

NO. 66428-0-1

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

King County Clerk,
Plaintiff/Appellant,

v.

Ignacio Encarnación and N. Karla Farras,
Defendant/Respondent.

**BRIEF OF RESPONDENTS' IN RESPONSE TO BRIEF OF AMICI
ALLIED DAILY NEWSPAPERS OF WASHINGTON,
WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION AND
WASHINGTON COALITION FOR OPEN GOVERNMENT**

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I. Introduction

Respondents Encarnacion and Farias (hereafter “defendants”), submit this brief in response to the Amici Curiae Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association and Washington Coalition for Open Government (hereafter “amici”).

II. Argument

The controlling authority governing the redaction of party names from electronic court indices, such as SCOMIS (i.e., the Superior Court Management Information System) is *Indigo Real Estate v. Rousey*, which holds that courts should apply the hybrid GR 15/*Ishikawa* test announced in *State v. Waldon*.¹ There is no question that the superior court applied the GR 15/*Ishikawa* test, and applied it correctly. If this Court adheres to that standard, then the redaction order should be affirmed. But if this Court chooses to revisit the legal standard for redacting party names from electronic indices, then the Court should lessen—not increase—the burden on parties seeking redaction.

A. Amici’s criticisms of the superior court’s application of the GR 15/*Ishikawa* analysis are flawed.

The superior court carefully and correctly applied each component of the GR 15/*Ishikawa* test which are, in abridged form:

¹ See *Indigo Real Estate Services v. Rousey*, 151 Wn. App. 941, 949-950; 215 P.3d 977 (2009); see *State v. Waldon*, 148 Wn. App. 952, 962; 202 P.3d 325 (2009); see also *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36; 640 P.2d 716 (1982); see also GR 15(c).

1. The proponent of closure and/or sealing must make some showing of the need therefor... 2. Anyone present when the closure motion is made must be given an opportunity to object... 3. The method for curtailing access [sh]ould be both the least restrictive means available and effective in protecting the interests threatened... 4. The court must weigh the competing interests of the defendant and the public, and ... 5. The order must be no broader in its application or duration than necessary...²

1. The defendants showed an adequate need for sealing.

The defendants had a compelling privacy interest for redacting their names from SCOMIS. Unlike the defendant in *State v. McEnry*, the defendants do not own a home, and at the time of their motion were living in a rental house that was undergoing foreclosure.³ They needed to find suitable and stable housing, but one landlord had already rejected them because of the eviction suit, which the court's electronic indices revealed.⁴

Amici argue that a family's need to obtain rental housing is not an "intimate" privacy concern that comes within the ambit of Art. I, Sec. 7. But neither GR 15 nor *Ishikawa* restrict courts to sealing only "intimate" personal information.⁵ Rather, any type of privacy concern that poses a "serious and imminent threat to some other important interest" can support

² *Indigo Real Estate*, 151 Wn. App. At 948-949.

³ *State v. McEnry*, 124 Wn. App. 918, 926; 103 P.3d 857 (2004) (defendant "conceded that potential loss of housing based on his court records was 'not an issue' because he owns his home."); CP 95.

⁴ CP 94-95, 102-116, 728.

⁵ See GR 15(c); see *Seattle Times v. Ishikawa*, 97 Wn.2d at 37-38.

an order to redact records GR 15/*Ishikawa*.⁶ As several prior decisions have established, information that damages a person's ability to obtain housing or employment threaten important interests under this standard.⁷

Amici also argue the court record posed was not a sufficiently "serious and imminent" threat to satisfy the GR 15/*Ishikawa* test because the defendants did have new rental applications pending at the time of their motion.⁸ But the superior court had substantial evidence to support its finding that the SCOMIS record diminished their rental opportunities; the defendants had already sustained an irreparable harm with the denial of one rental application, and to require more examples would have been arbitrary and contributed little to the evidentiary record.⁹ Also, as amici undoubtedly realize, bringing a motion for redaction with an application pending would not even be possible, since rental admission decisions are usually made within hours or minutes submitted the application.

⁶ *State v. Waldon*, 148 Wn. App. at 962. The "other" in the quote text refers to a criminal defendant's Sixth Amendment right to a fair trial, which courts may close proceedings or records to protect under a lower, "likelihood of jeopardy" standard. See *Waldon* at 962; see also *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 62; 615 P.2d 440 (1980).

⁷ See, e.g., *State v. McEnry*, 124 Wn. App. at 926 (recognizing housing and employment as potential grounds for sealing a criminal record); see *State v. Waldon*, 148 Wn. App. at 967 (theft conviction could be sealed to protect employment prospects, but remanded for application of GR 15/*Ishikawa* standard); see also *Indigo Real Estate*, 151 Wn. App. at (remanding for determination of whether unlawful detainer defendant's name should be redacted from SCOMIS to protect her housing prospects);

⁸ CP 729-730; see *State v. Waldon*, 148 Wn. App. at 962-63 ("[T]he first *Ishikawa* factor specifies that . . . the moving party must establish a 'serious and imminent threat to some other important interest.' This requires a showing that is more specific, concrete, certain, and definite than a 'compelling' concern.").

⁹ CP 728; see also *Carpenter v. Folkerts*, 29 Wn. App. 73, 77; 627 P.2d 559 (1981) (loss of any interest in real property constitutes irreparable harm).

2. The public has little, if any, interest in the defendants' names because they were not found guilty of unlawful detainer.

The superior court also correctly determined that the defendants' privacy interest outweighed the public interest in keeping their names in SCOMIS. Because the defendants were not culpable in the unlawful detainer action, the record has no significant value to potential landlords in deciding whether to accept them as tenants. And removing party names from SCOMIS only, while leaving the names intact on the other remaining court records, does not materially interfere with the public's access or use of the court records for other purposes.¹⁰

a. Supporting private background checks does not weigh significantly against SCOMIS redaction.

Public access to court records is predicated on Art. I, Sec. 10 of the Washington State Constitution, which requires courts to administer justice openly in all cases. This provision is concerned with maintaining public confidence in the judicial process—i.e., in the ability of courts to hear and decide cases in a fair, accurate, and just manner.¹¹ As the Supreme Court recently stated, open access to judicial proceedings (and records thereof) “assures the structural fairness of the proceedings, affirms their legitimacy, and promotes confidence in the judiciary.”¹²

¹⁰ CP at 730-731.

¹¹ See *In the Matter of Detention of D.F.F.*, 172 Wn.2d 37, 40; 256 P.3d 357 (2011).

¹² *Detention of D.F.F.*, 172 Wn.2d at 40.

The amici worry that redacting the defendants' names will threaten public confidence in SCOMIS as a reliable tool for conducting background checks on rental applicants. But this is not the purpose of Art. I, Sec. 10. Facilitating private background checks has nothing to do with assuring structural fairness in the judicial system or affirming the legitimacy of specific proceedings. Redacting party names from SCOMIS does not affect the public's ability to evaluate how courts adjudicate cases, and thus does not affect public confidence in the judicial functions with which Art. I, Sec. 10 is concerned.

Amici also complain that "if landlords, lenders, and employers believe that SCOMIS records will be erased once suits are dropped, they will rely more heavily on credit reporting agencies which do not tell the whole story." But public policy favors the use of credit reports, not than SCOMIS searches, for credit, housing, and employment decisions. Both the state and federal Fair Credit Reporting Acts (FCRAs) require consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom [a] report relates."¹³ Beyond technical accuracy, the contents of consumer reports be complete and not misleading—i.e., "tell the whole

¹³ RCW 19.182.060(2); see also 15 USC 1681e(b).

story.”¹⁴ And when inaccurate or incomplete information appears on a credit report, consumers can use a statutory dispute procedure to correct or remove the improper item.¹⁵

No such obligations pertain to the keepers of SCOMIS, who are not “consumer reporting agencies” and thus not subject to the FCRA.¹⁶ SCOMIS does not “tell the whole story” about eviction cases, as Amici suggest; rather, the system exists to track court dockets—not make credit reports—and a typical search result produces only the party names, case number, and docket entries.¹⁷ In fact, SCOMIS requires users to view and acknowledge disclaimers that make clear its contents are not guaranteed to be accurate, complete, or up-to-date, and urges users to verify information from SCOMIS by consulting official court documents.¹⁸ Thus, if amici are correct that redacting the defendants’ names from SCOMIS will lead to greater reliance on consumer reporting agencies, then it is difficult to see how this would negatively affect the public.

b. The filing of this unlawful detainer suit is not useful information in rental decisions about the defendants.

¹⁴ See, e.g., *Gorman v. Wolpoff & Abramson, LLP*, 552 F.3d 1008, 1023 (9th Cir. 2009) (consumer report that is technically accurate can still violate the FCRA if misleading).

¹⁵ See RCW 19.182.090; see also 15 USC 1681i.

¹⁶ See RCW 19.182.010(5); see also 15 USC 1681a(f).

¹⁷ CP at 105-116.

¹⁸ CP at 113.

Access to a court record that contains valuable information may also be in the public interest, even if that information relates to something other than public oversight of the judicial system. Amici give examples of cases about defective toys or crooked politicians, but the more pertinent example here are court records that may reveal particular rental applicants to have been untrustworthy or irresponsible tenants in the past. Housing providers have an undeniable interest in accessing such court records. But the superior court did not overlook this concern. Rather, it conducted a careful inquiry, but found that the defendants had not been culpable in the unlawful detainer action and had done “nothing to cause their removal” from the previous tenancy.¹⁹ That the names of parties to some settled lawsuits may be valuable to the public is true enough, just not in this case.

Amici argue that this case record does have predictive value to housing providers, because many assume that “the mere filing of a suit is significant because it shows that ‘a landlord elected to take the time and expense to file,’” or “that landlords always have good reasons to file eviction suits.” But the public interest in access to court records does not require courts to indulge shorthand decision-making by lazy landlords, especially when those assumptions are flawed. And “[a]s a matter of

¹⁹ CP 730.

common sense, one factor bearing on whether information is of legitimate concern to the public is whether the information is true or false.”²⁰

As amici concede, a landlord who evaluates rental applicants on a more holistic basis would still be able to learn about this action, such as through an interview with the defendants’ former landlords. But housing providers who reflexively reject applicants based on an internet search and guilt-by-accusation reasoning can hardly fault the courts for protecting the privacy of those tenants who are accused, but not guilty.

Indeed, landlords who use the mere filing of an unlawful detainer suit as a proxy for a rental applicant’s unsuitability threaten other public interests. That practice chills tenants from defending eviction suits, even when they have sound defenses and compelling evidence—a use that thwarts fundamental due process and erodes public confidence in the judicial system much more than the redaction of party names ever could.

Courts may not have the ability to control the methods by which landlords choose their tenants, but courts do have the ability—and the prerogative—to consider how some members of the public might abuse judicial records if released. The public interest in open administration of justice, being intended to promote and protect the integrity of the courts, is

²⁰ *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 148 827 P.2d 1094 (1992).

not served by enabling landlords to use the SCOMIS name index as a de facto tenant blacklist.

c. No legislation supports the reporting or use of non-predictive court records in rental applications.

No statute establishes a public interest in access to the names of unlawful detainer defendants. But amici argue that the Legislature has nonetheless signaled that it “wants landlords to know about eviction suits filed within the past seven years.” There is no support for this assertion.

Amici first rely on a section of the Fair Credit Reporting Act that prohibits credit reporting agencies from reporting outdated information, including lawsuits and expired judgments that are more than seven years old.²¹ The only legislative preference this statute reflects is a preference against outdated information. And even if one reads this provision as establishing a preference that non-outdated lawsuits appear in consumer reports, the text gives no clue as to whether that preference extends to all lawsuits or just some, or to all consumer reports or just some—and if the Legislature prefers that only some lawsuits should be reported in only some types of credit reports, the text does not say which ones for which.

²¹ See RCW 19.182.040(1) (“[N]o consumer reporting agency may make a consumer report containing any of the following items of information: ... (b) Suits and judgments that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period...”).

Amici draw equally dubious inferences from RCW 59.18.580, a provision of the Victim Protection Act. Amici argue that since that Act does not prohibit landlords from rejecting rental applicants based on dismissed eviction suits, the Legislature must have implicitly approved of that practice. But the Legislature enacted the Victim Protection Act to stop housing discrimination against domestic violence survivors, not as an attempt at comprehensive tenant-screening regulation.²²

3. The redaction order is tailored to the least restrictive, effective means of protecting the defendants' privacy.

The superior court ordered the defendants' names redacted from electronic court indices, but preserved their first and last initials, and even preserved their names on all other court documents.²³ This method of redaction, designed specifically "to prevent the reflexive denial of [the defendants'] rental applications based on SCOMIS entries alone, while leaving the balance of the court file intact," was the least-restrictive means of protecting the defendants' rental housing opportunities.²⁴

a. An explanatory notation would not have protected the defendants' housing opportunities.

²² See RCW 59.18.570 (Notes: 2004 c 17 § 1 ("By this act, the legislature intends to increase safety for victims of domestic violence, sexual assault, and stalking by removing barriers to safety and offering protection against discrimination.")).

²³ CP 732

²⁴ CP at 732; see also *Ishikawa*, 97 Wn.2d at 38.

Amici claim the superior court could have used the less-restrictive method of adding explanatory details into SCOMIS, such as “a ‘no eviction’ notation.”²⁵ But such a notation, even assuming it could be inserted, would not have protected the defendants against reflexive denials based on their status as past unlawful detainer defendants. Protecting their housing opportunities required measures calculated to prevent landlords from learning about this action.

b. SCOMIS redaction is an effective remedy.

The superior court’s determination that redacting the defendants’ names would materially improve their ability to secure rental housing adequately established redaction as an effective remedy.²⁶ Substantial evidence established that housing providers and screening services use the electronic court indices to detect unlawful detainer case filings.²⁷

Amici argue redaction is not an effective remedy because landlords and screening companies can still learn the defendants’ names through methods other than SCOMIS. But the redaction is not intended to make their names completely inaccessible; rather, as the order explicitly stated, the redaction is “calculated to prevent the reflexive denial of [defendants’]

²⁵ Br. of Amici at 14.

²⁶ CP 731.

²⁷ CP 25-37, 97-99, 727-733.

rental applications based on SCOMIS entries alone[.]”²⁸ The defendants have never claimed SCOMIS redaction is a full-proof solution, only a deterrent. The GR 15/*Ishikawa* test requires an “effective” remedy, not a perfect one. And, if the minimal redaction the superior court ordered proves inadequate, then the remedy is more extensive redaction—not denial of all relief, as amici suggest.

Amici also claim that *Indigo Real Estate v. Rousey* required the superior court to make specific findings about when tenant-screening companies collect unlawful detainer records. In fact, the *Indigo* court stated only that such information could help in assessing the effectiveness of SCOMIS redaction—*Indigo* did not mandate specific findings on that issue.²⁹ And the only evidence on timing before the superior court was the affidavit of Alexander Jourvalev, who investigated several Washington screening companies and found that most search SCOMIS directly at the time they prepare screening reports.³⁰ This evidence supported the conclusion that SCOMIS is an effective remedy.

4. The redaction is limited in duration.

Consistent with the GR 15/*Ishikawa* framework, the redaction order is also narrowly-tailored in duration, being set to expire on the date

²⁸ CP 731-732.

²⁹ See *Indigo Real Estate*, 151 Wn. App. at 953.

³⁰ CP at 97-99.

the case will become too old for tenant-screening companies to report.³¹ Amici join the Clerk in arguing the redaction amounts to “destruction” of records, but GR 15 is clear that “to destroy means to obliterate a court record or file in such a way as to make it permanently irretrievable.”³² Since the redaction is temporary, not permanent, it cannot be considered tantamount to the destruction of court records.

B. If this Court revises the standard for redacting names from electronic court indices, then redaction should be made easier.

This GR 15/*Ishikawa* analysis is arguably a more rigorous standard than an unlawful detainer defendant should have to meet for an order redacting her name from SCOMIS. It is definitely not *less* rigorous.

1. SCOMIS is tangential to the adjudication of cases.

Art. I, Sec. 10 of the state constitution affords great protection to the openness of court proceedings and records related to the trial and decision of cases and controversies.³³ But Art. I, Sec. 10 does not apply to proceedings or records unrelated to the adjudication of cases, even when proceedings (or records of proceedings) that take place in a courtroom.³⁴

³¹ See RCW 19.182.040(b)(2).

³² GR 15(b)(3).

³³ See *Detention of D.F.F.*, 172 Wn.2d at 40; see also *Ishikawa*, 97 Wn. 2d at 35-36.

³⁴ See *Bennett v. Smith Bunday Berman Britton, P.S.*, 156 Wn. App. 293, 304; 234 P.3d 236 (2010); see *Tacoma News, Inc., v. Cayce*, 172 Wn.2d 58, 68; 256 P.3d 1179 (2011).

For instance, in *Tacoma News, Inc., v. Cayce*, the Supreme Court held that Art. I, Sec. 10 did not entitle the public to attend a discovery deposition—even though the deposition took place in a courtroom with a judge present—because the deposition was not introduced at trial and did not factor into the court’s adjudication of the case.³⁵ In *Bennett v. Smith Bunday Berman Britton, P.S.*, this Court ruled that Art. I, Sec. 10 did not entitle the public to obtain copies of documents attached to a summary judgment motion that a trial court had not reviewed or ruled upon before the action was settled.³⁶ The *Bennett* decision relied heavily on *Rufer v. Abbott Labs* and *Dreiling v. Jain*, cases involving public access to the information obtained in pretrial discovery, in which the Supreme Court established that “Article I, Section 10 does not speak” to information obtained in discovery that “does not become part of the court’s decision-making process.”³⁷ The *Bennett* court also distinguished *In Re Treseler and Treadwell*, which held the good cause standard does not apply to sealing of documents actually before the court when it rules.³⁸

SCOMIS entries are even more clearly incidental to judicial proceedings than judge-monitored depositions or exhibits to undecided

³⁵ See *Tacoma News v. Cayce*, 172 Wn.2d at 68.

³⁶ *Bennett*, 156 Wn. App. at 304.

³⁷ See *Bennett* at 304; see *Rufer v. Abbott Laboratories, Inc.*, 154 Wn.2d 530, 541; 114 P.3d 1182 (2005), citing *Dreiling v. Jain*, 151 Wn.2d 900, 909-910; 93 P.3d 861 (2004).

³⁸ See *Bennett*, 156 Wn. App. at 309; see *In Re Treseler and Treadwell*, 145 Wn. App 278; 187 P.3d 773 (2008).

motions. It is difficult even imagine a situation where a SCOMIS entry would be a genuine part of the decision-making process. If SCOMIS entries come within the ambit of Art. I, Sec. 10 at all, it is only by the slightest margin. The “good cause” standard that governs motions to seal records not used in a court’s decision-making process may be a more logical fit with respect to the redaction of electronic indices.

2. The names of people subject to unsubstantiated claims of unlawful detainer are not a matter of legitimate public concern.

Multiple cases have held in the public records context that the public has no interest in the names of people subject to false allegations, particularly if the allegations would be deeply offensive to a reasonable person.³⁹ In *Bellevue John Does 1-11 v. Bellevue School District*, the Supreme Court extended this rule to find that “public does not have a legitimate concern in the identities of [people] who are the subjects of *unsubstantiated* allegations.”⁴⁰ (Italics added).

Bellevue John Does involved a set of public disclosure requests a newspaper made to three school districts, seeking records of alleged sexual misconduct by teachers.⁴¹ Thirty-seven teachers who had been accused of sexual misconduct filed motions to block the districts from

³⁹ See *City of Tacoma*, 65 Wn. App. at 148; see *Bellevue John Does 1-11 v. Bellevue School District*, 164 Wn.2d 199, 217; 189 P.3d 139 (2008).

⁴⁰ *Bellevue John Does*, 164 Wn.2d at 217.

⁴¹ *Bellevue John Does*, 164 Wn.2d at 206.

releasing their names.⁴² The alleged misconduct was confirmed in some cases and discredited in others, while in a third set of cases the allegations were neither confirmed nor discredited.⁴³

The Court of Appeals held that the districts could only withhold a teacher's name if the accusations had been found "plainly false" after an adequate investigation.⁴⁴ But the Supreme Court disagreed, ruling that the districts should reveal the names of teachers "only when alleged sexual misconduct has been substantiated or when that teacher's conduct results in some form of discipline."⁴⁵ The Supreme Court found that teachers had a right to privacy in allegations of sexual misconduct, and that the public had no legitimate interest in learning of those allegations when they were unsubstantiated.⁴⁶

When an unlawful detainer case is dismissed before any contested factual findings or rulings are made by the court, the landlord's allegations are best described as unsubstantiated. Just as unsubstantiated allegations of sexual misconduct may diminish a teacher's employment opportunities,

⁴² See *Bellevue John Does*, 164 Wn.2d at 206.

⁴³ See *Bellevue John Does*, 164 Wn.2d at 206-207.

⁴⁴ See *Bellevue John Does*, 164 Wn.2d at 207.

⁴⁵ *Bellevue John Does*, 164 Wn.2d at 227.

⁴⁶ *Bellevue John Does*, 164 Wn.2d at 223 ("[W]e hold that the public lacks a legitimate interest in the identities of teachers who are the subjects of unsubstantiated allegations of sexual misconduct because the teachers' identities do not aid in effective government oversight by the public and the teachers' right to privacy does not depend on the quality of the school districts' investigations.").

unsubstantiated unlawful detainer allegations can to diminish a person's housing opportunities. Unlawful detainer allegations can also be deeply offensive—the landlord accuses the tenant of one illegal act in holding over on property, and potentially other misconduct like non-payment of rent, material lease violations, or criminal activities.⁴⁷ Amici argue that “mere allegations raise red flags that are important to the public's ability to safeguard its interests,” but surely red flags about unlawful detainer defendants are no more important to the public than red flags about sexual predators teaching in the public schools.

Thus, even within the GR 15/*Ishikawa* framework, courts hearing redaction motions could justifiably presume the public has no legitimate interest in learning an unlawful detainer defendant's name when the action is dismissed before any substantive rulings are made. At the very least, such a presumption appears justified when a court dismisses an eviction suit upon affirmatively finding the landlord's claims unfounded.

Amici claim that *Bellevue John Does* “has no bearing” because it did not entail an interpretation of Article I, Sec. 10, and because CR 11 supposedly ensures that all civil actions are well-grounded in law and fact. But these are not relevant points of distinction. Just as Art. I, Sec. 10 creates a presumption in favor of public access to judicial records, the

⁴⁷ See RCW 59.12.030.

Public Records Act creates a presumption in favor of administrative agency records.⁴⁸ Since both laws facilitate public oversight of public institutions, whether the public has an interest in accessing a particular agency record is highly analogous to whether the public has an interest in accessing a particular judicial record.⁴⁹

Also, CR 11 does not “ensure that court claims are well-grounded in fact and law,” as amici claim. The rule only requires that a plaintiff have a good faith *belief* that his action is well-grounded, not that it actually is. Amici’s unsupported contention that “anyone can make an unfounded allegation to a school district” might be true, but so can anyone file an unfounded eviction lawsuit. And, CR 11 does not actually prevent the filing of even truly frivolous suits-- only allows sanctions against those who bring them.

C. The Court should not adopt amici’s arguments concerning impertinent points of law from *U.D. Registry Inc. v. California*.

Near the end of their brief, the amici assert under a California appellate decision, that “government may not suppress the truthful reporting of suits” and that “credit reports are not commercial speech.”⁵⁰

⁴⁸ See RCW 42.56.070(1), 080.

⁴⁹ See RCW 42.56.030 (Public Records Act assures that “[t]he people [remain] informed so that they may maintain control over the instruments that they have created.”).

⁵⁰ Br. of Amici at 17.

Neither of these controversial arguments are relevant to the present case, and the Court should approach these theories with extreme caution.

The case amici cite, *U.D. Registry Inc. v. California*, is an outlier; a sister division of the California Court of Appeals declined to follow it,⁵¹ and the U.S. Supreme Court ruled in 1985 that credit reports generally do constitute commercial speech, a ruling that has long insulated the federal FCRA from free-speech challenges.⁵² Adopting *U.D. Registry* could raise immediate constitutional doubts about several Washington statutes—such as RCW 19.182.040, which prohibits consumer reporting agencies from reporting true information about outdated lawsuits and expired judgments.

Also, the redaction order does not purport to “suppress the truthful reporting of suits,” as amici suggest. The order will likely prevent many consumer reporting agencies from discovering this action, but nothing in the order would prohibit a consumer reporting agency that does find out about it from reporting the case. Ironically, the *U.D. Registry* court itself suggested on this basis that restricting public access to cases files was a better way to address tenant blacklisting:

⁵¹ See *U.D. Registry, Inc. v. State*, 44 Cal.App.4th 405, 50 Cal.Rptr.3d 647, 658-659 (2006)

⁵² See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762; 105 S.Ct. 2939 (1985) (declining to apply strict scrutiny because “[t]here simply is no credible argument that this type of credit reporting requires special protection to ensure that ‘debate on public issues [will] be uninhibited, robust, and wide-open.’”); see *TransUnion Corp. v. F.T.C.*, 267 F.3d 1138, 1141 (C.A.D.C. 2001) (credit reports are commercial speech, do not warrant strict scrutiny even if related to matters of public concern).

Concern about the availability of rental housing for those needing housing, and particularly those facing eviction, is a valid and significant state interest. But it does not justify a ban on publication by credit reporting agencies of lawfully obtained truthful information contained in court records open to the perusal of everyone. The information is in the custody of the state. If the state is concerned about dissemination of this information, it has the power to control its initial release. [T]he government may classify the information, establish procedures for its redacted release, and extend a damages remedy [if] mishandling of sensitive information leads to its dissemination.⁵³

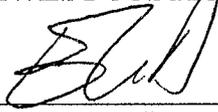
Ultimately though, the questions of whether credit reports are commercial speech and the extent to which states can restrict the inclusion of lawsuit information on consumer reports are not at issue in this case and have not been adequately briefed. If the Court takes a position on either matter, it should do so only with extreme caution.

III. Conclusion

For the reasons stated in the Brief of Respondent, and as further discussed herein, the superior court should be affirmed.

RESPECTFULLY SUBMITTED this 27 day of December, 2011.

NORTHWEST JUSTICE PROJECT

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⁵³ *U.D. Registry v. California*, 34 Cal.App.4th 107, 114-115; 40 Cal.Rptr.2d 228 (1995).