NO. 908753

SUPREME COURT OF THE STATE OF WASHINGTON

GLENDA NISSEN, an individual, Respondent

v.

PIERCE COUNTY, a public agency; PIERCE COUNTY PROSECUTOR'S OFFICE, a public agency, Petitioner

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PETITIONER LINDQUIST'S ANSWER TO AMICI CURIAE BRIEFS

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I. INTRODUCTION

Ignoring critical and dispositive constitutional issues that were ruled upon by the trial court and argued on appeal, *Nissen v. Pierce County*, 183 Wn.App. 581, 333 P.3d 577 (2014) reinterprets the PRA to make public employees synonymous with "agencies." As Amici note, if this were correct, any private writing by a public employee that somehow relates to work – letters, diaries, emails, text messages, Facebook posts and messages, etc. – would be a public record subject to retention and disclosure. *Nissen's* interpretation of the PRA renders it unconstitutional because, *inter alia*, it requires unlawful search and seizure of personal communications. Alarmingly, under *Nissen*, government entities will be held liable for not disclosing personal communications of public employees the entities have no lawful means to identify or seize.

II. STATEMENT OF THE CASE

Petitioner Mark Lindquist, Intervenor in the trial court (hereinafter "Petitioner"), fully adopts the factual statements and arguments made by Amici in support of this Court's review of the *Nissen* decision.

The memorandum of Amici Public Employee Organizations (hereinafter "Employee Br.") exposes Respondent Glenda Nissen's efforts to mislead this court through factual misstatements, both repetition of disproved assertions and minting of new misrepresentations. *See e.g.* Employee Br.

5-6; *see also*, Cy Ans. 2-3. Petitioner agrees with Amici that acceptance of review must focus on the record as opposed to Respondent's evolving claims and compounding mischaracterizations.

The record confirms Respondent's initial PRA request sought only "work related" records from Petitioner's private cell phone. In the interest of openness, Petitioner requested records from the exclusive possession of his private service provider even though personal records held by a service provider are not public records under the PRA.[1] *See* CP 15-16, 597-98. Though his telephone company advised that text records for those dates were not available,[2] he was able to obtain his call logs and reviewed them with his legal counsel. CP 58, 81, 444-46, 490, 598, 616.

In the interest of openness – while at the same time protecting his constitutional rights to records he knew were purely private – Petitioner then

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[1] Ignoring the unconstitutionality of such a requirement, Respondent attacks Petitioner for deleting personal texts on his own privately paid personal cell phone, and for not forwarding texts to a non-existent County repository for employee personal text messages. *See* Resp. Ans. to Pet. 7, 8, 11. Respondent also assumes without any factual basis that Petitioner's "government provided" cell phone included text message service, *id.* at 11, and repeats the false claim he used "his personal cell instead of his government cell to conduct agency business" when the record instead proves he used his two County land lines for official business. Like any other public employee, he "occasionally" discussed work on his personal cell phone. *Compare id.* at 4 *with* Cy Pet. 2 n. 2 (*citing* CP 234, 258, 681-83, 453).

[2] Nissen falsely states Petitioner has "admitted" the text messages still exist and have been maintained. See Resp. Ans. To Pet. 2. The record shows instead that Verizon later agreed "to preserve whatever text content it had in its custody for at least up to a year" after the December 20, 2011 request. See CP 617-18. Thus, based on the only facts of record, Amici properly notes it is doubtful Verizon Wireless "somehow still retains it." See Employee Br. 5-6. In any case, as the trial court recognized, this issue was not of concern because there was no constitutional means for the court to obtain the records without a warrant. *Nissen*, 183 Wn.App. at 581 n. 9.

provided all personal call logs "that may be work-related," despite the fact that these were not public records. CP 16, 18, 32-36, 40, 86, 334-38, 340-349, 445-46. Petitioner has sworn under oath that only private communications not related to work were redacted, *see* CP 81, and the record shows his unredacted records were never surrendered to the County or Respondent. *See* CP 16, 18, 86, 88, 445-46.

The record also confirms Respondent seeks to make the PRA a tool for unprecedented invasions of the privacy of public employees' non-work related private communications. After the County advised her that Petitioner was reviewing the above records with his County attorneys to redact calls that "were not 'work related,'" Respondent *admits* she served the County with a new request that *purposefully omitted the "qualifier 'work related'" so as to capture private communications. See* CP 17. Indeed, her complaint expressly demands – along with attorneys fees, costs, and $100 a day penalties – that these requested *private records* "be provided promptly for inspection and copying." CP 20-21.

Accordingly, when Respondent filed this PRA action solely against Pierce County, Petitioner personally intervened through private counsel and filed a declaratory action to protect his personal privacy. CP 494, 518. Contrary to Respondent's continued misrepresentations otherwise, *see* Resp. Ans. To Pet. 14, 16, Petitioner has repeatedly made clear he "will

not consent" to the demanded unconstitutional "searching [of] his family phone records." *See* Intervenor's COA Ans. To Amici 4. *See also* Lindquist's Pet. 18; COA oral argument (www.courts.wa.gov/appellate_trial_Courts/appellateDockets/index.cfm?fa=appellateDockets.ShowOralArgAudioList&courtId=a02&docketDate=20140225 at 13:42).

Thus, the record indisputably shows the issues presented here are: 1) does the PRA authorize courts to compel public employees to produce unredacted telephone logs disclosing private telephone calls; 2) does the PRA authorize courts to order private service providers to produce any existing text messages to confirm their private nature; and 3) would such orders be constitutional? In short, Respondent seeks to unconstitutionally fish through Petitioner's private records held by a third party service provider by means of the PRA.

III. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Amici, like Petitioner and Pierce County, demonstrate how "review under RAP 13.4(b) is warranted" on multiple grounds. *See* Employees Br. 1-10; Lindquist Pet. 4-18; Cy Pet. 6-20. In contrast, Respondent has neither cited nor analyzed RAP 13.4(b). *See* Resp. Ans. to Pet.

1. *Nissen* Decision Violates Precedent.

Amici persuasively demonstrate how review of *Nissen* is appropriate under RAP 13(b)(1-2) for its holding that public employees constitute an

"agency" under the PRA. That decision conflicts with precedent of this Court, *Nast v. Michels*, 107 Wn.2d 300, 306, 730 P.2d 54 (1986), and that of Division II. *See e.g. West v. Thurston County*, 168 Wn.App. 162, 183-84, 275 P.3d 1200 (2012). *See also* Employee Br. 2-3; WSAMA Br. 7; Lindquist Pet. 6-8; Cy Pet. 10-11.

Amici also correctly describe how the decision to remand for discovery of Petitioner's records violates precedent protecting a non-party employee from discovery of his private records during a suit against his employer. *Diaz v. Washington State Migrant Council*, 165 Wn.App. 59, 265 P.3d 956 (2011). They also show it violates precedent protecting a party's associational records from an *in camera* review without a prior stringent constitutional analysis. *See Snedigar v. Hoddersen,* 114 Wn.2d 153, 158, 786 P.2d 781 (1990); Employee Br. 3; WSAMA Br. 7. *See also T. R. v. Cora Priest's Day Care Ctr.*, 69 Wn.App. 106, 847 P.2d 33 (1993)(a trial court does not have jurisdiction to order non-party to submit to CR 35(a) examination); *Dulles v. Fong*, 237 F.2d 496 (9th Cir. 1956)(civil rules do not allow a court to order collection of blood samples from a party's parent). Finally, requiring *in camera* inspection despite a sworn declaration that all redacted material was private conflicts with *Forbes v. City of Gold Bar,* 171 Wn.App. 857, 867, 288 P.3d 384 (2012)("speculative claims about the existence and discoverability of other documents will not over-

come an agency affidavit which is accorded a presumption of good faith.")

Respondent ignores this precedent and this entire ground for review.

2. *Nissen* Decision Ignores Constitutional Protections.

Amici document how significant state and federal constitutional protections for privacy, speech, and property are at issue. *See* WSAMA Br. 2-8; Employee Br. 3-9; Lindquist Pet. 11-18; Cy Pet. 14-20. *See also e.g. State v. Hinton*, 179 Wn. 2d 862, 865, 319 P.3d 9 (2014)("Text message conversation was a private affair protected by the state constitution from warrantless intrusion"). Respondent has not confronted the merits of any state constitutional protection[3] or most federal protections.

Respondent's claim Petitioner has no federal "expectation of privacy" in records of his personal telephone conversations is contrary to United States Supreme Court precedent. *Compare* Resp. Ans. to Pet. 16-19 *with Riley v. California*, _ U.S. _, 134 S.Ct. 2473, 2495, 189 L. Ed.2d 430 (2014) ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple – get a warrant"); *see also, United States v. Finley*, 477 F.3d 250, 258-60 (5th Cir.

[3] Article I, section 7 of the Washington Constitution protects more than "expectation[s] of privacy." *See e.g., State v. Miles*, 160 Wn.2d 236, 243-44, 156 P.3d 864 (2007) ("Private affairs are not determined according to a person's subjective expectation of privacy because looking at subjective expectations will not identify privacy rights that citizens have held or privacy rights that they are entitled to hold."). Thus, a statute cannot provide the "authority of law" required by Article I, section 7 for a governmental intrusion into protected areas. Id. at 247-49. Once a matter is deemed private by Article I, section 7, a court considers "whether a search has 'authority of law'—in other words, a warrant." York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 306, 178 P.3d 995 (2008).

2007)(expectation of privacy for search of even employer issued phone).

Public employees do not yield their privacy protections by becoming public servants. *See Gardner v. Broderick*, 392 U.S. 273, 277 (1968) (constitution also protects "policemen or other members of our body politic"); W.R. LaFave, 4 *Search and Seizure*, 8.2(l)(5th ed. 2012) (If inspection unreasonable, "statute may not produce a contrary result via the fiction of implied consent."); Intervenor Ans to COA Amici 9-13. *See also, Cooper v. State*, 587 S.E.2d 605 (Ga. 2003))(*quoting Hannoy v. State*, 789 N.E.2d 977, 987 (Ind. App. 2003)) ("To hold that the legislature could nonetheless pass laws stating that a person 'impliedly' consents to searches under certain circumstances where a search would otherwise be unlawful would be to condone an unconstitutional bypassing of the Fourth Amendment.")

The only other federal issue briefed by Amici that Respondent addresses is the Stored Communications Act (hereinafter "SCA"). *See* Employee Br. 5-6. Respondent claims "a warrant is not necessary to obtain the texts" because text services supposedly are a lesser protected "remote computing service" under the SCA. *See* Resp. Ans. to Pet. 14-16 (*citing* 18 U.S.C. § 2703(b)(1)(B)(i)). To the contrary, under the SCA "text messaging ... constitute[s] an 'electronic communication service' and not a 'remote computing service.'" *Mintz v. Mark Bartelstein & Assocs., Inc.*, 885 F.Supp.2d 987, 991, 993 (C.D.Cal. 2012)("an 'electronic communication

service' ... may not disclose the content of text messages"). *See also, Doe v. City of San Diego,* 2013 WL 2338713 *2 (S.D.Cal., May 28, 2013) (Verizon is properly classified as an "electronic communication service.").

The many state and federal constitutional issues Amici briefed are additional compelling reasons to grant review under RAP 13(b)(3).

3. *Nissen* Decision Ignores Issues of Significant Public Interest that Should Be Decided by the Supreme Court.

Amici, representing tens of thousands of public employees, also show how this case raises significant issues of public interest that dramatically affect the constitutional rights of hundreds of thousands of public employees across this state. The trial court upheld these constitutional restrictions on the PRA but was reversed in a decision that refused to address them. Respondent affirmatively argues *Nissen* and the PRA *do* and *should* diminish and invade the constitutional rights of "*all* public employees." *See* Resp. Ans. to Pet. 5-7, 16-18 (emphasis added).

Because the government cannot lawfully identify or compel production of records of personal communications from its employees, *Nissen* also makes compliance with the PRA impossible, imposing perpetual liability on government entities. *See* WSAMA Br. 7; Employee Br. 9-10; Lindquist Pet. 4-19; Cy Pet. 5-20.

Though RAP 13.4(b)(4) makes "issues of significant public interest" a

specific and independent ground for granting Petitioner's motion, *Respondent inexplicably asserts the Court should not concern itself with the precedential value of this published appellate court decision.* Resp. Ans. to Pet. 3. This argument ignores this Court's rules and its precedent. *See e.g. State v. Watson*, 155 Wn.2d 574, 577-78, 122 P.3d 903 (2005) ("a prime example of an issue of substantial public interest" justifying review by the Supreme Court is where a "Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every" similar proceeding even in just a single county); *In re Marriage of Ortiz,* 108 Wn.2d 643, 646, 740 P.2d 843 (1987).

In sum, Petitioner agrees with Amici that, without review, the *Nissen* decision personally affects hundreds of thousands of our state's public employees and their families and friends in concrete ways. Permitting compelled discovery or the warrantless seizure by trial courts of private property for an *in camera* review - an act that Respondent's counsel argued in *Bennett v. Smith Bundy Berman Britton PS*, 176 Wn.2d 303, 291 P.3d 886 (2013) would transform private records into public records under Wash. Const. Art. I § 10 – invades public employees' privacy, speech, associational, and property rights.

IV. CONCLUSION

The trial court correctly recognized that constitutional protections

barred the relief sought in this PRA suit. The *Nissen* decision orders discovery while refusing to discuss the constitutional provisions upon which the trial court based its dismissal. Absent review, those unavoidable constitutional issues will endure in this and future cases. Because the constitutional questions at the heart of this case have yet to be addressed on appeal, and cannot be resolved or avoided by a remand to the trial court, Petitioner joins Amici in requesting that the petitions be granted and the violation of the constitutional rights of our citizens under the authority of *Nissen* be prevented.

Respectfully submitted this 23rd day of January, 2015.

KEATING, BUCKLIN & McCORMACK, INC., P.S.
By: *s/ Stewart A. Estes*
Stewart A. Estes, WSBA #15535

DECLARATION OF SERVICE

I declare, under penalty of perjury of the laws of the State of Washington, that on January 23, 2015, a true and correct copy of the foregoing document, Petitioner Lindquist's Answer to Amici Curiae Briefs, was served upon the parties listed below, via U.S. Mail, and a courtesy copy was sent via email:

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Good afternoon.

Attached please Petitioner Lindquist's Answer to Amici Curiae Briefs for filing in relation to the above-referenced matter.

Thank you and all the best,

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