

No. 94109-2

**THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

---

MICHAEL MOCKOVAK,

*Petitioner-Appellant,*

v.

KING COUNTY and the KING COUNTY PROSECUTING  
ATTORNEY'S OFFICE,

*Respondents.*

---

**ANSWER TO PETITIONER'S "MOTION FOR ORDER  
DECLARATING THAT THE UNITED STATES IS A  
RESPONDENT IN THIS CASE"**

The United States respectfully files this answer to petitioner's motion that this Court declare the United States a respondent in this case. As explained below, the court of appeals permitted the United States to participate as an amicus curiae, not as a respondent, and the United States took part in the proceedings before the court of appeals on that basis. The motion should therefore be denied.

**STATEMENT**

This lawsuit under the Public Records Act, RCW §§ 42.56.001 *et seq.*, arises from a closed criminal case. A Washington State jury convicted appellant Michael Mockovak of murder and theft. Mockovak invoked the

Act to request documents related to his trial from respondents King County and the King County Prosecuting Attorney's Office. During subsequent litigation over his request, Mockovak sought to depose and subpoena Leonard "Len" Carver III. Although Carver is a commissioned officer in the Seattle Police Department, he is assigned full-time to the FBI's Puget Sound Safe Streets Violent Crimes Task Force and works full-time to investigate "federal crimes for the purpose of federal prosecution." CP 464, 966. Carver, in his capacity as an FBI Task Force Officer, had participated in the investigation that led to Mockovak's criminal conviction. Carver declined to respond to Mockovak's discovery requests because regulations promulgated by the U.S. Department of Justice prohibited him from doing so.

Mockovak asked the trial court to compel Carver to submit to a deposition and subpoena. The United States and respondents filed separate papers opposing Mockovak's discovery motion. The trial court entered an order denying that motion and subsequently entered judgment against Mockovak on the merits of his Public Records Act claim. Mockovak appealed both the denial of his discovery motion and the judgment.

The United States filed an unopposed motion for leave to participate in proceedings before the Court of Appeals, Division I. The motion, which was accompanied by a brief, asked that the United States be allowed "to

intervene as respondent” in the appeal “and to file the attached brief in that capacity.” *See* Add. A1. Alternatively, the United States sought “leave to file the attached brief as amicus curiae in support of respondents.” *Id.*

The court of appeals granted the government’s motion in a one-word order that did not specify the capacity in which the United States would participate. *See* Add. A8. However, the court designated the United States as “Amicus Curiae,” rather than an intervenor-respondent, on the court’s docket. *See* Add. A24. To clarify the government’s status under the court’s order, counsel for the United States telephonically contacted the clerk’s office, which confirmed that the government’s status was reflected in the docket designation.

The court of appeals set the case for oral argument. Consistent with its designation as an amicus curiae, the government requested leave to appear at argument as an amicus. *See* RAP 11.2 (only parties may present oral argument as of right). The motion expressly identified the government as “amicus curiae in support of respondents,” and requested five minutes of argument time to be allocated to the government from the fifteen minutes allotted to respondents. Add. A15. Neither Mockovak nor respondents opposed the motion, *see* Add. A18, and the court granted the motion, *see* Add. A20.

An attorney for the United States, who is not a member of the bar in the State of Washington, applied for limited admission to the practice of law in Washington under APR 8(b) to represent the government as counsel of record. Add. A9-A11. The application reiterated that the court of appeals had allowed the United States “to participate as amicus curiae on behalf of [respondents].” Add. A10-11. The court granted the application.

The court of appeals ultimately affirmed the trial court in all respects. Mockovak then sought discretionary review in this Court. His petition mistakenly identified the United States as an “Intervenor/Respondent,” not as an amicus curiae. *See* Add. A22. To clarify the government’s status in the proceedings, the United States filed a letter with this Court explaining that the government participated below as an amicus curiae, not as an intervenor, and is therefore not currently a respondent in this case. *Id.* Mockovak’s motion followed.

## **ARGUMENT**

Mockovak’s motion for this Court to declare the United States to be a respondent should be denied because the court of appeals permitted the United States to participate solely as an amicus curiae, not as a party.

As noted above, the United States sought leave to participate as an intervenor-respondent or, in the alternative, as an amicus curiae. The order granting the government’s motion did not specify in which capacity

the court was permitting the government to participate, but the court designated the United States as “Amicus Curiae” on the court’s docket. Add. A24. And the clerk’s office orally confirmed to counsel for the United States that the docket designation represented the government’s status in that court. Thus, the court of appeals authorized the United States to appear as an amicus curiae in support of respondents and accepted the government’s brief on that basis.

Furthermore, the United States comported itself as an amicus curiae in the proceedings below, as reflected in the government’s motion for leave to participate in oral argument under RAP 11.2. That motion would have been wholly unnecessary had the government been a party to the appeal, since parties (unlike amici) may participate in oral argument as of right. RAP 11.2(a). Far from denying the government’s motion, as it logically would have done if the United States were already a party to the case, the court of appeals granted the motion. Mockovak’s assertion that the government participated in the appeal as an intervenor-respondent is therefore incorrect.

Mockovak’s rejoinders lack merit. *First*, Mockovak insists (Mot. 4-5) that the court of appeals unambiguously designated the United States an intervenor-respondent in its order granting the government’s motion to participate in appellate proceedings. But he acknowledges that the court’s

one-word order did not specify the relief granted. *Id.*; *see* Add. A8. And the court's subsequent actions, such as granting the government's motion for leave to participate in oral argument as an amicus curiae, refute Mockovak's reading of its initial order.

*Second*, Mockovak claims (Mot. 5, 8-9) that the government has made "conflicting statements" as to its status. Not so: The United States represented itself as an amicus curiae in all filings postdating the court's order authorizing the government to appear on respondent's behalf. *See* Add. A10, A15. Mockovak did not dispute that representation before the court of appeals. In fact, Mockovak *consented* to the government's motion to participate in oral argument as an amicus curiae.

Mockovak nonetheless suggests (Mot. 5, 8-9) that, because the United States identified itself as an intervenor-respondent on the cover of its appellate brief, the government must have participated in the appeal as a party. But the government submitted its brief as an attachment to its participation motion. Add. A1. That motion asked the court of appeals for leave to file the attached brief either as an intervenor-respondent or as an amicus curiae in support of respondents. *Id.* The court designated the government as an amicus curiae and accepted the brief on that basis. The title page of the government's brief, prepared prior to the court's

disposition of the government's participation motion, thus sheds no light on the status accorded the government by the court of appeals.

*Third*, Mockovak asserts (Mot. 2-3, 8-9) that the government is a party on appeal because it opposed his motion to compel discovery against Carver in the trial court. Mockovak reasons that, because the government's opposition relied on an attached declaration—which amici may not do, in his view—the government must have been a party in the trial court. This argument rests on the premise that a nonparty who opposes a discovery request in the trial court must do so either as an intervenor or as an amicus curiae. But the Superior Court Civil Rules allow any “party or . . . person from whom discovery is sought” to move for a protective order “that the discovery not be had.” CR 26(c). Nothing in CR 26(c) indicates that a nonparty who opposes discovery is automatically converted into either an intervenor or an amicus curiae. Indeed, the government did not move to participate either as an intervenor-respondent or as an amicus curiae in the trial court. Mockovak cites no case in support of his contrary view.

Mockovak's reasoning is also inconsistent with the procedural history of this case. If the United States had acquired party status in the trial court, the United States would have remained a party in the court of appeals and would not have needed to request permission to participate in

appellate proceedings. But the government did in fact file such a motion, and the court of appeals granted it—supplying further proof that the government did not acquire party status in the trial court.

*Finally*, Mockovak accuses the United States (Mot. 8-10) of seeking to “disavow” its status as an intervenor-respondent to obtain a tactical advantage before this Court. His accusation is doubly misguided. As a factual matter, the government has disavowed nothing, as it has never been a party. And as a legal matter, Mockovak’s insinuations of malfeasance rest on a misunderstanding of the law.

Mockovak suggests that the United States wishes to avoid designation as a party in order to evade the supposed res judicata effect of a hypothetical decision in Mockovak’s favor. But a ruling in Mockovak’s favor would effectively dispose of the government’s legal interests in this case regardless of whether the government is a party to the litigation. And even if the United States *were* a party, a judgment in Mockovak’s favor would not have res judicata effect on the United States in any future proceedings brought by other plaintiffs, because the United States is not subject to non-mutual offensive collateral estoppel. *See United States v. Mendoza*, 464 U.S. 154, 158 (1984). As a result, res judicata principles provide no reason for the government to evade party status. More generally, if the government had an ulterior reason for wishing to avoid



party status, it never would have moved for leave to participate as an intervenor-respondent in the court of appeals.

### CONCLUSION

For these reasons, Mockovak's motion should be denied.

DATED THIS 21st day of March, 2017.

Respectfully submitted,

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**CERTIFICATE OF SERVICE BY ELECTRONIC MAIL**

Today I directed electronic mail addressed to James E. Lobsenz, the attorney for the petitioner, at lobsenz@carneylaw.com, and Michael J. Sinsky, Senior Deputy Prosecuting Attorney, attorney for the respondent, at mike.sinsky@kingcounty.gov, containing a copy of the foregoing answer.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 21st day of March, 2017.

  
\_\_\_\_\_  
MICHAEL SHIH  
*Counsel for the United States*

## **ADDENDUM**

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No. 74459-3-I

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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MICHAEL MOCKOVAK,

*Appellant,*

v.

KING COUNTY and the KING COUNTY PROSECUTING  
ATTORNEY'S OFFICE,

*Respondents.*

---

**UNOPPOSED MOTION OF THE UNITED STATES TO  
INTERVENE OR FOR LEAVE TO FILE AN  
AMICUS CURIAE BRIEF**

The United States respectfully files this unopposed motion seeking leave to intervene as respondent in this action and to file the attached brief in that capacity. In the alternative, the United States requests leave to file the attached brief as amicus curiae in support of respondents King County and the King County Prosecuting Attorney's Office (collectively, "King County").

This appeal concerns, in part, a trial-court order denying appellant Michael Mockovak's motion to compel the deposition and subpoena *duces tecum* of Leonard Carver III. Because Carver is a Task Force Officer in the Federal Bureau of Investigation ("FBI"), the United States has a

substantial interest in the resolution of Mockovak's claim. The United States moves to intervene, or in the alternative to participate as an amicus curiae, to protect that interest and to assist this Court in its consideration of the motion to compel.

### STATEMENT

This lawsuit under the Public Records Act, RCW §§ 42.56.001 *et seq.*, concerns documents related to a closed criminal case. In 2011, a Washington State jury convicted Mockovak on murder and theft charges arising from his unsuccessful attempt on his business partner's life. *In re Mockovak*, No. 69390-5-I, 2016 WL 3190500, at \*1 (Wash. Ct. App. June 6, 2016). After his conviction, Mockovak requested documents from King County related to an individual who had testified at his trial. When King County did not respond to his satisfaction, Mockovak sued the County under the Public Records Act in Superior Court. Eventually, Mockovak agreed to settle all of his claims save one: that King County had improperly invoked the Act's exemption for documents constituting attorney work product to redact 81 documents in part or in whole.

In the course of litigating his remaining claim, Mockovak sought to depose and subpoena Leonard "Len" Carver III. Although Carver is a commissioned officer in the Seattle Police Department, he is assigned full-time to the FBI's Puget Sound Safe Streets Violent Crimes Task Force

and works full-time to investigate “federal crimes for the purpose of federal prosecution.” CP 464, 966. To that end, Carver has been designated both as a Special U.S. Deputy Marshal in the U.S. Marshals Service and as a Special Federal Officer in the FBI. CP 1376. These designations grant him investigatory and arrest powers for violations of federal law. CP 1376. Carver’s chain of command reflects his federal status: He receives assignments from an FBI Supervisory Special Agent and must “comply with the investigative and administrative requirements of the FBI and the” Department. CP 1376.

Carver declined to respond to Mockovak’s discovery requests because regulations promulgated by the U.S. Department of Justice (“Department”) prohibited him from doing so. These regulations vest high-level Department officials with exclusive authority to decide whether and how Department employees may respond to requests for testimony or documents. *See* 28 C.F.R. §§ 16.21 *et seq.* In this case, after receiving a request from Mockovak, the responsible Department official determined that Mockovak had failed to establish an adequate basis for his request.

Mockovak then asked the trial court to compel Carver to submit to a deposition and subpoena, arguing that the Department is barred by federal law and the Tenth Amendment to the U.S. Constitution from treating Carver as a Department employee under its regulations. *See* CP

1186-92. The United States and King County filed separate responses to Mockovak's discovery motion. *See* CP 1263-75, 1279-84.

The trial court denied Mockovak's motion for the "reasons set forth" in the responses. CP 1913. The court also determined that King County's redactions were proper as a matter of state public-disclosure law and entered judgment in the County's favor. CP 1915. Mockovak has appealed both the denial of his motion to compel and the judgment against him on the merits of his Public Records Act claim.

### **ARGUMENT**

The United States seeks leave to intervene as a respondent in this action with respect to Mockovak's attempt to compel the deposition and subpoena of FBI Task Force Officer Leonard Carver.<sup>1</sup> Although the Rules of Appellate Procedure do not expressly provide for intervention, Superior Court Civil Rule 24 supplies an informative standard. Intervention as of right is appropriate "when the applicant claims an interest relating to the . . . transaction which is the subject of the action and the person is so situated that the disposition of the action may as a practical matter impair or impede the person's ability to protect that interest." CR 24(a)(2).

The United States has a substantial interest in the resolution of Mockovak's discovery claim because Carver, an FBI Task Force Officer,

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<sup>1</sup> The United States takes no position on Mockovak's claim that King County violated state public-disclosure law by redacting 81 documents.



is the subject of Mockovak's motion. Furthermore, Mockovak's arguments seek to cast doubt on the validity of regulations promulgated by the Department of Justice. A holding in Mockovak's favor would interfere with the Department's ability to apply those regulations to Task Force Officers such as Carver, who play a significant role in the FBI's national operations. *See Oversight of the Federal Bureau of Investigation: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 17 (2014) (statement of James B. Comey, Director, FBI), *available at* <http://go.usa.gov/xxRWT>. Finally, Mockovak's claim implicates the sovereign immunity of the United States, which precludes state courts from compelling agency employees to testify "contrary to [their] federal employer's instructions under valid agency regulations." *See State v. Vance*, 184 Wn. App. 902, 914 (2014) (collecting cases).

In the alternative—and for the same reasons—the United States requests permission to participate in this appeal as amicus curiae with respect to Mockovak's discovery claim. *See* RAP 10.6(a). The United States has already filed a response to Mockovak's discovery motion in the trial court, which formed the basis of the trial court's decision, and is familiar with the issues this claim presents. *See* CP 1263-75. Because this case concerns the applicability of a federal regulation to a federal agent, the government's additional submission is necessary to provide this Court

with a complete understanding of the factual and legal underpinnings of Mockovak's appeal.

The government has conferred with counsel for Mockovak and for King County. Neither party opposes this motion.


### CONCLUSION

For these reasons, the government respectfully requests leave to intervene as respondent in this action and to file the attached brief in that capacity. In the alternative, the United States requests leave to file the attached brief as amicus curiae in support of King County.

Respectfully submitted.

SCOTT R. McINTOSH  
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JULY 2016

**CERTIFICATE OF SERVICE BY ELECTRONIC MAIL**

Today I directed electronic mail addressed to James E. Lobsenz, the attorney for the petitioner, at [lobsenz@carneylaw.com](mailto:lobsenz@carneylaw.com), and Michael J. Sinsky, Senior Deputy Prosecuting Attorney, attorney for the respondent at [Mike.Sinsky@kingcounty.gov](mailto:Mike.Sinsky@kingcounty.gov), containing a copy of the foregoing motion in *Mockovak v. King County*. Cause No. 74459-3, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 29th day of July, 2016.

  
\_\_\_\_\_  
HELEN J. BRUNNER  
WSBA No. 30245  
Done in Seattle, Washington

RICHARD D. JOHNSON,  
Court Administrator/Clerk

*The Court of Appeals*  
of the  
*State of Washington*

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CASE #: 74459-3-1  
Michael Mockovak, Appellant v. King County, Respondent

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on August 4, 2016, regarding unopposed motion of the United States to intervene or for leave to file an amicus curiae brief:

"Granted."

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

emp

SEP 27 2016

No. 74459-3-I

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

---

MICHAEL MOCKOVAK,

*Appellant,*

v.

KING COUNTY and the KING COUNTY PROSECUTING  
ATTORNEY'S OFFICE,

*Respondents.*

---

**MOTION FOR LIMITED ADMISSION PURSUANT TO  
APR 8(b) (PRO HAC VICE) AND ORDER**

**Identity of Moving Party (Washington State Bar Association Member):**

Name: Helen J. Brunner, WSBA No. 30245

Address: 700 Stewart Street, Suite 5220  
Seattle, WA 98101

Tel: (206) 553-7970 Email: micki.brunner@usdoj.gov

**Identity of Applicant for Limited Admission:**

Name: Michael Shih, Bar No. 1512160266

Jurisdiction of Primary Practice: Maryland

Address: 950 Pennsylvania Avenue NW, Room 7268  
Washington, DC 20530

Tel: (202) 353-6880 Email: michael.shih@usdoj.gov

**Statement of Relief Sought:**

Limited admission of the above-named applicant to the practice of law pursuant to APR 8(b) for the purpose of appearing as a lawyer in this proceeding.

**Facts Relevant to Motion:**

This lawsuit under the Public Records Act, RCW §§ 42.56.001 *et seq.*, concerns documents related to a closed criminal case. In the course of litigation, plaintiff Michael Mockovak sought to depose and subpoena Leonard “Len” Carver III. Although Carver is a commissioned officer in the Seattle Police Department, he is assigned full-time to the FBI’s Puget Sound Safe Streets Violent Crimes Task Force and works full-time to investigate “federal crimes for the purpose of federal prosecution.” CP 464, 966. Carver declined to respond to Mockovak’s discovery requests because regulations promulgated by the U.S. Department of Justice (“Department”) prohibited him from doing so. Mockovak then asked the trial court to compel Carver to submit to a deposition and subpoena. The trial court denied Mockovak’s motion and, separately, entered judgment against him on the merits of his Public Records Act claim. Mockovak appealed.

The United States moved to participate as amicus curiae on behalf of King County. This Court granted the government’s motion. Mr. Shih,

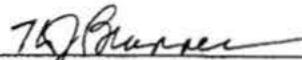
an attorney with the U.S. Department of Justice, seeks leave to participate as counsel of record in these proceedings on behalf of the United States.

**Grounds for Relief and Argument:**

This motion is made pursuant to Rule 8(b) of the Admission to Practice Rules (APR) and is based on the accompanying certifications of the Moving Party and the Applicant for Limited Admission.

DATED THIS 26<sup>th</sup> day of September, 2016.

Respectfully submitted,



---

*Attorney for the United States, WSBA No. 30245*  
HELEN J. BRUNNER  
700 Stewart Street, Suite 5220  
Seattle, WA 98101  
(206) 553-7970

**CERTIFICATION OF APPLICANT FOR LIMITED ADMISSION**

I hereby certify under penalty of perjury under the laws of the State of Washington that:


1. I am a member in good standing of the bar of the state or territory of the United States or of the District of Columbia listed above as my jurisdiction of primary practice.

2. I have read the Rules of Professional Conduct adopted by the Supreme Court of the State of Washington and agree to abide by them.

3. I have complied with all of the requirements of APR 8(b).

4. I have read the foregoing motion and certification and the statements contained in it are full, true and correct.

Signed on 26 Sept. 2016 at U.S. Dep't of Justice, Washington, D.C.

  
Applicant for Limited Admission

**CERTIFICATION OF MOVING PARTY/WSBA MEMBER**

I hereby certify under penalty of perjury under the laws of the State of Washington that:

1. I am an active member in good standing of the Washington State Bar Association.

2. I will be the lawyer of record in this proceeding, responsible for the conduct of the applicant, and present at proceedings in this matter



unless excused by the court.

3. I have submitted a copy of this motion together with the required fee of \$415 to the Washington State Bar Association, 1325 4<sup>th</sup> Ave., Ste. 600, Seattle, WA 98101-2539.

4. I have complied with all of the requirements of APR 8(b).

5. I have read the foregoing motion and certification and the statements contained in it are full, true and correct.

Signed on Sept. 26, 2016 at Seattle, Washington

T. J. Bruner  
Moving Party

**ORDER**

It is hereby ORDERED that the Applicant for Limited Admission pursuant to APR 8(b) listed above is admitted to practice as a lawyer in this proceeding. The Moving Party shall be the lawyer of record herein, is responsible for the conduct hereof, and shall be present at all proceedings unless excused by this court.

Dated \_\_\_\_\_.


\_\_\_\_\_  
Judge/Commissioner/Clerk

**CERTIFICATE OF SERVICE BY ELECTRONIC MAIL**

Today I directed electronic mail addressed to James E. Lobsenz, the attorney for the petitioner, at [lobsenz@carneylaw.com](mailto:lobsenz@carneylaw.com) and Michael J. Sinsky, Senior Deputy Prosecuting Attorney, attorney for the respondent at [Mike.Sinsky@kingcounty.gov](mailto:Mike.Sinsky@kingcounty.gov) containing a copy of the foregoing motion in *Mockovak v. King County*, Cause No. 74459-3, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 27<sup>th</sup> day of September, 2016.

  
HELEN J. BRUNNER  
WSB No. 30245  
Done in Seattle, Washington

No. 74459-3-1

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

---

MICHAEL MOCKOVAK,

*Appellant,*

v.

KING COUNTY and the KING COUNTY PROSECUTING  
ATTORNEY'S OFFICE,

*Respondents.*

---

**MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT  
AND FOR ADDITIONAL TIME**

**Identity of Moving Party:**

The United States of America, as amicus curiae in support of respondents King County and the King County Prosecuting Attorney's Office (collectively, "King County").

**Statement of Relief Sought:**

The United States respectfully files this unopposed motion seeking leave to participate in oral argument. The United States requests that the Court extend the time allotted to each side from 10 minutes to 15 minutes, and that the United States be assigned 5 minutes of King County's time.

**Facts Relevant to Motion:**

This lawsuit under the Public Records Act, RCW §§ 42.56.001 *et seq.*, concerns documents related to a closed criminal case. In the course of the litigation, plaintiff Michael Mockovak sought to depose and subpoena Leonard “Len” Carver III. Although Carver is a commissioned officer in the Seattle Police Department, he is assigned full-time to the FBI’s Puget Sound Safe Streets Violent Crimes Task Force and works full-time to investigate “federal crimes for the purpose of federal prosecution.” CP 464, 966. Carver declined to respond to Mockovak’s discovery requests because regulations promulgated by the U.S. Department of Justice prohibited him from doing so. Mockovak then asked the trial court to compel Carver to submit to a deposition and subpoena. The United States and King County filed separate responses to Mockovak’s discovery motion. *See* CP 1263-75; 1279-84. The trial court denied Mockovak’s motion and, separately, entered judgment against him on the merits of his Public Records Act claim. Mockovak appealed. This Court granted the United States leave to appear as *amicus curiae* in support of King County. Oral argument has been scheduled for November 3, 2016.

**Grounds for Relief and Argument:**

The United States seeks leave to appear at oral argument because the federal government is the real party in interest with respect to

Mockovak's discovery claim. Carver, an FBI Task Force Officer, is the subject of Mockovak's discovery demands. Furthermore, Mockovak's arguments seek to cast doubt on the validity of regulations promulgated by the U.S. Department of Justice. A holding in Mockovak's favor would interfere with the Department's ability to apply those regulations to Task Force Officers such as Carver, who play a significant role in the FBI's national operations. *See Oversight of the Federal Bureau of Investigation: Hearing Before the H. Comm. on the Judiciary, 113th Cong. 17 (2014)* (statement of James B. Comey, Director, FBI), *available at* <http://go.usa.gov/xxRWT>. Finally, Mockovak's claim implicates the sovereign immunity of the United States, which precludes state courts from compelling agency employees to testify "contrary to [their] federal employer's instructions under valid agency regulations." *See State v. Vance*, 184 Wn. App. 902, 914 (2014) (collecting cases).

The United States filed a response to Mockovak's discovery motion in the trial court (which formed the basis of the trial court's decision, *see* CP 1263-75), and an amicus brief in this Court. The government is therefore familiar with the issues this claim presents. Because this case concerns the applicability of a federal regulation to a federal agent, the government's presence at oral argument is necessary to

provide this Court with a complete understanding of the factual and legal underpinnings of Mockovak's appeal.

The government has conferred with counsel for Mockovak and for King County. Neither party opposes this motion.

DATED THIS 26<sup>th</sup> day of September, 2016.

Respectfully submitted,

SCOTT R. McINTOSH  
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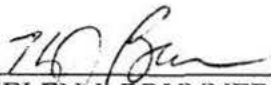
ANNETTE L. HAYES  
*United States Attorney,  
Western District of Washington*  
HELEN J. BRUNNER  
*First Assistant United States  
Attorney  
WSBA No. 30245  
700 Stewart Street, Suite 5220  
Seattle, WA 98101  
(206) 553-7970*

**CERTIFICATE OF SERVICE BY ELECTRONIC MAIL**

Today I directed electronic mail addressed to James E. Lobsenz, the attorney for the petitioner, at [lobsenz@carneylaw.com](mailto:lobsenz@carneylaw.com) and Michael J. Sinsky, Senior Deputy Prosecuting Attorney, attorney for the respondent at [Mike.Sinsky@kingcounty.gov](mailto:Mike.Sinsky@kingcounty.gov) containing a copy of the foregoing motion in *Mockovak v. King County*, Cause No. 74459-3, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 27<sup>th</sup> day of September, 2016.

  
\_\_\_\_\_  
HELEN J. BRUNNER  
WSBA No. 30245  
Done in Seattle, Washington

*The Court of Appeals  
of the  
State of Washington*

RICHARD D. JOHNSON,  
*Court Administrator/Clerk*

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
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September 30, 2016

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Michael Joseph Sinsky  
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516 3rd Ave Rm W400  
Seattle, WA 98104-2388  
mike.sinsky@kingcounty.gov

CASE #: 74459-3-1  
Michael Mockovak, Appellant v. King County, Respondent

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on September 30, 2016, regarding United States's motion for leave to participate in oral argument and for additional time:

"After consultation with the panel, the motion is granted. Each side shall have 15 minutes oral argument, with 5 minutes of King County's time assigned to the United States."

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

emp



RICHARD D. JOHNSON,  
Court Administrator/Clerk

*The Court of Appeals*  
of the  
*State of Washington*

DIVISION I  
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September 30, 2016

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CASE #: 74459-3-I  
Michael Mockovak, Appellant v. King County, Respondent

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on September 30, 2016, regarding United States Attorney's motion for limited admission (PRO HAC VICE):

"Granted."

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

emp



**U.S. Department of Justice**  
Civil Division, Appellate Staff  
950 Pennsylvania Ave., N.W., Rm. 7268  
Washington, D.C. 20530

SRM:MSHih

Tel: (202) 353-6880  
Email: michael.shih@usdoj.gov

February 23, 2017

Susan L. Carlson  
Supreme Court Clerk  
The Supreme Court of the State of Washington  
Temple of Justice  
415 12th Ave. SW  
Olympia, WA 98504

Re: *Mockovak v. King County*, Ct. App. No. 74459-3-I

Dear Ms. Carlson:

The United States has received the petition for review in the above-captioned case. The petition identifies the United States as an intervenor-respondent. As reflected in the attached Court of Appeals docket sheet, however, the United States participated below as an amicus curiae, not as an intervenor. It is therefore not currently a respondent in this Court.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael Shih".

MICHAEL SHIH  
U.S. Department of Justice  
Appellate Staff, Civil Division

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Washington Court Of Appeals

WA Court Of Appeals - Division I (Division I)

744593

Michael Mockovak, Appellant v. King County, Respondent

This case was retrieved from the court on Friday, February 10, 2017

Update Now

Header

Case Number: 744593 Date Filed: 12/22/2015 Date Full Case Retrieved: 02/10/2017 Status: Decided Misc: (12) Notice of Appeal; Appeal [Summary][Associated Case][Lower Court][Participants][Proceedings]

Summary

Date Received: 01/13/2016 Filing Fee: Paid Internal Case Notes: Sealed Notes

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Associated Case

941092

Relationship

Supreme Case

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Lower Court

Trial Court: King County Superior Court Trial Court Case Number: 142251912 Trial Court Judge: Doyle, Theresa B Trial Court Judgment Date: 11/25/2015

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Participants

Litigants

Michael Mockovak Appellant

Attorneys

James Elliot Lobsenz Bar Number: 08787 Firm Name: Carney Badley Spellman Firm Address: 701 5th Ave Ste 3600 Zip: Seattle WA 98104-7010 Work Number: 206-622-8020 Fax Number: 206-622-8983 Email: lobsenz(at)carneylaw.com Michael Joseph Sinsky Bar Number: 19073 Firm Name: Office of the Prosecuting Attorney Firm Address: 516 3rd Ave Rm W400 Zip: Seattle WA 98104-2388

King County Respondent

A23

Work Number: 206-477-1093  
 Fax Number: 206-296-0191  
 Email: mike.sinsky(at)kingcounty.gov

King County Prosecuting Attorney  
 Respondent

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United States of America  
 Amicus Curiae

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#### Proceedings

<u>Date</u>	<u>Description</u>	<u>Action</u>	<u>Participant</u>	<u>Notes</u>
12/22/2015	Notice of Appeal	Filed		Comment: filing fee paid copy of judgment filed service filed
01/13/2016	Case Received and Pending	Status Changed		
01/15/2016	Perfection Letter	Sent by Court	Johnson, Richard D	
01/29/2016	Court's Mot to Dismiss for Fail to file		LOBSENZ, JAMES ELLIOT - Attorney	failure to file designation of clerk's papers and statement of arrangements
01/29/2016	Court's Mot to Dismiss for Fail to file		LOBSENZ, JAMES ELLIOT - Attorney	failure to file designation of clerk's papers and statement of arrangements
02/02/2016	Designation of Clerks Papers	Filed	Lobsenz, James Elliot	Comment: 10 day letter sent January 29, 2016
02/02/2016	Statement of Arrangements	Filed	Lobsenz, James Elliot	Comment: 10 day letter sent January 29, 2016
02/05/2016	Supplemental Designation of Clerk's Papers	Filed	Lobsenz, James Elliot	
03/17/2016	Clerk's Papers		KING COUNTY SUPERIOR COURT - Superior Court	Subs. 1, 10, 20, 21, 37, 38, 40-44, 47-49, 52, 53, 55-58, 64, 65, 67, 68, 71-73, 75-79, 83, 86-88, 91-93, 95, 96 Pages 1-1955
03/18/2016	Supplemental Clerk's Papers		KING COUNTY SUPERIOR COURT - Superior Court	Sub. 100 Pages 1956-1957
03/31/2016	Letter	Filed		Comment: federal government asking for permission to be a part of this appeal
04/01/2016	Filing of VRP by Crt Reporter		KING COUNTY SUPERIOR COURT - Superior Court	
04/01/2016	Report of Proceedings	Filed	King County Superior Court	Comment: 10/30/15, Before Doyle, Transcribed by Reed, Jackson
04/01/2016	Record Ready	Status Changed		
05/12/2016	Motion to Extend Time to File		LOBSENZ, JAMES ELLIOT - Attorney	to June 16, 2016
05/13/2016	Ruling on Motions		Johnson, Richard D	xab ""Granted. However, no further extensions should be anticipated."
06/09/2016	Supplemental Designation of Clerk's Papers	Filed	Lobsenz, James Elliot	Comment: Second
06/15/2016	Motion for Waiver of Page Limitation		LOBSENZ, JAMES ELLIOT - Attorney	
06/15/2016	Appellants brief	Filed	Lobsenz, James Elliot	Comment: May 16, 2016 Electronic
06/17/2016	Order on Motions		Trickey, Michael	WVP "Approved."
06/27/2016	Invoice		Trickey, Michael	Invoice #16475 \$22.10
07/05/2016	Motion to Extend Time to File		SINSKY, MICHAEL JOSEPH - Attorney	to July 29, 2016
07/06/2016	Ruling on Motions		Johnson, Richard D	xrb "Granted."
07/29/2016	Respondents brief	Filed	Sinsky, Michael Joseph	
07/29/2016	Motion - Other		BRUNNER, HELEN JOANNE - Attorney	to file amicus brief
07/29/2016	Amicus Curiae brief	Filed		Comment: Sent to the printer August 11, 2016

07/29/2016	Ready	Status Changed	Brunner, Helen Joanne	
08/04/2016	Ruling on Motions		Neel, Mary	motion to file amicus brief "Granted."
08/05/2016	Letter		LOBSENZ, JAMES ELLIOT - Attorney	Advising the parties as to the date for filing appellant's reply brief.
08/10/2016	Screened	Status Changed		
08/18/2016	Invoice		Neel, Mary	Invoice #16661 \$10.59 2nd notice sent 10/6/16
08/23/2016	Motion to Extend Time to File		LOBSENZ, JAMES ELLIOT - Attorney	to October 12, 2016
08/30/2016	Ruling on Motions		Johnson, Richard D	xar "Granted. However, no further extensions."
09/19/2016	Oral Argument Setting Letter	Sent by Court		
09/19/2016	Set on a calendar	Status Changed		
09/27/2016	Motion - Other	Filed	Brunner, Helen Joanne	Comment: PRO HAC VICE
09/27/2016	Motion for Additional Time for OA	Filed	Brunner, Helen Joanne	Comment: and motion to participate in oral argument
09/30/2016	Ruling on Motions		JOHNSON, RICHARD D - Court Clerk	motion for limited admission pro hac vice "Granted."
09/30/2016	Ruling on Motions		JOHNSON, RICHARD D - Court Clerk	motion for leave to participate in oral argument and for additional time "After consultation with the panel, the motion is granted. Each side shall have 15 minutes oral argument, with 5 minutes of King County's time assigned to the United States."
10/12/2016	Motion for Waiver of Page Limitation		LOBSENZ, JAMES ELLIOT - Attorney	
10/12/2016	Appellants Reply brief	Filed	Lobsenz, James Elliot	Comment: August 29, 2016
10/18/2016	Ruling on Motions		Johnson, Richard D	motion for leave to file over-length reply brief of 37 pages "The motion is granted."
10/31/2016	Other filing	Filed	Shih, Michael	Comment: Department of Justice Additional Authorities
11/01/2016	Appellant Additional Authorities	Filed	Lobsenz, James Elliot	
11/03/2016	Oral Argument Hearing	Rescheduled		Comment: 9:30 AM (Rescheduled) Spearman, Michael S. Leach, J. Robert Cox, Ronald
11/03/2016	Heard and awaiting decision	Status Changed		
12/19/2016	Opinion	Filed	Cox, Ronald	Comment: "We affirm the summary judgment order and the order denying the motion to compel discovery. We deny Mockovak's request for an award of reasonable attorney fees."
12/19/2016	Decision Filed	Status Changed		
01/06/2017	Motion to Publish		LOBSENZ, JAMES ELLIOT - Attorney	
01/06/2017	Motion for Reconsideration		LOBSENZ, JAMES ELLIOT - Attorney	
01/13/2017	Order on Motions		Cox, Ronald	Motion for Reconsideration and Motion to Publish Orders that the motion for reconsideration and motion to publish are denied.
01/13/2017	Order on Motions		Cox, Ronald	Motion for Reconsideration and Motion to Publish Orders that the motion for reconsideration and motion to publish are denied.
02/13/2017	Mandate	Due		

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## CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

Today I directed electronic mail addressed to James E. Lobsenz, the attorney for the petitioner, at [lobsenz@carneylaw.com](mailto:lobsenz@carneylaw.com), and Michael J. Sinsky, Senior Deputy Prosecuting Attorney, attorney for the respondent, at [mike.sinsky@kingcounty.gov](mailto:mike.sinsky@kingcounty.gov), containing a copy of the foregoing letter.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 23 day of February, 2017.



---

MICHAEL SHIH

*Counsel for the United States*