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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM KIPP,

Petitioner.

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**BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON**

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ORIGINAL

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports the Privacy Act, Chapter 9.73 RCW, protecting private conversations against wiretapping, eavesdropping, and recording. It has participated in numerous privacy-related cases both as *amicus curiae* and as counsel to parties.

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether a conversation between family members in an otherwise unoccupied room of a private residence is private.

STATEMENT OF THE CASE

Kipp was accused of sexually assaulting two of his nieces. He was confronted about the allegations by their father, Kipp’s brother-in-law. Kipp and his brother-in-law spoke for about 10 minutes in the upstairs kitchen of a private residence while everybody else in the house was downstairs. Without Kipp’s knowledge or consent, the conversation was recorded. Over Kipp’s objection, this recording was admitted into evidence by the trial court, and Kipp was convicted. A divided Court of Appeals affirmed, holding that the conversation was not “private.” *See State v. Kipp*, 171 Wn. App. 14, 286 P.3d 68 (2012).

This case asks whether the Privacy Act, which prohibits recording of a “private conversation,” RCW 9.73.030(1)(b), applies to the undisputed facts here: conversation between family members about a sensitive matter in an otherwise deserted room of a private residence.

ARGUMENT

As a preliminary matter, *amicus* recognizes that the recording at issue in the present case was made by Kipp’s brother-in-law, one of the participants in the conversation. However, this fact does not render the surreptitious recording lawful. The Privacy Act allows recording of conversations only with “the consent of all the persons engaged in the conversation.” RCW 9.73.030(1)(b). As such, the brother-in-law’s consent to, and actual implementation of, the recording is immaterial, since Kipp clearly did not consent to the recording himself. It is appropriate, therefore, to view the case as if the conversation had been recorded by a third party who had surreptitiously planted a bug in the kitchen, without knowledge or consent of either participant.

Viewed through this lens, it seems obvious that the conversation was protected by the Privacy Act. The fact that the Court of Appeals reached a different conclusion illustrates the muddled state of the existing case law interpreting the meaning of “private” in the context of the Act. This state of confusion leads to results that are incompatible with this

Court's direction to "generally presume that conversations between two parties are intended to be private." *State v. Modica*, 164 Wn.2d 83, 89, 186 P.3d 1062 (2008). That incompatibility is especially evident when one considers this Court's description of the Act as "one of the most restrictive in the nation," *State v. Townsend*, 147 Wn.2d 666, 672, 57 P.3d 255 (2002).

This state of confusion has been largely caused by an incorrect quotation of the definition of "private," which improperly indicates that only "secret" conversations are "private." The correct definition focuses instead on the intent of the parties, and whether the conversation was meant to be open to all. The language of the Privacy Act further demonstrates that its protection extends far beyond "secret" conversations to instead encompass virtually all conversations. This presumption that a conversation is "private" can be rebutted only if there is clear evidence that the parties intended to open their conversation to the public at large. As discussed below, such an intent may be reasonably demonstrated by several factors—but none of those factors are present in this case.

Amicus respectfully urges the Court to clarify the law by returning to the ordinary meaning of "private conversation" and following both the text and spirit of the Act. All conversations should fall within the scope of

the Privacy Act's protection against surreptitious recording unless they are clearly public in nature.

A. Privacy Act Jurisprudence Has Been Confused by a Dictionary Misquotation

The Privacy Act protects only "private" conversations.

RCW 9.73.030(1)(b). It does not define the term, so our courts have determined that it should "be given its ordinary and usual meaning." *E.g.*, *State v. Clark*, 129 Wn.2d 211, 224, 916 P.2d 384 (1996). They have then typically repeated a definition first found in *State v. Forrester*, 21 Wn. App. 855, 861, 587 P.2d 179 (1978) (quoting Webster's Third New International Dictionary (1961)). The common quotation is "belonging to one's self ... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public." *E.g.*, *Clark*, 129 Wn.2d at 225.

Unfortunately, that widely used quotation was not accurate when it was written in *Forrester*, and it has not been corrected in any of the subsequent cases. The effect has been to improperly conflate "private" with "secret" and thereby limit the scope of the Act. In actuality, only one clause of the definition ("intended only for the persons involved") is relevant to the interpretation of the Privacy Act.

This is evident when one looks at the full definition of “private” in Webster’s Third New International Dictionary. That complete definition is attached in the Appendix, with highlights showing the sections that are included in the *Forrester* quotation. As can be readily seen, much of that quotation is simply not germane; it includes a section from the etymology, an obsolete definition of the *noun* “private,” and a section of a definition for the adverbial phrase “in private.” There is no apparent reason for *Forrester* to have included such disparate and irrelevant sections of the Webster’s definition. It is particularly puzzling because Webster’s includes a definition of “private” in the specific context of a conversation: “intended only for the persons involved.” In other words, when interpreting the Privacy Act’s use of the term “private conversation,” there is no reason to look further for the ordinary and usual meaning of “private” than that single clause in Webster’s—but that clause is inexplicably buried in the middle of the *Forrester* quotation.

It is easy to see how this inaccurate quotation has led the courts astray; it uses the term “secret” three times, and generally gives the impression that only secret or confidential communications should be considered “private.” Most notably, this led *Clark* to incorrectly import standards from privilege law, including the likelihood of a participant in

the conversation passing on information, or the possibility of a third party overhearing the conversation. *See Clark*, 129 Wn.2d at 225-27.

In contrast to the incorrect quotation, the actual most relevant definition of “private” (in the context of a conversation) does not use the word “secret” at all. The key aspect of a private conversation is not secrecy; instead, the key aspect is the belief and intent of the participants. The primary question is whether the participants intend the conversation—not the subject matter, but the actual conversation—to be limited to themselves, or open to all. Many conversations are private that are not secret, and the Privacy Act is intended to protect them.

In fact, if the Privacy Act were limited to protecting only secret or confidential conversations, it would have little meaning, and fail to provide much protection at all to Washingtonians. First, there is really no such thing as a “secret” conversation. In almost all cases, one runs the risk of the other party to a conversation repeating the substance to another. There may be social expectations that some discussions will not be repeated, but those social expectations are not binding, and are frequently broken. Put plainly, most people are poor at keeping secrets, even when they intend to. And it often seems that the more sensitive or “juicy” a secret it, the less likely it will be kept. This aspect of human nature has long been recognized, as in the old saying, “Three may keep a secret, if

two of them are dead.” Benjamin Franklin, Poor Richard’s Almanack 53 (U. S. C. Publishing Co. ed. 1914).

Perhaps the only instances in which one can rely on the silence of the other party are confidential conversations protected by law, such as conversations between an attorney and client.¹ But there wouldn’t be much purpose to the Act if it only applied to such confidential conversations, since those conversations are already protected by other law. In other words, rather than being limited to a few instances of secret conversations, the Act is clearly intended to apply to the vast majority of ordinary conversations—all those in which the participants intend and believe they are talking amongst themselves. Even if two friends are simply discussing recipes, including published recipes, the ordinary and usual meaning of “private” shows that the Privacy Act protects those friends from a fear of being recorded without their knowledge or consent.

B. The Language of the Privacy Act Supports a Broad Scope for “Private Conversation”

In addition to looking at the ordinary meaning of “private conversation,” one need only look at the language of the Privacy Act to recognize its broad scope. Although RCW 9.73.030(1) prohibits

¹ Even in those instances, there are no guarantees. One need only look at the headlines or bar disciplinary notices to find cases where information protected by law has been disclosed.

surreptitious recording only of “private” conversations and communications, it is clearly intended to apply to almost all conversations. This can be seen from several provisions of the Act, which specifically allow recording of some conversations under some circumstances. Those exemptions to the prohibition on recording include situations that many people would not consider “private” at first blush, but nonetheless must be intended to fall within the Act’s meaning of “private conversation”—if those conversations were not deemed to be “private,” the Act wouldn’t prohibit recording in the first place.

For example, unconsented recording is allowed of conversations “of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster.” RCW 9.73.030(2). This reinforces the fact that secrecy is not in any way required for a conversation to be “private” within the meaning of the Act. Such emergency conversations are far from secret; the whole purpose of a report of an emergency is to spread the news as wide and far as possible. Nonetheless, the Legislature found it necessary to include an explicit exemption for recording those conversations, implying that they would otherwise fall within the prohibition on recording of private conversations.

Even more instructive is a provision allowing the recording of incoming calls to police stations and interrogations of arrestees.

RCW 9.73.090(1). That exemption applies only to recording *by police personnel*, which implies that recording by third parties, or even by the caller, is prohibited. In other words, the Act still sees such conversations, which are not secret in any way, as being “private”—in circumstances far more public than the conversation at issue in the present case.

Perhaps the clearest evidence of the broad scope of “private,” encompassing virtually all conversations, is a provision allowing media reporters to assume consent to record a conversation as long as the recording device is “readily apparent or obvious to the speakers.”

RCW 9.73.030(4). This clearly implies that a conversation with a reporter with an obvious microphone is deemed “private” within the meaning of the Act, so that consent to record would be required except for this provision. Such a conversation is far from secret, of course; in fact, the expectation is that some or all of the conversation will be widely disseminated to the public—not just the substance, but the actual recording. If talking on-camera to a reporter is “private,” how can a conversation with a family member in a deserted room not be “private” as well?

C. The *Clark* Factors Should Be Updated to Reflect a Presumption of Privacy

As discussed above, when deciding whether a conversation is private, the ordinary and usual meaning of “private” leads us to the key question of whether the parties to the conversation intended it “only for the persons involved.” Webster’s. Unfortunately, people’s intents are not always obvious. A proper determination of intent, including whether the subjective intent of the parties was objectively reasonable, may therefore require examination of the entire context of the conversation.

This Court has previously identified several factors to be considered during that examination. *See Clark*, 129 Wn.2d at 225-27. But the language of the Act, as discussed above, requires that examination to begin with a presumption of privacy—the same presumption of privacy recognized in *Modica*, 164 Wn.2d at 89. In other words, the proper question is not whether the context shows a reasonable intent to have a *private* conversation; it is whether the context shows a reasonable intent to have a *public* conversation—unless the intent to be public is clear, the conversation must be deemed private for purposes of the Act.

In order to effectuate this presumption of privacy, *amicus* respectfully suggests that the *Clark* factors should be reconsidered. Several of the factors do not appear well suited to help in the

determination of privacy at all, while others could use application of a new gloss to better correspond to the correct definition of a “private” conversation:

Duration. The first factor listed was the “duration ... of the conversation,” *Clark*, 129 Wn.2d at 225, with the implication that very short conversations are not private. This is not a helpful factor. The only example discussed was a brief telephone exchange between a caller and the daughter of the intended recipient; the daughter simply said her father wasn’t home. *Id.* (citing *Kadoranian v. Bellingham Police*, 119 Wn.2d 178, 829 P.2d 1061 (1992)). But it was another aspect of the *Kadoranian* call, the willingness to talk to a stranger, that evidenced a lack of privacy far more than the duration did. In actuality, the length of a conversation says little, if anything, about the intent of the parties to make their conversation public. One can easily conceive of very long conversations that are public (e.g., town hall meetings) and very short conversations that are private (e.g., unsuccessful pick-up lines).

Subject matter. When discussing this factor, *Clark* looked at whether the subject of the conversation would be likely reported to others or whether it was “intended or reasonably expected to be kept secret.” *Clark*, 129 Wn.2d at 225. This is a direct reflection of the inaccurate

definition of “private” discussed above, and therefore does not indicate whether the parties intend the conversation to be private.

For example, a boy with a crush on a girl may well confide in a friend and ask that friend to approach the girl and let her know of his interest. That boy intends the *subject* of the conversation to be disclosed to another—that’s the entire point of talking to the friend—but would doubtless be mortified to have the actual conversation recorded and replayed. Or consider a marriage proposal. Assuming the proposal is accepted, both parties are probably thrilled to share the news. But they may well want to keep the actual moment private, and not want it replayed to the public on YouTube. In other words, each of these conversations is private, although the subject of the conversations is far from secret.

As with duration, *amicus* respectfully suggests the subject matter has little to do with privacy. A public lecture may deal with very intimate matters, while a private conversation may consist of nothing more significant than disagreement over the relative merits of two athletes. Nor does it matter whether the topic of discussion is incriminating. The Legislature surely intended to protect incriminating conversations, among others, as evidenced by the inadmissibility of improper recordings in criminal proceedings, RCW 9.73.050, but it seems highly dubious that the

Legislature passed the Act solely to protect criminals—instead, conversations covering all types of subjects were intended to be protected.

Location and Potential Presence of a Third Party. As with the preceding factors, the location by itself does not seem particularly relevant. A conversation held on stage during a dramatic performance would likely be public, but a conversation held in the same location when the theater is otherwise deserted could easily be private. Similarly, the *potential* presence of a third party means nothing. Unless a person is *actually* present to hear what is said, there can be no intrusion into privacy. This is especially true because the participants in a conversation can easily change the subject or simply stop speaking when a third party appears. As such, anything the third party hears may have no relation to the private conversation taking place beforehand.

Presence of a Third Party. Unlike the previous factors, the actual presence² of a third party may be significant in demonstrating the intent of the conversation participants, depending on the nature of the third party. On one hand, a third party may simply become an additional participant in the conversation, as when one friend joins others; in such a scenario, the conversation continues as private. But the presence of a stranger or

² Naturally, the presence of a third party is only significant if the participants in the conversation are (or should be) aware of the third party. A private conversation held in a bedroom does not become public if there is a person hiding in a closet.

outsider, and the willingness of the participants to continue speaking, may show that the speakers do not intend to limit the conversation to themselves. This intent may also be demonstrated by the manner of speaking; a whispered conversation is almost certainly intended to be private, whereas a shouted exchange may indicate a willingness to share with the public.

It should be emphasized that the mere *possibility* that a third party will overhear a conversation does not make it public. Consider a restaurant example. Many people hold very private conversations in restaurants, including the discussion of intimate matters. They recognize that there is a possibility that other diners will overhear portions of the conversation, but that does not indicate an intent to make the conversation public—and certainly not a willingness to have it recorded and widely disseminated. In fact, the participants are likely to temporarily stop a conversation when a waiter or busboy approaches, and it is obvious that all will be heard; they do not feel the same need when only snippets will be overheard by people at the next table. The participants' expectation of privacy may not survive, however, if the participants get into a heated argument and raise their voices—a “public scene” is probably not protected by the Privacy Act. Short of that, however, people should feel confident that their restaurant

discussions are not being recorded, whether the discussion is an intimate proposal or simply the decision of which entrée to order.

Role of the Nonconsenting Party. Although *Clark* labeled this factor in general terms, proper consideration of this factor should be limited to whether the participants in a conversation are strangers to each other. If they are not strangers, the particular nature of their relationship says little about the privacy of the conversation. Discussions between friends, enemies, business partners or adversaries, neighbors, family members, professional acquaintances, or simply regular patrons of an establishment all retain a presumption of privacy. But strangers are different. An “apparent willingness to impart the information to an unidentified stranger evidences the non-private nature of the conversation.” *Clark*, 129 Wn.2d at 226-27.

It should be emphasized that not all conversations with a stranger are public in nature. For example, a conversation may begin with a stranger, but due to the nature of the conversation, the participants develop a relationship over the course of the conversation. Or a person may be willing to bare his soul one night to an unknown stranger in a bar, without intending that conversation to be recorded and replayed to countless others on the Internet. Nonetheless, speaking to a stranger may be a significant indicator of intent to have a public conversation.

Number of Participants. This factor was not mentioned in *Clark*, but *amicus* suggests that it is more significant than some of the listed factors. The larger the number of participants in a conversation, the less likely it is to be private, particularly if the majority of participants are in the nature of an audience. Of course, numerosity is not alone a determinant that a conversation is public, especially if the participants are known to each other; it is safe to say that even very large corporate boards do not intend to have their meetings surreptitiously recorded. But a conversation consisting of a speaker addressing multiple strangers may well be intended to be public, as epitomized by a soapbox orator who speaks in a public park—the quintessential example of a public conversation.

In summary, *amicus* urges the adoption of an updated multi-factor test to determine whether a conversation is private. The factors to be considered are the actual visible presence of one or more third parties, the number of those outsiders, and whether those outsiders are strangers to the participants in the conversation. Unless those factors clearly demonstrate the intent to have a public conversation, the conversation should be deemed private, and protected by the Privacy Act.

D. Multiple Factors Demonstrate that Kipp's Conversation Was Private

Application of these factors to the present case leaves little doubt that the conversation was private. He spoke with one person, and that person was well known to him—a family member. The conversation took place in a deserted kitchen of a private residence. It is highly unlikely that another person could have come into the kitchen without Kipp's knowledge, since the only other people in the house were all downstairs; Kipp would easily have been able to terminate or change the conversation upon hearing another person approach. There is no reason to believe that Kipp intended his conversation for a wider audience. If he had, he could have simply asked others in the house to join the conversation. The presumption of privacy has not been rebutted, and Kipp's conversation was fully protected by the Privacy Act.

In fact, application of these factors to the facts in *Clark* itself raises the possibility that *Clark* was wrongly decided, and that the conversations in *Clark* should have been determined to be private. That question need not be decided in the present case, but *amicus* respectfully urges the Court to, at a minimum, reaffirm its earlier caution:

We emphasize that our ruling is limited to these sixteen conversations where the defendants approached a stranger for brief, routine conversations on the street about drug sales. We are not suggesting or deciding that a conversation

is not private solely because it takes place on a street or solely because it relates to a commercial or illegal transaction. Clearly, there are many commercial and/or illegal transactions that may involve private conversations. These conversations may involve relationships and transactions wholly unlike the anonymous and spontaneous street-level transactions here.

Clark, 129 Wn.2d at 231-32.

In other words, to the extent *Clark* has any continuing viability, its holding should be narrowly limited to its facts. It simply has no relevance to other conversations, such as the one at issue here. Instead, all indications are that Kipp reasonably intended his conversation to be private. As stated by Judge Van Deren,

A clearer case for application of the privacy act can hardly be stated. Any other interpretation of these facts leaves all Washington citizens vulnerable to the surreptitious recording of incriminating and nonincriminating conversations with a familiar party in a private home, as though the act did not exist.

Kipp, 171 Wn. App. at 43 (Van Deren, J., dissenting).

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests the Court to hold that Kipp's conversation with his brother-in-law was private. Accordingly, the recording should have been suppressed pursuant to RCW 9.73.050.

Respectfully submitted this 20th day of August 2013.

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APPENDIX

Complete definition of “private”

Webster’s Third New International Dictionary (1961)

Sections quoted in *Forrester* are highlighted

¹**private** \ˈprɪvət, usually -əd+V\ *adj*, sometimes -ER/-EST [ME *privat*, fr. L *privatus* apart from the state, deprived of office, of or belonging to oneself, private, fr. past part. of *privare* to deprive, release, fr. *privus* single, private, set apart, for himself; akin to L *pro* for — more at FOR] **1 a** : intended for or restricted to the use of a particular person or group or class of persons : not freely available to the public <a ~ park> <a ~ party> **b** : belonging to or concerning an individual person, company, or interest <our ~ goods> <~ property> <a ~ house> <~ means> **c** (1) : restricted to the individual or arising independently of others <~ views> <a ~ opinion> (2) : carried on by an individual independently rather than under institutional or organizational direction or support <~ research> (3) : being educated by independent study, under the direction of a tutor, or in a private school <~ students> **d** (1) : affecting an individual or small group : RESTRICTED, PERSONAL <~ malice> <for your ~ satisfaction> (2) : affecting the interests of a particular person, class or group of persons, or locality : not general in effect <~ act> —see PRIVATE BILL **e** : of, relating to, or receiving hospital service in which the patient has more privileges than a semiprivate or ward patient (as in having his own doctor, a room to himself, and extended visiting hours) **2 a** (1) : not invested with or engaged in public office or employment <a ~ citizen> (2) : not related to or dependent on one's official position : PERSONAL <~ correspondence> **b** *of military personnel* : of the lowest rank : having attained no title of rank or distinction <fought through the revolution as a ~ soldier> **c** (1) : manufactured, made, or issued by other than government means <~ mailing card> <~ stamp> (2) : issued by private not public authority but acceptable as money either because of intrinsic value or exchange value guaranteed by issuer <a ~ coin> <~ currency> **d** *of clothing* : CIVILIAN — used esp. by the Salvation Army **3 a** : sequestered from company or observation : withdrawn from public notice <a ~ retreat> **b** : free from the company of others : ALONE <let us go where we can be ~> **c** : not known publicly or carried on in public : not open : SECRET <~ negotiations> <a ~ understanding> <~ prayer> *esp* : intended only for the persons involved <a ~ conversation> —compare CONFIDENTIAL **d** : having knowledge not publicly available : holding a confidential relationship to something <you are ~ to all my affairs> **e** *obs* : peculiar to a particular person **f** : being or considered unsuitable for public mention, use, or display — used esp. of the genital organs

²**private** \ˈn-s [ME, fr. L *privatus*, fr. *privatus*, *adj.*, private] **1** *archaic* : one not in public life or office **2** *obs* **a** : a secret message : a private communication **b** : personal interest : particular business **c** : PRIVACY, RETIREMENT **d** : INTIMATE **3** *privates* *pl* : GENITALIA, PART 1 **d** (3) **4** : a

person having neither commissioned nor noncommissioned rank in a group organized along military lines : a private soldier: as **a** : an enlistee or draftee in the army just below a private first class and above a recruit or in the marine corps at the lowest level **b** : a fire fighter in an organized force below officer rank **5** : civilian dress for use when off duty — used by the Salvation Army — **in private** *adv* : PRIVATELY, SECRETLY : **not openly or in public** <usurp *in private* the authority she could never assert in public — Edith Wharton>