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**SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

LOUIS CHAO CHEN,

Appellant.

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SUPREME COURT  
STATE OF WASHINGTON  
2013 APR 23 P 12:26  
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**BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES  
UNION OF WASHINGTON**

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 ORIGINAL

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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***

How statutes and court rules that provide for bright line limitations of access to court records should be interpreted in conjunction with Article 1, Section 10 of the Washington State Constitution.

### **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:

The trial court ordered that Chen’s competency be evaluated at

Western State Hospital. Prior to the evaluation, Chen presented a report from Chen's psychiatrist that Chen was competent. He argued that an evaluation was no longer needed, but the court ordered the evaluation to proceed. Chen further moved for the competency evaluation report to be sealed, pursuant to RCW 10.77.210, which he argued provides for confidentiality of such reports.

The court agreed with Chen that RCW 10.77.210 mandates sealing of the competency evaluation report. Nonetheless, the court denied the sealing motion, finding that such a bright line rule conflicts with this Court's case law on sealing; in essence, the court held that RCW 10.77.210 violates Article 1, Section 10 to the extent it mandates sealing of a competency evaluation report that is submitted to a court.

This case asks whether Article 1, Section 10 does, in fact, prohibit all bright line rules that would limit access to particular types of court records.

### **ARGUMENT**

The parties' dispute revolves around the significance to be assigned the confidentiality provided for by RCW 10.77.210. Although Chen argued before the trial court that there were compelling individualized privacy interests justifying sealing, on appeal he relies primarily on the statute as the basis for sealing. In contrast, the State

argues that any interpretation of RCW 10.77.210 that provides for automatic sealing of competency evaluations “would plainly violate article I, section 10.” Brief of Respondent at 11. *Amicus* respectfully suggests that State’s view is based on a simplistic interpretation of both the constitution and this Court’s case law. As described below, a better view is that the right to open courts guaranteed by Article 1, Section 10 may be limited when necessary to protect other significant interests, especially other constitutional rights, including the privacy guarantees of Article 1, Section 7. 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). Furthermore, the Legislature may provide assistance to the judiciary in the implementation of the balance of those constitutional interests.

**A. The Traditional Interpretation of Article 1, Section 10 Recognized Bright Line Rules to Protect Privacy and Other Significant Interests**

For more than a century after adoption of our state constitution, it was an entirely uncontroversial proposition that statutes could constitutionally limit access to judicial proceedings and records in order to protect other significant interests. For example, one of the earlier examinations of Article 1, Section 10 involved a statute providing for closure of juvenile proceedings; this Court unanimously upheld the

constitutionality of the statute. *See In re Lewis*, 51 Wn.2d 193, 316 P.2d 907 (1957).

The current line of cases exploring the constitutional mandate of judicial transparency began with *Cohen v. Everett City Council*, 85 Wn.2d 385, 535 P.2d 801 (1975). *Cohen* involved a trial court's decision to seal records used in determining the validity of a license revocation. On appeal, the unanimous Court held that Article 1, Section 10 "entitles the public ... to openly administered justice." *Id.* at 388. This remains the touchstone of Article 1, Section 10 jurisprudence: there is a presumption of open access. But *Cohen* found no conflict between that proposition and long-standing rules limiting access in some situations; it stated that it was "obvious" that adoption matters and juvenile hearings are not public, and cited *Lewis* for the fact that such rules do not violate Article 1, Section 10. *Id.* In fact, it was only necessary to review the sealing decision because it had been made "absent any of the statutory exceptions." *Id.*

This view continued in the two cases establishing the now-familiar five-step framework to close proceedings or limit access to records. *See Federated Publications v. Kurtz*, 94 Wn.2d 51, 615 P.2d 440 (1980) (applying five-step framework and upholding closure of a suppression hearing in order to protect the fair trial rights of the defendant); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982) (expanding

*Kurtz* framework to apply to interests other than fair trial rights). As with *Cohen*, these cases involved closures with no statutory basis, and this Court continued to recognize the validity of statutory limitations on access. *Kurtz* cited both *Lewis* and *Cohen* for appropriate limitations on access, 94 Wn.2d at 60, and noted that a contrary interpretation of Article 1, Section 10 could “wreak havoc with established judicial practices,” *id.* at 60 n.3. *Ishikawa* similarly cited *Lewis* for the constitutionality of statutorily-closed juvenile proceedings. 97 Wn.2d at 36.

In other words, the much-cited *Ishikawa* guidelines were intended for use in situations where closure occurred *without statutory guidance*. It was not until more than a decade later that they were applied to determine the validity of a statutory closure. *See Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993) (striking down statute that effectively closed to the public all proceedings involving child victims of sexual assault). *Amicus* respectfully suggests that, although the correct result was reached, the Court’s analysis should not have been based on the *Ishikawa* guidelines, which were not designed to address statutory closures. Regrettably, this questionable analysis led to an opinion that has been misinterpreted ever since it was decided.

**B. *Allied Daily Newspapers* Has Been Misinterpreted to Prohibit All Bright Line Rules**

*Allied Daily Newspapers* involved an unusual scenario in the set of cases interpreting Article 1, Section 10. Rather than challenging a particular instance of closure or sealing, it was instead a facial challenge to newly-enacted legislation. That legislation did not even provide directly for closure of a court proceeding, but instead required courts to prevent disclosure of the identities of child victims of sexual assaults; as a practical matter, that would necessarily involve closure of proceedings if a judge feared that the identities might be disclosed during those proceedings. *See Allied Daily Newspapers*, 121 Wn.2d at 211-12. Such closure, without considering competing public interests, was held to violate Article 1, Section 10.

*Allied Daily Newspapers* is best understood by considering its context. The legislation at issue was Substitute House Bill 2348, Laws of Washington (1992), ch. 188, § 9. That bill was not even intended to regulate court practices as a general matter. Instead it was enacted specifically to address—and stop—the speech of a single newspaper. That newspaper covered all felony trials occurring in its county; the coverage included publication of the names of all witnesses and details of the crimes. Unlike most other newspapers, it made no exception for cases of

sexual assaults with child victims; as with all other felonies, it published the victims' names and details of the crimes. *See Allied Daily Newspapers*, 121 Wn.2d at 207. The Legislature recognized that “attempts to *directly* restrict the media from disseminating truthful information lawfully obtained are generally invalidated as violations of the First Amendment.” Final Bill Report on SHB 2348 (1992) at 1 (emphasis in original). The Legislature therefore provided for various restrictions to be placed on the courts; those restrictions were intended to have the same effect of stopping the newspaper's reporting on trials of sexual assaults against children. The Legislature apparently believed that its circuitous method of regulating the courts would, in effect, allow an end run of the First Amendment. The Governor vetoed several of the most egregiously unconstitutional sections of the bill, but left section 9 intact. *See id.* Section 9 was still part of the scheme to prevent the newspaper's publication of trial details, and a challenge to that section was the issue in *Allied Daily Newspapers*.

This context of legislative animus to particular speech counsels a narrow reading of *Allied Daily Newspapers*. It should be viewed as limited to its unusual facts, rather than establishing a broad rule requiring a case-by-case application of the *Ishikawa* guidelines in all instances where public access to court proceedings or records is implicated. The limited application is apparent because *Allied Daily Newspapers* did not overrule

or signal disagreement with any of the preceding line of cases interpreting Article 1, Section 10. As discussed in Section A above, *each* of those cases had spoken approvingly of statutes that closed particular types of proceedings to the public. There is no reason to believe that this Court in *Allied Daily Newspapers* intended to silently reverse its holding, which had been consistently repeated over decades, that some proceedings may constitutionally be closed as a bright line rule. It was only the particular statute at issue in *Allied Daily Newspapers*—a statute motivated by legislative animus to speech—that fell short of constitutional standards.

In fact, while the Legislature has chosen in the meantime to open some juvenile proceedings to the public, other proceedings remain closed to the public to this day under some or all circumstances, without requiring individualized *Ishikawa* findings. *See, e.g.*, RCW 26.33.060 (adoption hearings); RCW 13.32A.200 (Family Reconciliation Act hearings); RCW 10.27.080 (grand jury sessions); *but see In re Detention of D.F.F.*, 172 Wn.2d 37, 41, 256 P.3d 357 (2011) (summarily holding closed involuntary commitment proceedings unconstitutional without discussing prior case law).

Bright line rules are, in fact, common when they concern handling of court records, rather than proceedings. This is recognized by GR 31(d)(1), which provides exceptions to access for instances where

bright line prohibitions exist in statute or court rules. Some examples of these bright line rules include:

- RCW 4.24.130(5) (no public access to name change petitions by domestic violence victims)
- RCW 10.27.090 (secrecy of grand jury records)
- RCW 13.50.100 (confidentiality of non-offense juvenile records)
- RCW 26.12.180 (confidentiality of guardian ad litem records)
- RCW 26.26.610(2) (records of parentage proceedings are closed except for final orders)
- RCW 26.33.330 (sealed records of adoption proceedings)
- RCW 71.05.620 (closed records of mental health proceedings)
- RCW 71.34.335 (confidential records of mental health proceedings for minors)
- GR 22(g) (sealed financial, health, and confidential documents in family law and guardianship cases)
- GR 31(j)-(k) (privacy of juror information)
- RAP 3.4 (routinely used to replace names with initials in appellate cases dealing with juveniles)

- District and Municipal Court Records Retention Schedule, Version 6.0 at 6-22 (March 2009) (routine destruction of many district and municipal court records after a few years)

Such rules reflect careful consideration of competing important interests by the Legislature or the judiciary, and a determination that some restriction on transparency is necessary to accommodate other interests. Again, it strains credulity to believe that *Allied Daily Newspapers* was intended to hold that all of these bright line rules, many of long standing, violate Article 1, Section 10—without even mentioning the possibility. It is better understood to hold only that bright line rules enacted by the Legislature do not *inherently* meet the requirements of Article 1, Section 10. It establishes that statutes enacted to restrict speech fail the constitutional test, but goes no further. The Court left to another day—today—a more complete examination of exactly which factors should be considered in determining constitutionality or lack thereof of statutes and court rules that limit access to court proceedings or records.<sup>1</sup>

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<sup>1</sup> *Amicus* respectfully suggests that this Court's opinion in *D.F.F.* is also unhelpful in this regard. *D.F.F.* summarily held unconstitutional a bright line closure rule for involuntary commitment hearings, with no rationale or discussion of the previous case law beyond a bare-bones citation to *Ishikawa*.

**C. General Rules Enacted by the Legislature or This Court Are Constitutionally Acceptable When Supported by Compelling Interests and Subject to Judicial Review**

Although the *Ishikawa* guidelines are not directly applicable to evaluation of statutory (or rule-based) limits on access, the *Ishikawa* opinion remains the best source of guidance on the requirements of Article 1, Section 10. It states the basic principles: “The Washington Constitution clearly establishes a right of access to court proceedings. . . . However, it is equally clear that the public's right of access is not absolute, and may be limited to protect other interests.” *Ishikawa*, 97 Wn.2d at 36. In other words, the “competing interests” of public access and the motivation for closure or sealing must be balanced against each other. *Id.* at 38.

**1. Legislative and Rulemaking Proceedings Are Appropriate to Balance Interests Raised by Common Facts**

The five-step *Ishikawa* guidelines are designed to ensure that the evaluation of competing interests is thorough and thoughtful, and that the decision maker is fully informed, both about all the of interests at issue and the possible consequences of its decision. These guidelines are well suited for the type of situation for which they were designed: particular fact patterns in individual cases that create “exceptional circumstances” to justify limitations on public access. *Cohen*, 85 Wn.2d at 388.

The *Ishikawa* guidelines should not be viewed, however, as the exclusive means to ensure a proper balance is made between competing interests. When facts that create those interests are not particular to individual cases, but instead appear in an entire category of cases or records, alternative methods of balancing the competing interests may produce results that are at least as good as would be determined via case-by-case consideration. The most obvious of such alternatives are legislative and rulemaking proceedings.

In fact, those proceedings may well produce better-informed decisions. The *Ishikawa* guidelines are designed to ensure a court is informed about competing interests, but there are inherent limitations based on the nature of the proceeding. For example, few stakeholders other than the parties in a case are likely to even know about the issue, let alone be prepared to quickly provide briefing to a court. In contrast, legislative and rulemaking processes are designed to ensure input by a wide variety of stakeholders, typically with multiple opportunities for public comment (both oral and written) over an extended period of time. The resulting rule or statute also benefits from the collective wisdom of the enacting body, rather than being dependent on the wisdom of a single judge (subject only to appellate review in rare instances).

Judicial economy also counsels for the application of general rules in some instances rather than requiring case-by-case determinations. In scenarios with common fact patterns, there is no need for individualized consideration by a judge each time—and it would be a tremendous waste of resources, especially when the net result would be the same. For example, the family law courts would be deluged by sealing motions if GR 22(g) were eliminated—and virtually all of the motions would be granted, since there is no serious question that maintenance of financial and medical privacy is a compelling interest that outweighs the interest in public access to court records in the vast majority of family law cases. In the meantime, pending decisions on the sealing motions, the financial and medical privacy of every participant in a dissolution action would be at risk. In practice, consideration of such sealing motions would no doubt become *pro forma* hearings in which the court acts more as a rubber stamp than as a truly independent evaluator of competing interests. It is hard to see how such a perfunctory process, although literally compliant with the *Ishikawa* guidelines, would produce a better result than that provided by GR 22(g), which was the product of considerable debate and evaluation of multiple interests, carried out over a period of years.

A final advantage to application of a general rule is that it will lead to consistent results for common fact patterns. A requirement for case-by-

case determination assumes that the facts and interests in each case are unique. There certainly are some such instances, where the interests of justice require individualized decisions. But there are also a variety of scenarios in which the underlying facts and interests are so common in nature that society expects consistent results to be reached in each case. Application of a general rule would, of course, lead to those consistent results, but the same cannot be said for an approach that requires case-by-case determinations—different judges may well reach different conclusions about the relative weights to be assigned to the various interests, leading to different results.<sup>2</sup> This is well illustrated by the present case. Practitioners, the trial court, and this Court’s commissioner all recognized that there is a wide variance in handling of motions to seal competency evaluations. Motion for Discretionary Review at 8, E-1, and F-1; Petitioner’s Opening Brief at 8. This variance cannot be explained by difference in facts between the various cases; instead it is an inherent result of multiple judges making independent—and inconsistent—evaluations of the weight of the various interests at issue. Application of the general rule provided by RCW 10.77.210, with deviation only in exceptional cases, would eliminate this inconsistency.

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<sup>2</sup> Of course, if no statute or court rule addresses the common fact pattern, there is no alternative to case-by-case determinations, even with the shortcomings of that approach.

## 2. General Rules Must Advance Compelling Interests

As discussed above, statutes and court rules *may* meet the constitutional requirements to limit access to court proceedings or records. That does not mean, however, that *all* such statutes are constitutional; the legislature does not have the power to simply disregard Article 1, Section 10 and arbitrarily close judicial proceedings and records. For example, a statute enacted with improper motivation, such as the statute at issue in *Allied Daily Newspapers*, does not pass constitutional muster. Only rules that advance legitimate needs to restrict access will comply with the basic principles stated by *Ishikawa*.

Furthermore, “[t]he quantum of need which would justify restrictions on access differs depending on” which types of interests are at stake. *Ishikawa*, 97 Wn.2d at 37. The interest in open courts is, of course, always an important constitutional interest. Accordingly, if the competing interest motivating a limitation on access is also constitutional in nature, only a “likelihood of jeopardy” to that interest is necessary in order to limit open courts. *Kurtz*, 94 Wn.2d at 62 (balancing open court interests against fair trial rights). In contrast, “a serious and imminent threat to some other important interest must be shown” when that other interest is not constitutional in nature. *Ishikawa*, 97 Wn.2d at 37.

*Ishikawa* described the bifurcation as depending on whether or not “fair trial” rights were at stake, but that appears to be because fair trial rights were the sole constitutional rights at risk in *Ishikawa*. The holding in *Kurtz* was premised on the coequal magnitude of competing constitutional interests. It specifically talked about the “likelihood of jeopardy to his *constitutional rights*,” *Kurtz*, 94 Wn.2d at 62 (emphasis added), and sought “to strike a balance between these two interests which are protected by our state *constitution*,” *Id.* at 65. *Ishikawa* did not discuss any differences between different constitutional interests, nor did it describe any unique characteristics of fair trial rights. The best reading, therefore, is that *Ishikawa*’s bifurcation was intended to distinguish between constitutional and nonconstitutional rights, rather than differentiating between different constitutional rights; it simply used “fair trial rights” as shorthand for “constitutional rights.” A statute protecting other constitutional rights should therefore be treated the same as a statute protecting fair trial rights; only a “likelihood of jeopardy” need be present to justify restrictions on access.

One such significant constitutional right is the right of privacy. This Court has already determined that information divulged in court proceedings and present in court records implicates the privacy rights guaranteed by Article 1, Section 7. *See Allied Daily Newspapers*, 121

Wn.2d at 211. The Court found that nondisclosure could be necessary to ensure “privacy as guaranteed under Const. art. 1, § 7,” and further found that to be a compelling interest. *Id.* The continued development of Washington’s privacy jurisprudence over the last two decades strongly supports the view that privacy is a key element of Washington’s constitutional structure, and *Ishikawa’s* rule should be interpreted to explicitly recognize that. Statutes enacted to protect privacy, such as RCW 10.77.210, should only be required to meet the same “likelihood of jeopardy” standard as those enacted to protect fair trial rights.

### **3. “Bright Line” Rules Are Not Absolute**

It should be emphasized that the establishment of a “bright line” rule by the Legislature does not preclude judicial review in individual cases. Although a statute may be appropriate to establish the proper balance between interests resulting from common fact patterns, particular cases may involve variations to those fact patterns that dictate a different balance. Due to the strong constitutional interest in open courts, there must be some opportunity to override a general restriction on access when circumstances dictate.

Ideally, the statute or court rule will explicitly provide for such an opportunity. GR 22(i)(2) is an excellent example. It recognizes that extraordinary circumstances may arise such that “the public interests in

granting access or the personal interest of the person seeking access outweigh the privacy and safety interests of the parties or dependent children” whose records were automatically filed under seal pursuant to GR 22(g). “Bright line” rules such as GR 22(g) are then best viewed not as absolute rules, but simply as establishing the default resolution resulting from the balance of competing interests in common situations. These default resolutions can provide for automatic restrictions on access, without the need for a motion and hearing, but nonetheless are only defaults that can be overridden for good cause.

In other instances, the statute or court rule may not provide an explicit opportunity for judicial review of the restriction on public access. *See, e.g.,* RCW 10.77.210. This should not be viewed as a fatal defect, however. “In Washington, it is well established that statutes are presumed constitutional and that a statute’s challenger has a heavy burden to overcome that presumption.” *School Districts’ Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). The burden is particularly high to completely invalidate a statute; “a facial challenge must be rejected if there are any circumstances where the statute can constitutionally be applied.” *Wash. State Republican Party v. Pub. Disclosure Comm’n*, 141 Wn.2d 245, 282 n. 14, 4 P.3d 808 (2000). In other words, if a statute limiting access to court proceedings or records

properly balances the competing interests in most cases, the restrictions it imposes must be considered constitutional as a general matter. In atypical situations, a challenger could avail itself of the constitutionally mandated opportunity to override the statute's balance by bringing an as-applied constitutional challenge to the statute. If a challenger can demonstrate that the particular facts of the case dictate a different balance of interests, the statute would be constitutionally deficient, and its restrictions on access lifted *for that case only*. But this constitutional deficiency in one instance should not affect the statute's application to the typical situations it addresses; there is no reason to override as a general matter the balance established by the statute and put privacy or other compelling interests at risk.

### CONCLUSION

For the foregoing reasons, *amicus* respectfully requests the Court to reject an interpretation of Article 1, Section 10 that limits the ability of the Legislature and Supreme Court to balance the interests involved in public access to particular types of court records and establish "bright line" rules restricting access as appropriate.

Respectfully submitted this 12th day of April 2013.

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**Subject:** State v. Chen (No. 87350-0)

Dear Clerk,

Please accept for filing in State v. Chen, Case No. 87350-0, the attached documents:

1. MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF;
2. BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; and
3. CERTIFICATE OF SERVICE.

Thank you,

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