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No. 85665-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW H. RICHARDSON,

Respondent.

v.

MIKE SIEGEL,

Intervenor/Appellant.

BRIEF OF AMICUS CURIAE
WASHINGTON COALITION FOR OPEN GOVERNMENT
IN SUPPORT OF INTERVENOR/APPELLANT

FILED
SUPREME COURT
STATE OF WASHINGTON
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ORIGINAL

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“[S]ecret judicial proceedings would be a menace to liberty.”

– *Gannett Co. v. DePasquale*, 443 U.S. 368, 412, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979) (Blackmun, J., concurring and dissenting).

I. INTRODUCTION

This case raises the question of whether the existence of a sex crime prosecution – one involving a public school teacher who served as a local elected official and sought higher office – may be kept secret from the public without any explanation. This Court should reverse the trial court’s blanket denial of Intervenor/Appellant Mike Siegel’s motion to unseal. Moreover, the Court should make clear that open court dockets play a unique and significant role in assuring public oversight of the judicial branch.

Amicus Curiae Washington Coalition for Open Government fully supports Siegel’s position, and offers this brief to provide additional perspective on three points. *First*, WCOG urges the Court to recognize that sealed dockets pose a significant threat to the public’s ability to access court proceedings and records. The Court should hold that a party seeking to seal a docket, or opposing a motion to unseal one, faces a particularly steep burden.

Second, this Court should reverse the trial court order denying Siegel's motion to unseal. The order, and the position pressed by Richardson, are an improper attempt "to treat sealing orders as if they sealed caskets rather than presumptively open court records." *In re Marriage of Nicholas*, 186 Cal. App. 4th 1566, 1574, 113 Cal. Rptr.3d 629 (2010). The trial court's failure to make the findings required by *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) and General Rule 15 in itself requires reversal. Moreover, in light of Richardson's role as a political figure and teacher, the public has a compelling interest in accessing records related to his prosecution.

Third, this Court should clarify that an order denying a motion to unseal in a previously concluded case is appealable as a matter of right. Among other things, such an order is appealable under RAP 2.2(a)(13), which permits appeal as of right of post-judgment orders. Moreover, requiring discretionary review in such circumstances would impede access to judicial records and would undermine the right of intervention this Court recognized in *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011).

II. IDENTIFICATION AND INTEREST OF AMICI

WCOG is a statewide nonprofit, nonpartisan organization dedicated to promoting and defending the public's right to know about the

conduct of public business and matters of public interest. WCOG regularly advocates for access to records in matters of public concern. Its members frequently use court records as sources of information about the performance of the judicial system. WCOG is interested in this case because court records must be open in order to assess the effectiveness of the judicial system in Washington. WCOG is concerned that if this Court allows criminal dockets to be sealed – especially without complying with the well-established requirements for sealing court records – more parties will seek to have their cases hidden from public scrutiny.

III. DISCUSSION

A. Sealed Dockets Are A Particularly Grave Infringement Of The Public's Right To Access Judicial Records And Proceedings

1. Open Dockets Are A Critical And Necessary Component Of Public Access To Courts

The effect of a fully sealed docket is beyond dispute: the case disappears from public view. Absent an open docket, the public is denied the opportunity to know that judicial activity has occurred, or even that a case exists. *See, e.g.,* Meliah Thomas, *The First Amendment Right of Access to Docket Sheets*, 94 CAL. L. REV. 1537, 1538 (2006) (“Cases with sealed dockets have surfaced only by pure chance,” such as through clerical errors or news tips from court personnel).

“Docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment.” *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004); *see also Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89, 96 (D. Mass. 1993) (“Access to alphabetical indices can play a significant and positive role in the ability of the citizens of Massachusetts to learn about what is going on in their criminal court system.”). Conversely, secret dockets deprive the public of information about both individual cases and the operation of the judicial system generally.¹

Accordingly, courts have recognized that a right to access court dockets is the “necessary corollary” of the public’s right to access court proceedings and records. *Pellegrino*, 380 F.3d at 93. “[T]he ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible.” *Id.* The Eleventh Circuit reached a similar conclusion in *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993), where sealed

¹ *See, e.g.*, Patrick Danner and Dan Christensen, *300 More Civil Cases Uncovered*, MIAMI HERALD, Feb. 27, 2008, available at <http://www.miamiherald.com/2006/08/18/435982/300-more-civil-cases-uncovered.html> (visited Aug. 27, 2012) (noting discovery of secret Broward County court docket dating back to 1989 that kept hundreds of cases hidden from public view).

dockets concealed the existence of pretrial bench conferences and *in camera* pretrial motions:

These events remained hidden until a *Times* reporter happened to be present to observe a closed bench conference. The Middle District's dual-docketing system can effectively preclude the public and the press from seeking to exercise their constitutional right of access to the transcripts of closed bench conferences. Thus, we hold that the Middle District's maintenance of a dual-docketing system is an unconstitutional infringement on the public and press's qualified right of access to criminal proceedings.

Valenti, 987 F.2d at 715. *See also Washington Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991) (First Amendment right of access to court records and proceedings requires public docketing of criminal motions); *In re State-Record Co., Inc.*, 917 F.2d 124 (4th Cir. 1990) (per curiam); *Globe Newspaper Co.*, 819 F. Supp. at 92-93; *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 575 (8th Cir. 1988); *Di Pietro v. United States*, No. 02 CR. 1237-01, 2009 WL 801609 at *3 (S.D.N.Y. Mar. 24, 2009).²

² In contrast, in cases denying the public access to dockets, the party requesting secrecy was able to demonstrate a compelling reason for sealing the docket. These limited instances include cases involving safety concerns of co-defendants (*see, e.g., United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1021 (11th Cir. 2005)); protection of ongoing investigations (*see, e.g., United States v. Ketner*, 2008 U.S. Dist. LEXIS 108438 (W.D. Tex. Oct. 14, 2008)); grand jury investigations, which have a presumption of secrecy (*see, e.g., In re Sealed Case*, 199 F.3d 522 (D.C. Cir. 2000)); and dockets of proceedings for which public access is limited generally, such as portions of *qui tam* proceedings

2. The Public's Right To Access Court Dockets Is Rooted In History And Is Constitutionally Protected

Pellegrino and other cases finding a First Amendment right to access court dockets rest in part on the “experience and logic” test set out by the U.S. Supreme Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L.Ed.2d 1 (1986). See *Pellegrino*, 380 F.3d at 92. Under this test, the right of access to judicial proceedings turns on (1) “whether the place and process have historically been open to the press and general public” and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.”

As to history, the tradition of access to courts dates to before the Norman Conquest, and was transplanted to pre-Revolutionary America. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565-67, 100 S. Ct. 2814, 65 L.Ed.2d 973 (1980). This same openness has been applied historically to the books and dockets created by court administrators. *Pellegrino*, 380 F.3d at 94; *Globe Newspaper Co.*, 819 F. Supp. at 91-92; Thomas, *supra*, 94 CAL. L. REV. at 1542. Throughout American history, state court clerks have maintained dockets that were open to the public either through legislative mandate or common law. See *Pellegrino*, 380 F.3d at 94 (citing statutes and cases).

under the False Claims Act and closed juvenile cases. See *ACLU v. Holder*, 673 F.3d 245 (4th Cir. 2011); Thomas, *supra*, 94 Cal. L. Rev. at 1572.

In Washington, the first session laws from the first territorial legislative assembly in 1854 required clerks to compile a list of judgments, including the names of the parties and the date, amount and nature of the judgment. Laws of Wash. Terr. § 235 (1855). The information was to be put into an execution docket, and “[e]very clerk shall keep in his office a well bound book, to be called the execution docket, which shall be a public record, and open during usual business hours, to all persons desirous of inspecting it.” *Id.* § 234.³

The second prong of the “experience and logic” test considers whether public access “plays a particularly significant positive role in the functioning of the particular process” in question. *Press-Enterprise*, 478 U.S. at 11. Because docket sheets are a “map of the proceedings,” access enhances both the fairness and appearance of fairness that is essential to the justice system. *Pellegrino*, 380 F.3d at 95-96. By reviewing dockets, the public can assess conflicts of interest or biases, and understand the actions taken in a particular case. *Id.* at 95. In addition, dockets provide notice of scheduled hearings and trials, thereby allowing the public to

³ These requirements remain in state law to this day, largely unchanged. See RCW 4.64.030, 4.64.060, 4.64.080. At the federal level, Congress in 1848 passed a law requiring that all books containing the docket entries of judgments of the circuit and district be “open to inspection,” and later provided public access to indices recording the courts’ judgments. See Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 FED. CTS. L. REV. 177, 193 (2009). These indices were not “intended merely for the convenience of the clerk and to facilitate his work” but also existed for “the public and assistance to those interested in the judgment[.]” *Bell v. Com. Title Ins. & Trust Co.*, 189 U.S. 131, 134, 23 S. Ct. 569, 47 L.Ed. 741 (1903).

observe what goes on in the courtroom and to monitor cases as they work their way through the court system:

The collection of judicial records even in the less busy courthouse is substantial. Throughout the courts a sprawling amalgam of papers reflects action in connection with judicial proceedings. It is not misleading to think of courthouse papers as comprising a vast library of volumes for which docket sheets are the tables of contents. Without the card catalogue provided by alphabetical indices, a reader is left without a meaningful mechanism by which to find the documents necessary to learn what actually transpired in the courts. The indices thus are a key to effective public access to court activity.

Globe Newspaper, 819 F. Supp. at 94; *see also* Thomas, *supra*, 94 CAL. L. REV. at 1563-64.

Access to docket sheets also supports the public's ability to discuss and participate in governance. *See id.* at 1556-67; *Pellegrino*, 380 F.3d at 93. As Justice Frankfurter observed, "one of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 920, 70 S. Ct. 252, 94 L. Ed. 562 (1950) (Frankfurter, J., *dissenting from denial of pet. for cert.*). This Court likewise recognizes that "[o]penness 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.” *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993). “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.” *Dreiling v. Jain*, 151 Wn.2d 900, 903, 93 P.3d 861 (2004). Without access to dockets, there is simply no way for the public to assess, or maintain confidence in, its judicial system.

3. Docket Sealing Should Be Rare And Only Permitted In Extremely Narrow Circumstances

The constitutional right of access to court proceedings and records recognized by this Court (*see, e.g., id.; Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 542, 114 P.3d 1182 (2005)) would be an empty one without access to court dockets enabling the public to know when court hearings will take place; what documents have been filed; and what decisions the court reached. Without a docket, no one but court personnel and the litigants themselves has access to basic case information.

This Court should hold, in accordance with the authority noted above, that the public has a presumptive right of access to court dockets. That right may be overcome only by “identified compelling privacy or safety concerns that outweigh the public interest in public access[.]”

GR 15(c)(2); *Ishikawa*, 97 Wn.2d at 37-39. As with the sealing of any court record, restrictions on access to dockets must be the “least restrictive means available and effective in protecting the interests threatened.” *Id.* at 38. Access to a docket may not be restricted except in rare cases, and only where the party seeking the restriction proves that redaction or sealing of individual records would not be enough to protect the safety or privacy interest at issue. *See, e.g., In re State-Record Co.*, 917 F.2d at 129 (“There are probably many motions and responses thereto that contain no information prejudicial to a defendant, and we can not understand how the docket entry sheet could be prejudicial.”).

This Court should instruct trial courts that a party seeking to seal docket information faces a particularly steep burden under both *Ishikawa* and GR 15. The public has a *per se* compelling interest in maintaining access to court docketing information. As set forth above, in Washington dockets have been public documents since long before statehood, Wash. Terr. § 235 (1855), and they continue to serve as the only way the public at large can understand and review the course of a judicial proceeding. Any attempt to obscure docket information, or the very existence of a case, necessarily undermines public oversight of courts and public confidence in the judicial system. Rarely will the interest in docket

secrecy be compelling enough to overcome these substantial public interests.

B. The Trial Court Order Must Be Reversed

The trial court's denial of Siegel's motion to unseal must be overturned. First, the trial court's failure to make the findings required by *Ishikawa* and GR 15 warrants reversal. *See Seattle Times Co. v. Serko*, 170 Wn.2d 581, 598, 243 P.3d 919, 929 (2010).

Moreover, this Court should hold that there are no compelling circumstances justifying the sealing of Richardson's criminal case docket. Secrecy is not needed to protect any ongoing investigation or any co-defendant. Richardson simply wishes to make his long-concluded criminal conviction disappear from public scrutiny, presumably to protect his reputation. This is not a compelling reason that outweighs the public's right of access. *See State v. Loukaitis*, 82 Wn. App. 460, 468, 918 P.2d 535 (1996) (avoiding embarrassment does not outweigh the public's right to access judicial proceedings); *Foltz v. State Farm Mut. Automobile Ins.*, 331 F.3d 1122, 1137 (9th Cir. 2003).

Finally, even if a compelling reason existed at one time to justify the trial court's original sealing orders (and nothing in the public record suggests this was ever the case), it would be overcome by the public's substantial interest in this matter. Richardson was a local elected official

who was running for state senate. As such, the public has an obvious and critical interest in evaluating his fitness for office. Independently, the public has a heightened public interest in the fact that Richardson was a school teacher with a prior sex offense involving young children. *See, e.g., Brouillet v. Cowles Publ'g. Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990) (“[s]exual abuse of students is a proper matter of public concern because the public must decide what can be done about it”). Accordingly, the trial court’s denial of Siegel motion to unseal cannot stand.

C. An Order Denying A Motion To Unseal In A Concluded Case Is Appealable as a Matter of Right

Finally, WCOG urges the Court to hold that under the circumstances present here, Siegel was entitled to appeal the trial court’s denial of his motion to unseal as a matter of right under RAP 2.2(a). Requiring an intervenor in a completed case to seek discretionary review of denial of a motion to unseal (and potentially to forego any appeal at all, if discretionary review is denied) is contrary to the plain language of the rule and the presumption of access recognized by this Court.

Richardson’s criminal case was dismissed in 1994, and the orders vacating the conviction and sealing the file and docket were entered in 2002. Br. of Appellant at 9. In 2010, Siegel was permitted to intervene for the limited purpose of seeking to unseal the case record. *Id.* at 6-7. No

additional proceedings were pending or expected in Richardson's criminal matter at the time the trial court denied Siegel's motion. Nevertheless, Siegel's initial attempt to appeal the denial of the motion to unseal as a matter of right under RAP 2.2 was rejected by the Deputy Clerk of this Court, who directed Siegel instead to seek discretionary review under RAP 2.3. Br. of Appellant at 8. While this Court accepted discretionary review, this case squarely raises the question of whether a third party may appeal denial of a motion to unseal as a matter of right in a case that is otherwise fully concluded at the trial court level. *Id.* at 3, 10.

This Court should find that Siegel had a right to appeal under any of three provisions of RAP 2.2(a). First, RAP 2.2(a)(13) permits an appeal as a matter of right from "[a]ny final order made after judgment that affects a substantial right." A post-judgment order is appealable under this provision if it "affects a substantial right other than rights adjudicated by the earlier final judgment." *Seattle-First Nat. Bank v. Marshall*, 16 Wn. App. 503, 508, 557 P.2d 352 (1976). The scope of such review is limited to the issues raised in the post-judgment order. *Keene v. Edie*, 80 Wn. App. 312, 314, 907 P.2d 1217 (1995), *rev'd on other grounds*, 131 Wn.2d 822, 935 P.2d 588 (1997). Applied here, the trial court's order denying Siegel's motion to unseal was final; it occurred after entry of judgment in Richardson's underlying criminal matter; and the right of public access

Siegel seeks to vindicate is not only substantial, but of constitutional magnitude. *See* Const. Article I, § 10 (“Justice in all cases shall be administered openly”); *Ishikawa*, 97 Wn.2d at 37-39. Siegel’s appeal also raises issues that could not have been addressed earlier in the litigation – namely, whether compelling circumstances existed *in 2010* to justify continued sealing of the case file and docket. *See* GR 15(e).

Second, the trial court order is appealable under RAP 2.2(a)(1), which permits an appeal as a matter of right from the “final judgment entered in any action *or proceeding*, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.” RAP 2.2(a)(1) (emphasis added). Siegel’s intervention in the long-completed criminal matter, for the sole purpose of challenging the earlier sealing orders, was a “proceeding” separate and apart from Richardson’s earlier, long-concluded criminal action. Moreover, the trial court’s order denying Siegel’s motion to unseal was “final,” as it disposed of the proceeding and left nothing further for the trial court to do. *See In re Petersen*, 138 Wn.2d 70, 88, 980 P.2d 1204 (1999) (“final judgment” under RAP 2.2(a)(1) is one “that ends the litigation, leaving nothing for the court to do but execute the judgment.”).

Third, an appeal as of right is permitted under RAP 2.2(a)(3), which applies to “[a]ny written decision affecting a substantial right in a

civil case that in effect determines the action and prevents a final judgment or discontinues the action[.]” The rule is pragmatic, looking to whether the trial court decision “had the practical effect of discontinuing the action.” *White Coral Corp. v. Geysler Giant Clam Farms, LLC*, 145 Wn. App. 862, 866 n.3, 189 P.3d 205 (2008). The order denying Siegel’s motion to unseal was a written decision that effectively determined and discontinued the unsealing proceedings in the trial court. Although the files Richardson sought to unseal relate to a criminal matter, this Court should recognize that post-trial, third-party intervention for purposes of unsealing court records is a proceeding that is civil in nature, and thus governed by RAP 2.2(a)(3). Doing so would be consistent with this Court’s decision in *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011), which held that third parties have a limited right to intervene in a criminal matter after trial to review a prior sealing decision, notwithstanding the absence of any provision in the Criminal Rules allowing for such intervention. *Id.* at 801.

Indeed, implicit in this Court’s recognition of the public’s right to intervene in criminal matters in order to challenge previous sealing orders is a right to appeal trial court decisions regarding such intervention. The contrary rule – requiring unsuccessful intervenors to seek discretionary review when a motion to unseal is denied – would be an unnecessary and

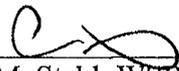
inappropriate barrier to public access to court files. In any event, denial of a third-party motion to unseal in a case that has previously been concluded is appealable as a matter of right under RAP 2.2(a)(1), (3) and (13).

IV. CONCLUSION

For the foregoing reasons, the Court should hold that the decision below is appealable as a matter of right; should reverse the trial court order denying Siegel's motion to unseal; and should hold that a party seeking to seal or to continue sealing docket information faces a particularly steep burden under GR 15 and *Ishikawa*.

Respectfully submitted this 4th day of September, 2012.

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PROOF OF SERVICE

The undersigned hereby certifies and declares under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

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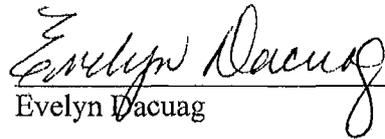
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Evelyn Dacuag

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Subject: RE: State v Richardson v Siegel, Case #85-665-6; Brief of Amicus Curiae WA Coalition for Open Government

Rec. 9-4-12

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From: Dacuag, Evelyn [<mailto:EvelynDacuag@dwt.com>]
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Subject: State v Richardson v Siegel, Case #85-665-6; Brief of Amicus Curiae WA Coalition for Open Government

Sent on Behalf of : Sarah H. Duran, WSBA #38954
Eric M. Stahl, WSBA #27619
Davis Wright Tremaine LLP
206-622-3150
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Re: State v. Richardson; No. 85-665-6

Attached for filing is the Brief of Amicus Curiae Washington Coalition for Open Government in Support of Intervenor/Appellant. Thank you.

Evelyn Dacuag | Davis Wright Tremaine LLP
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