APPELLATE COURT

OF THE

STATE OF CONNECTICUT

AC 24827

WILLIAM W. BACKUS HOSPITAL

v.

SAFAA HAKIM, M.D.

APPLICATION BY *AMICUS CURIAE*
THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC.
TO FILE A BRIEF
IN FAVOR OF THE DEFENDANT- APPELLANT

APPLICATION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Application the Association of American Physicians & Surgeons, Inc. ("AAPS"), on behalf of itself and its members in the State of Connecticut, and the medical profession, move for leave to file an *amicus curiae* brief pursuant to Conn. App. Proc. Section 67-7 for the purpose of overturning the sealing order of the court below and the closure of its courtroom to the public.

AAPS is a national non-profit organization that has a membership of thousands of physicians in all practices and specialties, and represents physicians practicing in Connecticut. AAPS was established in 1943 to preserve the practice of private medicine, and is dedicated to upholding the integrity of the medical profession. AAPS is incorporated in the State of Indiana and qualifies under Section 501(c)(6) of the Internal Revenue Code. AAPS reports and speaks out on issues important to the medical profession through its publications the *AAPS News* and the *Journal of American Physicians and Surgeons*. AAPS brings this motion in three capacities: (1) on behalf of its Connecticut members, (2) on behalf of itself as a publisher of medical news, and (3) on behalf of patients.

AAPS frequently files *amicus curiae* briefs of interest to state and federal courts. For example, in *Sunbeam Products, Inc. v. American Medical Association*, Civ. No. 97 C 6313 (N.D. Ill. Nov. 3,1998), AAPS prevailed in intervening in the action and obtaining rescission of the protective order concealing discovery documents. The federal judge then required the AMA to "identify specific documents, and clearly define the injury AMA

would suffer if those documents were disclosed" before mandating any confidentiality. *Id.* (oral ruling).

AAPS and its members are also thoroughly familiar with the uses – and abuses – of confidential peer review. Increasingly, the confidentiality of peer review is invoked to conceal injustices against physicians and patients alike. AAPS has filed numerous *amicus curiae* briefs on behalf of physicians subjected to "sham peer review," a term coined for the growing problem of unfair retaliation against good physicians due to their whistleblowing or competitive activities. AAPS recently filed a letter brief on behalf of "Dr. John Doe" in *Doe v. Thompson*, Civ. No. 02-02193 (D.D.C.), for this purpose.

In light of its membership, AAPS has a direct and substantial interest in promoting and preserving the rights of its members to be informed about this civil case. Those rights have not been and will not be adequately represented by existing parties to this cause. *See, e.g.*, *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *National Motor Freight Ass'n v. U.S.*, 372 U.S. 246 (1963); *NAACP v. Button*, 371 U.S. 415, 428 (1963).

As a publisher of information for the medical profession, AAPS has a direct and substantial interest in promoting and preserving its rights to be informed about and report on this case, which concerns alleged wrongdoing and malfeasance at a prominent community hospital. Those rights have not been and will not be adequately represented by existing parties to this cause. *See, e.g.*, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994) ("We have routinely found, as have other courts, that third parties have standing to challenge protective orders and confidentiality

orders in an effort to obtain access to information or judicial proceedings.") (citing numerous precedents, footnote omitted).

AAPS also brings this motion as an entity likely to be affected by the outcome reached in this litigation. AAPS members and their patients have come into contact with defendant William W. Backus Hospital and will continue to do so in the future. AAPS is thereby affected by any wrongdoing at that hospital. The outcome of the litigation in this case will directly influence the ability of whistleblowers at Backus Hospital and elsewhere within Connecticut to facilitate reform. AAPS also has a direct and substantial interest to avoid a precedent in this case that will adversely affect the rights of its members in similar cases. *See, e.g.*, *Atlantis Dev. Corp. v. U.S.*, 379 F.2d 818 (5th Cir. 1967).

This action indisputably concerns matters of significant public concern, and AAPS members (as well as the public) have a right to monitor the developments and rulings in this action. AAPS itself, in disseminating information in this and similar cases to its members, has sufficient interest to file an *amicus curiae* brief in favor of full disclosure.

Many AAPS members have been subjected to retaliation by hospitals for engaging in whistleblowing activities. Litigation that ensues from alleged retaliation is of utmost interest to AAPS and the public, and sealing orders without public notice on this matter of enormous public concern are unjustified. *See Hartford Courant Co. v. Pellegrino*, 2004 U.S. App. LEXIS 11206 (2d Cir. June 8, 2004). The "presumption of openness" that the Second Circuit recently applied to docket sheets in *Hartford Courant*

applies as strongly to the unusual closure of the courtroom to the public in this proceeding below. *See also Mainville v. Zoning Comm'n of Meriden*, 2004 Conn. Super. LEXIS 279, *4 (Conn. Super. Ct. Jan. 28, 2004) ("The court upon consideration of the entire record finds that a **sealing order** is not necessary to preserve an interest which overides the public's interest. Accordingly, the defendant's motion to seal the records is denied.").

The *Hartford Courant* decision made clear that publishers, like AAPS, have standing to challenge sealing orders, as here. Both "the public and press should receive *First Amendment* protection in their attempts to access certain judicial documents." 2004 U.S. App. LEXIS 11206, at *23.

The sealing order and closure of the courtroom below violated the "Practice Book" rules of court, which limit such closures and protect the public's and press's right of access under the First Amendment. "[T]he Connecticut judiciary itself promulgated new 'Practice Book' rules - rules of court specifying procedures for closure more protective of the public's and the press's *First Amendment* rights of access and, in particular, mandating that the public be notified of potential closure of the courtroom or sealing of materials, that the judge articulate the overriding interest in closure or sealing and specify findings, and that any closure or sealing order be no broader than necessary. *See* Conn. Practice Book §§ 11-20(c)-(e), 11-20A (2004)." *Hartford Courant*, 2004 U.S. App. LEXIS 11206, at *6 - *7. AAPS seeks to file an *amicus curiae* brief to argue for compliance with the Practice Book here.

The Hospital has important responsibilities to the community it serves.

Accordingly, it is essential for the public to have access to the proceedings in this case. Closure of the courtroom in a whistleblower case like this only serves to conceal the injustice associated with retaliation. A few Hospital officials may be protecting their own powerful jobs in a manner contrary to the interests of the community they serve, and public dissemination of the information in this proceeding is essential to bringing justice to this dispute. The court simply below failed to support its sealing order and secrecy with particularized findings as required by *Press-Enterprise Co. v. Superior Court*, 106 S. Ct. 2735 (1986).

The sealing order enables the Hospital to conceal wrongdoing. It prevents AAPS, as a publisher of medical news, from informing physicians about any malfeasance at the Hospital. Such confidentiality cannot withstand scrutiny. *Wiggins v. Burge*, 173 F.R.D. 226, 230 (N.D. Ill. 1997) ("[P]ublic interest far outweighs any harm to the [defendants] and thus[] there is no good cause to keep the documents confidential."); *see also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3rd Cir. 1994) ("Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders."). The sealing order and closure of the courtroom below was without any notice or opportunity to be heard by AAPS, physicians, the media, or the public.

There is no justification for the sealing order and closure of the courtroom to the public here. They operate to conceal wrongdoing by officers at the Hospital, to the detriment of the public. Just as a government official has no legitimate interest in concealing wrongdoing from the public, a community hospital lacks a legitimate interest

in wholesale denial of access by the public that it purports to serve. The effect of the orders below with respect to the Hospital is to allow it to withhold material information from its beneficiaries - physicians and patients. The effect of covering up corruption by the Hospital is a palpably improper basis for these orders below. “[T]here is an important public interest at stake -- the health and welfare of the general public and the integrity of the [defendant]. The public has a right to know.” *Wiggins*, 173 F.R.D. at 230.

“Absent a showing that a defined and serious injury will result from open proceedings, a protective order should not issue.” *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 485 (3rd Cir. 1995). Concealing wrongdoing by officers - the likely rationale by the Hospital in this action - is simply not one of the permissible justifications for a protective order. “General allegations of injury to reputation and client relationships or embarrassment that may result from dissemination of privileged documents is insufficient to justify judicial endorsement of an umbrella confidentiality agreement.” *Id.* at 484.

The sealing order and closure of the courtroom contravenes both the common law and the constitutional presumption that court records and proceedings are public property. Closure of judicial records is appropriate only where a compelling governmental interest exists, only where it is likely to be effective in preserving against the perceived harm, and only after considering less restrictive alternatives. *See Wiggins*, 173 F.R.D. at 230 (holding that the burden is on the proponent of secrecy to prove that “privacy interests” or a “chilling effect” does “outweigh the significant public interest in the disclosure of these documents”). Such justifications are plainly lacking

here.

There has been no specific demonstration that public hearings will cause a clearly defined and serious injury to the fair trial rights of the parties, and the only plausible resultant injury from dissemination would be to Hospital officials who breached their duties in retaliating against a whistleblower. The pretext of protecting individual patient names can be easily addressed by using initials and removing other personal identifiers, and any confidentiality should be narrowly limited that protection. The Hospital, as a community organization purportedly dedicated to the public interest, would itself benefit from widespread disclosure about the activities and any wrongdoings of its officers, thereby facilitating meaningful reform.

Because the sealing order and the closure of the courtroom implicitly restricts the litigants from speaking out about this case, these rulings below operate as a gag on free speech and interfere with the public's right to obtain information. Such restraints can only be justified in cases of serious and imminent harm to the administration of justice, which is not existent here. Further, such restraints cannot be imposed if they will not be effective in preserving the compelling interest at stake. The First Amendment requires opening the proceedings below and invalidating the sealing order.

The Applicant and the public have a legitimate right and compelling interest in public proceedings here, and the Applicant should be granted leave to file an *amicus curiae* brief to fully develop its points.

WHEREFORE, Applicant respectfully prays that this Court grant leave to file an *amicus curiae* brief on the points raised.

Dated: June 18, 2004

Respectfully submitted,