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CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

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PERRY MILLS,

Appellant,

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

v.

WESTERN WASHINGTON UNIVERSITY,

Respondent.

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AMICUS CURIAE BRIEF OF  
ALLIED DAILY NEWSPAPERS OF WASHINGTON and  
WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION  
IN SUPPORT OF APPELLANT

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Katherine George  
WSBA No. 36288  
HARRISON, BENIS & SPENCE LLP  
2101 Fourth Avenue, Suite 1900  
Seattle, WA 98121  
(425) 802-1052  
Attorney for Amici

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## I. INTRODUCTION

This case presents the question of when an adjudicative hearing held under the Administrative Procedure Act (APA), Chapter 34.05 RCW, may be closed to the public. The answer is in Article I, Section 10 of the Washington Constitution, which requires open administration of justice in *all* cases. This Court should affirm that the Constitution means what it says, and that openness in *all* cases includes quasi-judicial cases before administrative judges.

Any time the government determines a citizen's rights, the public has an interest in ensuring that the proceedings are conducted fairly and properly. Such public interest is not diminished when a judge is appointed under the APA instead of elected by voters to sit on the bench. On the contrary, public scrutiny is especially important when agencies interpret their own laws, rules and regulations, because courts generally must defer to agency interpretations when aggrieved citizens seek judicial review. The fact that citizens are not on an equal footing with agencies when they challenge administrative decisions in court is all the more reason to ensure that administrative hearings are open to public scrutiny.

Moreover, quasi-judicial cases often affect far more people than just the parties involved, such as in land-use challenges where a project may change the character of a neighborhood, or in major tax appeals where the entire state budget and all taxpayers may be affected. The public can seek reforms if an adjudicative system is flawed or if administrative hearings highlight shortcomings in agency regulations. In light of the fundamental policy that the people control *all* instruments of government, whether judicial or quasi-judicial, this Court should take this opportunity to hold that Article I, Section 10 applies to administrative law proceedings in the same way that it applies to courts of record.

## II. IDENTITY AND INTEREST OF AMICI

Allied Daily Newspapers of Washington (Allied) is a trade association representing 25 daily newspapers across the state. The Washington Newspaper Publishers Association (WNPA) is a trade association representing 140 weekly community newspapers throughout Washington. Both Allied and WNPA (“The Newspapers”) regularly advocate for public access to records, including court records, to achieve government accountability for the citizens of this

state. Newspapers frequently use government records, including court records, as sources of information.

The Newspapers are interested in this case because it could affect their ability to serve as public watchdogs concerning matters of public interest. The right to observe quasi-judicial hearings is important because the results affect the health, safety and financial well-being of citizens, including but not limited to the parties involved. For example, the Office of Administrative Hearings may uphold or reverse a state decision to revoke the license of an adult family home based on abuse or neglect of vulnerable residents. RCW 70.128.160; RCW 43.20A.205(3). A recent Seattle Times investigative series, "Seniors for Sale," highlighted the importance of rigorously regulating adult family homes by revealing hundreds of suspicious deaths in state-licensed homes throughout Washington.<sup>1</sup> This is just one recent example of a pressing public concern that may enter the quasi-judicial arena.

To name other examples, the Utilities and Transportation Commission holds quasi-judicial hearings on whether natural gas or

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<sup>1</sup> See [http://seattletimes.nwsourc.com/html/localnews/2012856611\\_seniors12.html](http://seattletimes.nwsourc.com/html/localnews/2012856611_seniors12.html).

electricity companies can raise rates for thousands of customers. The Department of Health's Adjudicative Services Unit deals with discipline of nurses and doctors whose actions may threaten patient safety. The state Pollution Control Hearings Board hears appeals of air and water pollution penalties, which can affect the quality of life in a neighborhood or the economic viability of an industry. And the fairness of our state's tax system may be illuminated when the Department of Revenue hears a business appeal of its share of the tax burden. Because these and many other hearings must be open in order to fully inform the public about important quasi-judicial decisions, The Newspapers have an interest in the issues in this case.

### III. DISCUSSION

The Newspapers agree with appellant Perry Mills' arguments as to why the Western Washington University faculty handbook is not a "provision of law expressly authorizing closure" under RCW 34.05.449(5), and do not repeat those arguments here. But there are additional legal and policy reasons, beyond the statutory reasons argued by Professor Mills and correctly recognized by the Court of Appeals, to hold that the closure of Professor Mills' disciplinary

hearing was unlawful. More specifically, if this Court should disagree with the Court of Appeals that the closure of Professor Mills' disciplinary hearing violated the APA, it should nevertheless affirm the order for a new hearing because the closure violated Article I, Section 10 of the Washington Constitution.

A. The Plain Language of Article I, Section 10 Requires Adjudicative Hearings to be Open to the Public.

Article I, Section 10 says in its entirety:

Justice in all cases shall be administered openly, and without unnecessary delay.

Thus, under the plain language of the Washington Constitution, if "justice" is administered, it must happen "openly." Id.

**1. APA hearings administer "justice."**

When agencies are compelled by citizen appeals to hold adjudicative hearings under the APA, they administer justice. "Justice" means the "fair and proper administration of laws." Black's Law Dictionary, 2<sup>nd</sup> Pocket Ed. (2001). It cannot be disputed that APA adjudicative proceedings involve "administration of laws." They are like trials, with judges hearing sworn testimony, applying rules of evidence, and ultimately issuing orders affecting citizens' rights.

RCW 34.05.010(11)(a); RCW 34.05.449(2); RCW 34.05.452; RCW 34.05.461.

But “justice” means more than administering laws – it means administering them fairly and properly. Black’s Law Dictionary, 2<sup>nd</sup> Pocket Ed. (2001). That is the whole point of APA hearings. They give citizens affected by agency decisions a fair opportunity to challenge them.<sup>2</sup> Because the very definition of justice is the “fair and proper administration of laws,” and because APA hearings safeguard the rights of citizens to fair and proper agency actions, such hearings are properly characterized as administering justice. Black’s Law Dictionary, 2<sup>nd</sup> Pocket Ed. (2001).<sup>3</sup>

## **2. Adjudicative proceedings are “cases.”**

A “case” is a “*proceeding*, action, suit or controversy at law or in equity.” Black’s Law Dictionary, 2<sup>nd</sup> Pocket Ed. (2001) (italics

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<sup>2</sup> Adjudicative hearings provide the same due-process protections as trials, including the right to examine and cross examine witnesses under oath, and application of the Rules of Evidence. RCW 34.05.449(2); RCW 34.05.452. The hearings result in findings of fact and conclusions of law that are subject to judicial review. RCW 34.05.461(3); RCW 34.05.570(3); RCW 34.12.060. In short, when agencies exercise adjudicative powers, they function like courts.

<sup>3</sup> The APA itself refers to “justice” in prescribing how to conduct adjudicative proceedings. See, e.g., RCW 34.05.446(3)(d) (judges must consider “whether the interests of justice will be promoted” when deciding discovery disputes); RCW 34.05.461(6) (a substitute judge “may conduct any further proceedings appropriate in the interests of justice”).

added). “At law” means “according to law; by, for or in law.” Id. Thus, a case is not limited to a “suit” in a court, but also includes any “proceeding” conducted “according to law.” Id. An adjudicative hearing under the APA is a “proceeding” conducted according to law. RCW 34.05.010(1). Therefore, APA hearings are “cases” subject to the Article I, Section 10 requirement that “justice in all cases shall be administered openly.”

B. Article I, Section 10 Was Enacted With Knowledge That Administrative Officers Have Quasi-Judicial Powers.

Article I, Section 10 was adopted in 1889 at the same time as Article 4, Section 1, vesting judicial power in courts, and Article 3, Section 1, defining the executive branch of state government. Just nine years after these provisions were adopted, in Bellingham Bay Imp. Co. v. City of New Whatcom, 20 Wn. 53, 57-60, 54 P. 774 (1898), this Court held that when executive and legislative officers act in a quasi-judicial capacity, they do not violate the separation of powers among executive, judicial and legislative branches. In upholding the constitutionality of a statute authorizing a city council to reassess property, this Court said:

It is contended that the city council is not a court, within the contemplation of the constitution, and that it cannot be clothed by the legislature with judicial powers, and that the powers prescribed by the statute just referred to are purely judicial...but the term 'judicial powers' has not, by the constitution, been defined, nor do we think it is susceptible of any specific definition. Section 1 of Article 4 of the constitution evidently means that the judicial power of the state which is exercised by courts shall be vested in the supreme and superior courts and justices of the peace and such inferior courts as the legislature may provide. It is more in the nature of a declaration of names of courts than it is a definition of judicial power; *and this article of the constitution must have been enacted with the knowledge that quasi judicial powers have from time immemorial been conferred upon administrative bodies and officers...*

Bellingham Bay Imp. Co., 20 Wn. at 56-58 (emphasis added).

This observation is critical to this case. It affirms that when the authors of the Constitution enacted Article 1, Section 10, to ensure that "justice in all cases shall be administered openly," *they knew that agencies as well as courts* had the power to hear and determine the rights of citizens. *Id.* at 58. Yet they did not limit Article I, Section 10 to courts, but referred to "*all*" cases. Article 1, Section 10. In light of the existence of quasi-judicial powers at the time Article I, Section 10 was adopted, and the plainly stated intent to allow public scrutiny of *all* administration of justice, this Court should hold that the

requirement for openness applies to *all* hearings, including quasi-judicial hearings by administrative judges.

C. APA Adjudicative Hearings Are Part of the “Entire Judicial System” and Therefore Are Subject to Article I, Section 10.

In Rufer v. Abbott Laboratories, 154 Wn.2d 530, 549, 114 P.3d 1182 (2005), this Court addressed “the extent of the public’s right to the open administration of justice” in the context of a sealing dispute. Rufer established that records which “become part of the court’s decision making process” must be open to the public, absent an overriding interest in secrecy, even if the records are not used to decide the case. Id. at 548-49. In so holding, this Court reasoned that the right to open administration of justice is broad enough to encompass “the entire judicial system” including, but not limited to, steps leading up to the final outcome.

If we define this right narrowly to consist only of the observation of events leading directly up to the court’s final decision, then arguably any documents put before the court that were not part of that final decision would be outside of the scope of article I, section 10. Put another way, if the jury does not see it, the public does not see it. But our prior case law does not so limit the public right to the open administration of justice. ...[T]he right is not concerned with merely whether our courts are generating legally sound *results*. Rather, we have interpreted this constitutional mandate as a means

by which the public's trust and confidence in our *entire judicial system* may be strengthened and maintained.

Id. at 549 (italics in original).

Although this case involves public access to hearings instead of records, the same reasoning applies. Under Rufer, anything that is part of the “entire judicial system” is properly within the scope of Article I, Section 10. Id., 154 Wn.2d at 549. Agency adjudicative hearings are an exercise of quasi-judicial power. Therefore, they are part of the “entire judicial system,” which also includes courts.

Even if quasi-judicial hearings were somehow not part of the judicial system standing alone, as a means of determining legal rights in and of themselves, they are certainly part of the overall judicial system when viewed as a precursor to judicial review. Under RCW 34.05.570, citizens can appeal agency adjudicative decisions to the courts. It makes no sense to close an administrative hearing based on an agency's internal handbook, as in this case, when the record of the administrative hearing will become presumptively open once an appeal is filed in court.

In applying Article I, Section 10, this Court has looked at whether a record becomes part of a court's decision-making process.

Rufer, 154 Wn.2d at 549; Dreiling v. Jain, 151 Wn. 2d 900, 910, 93 P.3d 861 (2004). In APA cases, the record of the agency's adjudicative proceeding is pivotal to appellate decision-making. Reviewing courts must give substantial weight and deference to an agency's interpretation of the laws it administers. Alpine Lakes Protection Society v. Wash. State Dept. of Natural Resources, 102 Wn.App. 1, 14, 979 P.2d 929 (2000). The agency's interpretation "should be upheld if it reflects a plausible construction of the language of the statute and is not contrary to legislative intent." Id. at 14. Thus, because agency proceedings form the basis for later judicial decisions, they fit within the court decision-making process that is presumptively open under Rufer.

In sum, APA adjudicative hearings are subject to Article I, Section 10 because they are part of the entire judicial system. Rufer, 154 Wn.2d at 549. They are part of the judicial system both as an independent means of determining citizen rights, and as a predicate to judicial decisions on appeal.

D. The Policy Reasons For Open Court Hearings Also Apply to Quasi-Judicial Hearings.

There is no policy or legal reason to treat quasi-judicial hearings differently than judicial hearings when enforcing the public's right to an open justice system. The purpose of the public trial right is "to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and discourage perjury." State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). These considerations of fairness and integrity are no less important in a quasi-judicial forum than in any other kind of court. As the Supreme Court of Illinois has said, "If the administration of justice means anything, it means a fair and impartial tribunal."<sup>4</sup> There is simply no point in providing agency adjudicative hearings unless they provide citizens with a fair opportunity to challenge agency actions.

Openness promotes fairness by reminding judges, witnesses and parties that if they behave wrongly, anyone can find out about it. To borrow the language of the United States Supreme Court, it is human nature that "judges, lawyers, witnesses and jurors will perform

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<sup>4</sup> In re Powell, 126 Ill.2d 15, 27, 533 N.E.2d 831 (1988) .

their respective functions more responsibly in an open court than in secret proceedings.”<sup>5</sup>

When discussing Article I, Section 10, this Court has recognized that citizens benefit from openness in all operations of government, not just courts. Dreiling, 151 Wn. 2d at 908. “Open access to *government institutions* is fundamental to a free and democratic society.” Id. (italics added). “For centuries publicity has been a check on the misuse of *both political and* judicial power.” Id. (italics added). “Proceedings cloaked in secrecy foster mistrust and, potentially misuse of power.” Id. Dreiling’s reasoning – that openness promotes public trust and prevents misuse of power - should apply to quasi-judicial hearings as well as judicial hearings.

In fact, quasi-judicial hearings are treated the same as judicial hearings for other purposes, such as protecting litigants from liability for communications made in litigation, and regulating the conduct of attorneys. In Twelker v. Shannon & Wilson, 88 Wn.2d 473, 477, 564 P.2d 1131 (1977), for example, this Court quoted with approval the statement in Middlesex Concrete Prods. v. Carteret Indus. Ass'n, 68 N.J.Super. 85, 91, 172 A.2d 22, 25 (1961), that “statements made in

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<sup>5</sup> Waller v. Georgia, 467 U.S. 39, 46 n. 4 (1984).

*judicial or Quasi-judicial* proceedings and having some relation thereto are absolutely privileged against a suit for defamation” (italics added). See also Perdue, Brackett, Flores, Utt & Burns v. Linebarger, Goggan, Blair, Sampson and Meeks, LLP, 291 S.W. 3d 448, 451-452 (TX Ct. of App. 2009) (the rationale for extending the absolute privilege to statements made during quasi-judicial proceedings is that citizens should be able to seek redress from agencies without fear of lawsuits); In re Mason, 736 A.2d 1019, 1024 (D.C. Ct. of App. 1999) (“harm results to the administration of justice” when an attorney’s conduct renders a judicial or quasi-judicial proceeding “bogus”). There is no reason to treat judicial and quasi-judicial hearings alike for some purposes but not others, when fairness of the process is the common overriding concern.

Applying Article I, Section 10 to administrative hearings does not mean that every hearing must be entirely open. But administrative hearings may be closed only upon a showing of a compelling interest in secrecy, after giving the public a chance to object and after weighing the public’s interest. City of Bellingham v. Chin, 98 Wn.App. 60, 74, 988 P.2d 479 (1999) (applying the State v. Bone-

Club test for closing a criminal hearing to “those few situations in civil proceedings where a party seeks to close a hearing”). If that compelling-interest test is sufficient to protect the rights of criminal defendants, whose very liberty is at stake, surely it is adequate to protect citizens in administrative proceedings.

Finally, the APA itself is designed to “provide greater public...access to administrative decision making.” RCW 34.05.001.<sup>6</sup> Applying Article I, Section 10 to quasi-judicial hearings is consistent with that stated intent of the Legislature, as well as with Washington’s fundamental constitutional tenet that all power ultimately rests with the people. Article 1, Section 1 (“All political power is inherent in the people, and governments derive their just powers from the consent of the governed”); Article 1, Section 32 (“A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government”). In sum, because APA adjudicative hearings are part of this state’s administration of justice,

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<sup>6</sup> The Legislature also stated that, in adopting the APA, it intended to “achieve greater consistency with other states...in administrative procedure.” As noted by Professor Mills, other states have required quasi-judicial proceedings to be open. See, e.g., Daily Gazette v. Bd. of Medicine, 177 W.Va. 316, 352 S.E.2d 66, 69 (1986); Herald Co. v. Weisenberg, 89 A.D.2d 224, 277, 455 N.Y.S.2d 413 (1982).

affecting the rights of citizens, this Court should hold that they are presumptively open under Article I, Section 10.

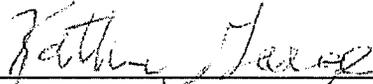
### III. CONCLUSION

For the foregoing reasons, the Court should affirm the order for a new hearing.

Dated this 28<sup>th</sup> day of September, 2010.

Respectfully submitted,

HARRISON BENIS & SPENCE LLP

By: 

Katherine George  
WSBA No. 36288  
Attorney for Amici