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

PETITIONER'S REPLY IN SUPPORT OF MOTION FOR ORDER DECLARING THAT THE UNITED STATES IS A RESPONDENT IN THIS CASE

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I. ARGUMENT IN REPLY

A. Mockovak's decision not to file any opposition to the United States' *Motion to Participate in Oral Argument* did not mean that he agreed that the United States would be participating "as an amicus curiae." Mockovak simply believed that fifteen minutes of argument per side was a good idea and he did not object to giving the United States five of the minutes allocated to the Respondents.

The United States incorrectly asserts that "Mockovak *consented* to the government's motion to participate in oral argument as an amicus curiae." *Answer to Petitioner's Motion* at 6 (italics in original). In fact, Mockovak did not "consent" to anything; he simply did not file any opposition to the motion filed by the United States.

More importantly, Mockovak never took any position on the question of whether the United States was properly characterizing itself as an amicus or as a party. An examination of the motion filed by the United States reveals neither the title of the United States' motion nor the "Statement of Relief Sought" said anything about characterizing the United States as an amicus curiae. The United States entitled its motion: *Motion for Leave to Participate in Oral Argument and for Additional Time.* In that motion, under the heading "Statement of Relief Sought, the United States said this:

> 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 to 15 minutes, and that the United States be assigned 5 minutes of King County's time.

Motion for Leave to Participate in Oral Argument, at p. 1.

Mockovak simply did not object to allocating 15 minutes per side for oral argument (instead of the usual ten minutes). Nor did he object to allocating five of those fifteen minutes to the United States. Mockovak did not object to increasing the oral argument time because he believed that the Court of Appeals would benefit from additional oral argument time. He also believed that *he* would benefit from having fifteen minutes of argument time instead of ten.

As to the status of the United States – as a party or as an amicus – Mockovak believed that the United States was mischaracterizing itself, but that was of no concern to Mockovak because the United States was not asking the Court of Appeals to declare that it was an amicus as opposed to a party. Moreover, the fact that the United States was referring to itself as an amicus, instead of as an intervenor/respondent (as it had done on the cover sheet of its appellate brief) was of no significance to Mockovak. No matter what the United States called itself, Mockovak was not opposed to *either* the United States' request for additional argument time or to its request for leave to participate in oral argument. Since he did not oppose the granting of any of the relief sought, he filed no opposition to the motion. That certainly does not mean that Mockovak "conceded" that the United States had the status of an amicus curiae.

B. At oral argument, the attorney appearing for the United States did *not* identify himself as counsel for an amicus curiae.

The United States argues that it "comported itself" as an amicus curiae" in the Court of Appeals, and therefore it should be deemed to have

appeared in the Court of Appeals as an amicus curiae and not as a party. But as Mockovak pointed out in his motion, at the oral argument held in the Court of Appeals, attorney Shih did *not* clearly "comport himself" as counsel for an amicus curiae: "Mr. Shih identified himself at the outset of his argument as the 'attorney appearing 'for the United States.' He never said the words 'amicus' or 'amicus curiae.'" *Decl. Lobsenz*, ¶9. The United States makes no response to this observation, choosing instead to simply ignore it. Mockovak submits that by *not* stating that he was representing an amicus, the attorney comported himself as if he were representing a party and that party was the United States. Alternatively, the very most that anyone could say in favor of the United States' current position is that its attorney left the status of the United States ambiguous by refraining from stating whether the United States was participating in the appeal as a party or an amicus.

C. Compliance with APR 8 is required regardless of whether the applying lawyer seeks to appear as counsel for a party or for an amicus. Thus, compliance with APR 8 in no way suggests or implies that the lawyer appeared for an amicus.

The United States points to the fact that it complied with APR 8 by filing an application for permission to appear *pro hac vice* in Division One of the Court of Appeals. It argues that this shows that it was appearing as an amicus curiae and not as a party.

But the fact that the United States complied with APR 8 does not support any inference that the attorney was appearing as counsel for an

amicus as opposed to counsel for a party. "Except as may be otherwise provided in these rules, a person shall not appear as an attorney or counsel in any of the courts of the State of Washington" unless he is an active member of the Washington State Bar Association. APR 1(b). An exception to this rule is provided by APR 8(b) which allows a member of the bar in another state to "appear as a lawyer in any action or proceeding" in Washington State if he or she makes an application for permission to appear in the court where the action is pending. APR 8(b) makes no distinction between appearing as counsel for a party and as counsel for an amicus curiae. In either case, an out of state lawyer cannot appear without securing the permission of the court. Thus, the fact that the Assistant United States Attorney complied with APR 8(b), by applying for and obtaining such permission, does not constitute evidence that the attorney appeared in the Court of Appeals as counsel "for an amicus."

D. The text of CR 26(c) actually shows that the United States appeared in the Superior Court as counsel for a party and thus supports Mockovak's position, not the United States' position.

The United States concedes, as it must, that it filed a brief and a supporting declaration in the King County Superior Court. In an attempt to negate the conclusion that it must have appeared in that court as a party – not as an amicus curiae – the United States points to the language of Civil Rule 26(c). But the language of that Rule actually supports the exact opposite conclusion – the conclusion that the United States appeared as a *party* in the Superior Court.

Rule 26(c) provides in pertinent part:

> Upon motion by ***a party or by the person from whom discovery is sought***, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .

(Emphasis added).

In an attempt to escape from the unavoidable conclusion that it appeared in the Superior Court as "a party" the United States attempts to persuade this Court that it merely appeared on behalf of "the person from whom discovery is sought," and that it made a motion for a protective order on his behalf. But even a cursory examination of the brief that the United States filed in the Superior Court shows that this is not true.

First, the United States never filed any motion at all, much less a motion for a protective order pursuant to CR 26(c). The United States filed a brief which it entitled *Response to Motion to Compel.*[1] Nowhere in that brief did the United States ever mention subsection (c) of Rule 26. The United States never requested the issuance of a protective order, and nowhere in its brief did it ever mention or use the phrase "protective order." Instead, the United States simply stated that the Superior should "deny Plaintiff's motion to compel." *Response to Motion to Compel*, at 11:10.

[1] A complete copy of this brief is attached as Appendix C to the Declaration of James Lobsenz which was filed in this Court on March 6, 2017.

Second, the United States never alleged that it was representing "the person from whom discovery is sought." Mockovak was seeking discovery from Detective Leonard Carver, a Seattle police detective. In its brief, the United States never said that it was representing Detective Carver. The United States filed a declaration from FBI Special Agent Gregory W. Jennings, but Jennings was *not* the person whom Mockovak had subpoenaed to attend a deposition.

Third, the United States never argued that Superior Court action was needed to protect Detective Carver from "annoyance, embarrassment, oppression, or undue burden or expense." Moreover, Detective Carver made no such claim for himself. Instead, he simply said he was "caught in the middle" between the lawyers – presumably between the lawyers for King County and the lawyer for the United States (who was at that time AUSA Peter Winn).

Since the United States never claimed that it was representing "the person from whom discovery is sought," the only other category covered by CR 26(c) is the category covering "a party." Thus, even if the United States *had* filed a motion for a protective order, or even if its *Response to Motion to Compel* could be so characterized, it could only have sought a protective order under CR 26(c) because it was "a party" to the case. The United States began its participation in this case as a party. Since it never filed any notice of withdrawal in the Superior Court, that status was never altered. Thus, the United States remained a party to this case throughout all the proceedings in the two courts below.

E. Washington Courts do recognize non-mutual offensive collateral estoppel against government parties in civil cases, so the United States' attempt to avoid party status is motivated by its desire to prevent being bound by a decision in Mockovak's favor.

The United States argues that its desire *not* to be treated as a party has nothing to do with any desire to avoid the collateral estoppel effect of a decision in Mockovak's favor that this Court might render in this case. *Answer to Petitioner's Motion*, at 8. Citing to *United States v. Mendoza*, 464 U.S. 154, 158 (1984), the United States argues that in a future case against a different litigant it *couldn't* be collaterally estopped by a decision in Mockovak's favor in this case because the United States is not subject to non-mutual offensive collateral estoppel.

But the *Mendoza* decision does not govern proceedings in state courts; it only applies to federal courts. Although Washington has decided not to apply nonmutual offensive collateral estoppel against government parties in *criminal* cases, *State v. Mullin-Coston*, 115 Wn. App. 679, 64 P.3d 40 (2003), Washington *does* apply the rule against government parties in *civil* cases. *See City of Seattle, Executive Services Department v. Visio Corp.*, 108 Wn. App. 556, 31 P.3d 740 (2001); *Mullin-Coston*, 115 Wn. App. at 686. So in a future Washington state court case involving some other Public Records Act requestor seeking records from a Washington law enforcement officer who is also a member of federal joint task force, the United States *would* be collaterally estopped from relitigating any issues which this Court might have decided against it in this case. Therefore, contrary to its assertion that it would not secure any

benefit from being treated simply as an amicus curiae by this Court, the United States *does* have a collateral estoppel-avoiding motive to persuade this Court that it is not currently a party in this appellate case.

II. CONCLUSION

The United States intervened in the Superior Court and presented evidence in that Court in opposition to Mockovak's motion to compel. The United States sought to be treated as an Intervenor/Respondent in the Court of Appeals and its motion was granted. It should not now be heard to protest and complain about being treated as an Intervenor/Respondent in this Court.

Why is the United States trying so hard to avoid party status? Because it understands that if this Court grants review and then rules in Mockovak's favor, the United States will be collaterally estopped from relitigating the federalism issues that this case presents in any court. A decision in Mockovak's favor will not only be given collateral estoppel effect in all Washington courts, but by virtue of the Full Faith and Credit Clause of the U.S. Constitution, every other state court in the land will be obligated to follow this Court's decision.

Having participated as a party, the United States won a decision in its favor in the Court of Appeals. Now it seeks to portray itself as a mere amicus, so that if this Court rejects its arguments and takes away its victory, it will be able to argue that it is not bound by this Court's decision in any future case. This Court should not permit the United States to

change its status from party to non-party simply because it is now to its advantage to do so.

Respectfully submitted this 10th day of April, 2017.

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By _____

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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:

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April 11, 2017 - 11:31 AM

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