been applied to a sealing or redaction motion. *See State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (first articulating the standard when considering closure of a suppression hearing); *see also, e.g.*, *State v. Momah*, 167 Wn.2d 140, 161, 217 P.3d 321 (2009) (closure of voir dire); *State v. Wise*, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012) (same).

Such a high standard is appropriate when considering closure of proceedings because it is at that point that the public interest in open administration of justice is at its zenith; a court hearing is the epitome of the administration of justice.[1] But, as discussed more fully below in

[1] Despite this strong interest in open administration of justice, other equally strong public policies may dictate deviation from the "most unusual" standard and require categorical closures of some particularly sensitive types of hearings. *See, e.g.*, RCW 13.32A.200 (Family Reconciliation Act hearings). *Amicus* more fully explains how such categorical rules may be compatible with Article 1, Section 10 in its brief submitted in *State v. Chen*, No. 87350-0. The Court need not consider that question in the present case, since there is no applicable categorical rule; all parties agree that the *Ishikawa* framework applies here.

Section B, a lesser standard is appropriate for the constitutional analysis of limitations on public access to court records.

This Court has already effectively recognized that different standards apply depending on the type of restrictions at issue. Although the "most unusual" standard has been consistently used in cases involving closure of court proceedings, this Court has articulated a different standard in the context of sealing court records: "The public's right of access may be limited to protect other significant and fundamental rights." *Dreiling v. Jain*, 151 Wn.2d 900, 909, 93 P.3d 861 (2004); *see also Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005). The appropriate question when sealing or redacting a record, therefore, is not whether the situation is "unusual," as the Court of Appeals believed, but whether the rights to be protected are "significant and fundamental." An example of this can be seen in GR 22(g), which provides for sealing of financial and health records in family law cases; that situation is far from unusual, but sealing is the appropriate method to protect significant and fundamental privacy rights of the parties and related individuals. Similarly, here the question is not how similar the tenants' situation is to that of other unlawful detainer defendants, but whether their interest in housing

opportunities is significant, fundamental, and under imminent threat in their particular circumstances.[2]

In fact, even the "protect other significant and fundamental rights" standard is more stringent than necessary for the remedy requested here—redaction of a name in an electronic index for a case that has been concluded. Here, the public interest in open administration of justice is at its nadir. No actual court records need be sealed or redacted; only the index to those records will be affected. The public will still be able to access all of the underlying records, and examine them to assure themselves that the judiciary functioned properly. *See Dreiling*, 151 Wn.2d at 903 (describing the purpose of judicial transparency as allowing public scrutiny of the judicial process). In fact, any examination of records for the legitimate purpose of judicial oversight is unlikely to be affected by redaction of names in indices. Rather than starting with the names of the parties, a person investigating the judiciary is more likely to want to examine all records associated with a particular court or type of action. Even if interested only in the details of one particular case, it is likely that

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[2] One can also question the conclusion of the Court of Appeals that these tenants are indistinguishable from other unlawful detainer defendants. The trial court relied on many facts specific to these particular tenants. *See* Petition for Discretionary Review at 17-20. *Amicus* certainly hopes that this case is unusual, and that innocent tenants are not routinely sued for unlawful detainer. But ultimately, whether many defendants or only a few would be able to satisfy the *Ishikawa* balance is simply irrelevant to proper analysis of a redaction motion.

a person will start with some additional information (e.g., date, court, type of action), and will still be able to locate the case by the person's initials. It is only people who are interested in the index for purposes entirely unrelated to oversight of the judiciary, such as the potential landlords in this case, who will be affected by the limited redaction requested here. Since those private uses are not the purpose of Article 1, Section 10, they should be given little weight when being balanced against other significant interests, such as privacy.

In any event, the "most unusual" standard used for closure of court proceedings is clearly not applicable to a motion for redaction of names from electronic indices. The Court of Appeals not only misapplied the standard, but also transformed it into a requirement for uniqueness, by requiring a movant to "distinguish" himself from all other similarly-situated movants. *See Hundtofte*, 169 Wn. App. at 502. That requirement warps the *Ishikawa* balancing test. In the view of the Court of Appeals, if serious harm comes to *one* individual through public disclosure of court records, that individual can obtain relief by sealing or redaction—but if the exact same serious harm comes to *many* people, no relief is available. This nonsensical result, prohibiting solutions to problems that most affect society as a whole, cannot be what our constitution requires.

If the decision of the Court of Appeals is not corrected, a requirement that a proponent of sealing or redaction must "distinguish" his case from all others similarly situated (in order to establish his circumstance is "most unusual") will spread to more situations, and undermine this state's public policies. This is already apparent with draft amendments to GR 15 being considered by the JIS Data Dissemination Committee. Those amendments would require individuals attempting to seal nonconviction records to "distinguish their case from similarly situated individuals"—in addition to complying with *Ishikawa* and showing a compelling interest that outweighs the public interest. Draft Amendment GR 15(c)(4) (Mar. 19, 2013). This additional requirement is in direct conflict with numerous state statutes recognizing the privacy rights of criminal defendants in nonconviction information. *See, e.g.*, RCW 9.94A.640 (entitling those whose convictions have been vacated to say they have never been convicted); RCW 9.96.060 (same); RCW 10.97.050 (limiting law enforcement dissemination of non-conviction records).

In other words, adoption of the "most unusual" standard would prevent sealing and redaction intended to protect interests that our state has recognized are important and compelling, while permitting sealing to protect against more idiosyncratic threats. For example, an innocent

person who has been denied a job because a dismissed charge showed up in a background check would be denied the opportunity to redact his name simply because other innocent defendants may have similar problems. A person denied an apartment because of a probable cause finding would be hard-pressed to prove that no other person is similarly situated. The "most unusual" standard is inconsistent with the legislative recognition of fundamental privacy interests in nonconviction information. It erects a virtually insurmountable bar to protection of those interests in court records, a bar which is not required by the constitutional guarantee of open administration of justice.

B. Open Administration of Justice Does Not Preclude Redaction of Names in Indices

The Court of Appeals incorrectly equated redaction of names in court indices with closure of court proceedings. That equation is inconsistent with both the language of Article 1, Section 10 and this Court's interpretation of it. The line of cases considering Article 1, Section 10 now stretches back almost 40 years. *See Cohen v. Everett City Council*, 85 Wn.2d 385, 388, 535 P.2d 801 (1975) (holding that Article 1, Section 10 "entitles the public ... to openly administered justice" and reversing sealing order for records submitted in licensing appeal); *Federated Publications v. Kurtz*, 94 Wn.2d 51, 615 P.2d 440 (1980) (establishing

five-step test to justify closure of court proceedings); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982) (expanding *Kurtz* framework in another closed hearing case); *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993) (holding that a statute effectively requiring closure of some court proceedings was unconstitutional because it precluded application of the *Ishikawa* factors); *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004) (holding that materials submitted in support of a motion to terminate a shareholder derivative action are protected by Article 1, Section 10 and may only be sealed by applying *Ishikawa* factors); *Rufer v. Abbot Laboratories*, 154 Wn.2d 530, 114 P.3d 1182 (2005) (applying *Ishikawa* factors to sealing of materials filed with nondispositive motions).

It is important to note that *all* of these cases involved closure of proceedings or sealing of records *before they had ever been made available to the public*.[3] In other words, the result of a successful closure/sealing motion in these cases would, in fact, prevent the public from ever learning of the operation of the judiciary in a specific instance. As such, there was no question that those cases implicated Article 1,

[3] There was also a motion in *Rufer* to seal a trial exhibit, but the trial court denied the motion and the Supreme Court opinions summarily affirmed that ruling, discussing only sealing of discovery and the materials filed with nondispositive motions.

Section 10's command that "justice in all cases shall be administered openly."

The present case is far removed from the ones listed above because it involves redaction of a court index *after* a fully public proceeding, and when the records themselves have been and will remain public. Article 1, Section 10 requires a somewhat different balance of interests under these circumstances than when considering completely precluding public access. As described by this Court, the purpose of Article 1, Section 10 is to enable public scrutiny of the operations of the judiciary. *See Dreiling*, 151 Wn.2d at 903 ("The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust."); *see also Allied Daily Newspapers*, 121 Wn.2d at 211 ("Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.")

Transparency in the judicial system is, of course, a compelling public interest, and one that *amicus* fully supports. Yet, the need for and methods to effectuate transparency depend on the circumstances. In particular, the standards are different for transparency in proceedings and

transparency in records. The language of Article 1, Section 10 itself reflects this vision: "Justice in all cases *shall be administered* openly." This commandment is in the future tense, and shows a need for the actual administration of justice—the proceedings—to be open to the public.

Article 1, Section 10 does not explicitly address records of past administration of justice, although some level of access to records is implied as necessary in order to effectuate oversight. But other compelling interests, including the constitutional privacy protection of Article 1, Section 7, also imply limits on that access.[4] These competing interests must be balanced, and the relative weight of the interests should vary depending on whether records or proceedings are at issue.

Having different standards for proceedings and records is a well-recognized concept in settings outside the judiciary. For example, the Open Public Meetings Act, Chapter 42.30 RCW, is significantly different in both structure and content from the Public Records Act, Chapter 42.56 RCW—and both effectively support transparency in government operations. It is worth noting that the list of exemptions is considerably longer in the Public Records Act than in the Open Public Meetings Act. *Compare* RCW 42.56.230-480 *with* RCW 42.30.110(1).

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[4] This is discussed more fully in Section C of the brief *amicus* submitted to the Court of Appeals in this case, and is incorporated herein by reference.

This is only natural. The need for government oversight is highest at the time of government action, which emphasizes the need for open proceedings. Sensitive personal details are more likely to be contained in records than to be disclosed orally during a proceeding, so there is greater emphasis on privacy interests in records. Moreover, as time passes, the privacy interest in those same records grows. *See United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989) (considering "the extent to which the passage of time rendered [a fact] private").

Historically, this shift in interests from oversight to privacy was handled practically by limitations of technology; as time passed, even open records became harder to locate and obtain. In today's electronic world, however, it is as easy to locate a record of a minor peccadillo from decades past as it is to locate records of major actions from yesterday. As this Court has recognized, "[t]echnology use may create or magnify conflict between values of openness and personal privacy." Access to Justice Technology Principles § 3. Similarly, even in the relative infancy of electronic information, the United States Supreme Court recognized the significance of greater electronic access:

> [T]he compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the

> public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

Reporters Committee, 489 U.S. at 764; *see also* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Pa. L. Rev. 477, 536-38 (2006) (discussing the effect on privacy of increased accessibility).

Consequently, a proper constitutional analysis must explicitly accommodate the shifting balance between privacy and oversight interests that occurs as time passes and we move from court proceedings to historical court records. Fortunately, in addition to risking privacy due to increased accessibility, technology has also created the possibility of easy redaction, which can often serve—as here—to both protect privacy and allow public oversight of the judicial system. The best way to incorporate this solution without changing the basic *Ishikawa* framework is to recognize a heightened privacy interest in historical information; "[t]he substantial character of that interest is affected by the fact that, in today's society, the computer can accumulate and store information that would otherwise have surely been forgotten." *Reporters Committee*, 489 U.S. at 770. When coupled with the fact that the records are increasingly being used for purposes entirely unrelated to judicial oversight, such as tenant screening, the need for a shift in balance is apparent.

Here, justice *was* administered openly. No hearing was closed, and no records were filed under seal. The public had ample opportunity to scrutinize the operation of the judiciary. It is only after conclusion of the underlying actions—and with no indication of any public interest in the judiciary's handling of the case—that the motion to redact information was made, accompanied by strong proof of concrete harm being done to the individuals by the continued dissemination of their names as defendants in an unlawful detainer action. The constitutional mandate of open administration of justice has been fulfilled, and the balance of interests recognized in *Ishikawa* shifts. The imminent harm facing tenants here clearly outweighs the speculative and hypothetical future need to locate their names in SCOMIS for purposes of judicial oversight.

Arguably the electronic indices do not even fall within the ambit of Article 1, Section 10. They were created for the convenience of the judiciary and public, but are not an essential component of the administration of justice. Nobody would contend that Washington State did not administer justice openly for its first century, before SCOMIS was developed. Nor that we do not administer justice openly today because information about many older cases has never been entered into the electronic indices. In fact, it is only in the past twenty years, with the development of JIS, that *any* form of statewide index has existed. There is

no reason to believe that presence of full names in SCOMIS is constitutionally mandated.

In any event, the relief requested—and granted by the superior court—is neither permanent nor irreversible. By its terms, the redaction will only last until November 17, 2016. And if, in the meantime, a legitimate need to restore the names arises in order to allow public oversight of the judiciary, any member of the public can move to obtain access pursuant to GR 15(e). *See also State v. Richardson*, ___ Wn.2d ___, ___ P.3d ___, 2013 WL 1912613 (2013). A temporary redaction of names within SCOMIS will in no way affect our state's commitment to open administration of justice.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests the Court to reverse the Court of Appeals and uphold the trial court's order to temporarily redact the tenants' names from SCOMIS.

Respectfully submitted this 14th day of May 2013.

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