
SUPREME COURT OF THE STATE OF WASHINGTON

Aaron Hundtofte and Kent Alexander,

Plaintiffs,

v.

Ignacio Encarnación and N. Karla Farías,

Defendants/Petitioners,

v.

King County Superior Court Office of Judicial Administration

Intervenor/Respondent.

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STATE OF WASHINGTON
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**SUPPLEMENTAL BRIEF OF DEFENDANT-PETITIONERS
IGNACIO ENCARNACIÓN AND N. KARLA FARIÁS**

Allyson O'Malley-Jones, WSBA #31868

Eric Dunn, WSBA #36622

Leticia Camacho, WSBA #31341

NORTHWEST JUSTICE PROJECT

401 Second Ave S. Suite 407

Seattle, Washington 98104

Tel. (206) 464-1519

Respondent Ignacio Encarnación and N. Karla Farías

 ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction	1
II. Assignments of Error	2
III. Statement of the Case	2
IV. Argument	4
A. Protecting a family’s rental housing prospects can be a sufficiently compelling privacy interest to redact records .	5
1. Categorical rules requiring or preventing public access to court records are inappropriate	5
2. The Superior Court did not overvalue Encarnación’s and Farías’s interest in being able to obtain rental housing	8
3. <i>State v. Bone-Club</i> did not require the Superior Court to find “unusual circumstances” before ordering redaction	10
B. The public has little, if any, legitimate interest in knowing Encarnación and Farías were sued for unlawful detainer ..	12
1. The public has little interest in judicial indices that are not relevant to the court’s decision-making process	13
2. The public has no legitimate interest in the identities of persons against whom unsubstantiated unlawful detainer claims have been filed	15
3. No statute could, or does, supply an overriding public interest in access to the names of non-culpable unlawful detainer defendants	16
V. Conclusion	20

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Constitutional Provisions</u>	
Wash. St. Const., Art. I, Sec. 7	5, 20
Wash. St. Const., Art. I, Sec. 10	13-14
Wash. St. Const., Art. I, Sec. 22	12
<u>Statutes</u>	
Laws of 2012, Ch. 41, § 1	19
RCW 10.97.060	19
RCW 19.182.020(1)	17
RCW 19.182.040	17-19
RCW 19.182.040(1)(b)	4
RCW 19.182.040(e)	19
RCW 19.182.060(2)	16
RCW 19.182.090(1)	20
RCW 19.182.090(5)(a)	17
RCW 43.185B.007	10
RCW 59.18.257	19
15 USC 1681c	18
15 USC 1681c(a)(2)	18
<u>Court Rules</u>	
GR 15	16
GR 15(c)	10
GR 15(c)(2)(F)	10

TABLE OF AUTHORITIES

	<u>Page</u>
GR 31(e)	6
 <u>Judicial Decisions</u>	
<i>Allied Daily Newspapers v. Eikenberry</i> , 121 Wn.2d 205; 848 P.2d 1258 (1993)	4-6, 9
<i>American Safety Cas. Ins. Co. v. City of Olympia</i> , 162 Wn.2d 762; 174 P.3d 54 (2007)	16
<i>Bellevue John Does 1-11 v. Bellevue School Dist. #405</i> , 164 Wn.2d 199; 189 P.3d 139 (2008)	9, 15- 16
<i>Bennett v. Smith Bunday Berman Britton, P.S.</i> , 176 Wn.2d 303; 291 P.3d 886 (2013)	8, 12- 15
<i>Cohen v. Everett City Council</i> , 85 Wn.2d 385; 535 P.2d 801 (1975)	4
<i>Cowles Publishing Co. v. Murphy</i> , 96 Wn.2d 584; 637 P.2d 966 (1981)	5-7, 9, 13
<i>Dreiling v. Jain</i> , 151 Wn.2d 900; 93 P.3d 861 (2004)	8-9, 13
<i>Hundtofte v. Encarnacion</i> , 169 Wn. App. 498, 280 P.3d 513 (2012)	1
<i>Indigo Real Estate Services v. Rousey</i> , 151 Wn. App. 941; 215 P.3d 977 (2009)	8, 14
<i>In re Dependency of J.B.S.</i> , 122 Wn.2d 131; 856 P.2d 694 (1993)	10
<i>In Re Detention of D.F.F.</i> , 172 Wn.2d 37; 256 P.3d 357 (2011)	6, 13
<i>Nixon v. Warner Comm., Inc.</i> , 435 U.S. 589; 98 S.Ct. 1306; 55 L.Ed.2d 570 (1978)	5

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Rufer v. Abbott Laboratories</i> , 154 Wn.2d 530; 114 P.3d 1182 (2005)	9, 12, 15
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30; 640 P.2d 716 (1982)	1, 2, 6
<i>State v. Bone-Club</i> , 128 Wn.2d 254; 906 P.2d 325 (1995)	6, 11- 12
<i>State v. C.R.H.</i> , 107 Wn. App. 591; 27 P.3d 660 (2001)	20
<i>State v. McEnroe</i> , 174 Wn.2d 795; 279 P.3d 861 (2012)	14
<i>State v. McEnry</i> , 124 Wn. App. 918; 103 P.3d 857 (2004)	8
<i>State v. Noel</i> , 101 Wn. App. 623; 5 P.3d 747 (2000)	20
<i>State v. Rohrich</i> , 149 Wn.2d 647; 71 P.3d 638 (2003)	8
<i>State v. Sublett</i> , 176 Wn.2d 58; 292 P.3d 715 (2012)	11, 13-14
<i>Tacoma News, Inc. v. Cayce</i> , 172 Wn.2d 58; 256 P.3d 1179 (2011)	13-14
<i>Yakima v. Yakima Herald-Republic</i> , 170 Wn.2d 775; 246 P.3d 768 (2011)	14, 20
<i>Yousoufian v. Office of Ron Sims</i> , 168 Wn.2d 444; 229 P.3d 735 (2010)	8
<u>Other Authorities</u>	
114 Cong. Rec. 24903 (Aug. 2, 1968)	18

I. Introduction

After carefully applying the five-factor *Seattle Times v. Ishikawa* analysis,¹ the Superior Court properly redacted the names of two tenants who had been unjustly sued for unlawful detainer. The order kept the mere case filing record from denying those tenants admission to rental housing. But the Court of Appeals, fearful that affirming redaction would mean “the same relief would be properly granted whenever a defendant in an unlawful detainer action is not evicted,” reversed.²

The ruling did not only deprive the instant tenants of the redaction they so desperately needed to obtain housing for their family. In avoiding the illusory extreme it feared, the Court of Appeals lurched to an actual, opposite extreme—precluding redaction of virtually any unlawful detainer defendant’s name, no matter how well-justified, and on a profoundly disquieting premise: that, *as a matter of law*, protecting a family’s ability to obtain housing is not a compelling enough interest to justify even the slightest redaction of a court record.

This Court has consistently held that conflicts between individual privacy interests and the public’s interest in access to judicial records be resolved through particularized, case-specific applications of the *Ishikawa*

¹ See *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39; 640 P.2d 716 (1982).

² Court of Appeals, Pub. Op. at 25, reported as *Hundtofte v. Encarnacion*, 169 Wn. App. 498, 280 P.3d 513 (2012).

factors. This jurisprudence does not allow for sweeping conclusions that housing is not important enough, or that all dismissed eviction suits are the same. The Superior Court applied *Ishikawa* correctly, focusing only on the individual tenants before it and basing its decision on a host of case-specific factors. This Court should reinstate the Superior Court's careful determination: that Ignacio Encarnación's and Karla Farías's privacy interest in preserving their rental housing opportunities was compelling, and justified redacting their names from the on-line judicial indices.

II. Assignments of Error

The Court of Appeals erred when it determined:

1. That, as a matter of law, protecting a family's ability to obtain rental housing is not important enough to justify redacting a court record;
2. That Encarnación's and Farías's circumstances cannot reasonably be distinguished from those of any other unlawful detainer defendant who is not ultimately evicted;
3. That the public's interest in being able to find out that Encarnación and Farías were sued for unlawful detainer outweighs their interest in being able to obtain housing, even though they were not culpable; and
4. That substantial evidence did not support the Superior Court's finding that Encarnación and Farías lacked culpability (for unlawful detainer).

III. Statement of the Case

In 2009, Aaron Hudtofte and Kent Alexander purchased the Burién apartment building where Ignacio Encarnación and Karla Farías were then

residing with their three minor children.³ At the time of sale, Encarnación and Farías had been living in the building for more than two years, and had recently renewed their lease term through July 2010.⁴ Despite that lease, Hundtofte and Alexander attempted to terminate the tenancy in September 2009 in order to make renovations; they brought this unlawful detainer action when Encarnación and Farías refused to leave.⁵

The parties settled the action when Encarnación and Farías agreed to move out early in exchange for (the equivalent of) three months' rent and favorable reference.⁶ But afterwards, Encarnación and Farías could not obtain a suitable new rental home in King County because of the court record showing they had been sued for unlawful detainer.⁷

Hoping to overcome this barrier, Encarnación and Farías filed a motion to redact their names from the on-line judicial indices that tenant-screening firms use to detect and report eviction lawsuits.⁸ The Superior Court ordered the redaction, directing the clerk to remove Encarnación's and Farías's full names from the on-line indices and replace the names with their initials, and to keep the redaction in effect until 2016 (when the

³ CP at 39, 52, 93.

⁴ CP at 38-39, 46-50, 93-94.

⁵ CP at 40-42, 68, 70, 78, 94.

⁶ CP at 41-43, 90-94.

⁷ CP at 42-43, 94-96.

⁸ CP at 1-12, 133-140.

case will become too old for consumer reporting agencies to lawfully report).⁹ But the Court of Appeals reversed, on appeal by the King County Clerk.¹⁰ This Court granted discretionary review.

IV. Argument

Court records are ordinarily open to the public.¹¹ But a court may withhold a record from public view if a person has a compelling interest (usually in privacy or safety) that outweighs the public interest in access.¹² In this case, the Superior Court found that protecting Encarnación's and Farías's ability to obtain housing was a compelling reason to withhold their names from potential housing providers, and a privacy interest that outweighed the public interest in access because, as Encarnación and Farías had not been culpable on the holdover allegations, the record would not legitimately assist a prospective landlord in a making rental admission decision.¹³ Those rulings should have been affirmed.

⁹ CP at 727-733; see RCW 19.182.040(1)(b) (prohibiting consumer reporting agencies from reporting civil suits and expired judgments that antedate the report by seven years).

¹⁰ CP at 734; see Pub. Op. at 2.

¹¹ See *Cohen v. Everett City Council*, 85 Wn.2d 385, 387; 535 P.2d 801 (1975).

¹² See *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 210-11; 848 P.2d 1258 (1993); see GR 15(c) ("After the hearing, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record.").

¹³ CP at 730-732.

A. Protecting a family’s ability to obtain rental housing can be a sufficiently compelling privacy interest to redact records.

This Court has repeatedly refrained from establishing categorical rules requiring or denying access to judicial hearings and records; rather, the Court has insisted on case-specific determinations, noting that “the decision as to access is one best left to the discretion of the trial court.”¹⁴

1. Categorical rules requiring or preventing public access to court records are inappropriate.

In *Allied Daily Newspapers v. Eikenberry*, this Court declared unconstitutional a statute directing courts to close hearings and records as necessary to keep the identities of child sexual assault victims from the public.¹⁵ The Court recognized, as the Legislature had, that child victims had compelling privacy interests which merited constitutional protection.¹⁶ But the statute required automatic closure in all cases—even where a “child’s psychological maturity, the nature of the crime, and the child’s and the relatives’ wishes regarding closure all warrant keeping the trial open.”¹⁷ Such cases might be uncommon. Nonetheless, only by

¹⁴ *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 588; 637 P.2d 966 (1981), citing *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 599; 98 S.Ct. 1306; 55 L.Ed.2d 570 (1978).

¹⁵ See *Allied Daily Newspapers*, 121 Wn.2d at 209.

¹⁶ See *Allied Daily Newspapers* at 211; see Wash. St. Const., Art. I, Sec. 7.

¹⁷ *Allied Daily Newspapers* at 212.

evaluating the specific grounds for closure (against public access) on a case-by-case basis could a court fulfill the *Ishikawa* guidelines.¹⁸

As *Allied Daily Newspapers* (and later cases) made clear, a blanket rule—whether legislative or judicial in origin—broadly denying public access to a court hearing or record without an individualized determination is highly suspect, if not impermissible altogether.¹⁹ But this Court also held in *Cowles Publishing Co. v. Murphy* that courts must likewise avoid indiscriminately releasing records that may harm important privacy or safety interests—and should instead use a similar case-specific inquiry to decide whether, and to what extent, public access will be allowed.²⁰

Cowles Publishing concerned public access to search warrants and probable cause affidavits.²¹ The public had both strong constitutional and common law rights of access to the records, which could “reveal how the judicial process is conducted,” allow evaluation of prosecutorial and law enforcement activities, and determine “whether the judge is acting as a

¹⁸ See *Allied Daily Newspapers* at 212; see also *Ishikawa*, 97 Wn.2d at 37-39.

¹⁹ See also *State v. Bone-Club*, 128 Wn.2d 254, 261; 906 P.325 (1995) (inherent dangers to which testifying openly could subject an undercover police officer still did not allow for the automatic closure); *In re Detention of D.F.F.*, 172 Wn.2d 37, 40; 256 P.3d 357 (2011) (requiring case-specific analysis before closing involuntary commitment hearing); but see, c.f., GR 31(e) (providing for automatic redaction of certain personal identifiers).

²⁰ See *Cowles Publishing*, 96 Wn.2d at 585.

²¹ See *Cowles Publishing* at 585.

neutral magistrate.”²² Still, unlimited public access could “unnecessarily embarrass the subject of an unfruitful search, ... allow a suspect to escape arrest or destroy evidence, [or] discourage informants from providing information out of fear for their safety[.]”²³ Such concerns would not exist in every case, and would vary in importance where they did. But the possibility that public access might pose “a substantial threat [to] effective law enforcement or individual privacy and safety” in some cases led the Court to reject a broad rule requiring “indiscriminate disclosure.”²⁴

Instead, presaging *Allied Daily Newspapers*, the Court held that public access must be decided on a case-specific basis.²⁵ Warrants would be presumed open, but could be withheld to protect persons with “specific reasons for the need for confidentiality.”²⁶ The Court directed trial judges to carefully weigh the interests in confidentiality and in public access, and to consider alternatives such as “deletion of the harmful material.”²⁷

Similarly, some litigants whose names appear in court databases have specific reasons for confidentiality—such as an unlawful detainer

²² *Cowles Publishing* at 587-89.

²³ *Cowles Publishing* at 590.

²⁴ See *Cowles Publishing* at 590.

²⁵ See *Cowles Publishing* at 590.

²⁶ *Cowles Publishing* at 590.

²⁷ *Cowles Publishing* at 590.

defendant who needs rental housing.²⁸ Indiscriminately releasing the names of such persons is thus no more appropriate than automatically withholding them.²⁹ Instead, whether to withhold a particular tenant's name must be decided on a case-by-case basis by a trial judge—who can assess each specific person's need for rental housing, how much of a barrier a record poses, whether a record contains information valuable to the public, and the utility of possible alternatives.

2. The Superior Court did not overvalue Encarnación's and Farías's interest in being able to obtain rental housing.

Consistent with its commitment to case-specific determinations, orders to redact court records are reviewed for abuse of discretion.³⁰ An abuse of discretion occurs when a trial court, “despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take.’”³¹ A reasonable person could certainly have agreed with the Superior Court that Encarnación and Farías had a compelling

²⁸ See, e.g., *State v. McEnry*, 124 Wn. App. 918, 926; 103 P.3d 857 (2004) (recognizing privacy interest in sealing criminal record to protect housing or employment prospects, but finding the interest not compelling because movant was a homeowner and had long-term employment that was not threatened by the record); *Indigo Real Estate Services v. Rousey*, 151 Wn. App. 941, 953; 215 P.3d 977 (2009) (domestic violence survivor's need for rental housing is a privacy interest, but trial court must decide whether the interest is compelling enough under the circumstances to support redaction of court indices).

²⁹ See *Cowles Publishing* at 590; see also *Allied Daily Newspapers* at 211.

³⁰ See *Bennett v. Smith Bunday Berman Britton*, PS, 176 Wn.2d 303, 307; 291 P.3d 886 (2013), citing *Dreiling v. Jain*, 151 Wn.2d at 907.

³¹ *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459; 229 P.3d 735 (2010), quoting *State v. Rohrich*, 149 Wn.2d 647, 654; 71 P.3d 638 (2003).

interest in redacting their names from the on-line court indices. They did not own (and could not have bought) a home, were living in an unsuitable property that was facing foreclosure, and had already been rejected for a rental specifically because of the case filing record.³² A reasonable person could also have viewed their ability to obtain housing as more important than public access, because their lack of culpability made the record irrelevant to their fitness for a new tenancy, and because their names were of no value to a person genuinely investigating judicial performance.³³

This Court has never limited the types of privacy interests that can justify redacting a court record, it has simply insisted that any such interest be compelling—whether in the psychological well-being of children,³⁴ the best legal interests of a publicly-traded corporation,³⁵ proprietary material from a manufacturer obtained in discovery,³⁶ or avoiding “unnecessary embarrassment” of persons investigated by police.³⁷ To foreclose an entire brand of privacy interest from serving as a basis for limiting public

³² CP at 730-732.

³³ See CP at 726-733; see also *Bellevue John Does 1-11 v. Bellevue School District*, 164 Wn.2d 199, 220; 189 P.3d 139 (2008) (“Precluding disclosure of the identities of teachers who are subjects of unsubstantiated allegations will not impede the public’s ability to overs school districts’ investigations of alleged teacher misconduct.”).

³⁴ See *Allied Daily Newspapers*, 121 Wn.2d at 211.

³⁵ See *Dreiling v. Jain*, 151 Wn.2d 900, 905; 93 P.3d 861 (2004).

³⁶ See *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 536-37; 114 P.3d 1182 (2005).

³⁷ See *Cowles Publishing*, 96 Wn.2d at 590.

access to a court record departs sharply from this tradition.³⁸ And if there is a role for such broad, categorical rules as to the relative worth of particular privacy interests, surely the place to begin is not in declaring that the preservation of a family's access to such a fundamental human need as housing cannot be compelling enough to justify redaction (of records that diminish or prevent the ability to obtain it).

That the Court of Appeals found no statute or court rule had previously established access to housing as a compelling interest is immaterial; courts do not need statutory authority to redact their own records.³⁹ Moreover, the Legislature has declared "the attainment of a decent home in a healthy, safe environment for every resident of the state" to be a state priority.⁴⁰ And GR 15(c) includes a "catch-all" provision that effectively authorizes redaction to protect compelling interests that have not been specifically recognized elsewhere.⁴¹

3. *State v. Bone-Club* did not require the Superior Court to find "unusual circumstances" before ordering redaction.

Ironically, the Court of Appeals' main rationale for reversing the Superior Court was to avoid establishing a rule automatically entitling any

³⁸ See Pub. Op. at 14-15.

³⁹ *In re Dependency of J.B.S.*, 122 Wn.2d 131, 137; 856 P.2d 694 (1993).

⁴⁰ RCW 43.185B.007.

⁴¹ See GR 15(c)(2)(F) (authorizing redaction or sealing where "[a]nother identified compelling circumstance exists that requires the sealing or redaction.").

and all unlawful detainer defendants who are not ultimately evicted to have their names redacted.⁴² Since it is not uncommon for unlawful detainer defendants to avoid eviction, the Court of Appeals found such a result irreconcilable with *State v. Bone-Club*, which observed that a trial court must “resist court closures except in most unusual circumstances.”⁴³

In fact, this case never presented a choice between making one categorical rule or another, because the Superior Court’s redaction order was predicated on numerous case-specific factors far from universal in dismissed unlawful detainer suits. But more importantly, nothing in *Bone-Club* requires a separate showing of “unusualness” when a compelling interest in closure is shown to eclipse the public interest in access.

Bone-Club involved the closure of a criminal trial during the testimony of an undercover police officer.⁴⁴ Since hardly anything could be more important to the merits and decision-making process in a criminal prosecution than live trial testimony, the public interest in access to the hearing in *Bone-Club* was at or near its maximum.⁴⁵ The public’s interest in access was further amplified by the defendant’s right to a public trial

⁴² Pub. Op. at 18, 22-23.

⁴³ *State v. Bone-Club*, 128 Wn.2d 254, 259; 906 P.2d 325 (1995).

⁴⁴ See *Bone-Club*, 128 Wn.2d at 257.

⁴⁵ See *Bone-Club* at 259; see also *State v. Sublett*, 176 Wn.2d 58, 74; 292 P.3d 715 (2012) (under “experience and logic test,” public interest in access to a court hearing is greatest where public presence will most enhance fairness and accuracy of the tribunal).

under Art. I, Sec. 22.⁴⁶ It was in this context that the *Bone-Club* court found “the public trial right . . . clearly calls for a trial court to resist a closure motion except under the most unusual of circumstances.”⁴⁷

Even so, *Bone-Club* went on to hold only that the trial court should have conducted an *Ishikawa* analysis, rather than summarily closing the hearing without one.⁴⁸ “[T]he most unusual of circumstances” thus meant a scenario in which a criminal courtroom would be closed during live trial testimony despite an *Ishikawa* examination —and even then, *Bone-Club* court did not hold, despite the formidable grounds for public access there, that closure was out of the question altogether.⁴⁹

By contrast, the public’s interest in being able to look up Encarnación’s and Farías’s names in judicial databases is at its lowest extreme. Redaction is a much milder denial of access than closure of a live hearing, and is more attainable under *Ishikawa* when no public trial right is implicated and where the record bears no relevance to the merits.⁵⁰

B. The public has little, if any, legitimate interest in knowing Encarnación and Farías were sued for unlawful detainer.

⁴⁶ See *Bone-Club* at 259.

⁴⁷ *Bone-Club*, 128 Wn.2d at 259.

⁴⁸ See *Bone-Club* at 261.

⁴⁹ See *Bone-Club* at 261.

⁵⁰ See *Bennett*, 176 Wn.2d at 311 (“when *Ishikawa* is applied to truly irrelevant documents, the test always comes out in favor of nondisclosure.”), citing *Rufer*, 154 Wn.2d at 548.

Art. I, Sec. 10 is principally concerned with judicial transparency, which “permits the public to scrutinize the proceedings[,] assures the structural fairness of the proceedings and affirms their legitimacy.”⁵¹ The public interest in access is thus greatest with respect to live hearings and records bearing on the decision-making process.⁵² By contrast, when “information does not become part of the court's decision making process, Art. I, Sec. 10 does not speak to its disclosure.”⁵³ The common law right of access to court records similarly prioritizes materials that help the public “understand the functioning of their government and to evaluate the performance of their public servants.”⁵⁴

1. The public has little interest in judicial indices that are not relevant to the court’s decision-making process.

Several recent cases have held *Ishikawa* inapplicable altogether to hearing and records unrelated or tangential to core adjudicatory functions. *Tacoma News v. Cayce* held that an *Ishikawa* analysis was not necessary before denying public access to a deposition, even though it took place in a courtroom with a judge present, because the testimony was not used at

⁵¹ *In re Detention of D.F.F.*, 172 Wn.2d at 43; see also *Bennett*, 176 Wn.2d at 311-12.

⁵² See, e.g., *State v. Sublett*, 176 Wn.2d 58, 74; see *Bennett* at 311-12.

⁵³ *Dreiling v. Jain*, 151 Wn.2d at 910; see also *Bennett* at 311.

⁵⁴ *Cowles Publishing*, 96 Wn.2d at 589; (requiring public access to most search warrants, subject to exceptions protecting privacy and law enforcement interests).

trial and never became part of the decision-making process.⁵⁵ *State v. McEnroe* held that Art. I, Sec. 10 did not reach working papers filed with a motion to seal, and thus the documents could be withdrawn (and kept secret) if the motion were denied.⁵⁶ A plurality went a step further in *Bennett v. Smith Bunday Berman Britton*, to hold that Art. I, Sec. 10 did not protect public access to documents filed in support of a motion that was never decided.⁵⁷ And *State v. Sublett* held that a “closure” (requiring an *Ishikawa* analysis) did not occur when a court considered a jury question in chambers because “not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.”⁵⁸

The Petitioners nonetheless assume that *Ishikawa* does apply to motions for redaction of judicial indices.⁵⁹ This means that a case-specific inquiry will always be required and that the burden to demonstrate a compelling interest will always remain with the moving party—and yet, “an *Ishikawa* analysis will invariably favor nondisclosure of irrelevant

⁵⁵ See *Tacoma News, Inc. v. Cayce*, 172 Wn.2d 58, 68-69; 256 P.3d 1179 (2011).

⁵⁶ See *State v. McEnroe*, 174 Wn.2d 795, 805; 279 P.3d 861 (2012).

⁵⁷ *Bennett*, 176 Wn.2d at 312.

⁵⁸ *State v. Sublett*, 176 Wn.2d at 71 (adopting U.S. Supreme Court’s “experience and logic” test to determine when a court closure, requiring an *Ishikawa* analysis, occurs).

⁵⁹ See *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 780-81; 246 P.3d 768 (2011) (“documents prepared by court personnel in connection with court cases and maintained by the court are judicial documents governed by the court rules for disclosure”); see also *Indigo Real Estate Services v. Rousey*, 151 Wn. App. at 949-50.

material.”⁶⁰ And here, there is no serious argument that the records at issue—the defendants’ name entries in on-line court databases—had anything to do with the merits or the decision-making process.⁶¹

2. The public has no legitimate interest in the identities of persons against whom unsubstantiated unlawful detainer claims have been filed.

Rightly or wrongly, the Superior Court treated the commercial uses for which consumer reporting agencies and residential landlords obtain unlawful detainer case filing records as a factor supporting public access, even though selling tenant-screening reports has nothing to do with overseeing or legitimizing judicial institutions.⁶² Encarnación’s and Farías’s privacy interest still took priority because they were not culpable of holding over, and so the record would not help a housing provider evaluate them for a tenancy.⁶³ This was correct because “the public as a rule has no legitimate interest in finding out the names of people who have been falsely accused[.]”⁶⁴

The Court of Appeals discounted the trial court’s determination that Encarnación and Farías lacked culpability because the finding was

⁶⁰ *Bennett* at 312 (lead opinion) and at 330-31 (Stephens, J, dissenting).

⁶¹ *Bennett* at 311 (“Art. I, Sec. 10 applies only to documents relevant to the merits of the motion before the court.”), discussing *Rufer*, 154 Wn.2d at 548.

⁶² See CP at 730-32.

⁶³ CP at 730-31.

⁶⁴ *Bellevue John Does*, 164 Wn.2d at 217.

made after the parties settled, when the landlords were no longer actually contesting their right to possession.⁶⁵ Yet conclusive documents showed that Encarnación and Farías had a term tenancy entitling them to occupy the disputed premises at the time of suit.⁶⁶ To disregard factual findings because they were not actually contested would create an unworkable rule in GR 15 cases—and an impediment to settlement whenever litigants anticipate a need for redaction or sealing.⁶⁷

Moreover, even if substantial evidence had not supported the lack-of-culpability finding, the holdover allegation was at most unsubstantiated. The public has no greater interest in knowing the names of people accused of “unsubstantiated” allegations than of “patently false” allegations.⁶⁸

3. No statute could, or does, supply an overriding public interest in access to the names of non-culpable defendants.

The Fair Credit Reporting Act requires information in consumer reports to be of “maximum possible accuracy,”⁶⁹ requires adverse content

⁶⁵ Pub. Op. at 19.

⁶⁶ See CP at 39, 49.

⁶⁷ See *American Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 773; 174 P.3d 54 (2007) (public policy strongly favors amicable settlement of disputes).

⁶⁸ See *Bellevue John Does* at 221 (requiring “agencies and courts to determine whether allegations are patently false rather than simply unsubstantiated is unworkable, time consuming, and, absent specific rules and guidelines, likely to lead to radically different methods and conclusions.”).

⁶⁹ See RCW 19.182.060(2) (“Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”).

be verifiable,⁷⁰ and ensures that reports are furnished only to people who are authorized by the consumer or who otherwise have “a legitimate business need for the information.”⁷¹ The FCRA may thus reflect a heightened public interest in access to records that contain accurate and verifiable information relevant to a transaction—but not in records that reveal only speculative or unverifiable information with no legitimate use.

The Court of Appeals seized on a single FCRA provision, RCW 19.182.040, and deemed it a “clear legislative declaration of public policy allowing for the reporting of lawsuits by credit reporting agencies within seven years of filing.”⁷² But viewed holistically, the FCRA does not support the reporting of unfounded or dubious lawsuits—even if they are less than seven years old. And the FCRA disfavors incomplete reports, such as those based on judicial name indices alone.

A rental housing provider has a legitimate reason to know about an unlawful detainer suit when its facts or circumstances appear reasonably helpful in predicting an applicant’s likely performance in a potential future tenancy. But an unfounded lawsuit has no such predictive value. Whether holdover allegations are accurate can be determined and verified when a

⁷⁰ See RCW 19.182.090(5)(a) (“If ... information is found to be inaccurate or cannot be verified, the consumer reporting agency shall promptly delete the information...”).

⁷¹ See RCW 19.182.020(1).

⁷² Pub. Op. at 20-21.

court has entered a finding or judgment on such a claim. Where no such ruling has been made, the accuracy of that allegation (and its predictive value) is murky at best. But an allegation has practically no predictive value when a court has found the defendant actually lacks culpability. Nothing in the FCRA supports the reporting of such unreliable material—let alone in superficial reports drawn from court name indices alone.

As for RCW 19.182.040, its function is to protect consumers from harms associated with outdated information by imposing time-limits for the reporting of adverse credit information, including civil lawsuits. Its text is modeled on a nearly identical provision of the federal FCRA, 15 USC 1681c(a)(2), the framers of which made this purpose clear:

“The bill further provides that there be in effect procedures ... for evaluating and for keeping the information in an individual’s credit file up to date. This requirement is related to the one I have just discussed: the requirement that the information be accurate. However, there is a further element here: that irrelevant and outdated information be discarded from the file.”⁷³

Nothing in the legislative record of either RCW 19.182.040 or 15 USC 1681c suggests those provisions were intended to be read negatively, or to promote the reporting of any and all non-outdated lawsuits, irrespective of the merits, outcomes, or other indicia of predictive value.

⁷³ 114 Cong. Rec. 24903 (Aug. 2, 1968).

Applying the same logic to other subsections of RCW 19.182.040 further reveals negative inferences as untenable. For instance, RCW 19.182.040(e) prohibits reporting arrests past seven years. Yet the Legislature could not have intended for consumer reports to reflect *all* arrests within seven years, because the Criminal Records Privacy Act requires the State Patrol to delete non-conviction records after just two years.⁷⁴ The statutes are easily reconciled, however, if one treats RCW 19.182.040(e) as a mere time limit—i.e., one that reflects a legislative determination that arrest records become *obsolete* after seven years—while allowing other reasons (such as the lack of a conviction) to support the omission of some arrest records even when they are not obsolete.

Beyond the FCRA, the Legislature has hardly proclaimed a policy that every last (non-obsolete) unlawful detainer suit be reported. In 2012, for instance, the Legislature lamented that “tenant screening reports . . . may contain misleading, incomplete, or inaccurate information, such as information relating to eviction or other court records,” and that applicants often cannot “dispute errors until after they apply for housing and are turned down, at which point lodging disputes are seldom worthwhile.”⁷⁵ This was precisely the troublesome dynamic from which the Superior

⁷⁴ See RCW 10.97.060.

⁷⁵ See Laws of 2012, Ch. 41, Sec. 1; see also RCW 59.18.257.

Court sought to protect Encarnación and Farías—the reflexive denial of housing by landlords indifferent to their lack of culpability, based on incomplete screening reports drawn from mere electronic name indices.⁷⁶

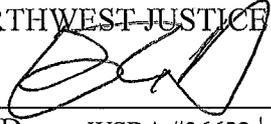
Protecting privacy is ultimately a constitutional prerogative, and the judicial branch has inherent control over its own records; accordingly, two divisions of the Court of Appeals have previously held that a court may restrict public access to a record privacy grounds despite a contrary statute.⁷⁷ But even that did not happen here. No legislative enactment establishes a public interest in the names of tenants inappropriately sued for eviction, or supports using such information in rental admissions.

V. Conclusion

For all of the foregoing reasons, the Court should reverse the Court of Appeals and reinstate the Superior Court’s order for redaction.

Respectfully Submitted this 5th day of April 2013,

NORTHWEST JUSTICE PROJECT


Eric Dunn, WSBA #36622 | Leticia Camacho, WSBA #31341
Allyson O'Malley-Jones, WSBA #31868
Attorneys for Encarnación and Farías

⁷⁶ CP at 726-733; see also RCW 19.182.090(1) (establishing procedure for disputing “the completeness or accuracy” of information on file with a consumer reporting agency).

⁷⁷ See Wash. St. Const., Art. I, Sec. 7; see *State v. C.R.H.*, 107 Wn. App. 591, 593; 27 P.3d 660 (2001); see *State v. Noel*, 101 Wn. App. 623, 628; 5 P.3d 747 (2000); see also *Yakima* at 795 (“without question” that judicial branch has inherent authority over public access to court documents).