No. 95881-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MEGAN LARES-STORMS,

Petitioner.

PETITIONER'S ANSWER TO AMICUS MEMORANDA

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A. RELEVANT FACTS

Megan Lares-Storms filed a petition for review raising two broad state constitutional issues this Court has not yet addressed:

> (1) Does the application of a drug-detection dog to a person's car disturb a private affair, such that article I, section 7 requires a warrant or other "authority of law" prior to the intrusion?; and
>
> (2) Does article I, section 7 require higher standards of reliability than the Fourth Amendment in determining whether a dog's "alert" is reliable and supports probable cause to issue a warrant for a further search, and specifically, must the State present evidence of the dog's track record of false positives and false negatives in order to demonstrate reliability?

Ms. Lares-Storms noted that this Court left the first issue open in *State v. Neth*[1], and that the Court of Appeals stated this Court was a more appropriate arbiter of the second issue than the Court of Appeals. The petition for review highlighted this Court's many cases holding that article I, section 7 is more protective than the Fourth Amendment in the context of vehicles, and reasoned the same should be true for canine searches of cars. The petition also discussed this Court's repeated admonition that article I, section 7 is not grounded in notions of "reasonableness," and noted that Division Three erred in following a Division One case that relied on the Fourth Amendment's "reasonable expectation of privacy"

[1] 165 Wn.2d 177, 181, 196, P.3d 658 (2008).

standard. As to the second issue, the petition noted that article I, section 7 imposes higher standards of reliability for informants' tips than the Fourth Amendment, and urged this Court to hold the same is true for canine tips.

The American Civil Liberties Union of Washington ("ACLU") filed a motion and memorandum in support of the petition, focused primarily on the first issue. In addition to explaining the errors in the State's and Court of Appeals' reasoning, the memo provided relevant information about the physics of perception and the development of technologies which can detect private details from great distances notwithstanding physical barriers. It was important for the ACLU to educate the Court about these technologies, because whatever rule the Court adopts for canine noses would apply equally to "electronic noses" and other tools. ACLU Memo at 7.

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") filed a motion and memorandum in support of the petition, focused primarily on the second issue. The memo cited studies and cases questioning the reliability of drug-detection dogs and underscoring the importance of considering false-positive rates and handler bias. The Court of Appeals had acknowledged these studies, but determined that "the formulation of a new rule requiring disclosure of a police dog's record of

reliability before the issuance of a search warrant based on a sniff" was a subject best left for this Court or the legislature. Slip Op. at 15.

The State filed objections to both amicus memoranda. It accused the ACLU of promoting "hysteria," the Korematsu Center of engaging in "egregious" conduct, and both organizations of violating the RPCs.[2] *See* Objection to ACLU memo at 4, 7; Objection to Korematsu memo at 6. The State protested that a dog "has a right to breathe[,]" Objection to ACLU memo at 3, and opined that other surveillance methods are irrelevant and citation to studies improper.

This Court overruled the State's objections and granted the motions of ACLU and Korematsu Center to file amicus memoranda. This Court granted the State's motion to strike Ms. Lares-Storms's response to the State's objections, but noted that counsel for the parties could file answers to the amicus memoranda by August 7, 2018. *See also* RAP 10.1(e) ("If an amicus curiae brief is filed, a brief in answer to the brief of amicus curiae may be filed by a party.").

[2] The State had levied a similar accusation against Ms. Lares-Storms in its answer to the petition for review. Answer at 15.

B. ARGUMENT

1. Amici properly explained the broad implications of the issues presented in light of developing technologies and racial bias.

This case is not just about dog's noses, as the State has claimed. It is also not just about Washington's strong privacy protection in cars, which petitioner has emphasized. Rather, if the government may apply a drug-detection dog to a person's car without authority of law, the government may also engage in analogous activities unchecked. Amici have highlighted the broad implications of shielding such surveillance from constitutional scrutiny, and the importance of this Court's granting review to determine the proper standards under article I, section 7. RAP 13.4(b)(3) (this Court will review significant constitutional questions); RAP 13.4(b)(4) (this Court will review issues of substantial public interest); RAP 10.6(a) (this Court will grant permission to file an amicus brief that will assist the Court).

This Court regularly – and appropriately – considers the broad implications of its holdings to all Washingtonians, not just the parties. For instance, in a case addressing legal financial obligations, this Court discussed the "[s]ignificant disparities" in the administration of LFOs. *State v. Blazina*, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). Among other things, this Court noted that higher LFOs are imposed on Latino

defendants and on defendants in smaller counties. *Id.* The parties before the Court were white defendants and a large county (Pierce), but this Court understood that the standard it set would apply broadly, and therefore it was important to understand the landscape throughout the state.

The amici here have provided helpful information about the broad implications of the issues presented. The petition for review discussed the cases involving use of infrared technology, but did *not* explain the physics of perception or recent technological advances. As the ACLU points out, cutting-edge surveillance tools can detect private details from great distances notwithstanding physical barriers, and whatever rule the Court adopts for canine noses would apply equally to these advanced technologies. ACLU Memo at 7.

Similarly, the petition for review discussed the relevance of this Court's cases prohibiting pretextual searches, and cited a law review article suggesting police request drug-detection dogs more often for Hispanic drivers, but did *not* discuss the problem of handlers' biases during the searches themselves. As the Korematsu Center notes, studies show that dog sniff searches of drivers of color result in disproportionately high false-positive rates, and this information is important to consider when setting reliability standards. Korematsu Center Memo at 8-9.

In sum, amici have demonstrated the broad implications of the issues presented in light of developing technologies and racial bias. This Court should grant review.

2. Amici properly cited scientific studies relevant to the broad issues presented.

Amici have properly cited studies and articles in support of their arguments. Neither parties nor amici are limited to citing cases and the record; citation to secondary sources is also proper and helpful.

This Court should reject any argument that amici may not cite secondary sources unless they were filed in the trial court. The reports cited are not "adjudicative facts" about this particular case. They are broad studies addressing phenomena relevant to the constitutional issues before this Court. If amici attempted to introduce new evidence about K-9 Pick or Ms. Lares-Storms's car, that would be improper absent a motion pursuant to RAP 9.10 or 9.11. But amici have done no such thing. The amicus memos properly cite and discuss law review articles and studies, just as they properly cite and discuss case law.

"[A] court can take notice of scholarly works, scientific studies, and social facts." *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980) (citing, inter alia, *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973)). Indeed, this Court regularly relies on such secondary

sources. In a case involving race discrimination in jury selection, this Court relied on numerous studies demonstrating the breadth of the problem to conclude that Washington should develop a more-protective standard. *State v. Saintcalle*, 178 Wn.2d 34, 45, 309 P.3d 326 (2013). And in an article I, section 7 case, this Court cited several secondary sources and quoted conclusions drawn from "numerous research studies[.]" *State v. Chacon Arreola*, 176 Wn.2d 284, 295, 290 P.3d 983 (2012).

Other examples abound. *See, e.g.*, *See State v. Copeland*, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996) (noting that in a case involving the admissibility of DNA evidence, the Court "relied upon [a] scientific report issued after oral argument"); *State v. Allen*, 176 Wn.2d 611, 621 & n.4, 294 P.3d 679 (2013) (citing "research and studies exposing problems inherent in eyewitness identification testimony," which was not presented in trial court); *In re Parentage of L.B.*, 155 Wn.2d 679, 692 n.7, 122 P.3d 161 (2005) (relying on social science to define "psychological parent" and citing Joseph Goldstein, Anna Freud, Albert J. Solnit, Beyond The Best Interests Of The Child 19 (1973)).

This Court is not alone in considering secondary sources when addressing issues of broad importance. For instance, the Connecticut Supreme Court recently explained, "[a]lthough finding the adjudicative facts that concern the parties and events of a particular case is largely the

province of the jury—or the trial court in cases tried to the court—appellate courts tasked with determining the content of law and policy may take notice of constitutional and legislative facts, such as historical sources and scientific and sociological studies." *State v. Santiago*, 318 Conn. 1, 126–27, 122 A.3d 1, 77–78 (2015). And of course the United States Supreme Court frequently relies on scholarly articles in reaching its conclusions. *E.g. Atkins v. Virginia*, 536 U.S. 304, 316 n.21, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (citing "[a]dditional evidence" regarding intellectual disabilities attached to amicus briefs filed by psychological experts to conclude death penalty may not be imposed on people with intellectual disabilities).

The State argues that citation to studies and other secondary sources violates its right to due process. Objection to Korematsu Center memo at 5, 8; Objection to ACLU memo at 5, 7. The State is wrong. The Due Process Clause protects individuals, not the State. The clause provides, "…nor shall any State deprive any person of life, liberty, or property, without due process of law …." U.S. Const. amend XIV. "The due process clause protects people from government; it does not protect the state from itself." *City of Mountlake Terrance v. Wilson*, 15 Wn. App. 392, 394, 549 P.2d 497 (1976).

Moreover, the case the State relies on to claim a due process violation is not on point. *State v. K.N.*, 124 Wn. App. 875, 883, 103 P.3d 844 (2004). *K.N.* involved a trial judge taking judicial notice of an adjudicative fact – an element of the crime – that the State should have been required to prove beyond a reasonable doubt. *Id.* at 877. The judge took "judicial notice" of the defendant's age and found him guilty of being a minor in possession of alcohol. *Id.* The *K.N.* court correctly recognized that relieving the State of its burden to prove each element of a crime beyond a reasonable doubt violates an accused individual's right to due process. The case cannot be stretched to imply that the government has a right to due process or that amici violate that right by citing secondary sources.

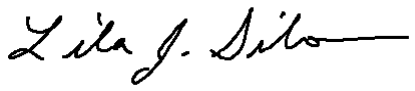
Finally, the State claims the Court of Appeals "properly refused to consider" the studies the Korematsu Center and Ms. Lares-Storms cited. Objection to ACLU Memo at 8. This is incorrect. In fact, the court stated, "We recognize recent studies and literature that question the reliability of dog sniffs." Slip Op. at 15. But the court declined to reach the reliability issue under RAP 2.5(a)(3), stating, "This court previously held that law enforcement may premise the reliability of a dog's sniff solely on an attestation of the dog's training and certification. *State v. Gross*, 57 Wn. App. 549, 551, 789 P.2d 317 (1990)." Slip Op. at 15. At the end of the

paragraph, the court suggested the issue was appropriate for this Court's review. *Id.* Division Three was right: the issue is appropriate for this Court's consideration, and this Court should grant review.

C. CONCLUSION

Amici have demonstrated the broad implications of the issues presented in this case. Exempting drug-detection dogs from constitutional limitations necessarily means exempting increasingly intrusive surveillance technologies from constitutional scrutiny. And issuing warrants for further searches based on canine alerts, without meaningfully testing the reliability of those alerts, ignores the scientific reality of false positives and unconscious bias. This Court should grant review to address these constitutional questions of broad public import.

Respectfully submitted this 7th day of August, 2018.



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***ANSWER TO AMICUS MEMORANDA

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