

72159-3

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Division I  
State of Washington  
No. 72159-3-I

72159-3

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON, DIVISION I

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JANE DOES 1 through 15 and JOHN DOES 1 through 15, victims  
of and witnesses to the June 5, 2014 Seattle Pacific University  
shooting, and SEATTLE PACIFIC UNIVERSITY, a Washington  
nonprofit corporation,

Appellants,

v.

KING COUNTY, a legal subdivision of the state of Washington,  
CITY OF SEATTLE, a Washington municipal corporation,  
TRIBUNE BROADCASTING SEATTLE, LLC and its affiliates, d/b/a  
KCPQ-TV and Q13 FOX, a Delaware corporation, KIRO-TV, INC.  
and its affiliates, d/b/a KIRO NEWS and KIRO TV, a Delaware  
corporation, SINCLAIR SEATTLE, LICENSEE, LLC, and its  
affiliates, d/b/a KOMO TV and KOMO 4, a Nevada corporation,  
KING BROADCASTING COMPANY and its affiliates, d/b/a KING 5  
TELEVISION, a Washington corporation, ARTHUR WEST, a  
Washington resident, JOHN DOE MEDIA ORGANIZATIONS 1  
through 100,

Respondents.

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REPLY BRIEF OF SEATTLE PACIFIC UNIVERSITY

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## INTRODUCTION

Our Supreme Court very recently struck down the anti-SLAPP statute for violating Washington State Constitution Article 1, § 21's jury trial right. *Davis v. Cox*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (May 28, 2015). While it is too soon to tell at this early stage of the proceedings, the same analysis may apply to the PRA. If (as the media suggest) the government may forcibly take (with a warrant) a private entity's private records containing no information related to governmental conduct or performance, and – merely by retaining them – convert them into public records freely available to the press and public, or if the private entity's only protection against this unlawful taking is a summary hearing without trial, then the PRA may violate the right to jury trial and sanction an unconstitutional taking.

This Court should avoid this constitutional quagmire. The roughly 84% of the videos containing no information related to governmental conduct or performance simply are not public records under the plain language of the PRA. The other roughly 16% that may show emergency response could be public records, but no findings say that they were used in governmental decision making. And SPU is entitled to a trial regarding whether any exemptions may apply. The Court should reverse and remand for that trial.

## REPLY ARGUMENT

### A. The standard of review is *de novo*.

The media appear to concede that the standard of review is *de novo*. Supplemental Opening Brief of Respondents (SBR) 11.

### B. The trial court erroneously skipped the trial on the merits.

The media argue that SPU “Cannot Plausibly Contend The Second Preliminary Injunction Skipped A ‘Trial on the Merits.’” SBR 11. But it did. *Cf.*, Brief of Appellant Seattle Pacific University (BA/SPU) 17-20. There was no trial on the merits.

This Court’s Commissioner has already ruled that the trial court failed to give the parties notice that it was going to skip the trial and order the documents released in the first round. See, e.g., BA/SPU 17 (citing Commissioner’ Ruling (Aug. 15, 2014); ***Ameriquest Mortg. Co. v. Attorney Gen.***, 148 Wn. App. 145, 154, 156, 199 P.3d 468 (2009), *aff’d on other grounds*, 170 Wn.2d 418, 241 P.3d 1245 (2010); ***N.w. Gas Ass’n v. Wash. Utilities & Transp. Comm’n***, 141 Wn. App. 98, 114-15, 168 P.3d 443 (2007)). It did the same thing this time.

The media’s main argument seems to be that SPU had to tell the trial court not to skip the trial. SBR 12. But as the cases cited hold, CR 65(a)(2) requires the trial court to tell the parties that it

intends to consolidate the preliminary and permanent injunction phases. *Ameriquest*, 148 Wn. App. at 156; *N.w. Gas*, 141 Wn. App. at 114-15. Without that notice, consolidation is reversible error. *Id.* No case holds that a party has to ask the trial court whether it intends to skip the trial in order to preserve this error. The media cite none.<sup>1</sup>

The media also claim that Judge Halpert did not consolidate the two phases or order release of the videos. SBR 13. This is false: SPU's request to enjoin their release was denied, so they can be released but for this Court's stay order. CP 1039. Had this Court not enjoined their release, the City and County could not withhold the videos at this point. Yet there has been no trial. This is simply the practical effect of denying a PRA preliminary injunction: the trial court allows the release, depriving the movants of a pre-release trial.

**C. The trial court erred in concluding that the entire 20 hours of private security video is a public record, even though 84% of it has absolutely nothing to do with government, and no findings say any of it was used by government.**

SPU's first point in its Supplemental Brief of Appellant (SBA/SPU) was that 84% of the 20 hours of video (*i.e.*, about 16.8

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<sup>1</sup> The media's second response is that the trial court proceedings were not rushed because they took four months. SBR 12-13. SPU agrees that it had more time to gather evidence than at the first hearing, but four months is hardly a reasonable amount of time to litigate such significant issues.

hours) shows nothing related in any way to governmental activities, so it cannot be a public record under the plain language of the PRA. SBA/SPU 7-11. Equally important, the trial court failed to enter any findings that the government “used” *any* of the 20 hours of videotape, including the roughly 3.2 hours that shows some police activity. *Id.* at 12-13. Without such findings, reversal and remand is required. *Id.*

The media respond that these videos – in their entirety – are public records. SBR 14-19.<sup>2</sup> They begin by noting that roughly 3.2 hours out of the 20 hours do show the emergency response of public agencies, thus tacitly conceding that the other 16.8 hours do not depict any governmental conduct. SBR 14. The media then summarily pronounce that this 3.2 hours is a public record – without analysis, citation, or even argument. *Id.* The media fail to address SPU’s repeated point that without findings showing that the government used this 3.2 hours, whether it is a public record remains an open question. *See, e.g.,* SBA/SPU 12-13.<sup>3</sup>

The media’s second argument seems to be that this Court should treat the entire 20 hours as one record, so that if any of it

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<sup>2</sup> The media seem to argue that the PRA’S purpose is not limited to public records. SBR 14 n.8. But it is the **Public Records Act**, not the private records act. It covers *only* public records.

<sup>3</sup> In any event, the 3.2 hours is subject to the exemptions discussed *infra*.

depicts governmental conduct, it is all a public record. SBR 15. This argument flies directly in the face of *Nissen v. Pierce Cnty.*, 183 Wn. App. 581, 582-83, 333 P.3d 577 (2014), *rev. granted*, 182 Wn.2d 1008 (Mar. 4, 2015).<sup>4</sup> See, e.g., SPU/BA 22-23; SBA/SPU 7-8, 11, 12-13. The PRA captures only records “**containing information** relating to the conduct of government or the performance of any governmental or proprietary function.” RCW 42.56.010(3) (emphasis added). The media ask this Court to ignore this plain language.

Similarly, the media’s argument that documents “depicting 100 percent private activity **are** public records and **are** related to government conduct when held by police agencies for investigative purposes” is simply an exercise in question begging and false analogy. SBR 15-16 (emphases in original). The media beg the question whether the 84% of the footage showing empty parking lots and hallways was “held by police agencies for investigative purposes,” or was simply swept up by an overbroad search warrant and never used. Without findings, it is impossible to know.

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<sup>4</sup> As the media note in their footnote 10, the Supreme Court heard argument on *Nissen* on June 11, 2015. It is worthwhile listening to the argument at [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2015060007](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2015060007). The lawyers and Justices appear to agree that Lindquist’s non-governmental text messages are not public records. The same is true here.

The media's false analogies concern the cases cited at SBR 16.<sup>5</sup> Taking these in chronological order, **Dawson** actually favors SPU. There, the requestor sought (a) files concerning an expert witness compiled and held in a prosecutor's office; and (b) the personnel file of the deputy prosecutor who compiled one of the expert-witness files. 120 Wn.2d at 786-87. **Dawson** says that the expert files "are public records because they are writings relating to the performance of prosecutorial functions, and they are used by the prosecutor's office in carrying out those functions." *Id.* at 789. This analysis cannot apply to SPU's private security videos depicting empty private spaces, particularly absent findings regarding use.

**Dawson** also says that performance evaluations for the deputy prosecutor are a public record "because they are prepared by the prosecutor's office, and they contain information relating both to the conduct of government and to the performance of governmental, prosecutorial functions." *Id.* Again, this analysis cannot apply to the 84% of SPU's videos that show no governmental conduct.

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<sup>5</sup>**Comoroto v. Pierce Cnty. Med. Exam'r's Office**, 111 Wn. App. 69, 43 P.3d 539 (2002); **Koenig v. City of Des Moines**, 158 Wn.2d 173, 142 P.3d 162 (2006); **Limstrom v. Ladenburg**, 85 Wn. App. 524, 933 P.2d 1055 (1997), *rev'd on other grounds*, 136 Wn.2d 595, 963 P.2d 869 (1998); **Dawson v. Daly**, 120 Wn.2d 782, 845 P.2d 995 (1993), *overruled on other grnds. in Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007).

But **Dawson** holds that “requests for verification of [the deputy’s] employment . . . are not public records.” *Id.* at 789. That is, outside requests to verify an employee’s “position, salary, and length of service relate neither to the conduct of government, nor to the performance of any governmental function.” *Id.* If such requests – which (like these videos) were not created by the prosecutor’s office, but which (also like these videos) were plainly in the possession of the prosecutor’s office – are not public records because they do not relate to the conduct or performance of government, then plainly SPU’s private security videos showing no governmental conduct are not public records merely because they were in the possession of a prosecutor’s office. **Dawson** directly supports SPU’s argument.

The media also rely on the Court of Appeals’ decision in **Limstrom** for the proposition that a prosecutor’s criminal investigative files are public records. SBR 16. But **Limstrom** specifically states that these prosecutorial files “are public records because they are writings relating to the performance of prosecutorial functions, and they are used by the prosecutor’s office in carrying out those functions.” 85 Wn. App. at 529 (citing **Dawson**, 120 Wn.2d at 789). By contrast, here 84% of the videos are in no way related to the performance of governmental functions, and there

is no finding that they were used by the prosecutor's office. **Limstrom** does not help the media on this point.<sup>6</sup>

The media continue to rely on **Comaroto**, a Division Two decision written – like **Nissen** – by Judge Hunt. It holds that a suicide note given to and used by the medical examiner for the public purpose of determining the cause of death was a public record. 111 Wn. App. at 73-74. But the court also held that it was exempt from disclosure both under the Medical Examiner's records exemption, and under RCW 42.17.310(2) – because it is not of legitimate public concern. *Id.* at 74. Judge Hunt saw no conflict between her **Comaroto** and **Nissen** decisions. There is none. But only **Nissen** is on point.

Finally, **Koenig** concerns only the specific statutory exemption for child sexual assault records in RCW 42.17.31901. 158 Wn.2d at 181. The opinion contains no analysis of the question whether these were public records, since they are specifically covered in the statute. **Koenig** does not support the media's claims.

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<sup>6</sup> It is also worth noting that the Supreme Court plurality in **Limstrom** said the parties "do not dispute that . . . a prosecutor's files are public records under the Act." 136 Wn.2d at 604. This question simply was not at issue.

Since none of the authorities the media cites hold that SPU's private videos showing no governmental conduct or performance are a public record, its conclusion that this requirement is met is fallacious. SBR 16-17.<sup>7</sup> The media go on to argue that (a) mere possession is sufficient, and (b) the prosecutor's offices did use the videos. Neither claim is correct. SPU/BA 24-25; SBA/SPU 12-13.

The media cite *West v. Thurston Cnty.*, 168 Wn. App. 162, 275 P.3d 1200 (2012), which does not *hold* anything regarding "retain," and otherwise supports SPU. In *West*, the court (again, Judge Hunt writing) notes that "West does not argue that the County 'retained' the requested records." 168 Wn. App. at 186. Its statement about the meaning of "retain" is thus dicta.

And in any event, *West* follows *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1 of Clark County*, 138 Wn.2d 950, 960, 983 P.2d 635 (1999) regarding "use," specifically reiterating that

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<sup>7</sup> In a footnote, the media claim that SPU's reliance on *Lindeman v. Kelso School Dist. No. 458*, 162 Wn.2d 196, 208 n.7, 172 P.3d 329 (2007) is "highly misleading" because the issue in the text (not the footnote) is whether a video is a student record. SBR 16 n.9. But the media fail to read the footnote. It says the "parties do not dispute that the videotape is a 'public record,' thereby leaving open . . . whether a . . . surveillance videotape showing children on a public school bus does . . . contain 'information relating to the conduct of government . . .'" 162 Wn.2d at 208 n.7. That is precisely the point SPU raised, and only the media are being "highly misleading."

the “critical inquiry is whether the requested information bears a nexus with the agency’s decision-making process.” 168 Wn. App. at 185 (quoting with emphasis **Concerned Ratepayers**, 138 Wn.2d at 960-61). Here, Judge Halpert entered no findings that an agency used the 84% of the videos showing no governmental conduct. See also SBA/SPU 8-9 (discussing **Dragonslayer, Inc. v. Wash. State Gambling Comm’n**, 139 Wn. App. 433, 445, 161 P.3d 428 (2007)).

The media also attempt to distinguish **Concerned Ratepayers’** holding that mere possession is not sufficient to establish use. SBR 18. But as quoted above, “use” requires a nexus with agency decision making. 138 Wn.2d at 959. Here, no findings show that the prosecutors used *any* of the video, much less the 84% containing no nexus to governmental conduct.

The media also attempt to distinguish **Nissen** on this point, but merely through misdirection. SBR 18. While it is true that **Nissen** concerns – in part – text messages, it also concerns personal cellphone logs created by a private entity and mailed to a private address, but in the government’s possession for purposes of redaction and disclosure. See SBA/SPU 12 (citing **Nissen**, 183 Wn. App. at 595 n.16). This is no different than the prosecutors’

possession of SPU's private security videos. And here, there are no findings of use.

But this is really Achilles heel of the media's argument: is it true that when a government forcefully extracts (*i.e.*, with a warrant) a privately record from a private entity, and then merely retains that private record by force of law – without using it for any public decision-making purpose – the government somehow converts that private property into a public record that can be freely disseminated by the press? The constitutional implications of such a conversion are too troubling to summarily answer yes or no. This Court should reverse and remand for a trial on whether these private videos are public records or are otherwise exempt from public disclosure.

**D. Assuming *arguendo* that any of the surveillance video is a public record, the trial court erred in failing to apply the Security Exemption in RCW 42.56.420(1), where the video is a record assembled, prepared, and maintained to prevent, mitigate, or respond to terrorist acts, whose disclosure would create a substantial likelihood of threatening public safety.**

As noted in SPU's supplemental opening brief, even assuming *arguendo* that any of the surveillance video is a public record, the trial court erred in failing to apply the Security Exemption, RCW 42.56.420(1). SBA/SPU 14-16. The surveillance footage is a record assembled, prepared, and maintained to prevent, mitigate, or

respond to terrorist acts. Its disclosure would create a substantial likelihood of threatening public safety. This Court should reverse, maintain its preliminary injunction, and remand for trial.

The media's response to the terrifying likelihood that other shooters will be "inspired" by this video – just as Ybarra was "inspired" by the Columbine shootings – is that it is "too remote." SBR 32-35. Apparently, the media have not been watching their own coverage like the shooters have: Charleston, South Carolina; Washington, D.C.; Blacksburg, Virginia; Newtown, Connecticut; Minneapolis, Minnesota; Columbus, Ohio; Oak Creek, Wisconsin; Menasha, Wisconsin; DeKalb, Illinois; Omaha, Nebraska; Edmond, Oklahoma; Garland, Texas; Fort Hood, Texas; Aurora, Colorado; Englewood, Colorado; Salt Lake City, Utah; Isla Vista, California; Oakland, California; Springfield, Oregon; Portland, Oregon; Fairchild Air Force Base, Washington; and three in Seattle, Washington – Capitol Hill, Cafe Racer, and SPU. This is a very partial list of the tragedies.<sup>8</sup> It is common knowledge that from 1982 to 2012, there were at least 70 mass shootings, with just the seven in 2012 claiming

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<sup>8</sup> See MOTHER JONES, *A Guide to Mass Shootings in America*, (June 18, 2015): <http://www.motherjones.com/politics/2012/07/mass-shootings-map>.

151 victims. In 2013, 26 school shootings claimed 34 lives; in 2014, 24 school shootings claimed a dozen lives. The danger is not remote. Rather, the likelihood of this public-safety threat is substantial.

Oddly, the media assert that “[n]o one is requesting access to the unique capabilities or vulnerabilities of SPU’s video security system.” SBR 23. But disclosure of one video, three hours of video, or all 20 hours of video, absolutely does disclose the unique capabilities and possible vulnerabilities of SPU’s video security system. See, e.g., SPU/BA 7-10, 13-14 (citing experts and Commissioner Velategui); SBA/SPU 4-6 (citing additional expert declarations). To the extent that the media seriously dispute this, a trial is required.

The media also claim that SPU “proves too much” in trying to protect “*any*” of its private security video from terrorist analysis because “routine crime records would [then] be categorically exempt from disclosure.” SBR 33. This false reasoning is transparently overbroad: “Routine crime records” rarely would disclose a private entity’s proprietary and protected security arrangements. SPU’s desire to protect its students, staff, and campus from another shooting rampage is reasonable and measured.

The media also make a fallacious analogy to “dash-cams” in police cars. SBR 34 (citing *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 326 P.3d 688 (2014)). The key difference between police dash-cam videos and SPU’s private-security-camera videos is that the dash-cam videos are created by a governmental actor for an express governmental purpose – so they are obviously public records – while SPU’s private security videos are created by a private actor for an expressly private purpose, so they are not public records. Another salient difference is that a dash-cam is mobile, while the location, capabilities, and vulnerabilities of a fixed-camera system are exposed by watching the video. *Fisher* has no application here.<sup>9</sup>

Interestingly, the media assert that SPU “failed to meet its burden of showing that public disclosure of the videos poses a ‘substantial likelihood of threatening public safety.’” SBR 34. The media thus tacitly admit that the trial court just skipped the trial and

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<sup>9</sup> In a footnote, the media make the unexplained and absurd assertion that “routine criminal discovery would grind to a halt” if releasing SPU’s videos to public scrutiny was dangerous. SBR 32. Routine criminal discovery is not normally released to the media and posted on the internet. But in any event, there is no finding or evidence that *any* of this video will be used at Ybarra’s criminal trial, contrary to the media’s off-hand remark. *Id.* It is hard to imagine the jury being asked to watch endless hours of empty parking lots and hallways, or even three hours of police milling around.

imposed an ultimate burden of proof on SPU. If SPU is to face such a burden, it is entitled to a trial *before* it is deprived of its right to protect its staff, campus, and students from future attacks. And SPU submitted ample evidence that this threat to public safety is substantially likely to occur if these videos are released. It is up to the factfinder to make that determination after a fair trial.

The fact that Ybarra was captured and *may* never be a threat again is irrelevant to whether release of this video will threaten public safety. SBR 34. It is copycat shooters and other terrorists that create the substantial threat. There are too many of those to be sanguine.

The media improperly truncate RCW 42.56.420(1)(a), limiting it to “specific and unique vulnerability assessments or specific and unique response or deployment plans.” SBR 34. But this sentence goes on to expressly include “compiled underlying data collected in preparation of . . . the assessments, or to the response or deployment plans.” RCW 42.56.420(1)(a). These videos **are** compiled underlying data collected in preparation of assessments.

The media’s final argument is also incorrect. SBR 34-35. They claim that RCW 42.56.420 somehow requires that a governmental entity (here, allegedly the local police) be using the record to “prevent, mitigate, or respond to” terrorism, rather than the owner of

the record (SPU) working with others (*e.g.*, federal authorities) to do so. *Id.* But neither the statute nor *N.w. Gas* supports this argument, which the media have made from whole cloth.

**E. SPU also has a privacy interest under RCW 42.56.240(1) that the trial court failed to protect.**

The PRA also exempts “intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies . . . the nondisclosure of which is essential . . . for the protection of any person’s right to privacy.” SBA/SPU 17-18 (quoting RCW 42.56.240(1); citing RCW 42.56.050 and *DeLong v. Parmelee*, 157 Wn. App. 119, 154-55, 236 P.3d 936 (2010) (quoting *Lindeman* 127 Wn. App. at 535–36); WAC 44-14-01003). SPU’s security system is confidential private property used to protect staff, students, and faculty, so disclosure would be highly offensive because of the breadth of information revealed and because of the financial and security impacts on SPU. *Id.* The public has no legitimate interest in undermining SPU’s campus safety.

The media’s first response to SPU is that the public has a “legitimate interest” in seeing videos of the empty parking lots and hallways of SPU’s private campus because they were “used by police and prosecutors to investigate and prosecute this crime.” SBR

26. But as SPU has repeatedly noted, there is no evidence in this record – much less a finding – that authorities used videos of an empty SPU campus to investigate or prosecute a crime. Absent evidence and a finding, the public has no legitimate interest here.

The media also claim that releasing over 16 hours of video footage showing empty campus spaces is not highly offensive to a reasonable person. SBR 27. The whole point of SPU's argument is that a private university – one that chooses not to open its doors to the public, but to retain its private status – has a reasonable expectation of privacy on its own campus and in its own private security videos. The media's analogy to public spaces is irrelevant. It would be highly offensive to broadly disseminate private security footage that has nothing to do with governmental conduct or processes (84% of the video at issue here) simply in order to destroy SPU's safety and security. This Court should thus reverse and remand for trial solely regarding the application of *the Security Exemption* to the three-minute shooting video and to the 16% of the video that may depict some governmental activity.

**F. The trial court erred in failing to grant SPU's request for a preliminary injunction.**

For all of the reasons stated above and throughout the Appellants' briefing, the trial court erred in failing to grant SPU's request for a preliminary injunction. SBA/SPU 18-20. Disclosure is adverse to the public interest because it would provide terrorists with a how-to for attacking SPU, its staff and students. *Id.* Disclosure will also cause real, immediate, and substantial harm to SPU's security system. *Id.* SPU plainly had a well-grounded fear of an immediate invasion of these rights. *Id.* And once the confidential security information is in the public domain, the University, its students, and faculty, all will be vulnerable to actual and substantial injury. *Id.*

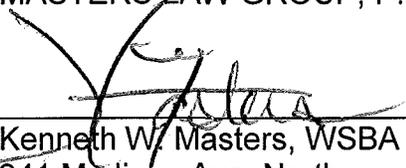
The media has no response.

**CONCLUSION**

For the reasons stated, the Court should reverse and remand for trial regarding the exempting the three-minute video and the 16% of the remaining video that may depict governmental conduct. The remaining 84% is not a public record or is exempt.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of June, 2015.

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**CERTIFICATE OF SERVICE BY MAIL AND/OR EMAIL**

I certify that I caused to be mailed, postage prepaid, via U.S. mail and/or emailed a copy of the foregoing **REPLY BRIEF** on the 25<sup>th</sup> day of June 2015, to the following counsel of record at the following addresses:

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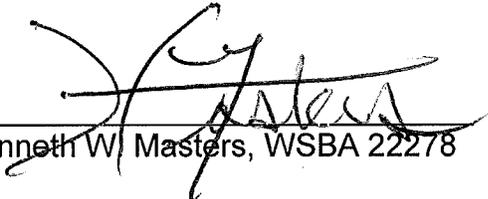
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