NO. 94109-2

THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL MOCKOVAK,

Petitioner,

v.

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

Respondents, and

UNITED STATES OF AMERICA,

Intervenor/Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Theresa Doyle

MOTION FOR ORDER DECLARING THAT THE UNITED STATES IS A RESPONDENT IN THIS CASE AND REJECTING ITS ASSERTION THAT IT PARTICIPATED IN THE COURTS BELOW MERELY AS AN AMICUS CURIAE

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I. IDENTITY OF MOVING PARTY

Petitioner, Michael Mockovak, seeks the relief designated below.

II. RELIEF REQUESTED

Petitioner moves the Court for an order declaring that the United States is a Respondent in this case, and rejecting its assertion that it participated in the courts below merely as an amicus curiae and never as an Intervenor/Respondent.

III. EVIDENCE RELIED UPON

Petitioner relies upon the Declaration of James E. Lobsenz that accompanies this motion.

IV. PROCEDURAL HISTORY OF THIS CASE

On February 23, 2017, attorney Michael Shih sent a letter to the Clerk of this Court. The letter stated that the United States was not a party to this case:

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

This letter prompts petitioner's motion.

A. The United States participated as a party in the Superior Court and submitted evidence in support of its position to the Superior Court.

This case began, as all Public Records Act cases do, in the Superior Court. Initially, the United States was not a party to the proceedings in the Superior Court. However, that changed after October 19, 2015, when Petitioner filed a motion seeking a court order compelling Detective Leonard Carver to submit to a deposition and to produce the subpoenaed documents which were referenced in the deposition subpoena served upon the detective. *See Decl. Lobsenz, Appendix A* (Plaintiff's Motion to Compel Detective Carver). Along with the motion, Mockovak's counsel submitted a Certificate of Compliance with CR 26 in which he recited the fact that he had conferred with AUSA Peter Winn, counsel for deponent Carver, in an attempt to resolve the United States Attorney's objection to the deposition of Detective Carver. *Id., Appendix B* (Certificate of Compliance).

On October 23, 2015, the United States filed an 11-page Response to Motion to Compel in the Superior Court. *Id., Appendix C* (Response to Motion to Compel). In that response, the United States argued that Mockovak's motion to compel should be denied. The United States did not identify itself as an amicus curiae in its response. Nor did it ever seek permission of the Superior Court to file an amicus curiae brief, as is

customarily done. *See, e.g., Fritz v. Gorton,* 8 Wn. App. 658, 658, 509 P.2d 83 (1973).[1]

Along with its brief opposing Mockovak's motion to compel, the United States submitted the declaration of Gregory W. Jennings. Decl. Lobsenz, *Appendix D* (Jennings declaration). In its brief, the United States made extensive reference to factual statements made by Jennings. The submission of evidence is not consistent with the role of an amicus curiae. Only a party has the right to submit evidence.

The Superior Court eventually denied Mockovak's motion to compel on November 25, 2015 and Mockovak appealed the denial of that order to the Court of Appeals.

B. The United States participated as a party in the Court of Appeals by seeking leave to intervene in the appeal, by labeling itself an "Intervenor/Respondent" on the title page of that brief, and by participating in oral argument.

On July 29, 2016, the United States filed a motion in Division One of the Court of Appeals. In that motion, the United States expressly sought leave to intervene in the case, or, in the alternative, to participate as amicus curiae. *Id., Appendix E* (Motion of the United States to Intervene, or for Leave to File an Amicus Curiae Brief). The motion clearly identifies amicus participation as a fallback request.[2]

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[1] "The League of Women Voters of Washington has petitioned this court for a writ of certiorari to review an order of the superior court entered on March 9, 1973 which both denied the League's motion to intervene as a party defendant under CR 24, and granted the League permission to appear as an amicus curiae."

[2] The motion begins with this first paragraph: "The United States respectfully files this unopposed motion seeking leave to intervene as respondent in this action ***and to file the***

(Footnote continued next page)

Under the caption heading of "Argument," the United States explained why it wanted to intervene in the case. Pointing to CR 24 the United States argued that it had a *right* to intervene because it had a substantial interest at stake in the litigation and a ruling in favor Mockovak would impair that interest:

> 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. 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, 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.

Id., *Appendix E*, at pp. 4-5 (emphasis added).

Commissioner Mary Neel considered the motion. Not surprisingly, she granted the United States' motion in a one word order

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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")." (Emphasis added).

that said simply, "Granted." *Id.*, *Appendix F.* Since the United States' first choice was to be allowed to intervene, and since Mockovak did not oppose the United States' motion to intervene, it is abundantly clear that Commissioner Neel *granted leave to intervene as a party.*

The Court of Appeals accepted the brief filed by the United States. On the title page of the brief, *the United States identified itself* in the case caption as an "*Intervenor-Respondent*" and identified the document simply as the "Brief of the United States." *Id., Appendix G* (title page). It did *not* identify the brief as the brief of an amicus curiae.

Counsel for the United States appeared at the oral argument in the Court of Appeals and made argument to the panel. When counsel identified himself to the panel he did not identify himself as counsel for an amicus curiae, he simply stated that he was appearing "for the United States." *Id.*, ¶ 9.

C. In its letter to the Clerk of this Court, the United States failed to make any mention of (1) the fact that it chose to represent itself as an Intervenor/Respondent in the Court of Appeals, and (2) the fact that it presented evidence in the Superior Court.

In its February 23, 2017 letter to this Court, the United States made no mention of any of the following facts:

(1) its submission of evidence in the Superior Court proceedings;

(2) its motion for leave to intervene in the Court of Appeals;

(3) its argument to the Court of Appeals that it had an interest in the case, which gave it the right to intervene;

(4) its identification of itself on the title page of the brief it submitted to the Court of Appeals as an Intervenor/Respondent; or

(5) its participation in the oral argument.

The only support that the United States offered for its representation that it appeared simply as "amicus" in the Court of Appeals was to present this Court with a copy of the electronic docket of the case in the Court of Appeals. As this Court surely knows, docket entries, are made by deputy clerks who frequently abbreviate the title of motions rather than type in the complete title. In this case, the docket has the following entries that refer to the United States:

3/31/2016	Letter	Filed	Comment: federal government asking for permission to be a part [sic][3] of this appeal.
7/29/2016	Motion–Other	BRUNNER, HELEN JOANNE–Attorney	To file amicus brief
8/4/16	Ruling on Motions	Neel, Mary	motion to file amicus brief "Granted."

A docket entry, however, does not control over the actual order made by the Commissioner. A reading of the motion filed by the United

[3] It is hard to know whether this is a typo and whether the word "part" was meant to be the word "party."

States together with the one word order "granted" demonstrates that the United States' motion *to intervene as a party* was granted.

V. REASONS WHY RELIEF SHOULD BE GRANTED

A. Participation as An Amicus Allows the Amicus to Evade Res Judicata.

When a court rejects the arguments made by an amicus curiae, the amicus is not bound by that decision. As one scholar has noted, amicus' ability to evade the doctrine of res judicata gives it a big advantage:

> Because the amicus curiae generally lacks party status or the ability to control the course of the litigation, the private amici can, in most instances, participate in the suit ***free of the effects of res judicata***. In this sense, the amicus may freely raise the same issues and arguments in subsequent litigation, thus potentially serving a wider group of its members or general public. ***The importance of the amici's curiae's ability to evade res judicata*** in the development of new law should not be understated.

M. Lowman, The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave? 41 AMERICAN UNIV. LAW REVIEW 1243, 1260-61 (1992) (emphasis added, footnotes omitted).[4]

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[4] *Accord Munoz v. County of Imperial*, 667 F.2d 811, 816-17 (9th Cir.) (finding simple amicus status does not bind nonparty), *cert. denied,* 459 U.S. 825 (1982); *TRW, Inc. v. Ellipse Corp.,* 495 F.2d 314, 318 (7th Cir. 1974)(noting amicus is only bound by res judicata if there is privity between amicus and litigant); *Cory Corp. v. Sauber,* 267 F.2d 802, 803 (7th Cir. 1959)(denying request for amicus to intervene as amicus because amicus would not be bound in later litigation), *rev'd on other grounds,* 363 U.S. 709 (1960); 3A C.J.S. Amicus Curiae §7, at 429-31 (1973) (stating that because amicus is not party to case or responsible for its management, amicus participation does not constitute final determination of rights); *see also* Charles A. Wright et al., *Federal Practice and Procedure* note 3, §4451, at 427 (suggesting that most direct basis for applying res judicata against nonparty consists of degree of participation and amount of control nonparty enjoyed during course of litigation).

B. The United States is judicially estopped from claiming that it participated in this case merely as an amicus curiae. The United States made one representation to the Court of Appeals. It cannot now contradict that representation by making a conflicting representation to this Court simply because it would be tactically advantageous to change its status to that of amicus curiae.

The United States does not want this case to be decided in Mockovak's favor. In the motion it filed in the Court of Appeals, it made it very clear that a ruling in Mockovak's favor would substantially harm the United States by invalidating the application of the Department of Justice's regulations to state police officers who participate in joint Federal/State task forces. Both in the Superior Court and the Court of Appeals, the United States participated as a party in order to maximize the chance that the courts would reject Mockovak's arguments and uphold the applicability of the DOJ regulations to Detective Carver.

Now, having won a favorable decision in the Court of Appeals, the United States seeks to change its status from a party to an amicus. Why would it do that? Because if it is a "mere" amicus in the Washington Supreme Court, then an adverse decision on the merits – a decision in favor of Petitioner Mockovak – will not be as harmful to the United States. If it is a "mere" amicus, it will be able to "evade res judicata," and, as Prof. Lowman has noted, the importance of that advantage "should not be understated." *Id.*

If the United States had consistently participated in this case as a "mere" amicus, then Petitioner Mockovak could not object to its continuation in that status in all proceedings in this court. But when a party makes conflicting statements to courts in order to secure a tactical advantage, a litigant like Mockovak has every right to object. The doctrine of judicial estoppel prohibits the United States from attempting to play fast and loose with Washington courts in thus fashion:

> Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." The doctrine seeks "to preserve respect for judicial proceedings," and "to avoid inconsistency, duplicity, and ... waste of time."

Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (citations omitted). *Accord Haslett v. Planck*, 140 Wn. App. 660, 665, 166 P.2d 866 (2007) ("In short, judicial estoppel prevents a litigant from "playing fast and loose with the courts.")(internal quotation marks omitted). It "precludes a party from gaining an advantage by taking an incompatible position in a subsequent action." *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001).

It would be inequitable to allow the United States to represent itself as a party in the Court of Appeals, and to then tell this Court that it was really only an amicus in that court. The United States chose to ask to become a party and its request was granted. It cannot disavow that status. It is judicially estopped from taking inconsistent positions in this fashion, and should not be allowed to escape the effects of res judicata. Petitioner

urges this Court to rule that throughout the proceedings in this Court, the United States is a party. Here, as in the Court of Appeals, the United States is a Respondent.

VI. CONCLUSION

For these reasons, Petitioner asks this Court to enter an order rejecting the United States' contention that it participated in the courts below merely as an amicus curiae, and prohibiting the United States from characterizing itself as anything other than a Respondent. If the United States does not wish to file a brief in this Court, it need not do so. But it should not be allowed to pretend that because it was never a party to this case that it will not be bound by any decision which this Court might render in favor of Petitioner Mockovak.

Respectfully submitted this 6th day of March, 2017.

CARNEY BADLEY SPELLMAN, P.S.

By /s/ James E. Lobsenz

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

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DATED this 6th day of March, 2017.

Deborah A. Groth, Legal Assistant

CARNEY BADLEY SPELLMAN

March 06, 2017 - 1:21 PM

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Appellate Court Case Title:	Michael Mockovak v. King County, et al.

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- mike.sinsky@kingcounty.gov
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- Michael.Shih@usdoj.gov

Comments:

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