NO. 908753

SUPREME COURT OF THE STATE OF WASHINGTON

GLENDA NISSEN, an individual, Respondent

v.

PIERCE COUNTY, a public agency; PIERCE COUNTY PROSECUTOR'S OFFICE, a public agency, Petitioner

v.

MARK LINDQUIST, Petitioner

BRIEF OF AMICI CURIAE WASHINGTON FEDERATION OF STATE EMPLOYEES, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, WASHINGTON EDUCATION ASSOCIATION, WASHINGTON COUNSEL OF POLICE AND SHERIFFS, WASHINGTON STATE PATROL TROOPERS ASSOCIATION, PIERCE COUNTY PROSECUTING ATTORNEYS' ASSOCIATION

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A. IDENTITY OF AMICI

Amici Washington Federation of State Employees, International Association of Fire Fighters, Washington Education Association, Washington Counsel of Police and Sheriffs, Washington State Patrol Troopers Association, and Pierce County Prosecuting Attorneys' Association, organizations representing public employees, support this Court's grant of review of the decision designated in part B of this petition. Their interest in obtaining review is described in their motion for leave to file this brief.

B. COURT OF APPEALS DECISION

The above Amici support discretionary review of the September 9, 2014, decision by the Washington State Court of Appeals, Division II, in *Nissen v. Pierce County*, __ Wn.App. __, 333 P.3d 577 (2014), which reverses dismissal and remands for discovery a Public Records Act ("PRA") suit that unconstitutionally seeks to compel a public employee to produce personal records of his communications on his privately owned telephone.

C. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

All considerations for review under RAP 13.4(b) are present. *Nissen's* dramatic expansion of the PRA's definition of "public record" conflicts with statutory language and court precedent. Its unprecedented order for discovery of a public employee's personal records against his will violates privacy, property, and speech protections of the state and federal constitu-

tions. All of these issues are of substantial interest to the public.

1. Compelled Production of Personal Records From Public Employees Under the PRA Conflicts With Precedent

In a remarkable footnote providing no explanation, analysis, or citation to authority, *Nissen* holds public employees are an "agency." *Nissen,* 333 P.3d at 584 n. 15. This allows it to hold that public servants are "subject to the PRA" if they "owned, used, or retained records relating to government business in [their] official capacity," or texted "using [a] personal cellular phone to conduct government-related communications ...." *Id.* at 583-84.

This holding is unsupported by the PRA definition of "agency" – which does not list natural persons as among entities that can be an "agency," *see* RCW 42.56.010(1) – and its application to employees by judicial fiat conflicts with precedent of this Court and the Court of Appeals. *See Nast v. Michels*, 107 Wn.2d 300, 306, 730 P.2d 54 (1986) (Courts are not "agencies" because the PRA's definition did not "specifically include" them); *West v. Thurston Cy*, 168 Wn.App. 162, 183-84, 275 P.3d 1200 (2012) (finding "no Washington authority extending this principal-agency relationship to the PRA context or establishing that records prepared by agents of a public agency automatically become 'public records' subject to disclosure under the PRA," and holding the "legislature 'means exactly what it says'" and thus "intended to exclude from this designation" those

"who prepare documents that the agency never physically possesses").

Further, the PRA contains no procedure to compel production of personal records that were never possessed by an agency and over which no agency had control. Similarly, precedent holds the civil discovery rules cannot compel employees to produce their personal records in a suit against their employer. *See e.g. Diaz v. Washington State Migrant Council*, 165 Wn.App. 59, 265 P.3d 956 (2011) (corporate entity does not have possession, custody, or control over responsive personal records just because they belong to its directors and therefore employer could not be found in contempt for failing to produce them because there is "no statutory or common law authority ... imposing a duty on a corporate director to make personal records available to the corporation that he or she serves").

Thus, both RAP 13.4(b)(1) and (b)(2) support review of *Nissen*.

2. State and Federal Constitutions Prohibit Compelling Public Employees to Produce Their Personal Records for Discovery in PRA Suits

A state can dictate for governmental purposes the ownership and disposition of its political subdivisions' property. The absence of "employees" – or *any* natural person – from the PRA's definition of "agency," reflects the constraints enshrined in our state and federal constitutions against state seizure and disposition of its *citizens' property*. *See e.g.* U.S. Const. Amend. 4, 14; Wash. Const., art. I, §§ 3, 7, 16. *See also City of Seattle v.*

McCready, 123 Wn.2d 260, 267-68, 868 P.2d 134 (1994) (constitution "prohibits courts from issuing warrants without an authorizing statute or court rule"). *Nissen* first ignores and then violates these constraints.

Citing state and federal constitutions, *Nissen* revealingly misstates the law by asserting "[w]e balance" the PRA "against the countervailing principle that individuals, including government employees, should be free from unreasonable searches and intrusions into their private affairs." *See Nissen, id.* at 581. In fact, the PRA *cannot* be *balanced against* the constitution: "the PRA must give way to constitutional mandates." *See Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013) (emphasis added). *See also Pierce County v. Guillen*, 537 U.S. 129 (2003) (reversing state decision since PRA subject to federal statutory privilege).

Though improperly imbuing the PRA with constitutional equivalency, *see Seattle v. Egan*, 179 Wn.App. 333, 339, 317 P.3d 568 (2014) ("United States Supreme Court revealed that there is not a general constitutional right of access to government information") (emphasis added), *Nissen* chooses to "not address ... constitutional privacy arguments" at all but "leave[s] these arguments for the superior court, which will be in a better position to consider them on remand after developing the appropriate record." *Nissen, supra.* at 585 (emphasis added). However, the superior court already considered those constitutional issues and found they war-

ranted dismissal on the face of the complaint. *See id.* at 581 n. 9. Indeed, "determination of a constitutional question is necessary and proper whenever it is essential to the decision of the case, as where the right, or the alleged denial of a right, of a party is founded solely on a statute, the validity of which is attacked." 16 C.J.S. Constitutional Law § 157 (2009) (emphasis added). *See also e.g. Tunstall v. Bergeson,* 141 Wn.2d 201, 210, 5 P.3d 691 (2000) ("Because we do not favorably resolve the ... claims ... on statutory grounds, we next analyze the ... constitutional rights"); *State v. Fain*, 94 Wn.2d 387, 402, 617 P.2d 720 (1980) (legislative authority is ... circumscribed by the constitutional mandate" and Courts "do not shrink from our responsibility" to determine if it "is constitutionally excessive").

By ordering discovery on remand to determine which of the "personal cellular phone text messages and call logs, if any, pertained to the conduct of government business," *Nissen, supra.* at 585, *Nissen* orders the violation of the very constitutional provisions it refuses to address. Had it conducted the required analysis, the decision would have confronted superseding federal statutes and state and federal constitutions that prohibit court compelled production of "personal cellular phone text messages and call logs" regardless of their content or to what they "pertained."

For example, if the Superior Court orders the public employee's private, third-party service provider to produce text message content that on-

ly it possessed at the time of the PRA request (assuming it somehow still retains it, *but see* CP 251, 617-18), the order would violate the Supremacy Clause by ignoring the Stored Communications Act (SCA). *See* U.S. Const. art. VI, cl. 2. To compel such personal records, 18 U.S.C. § 2703 specifically requires a court order based on "reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." Because here the public employee's private text messages and other telephone records are not relevant and material to an ongoing criminal investigation, neither the County nor any state or federal court has authority to demand their production without violating the public employees' rights under the SCA. *See e.g. U.S. v. Herron,* _ F.Supp.2d _, 2014 WL 824291 (E.D. N.Y., 2014) (defendant's legitimate expectation of privacy in cell phone gives standing to challenge execution of order issued under SCA directing cell phone service provider to disclose information pertaining to that phone). Indeed, as a matter of federal law, "'private parties' and governmental entities are prohibited from using ... civil discovery subpoenas to circumvent" 18 U.S.C. § 2701-03. *See In re Subpoena Duces Tecum to AOL, LLC,* 550 F.Supp.2d 606 (E.D. Va., 2008).

Likewise, if the public employee is ordered to produce in discovery the personal telephone call logs in his possession, such would trigger the war-

rant requirement protection for cellular telephone data under both the Fourth Amendment and article I, § 7. *See e.g. Riley v. California*, _ U.S. _, 134 S.Ct. 2473, 2495, 189 L.Ed.2d 430 (2014) ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple – get a warrant"); *State v. Hinton*, 179 Wn.2d 862, 865, 319 P.3d 9 (2014) ("text message conversation was a private affair protected by the state constitution from warrantless intrusion").[1] Thus, such discovery raises more than just statutory objections.[2]

Similarly, the very purpose of such discovery – i.e., to determine whether the employee's personal property consisting of call logs and text records have been converted into "public records" by operation of statute – would be in service of a physical taking without just compensation or due process. Such a taking of public ownership over private property violates article I, §§ 3 and 16 of Washington's constitution as well as the 14th

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[1] If depositions of the public employee or his legal advisors who assisted him in excising his records is ordered and they are required to explain why each redaction was private, such would violate not only the aforementioned privacy rights but also the attorney-client privilege and attorney work product protections. *See e.g.* Tegland, 14A Wash. Pract. 545 (2nd Ed. 2009) (CR 26 protects against asking "questions designed to reveal an attorney's impressions, theories or strategies"); James W. Moore, Federal Practice, ¶ 26.15[1], at 26-293 (2d ed. 1995) ("activities of the attorneys" are "protected regardless of the discovery method employed").

[2] One such statutory objection is *Nissen's* failure to identify what provision of the public records act authorizes ordering discovery concerning personal records when the only evidence submitted shows they were never possessed by the government and concern only its employee's private matters. *See e.g.* CP 15-16, 81, 445-46, 597. *See also Nissen, supra.* at 583 ("the portions of the cellular phone call logs relating to ... personal calls and ... personal text messages do not satisfy the second, 'government' element and, therefore, are not 'public records'").

Amendment. *See e.g. Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) ("'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation"); *Philip Morris, Inc. v. Reilly,* 312 F.3d 24, 46 (1st Cir. 2002) ("Disclosure Act violates the Takings Clause by taking appellees' property without just compensation").

Finally, compelled production of records concerning personal communications – including political speech of elected officials – also intrudes on fundamental rights to freedom of speech and association under the First Amendment and article I § 5 of our state constitution. Compelled discovery in PRA actions of public employees' personal records "relating to government business in his official capacity," *see Nissen, supra* at 584 n. 15, will unlawfully "chill" private, common, and innocuous communications. For example, it will inhibit even employees' calls and text messages on their own devices to their families about when they will be home from conducting government business. *See e.g. O'Day v. King County,* 109 Wn. 2d 796, 749 P.2d 142 (1988) ("Washington's free speech guarantee requires us to pay especially close attention to allegations of overbreadth" and "[r]egulations that sweep too broadly chill protected speech prior to publication, and thus may rise to the level of a prior restraint"); *Dream Palace v. County of Maricopa,* 384 F.3d 990, 1010-12 (9th Cir. 2004) (dis-

closure under state PRA enjoined since it chills first amendment speech).

Nissen's refusal to address these constitutional constraints, while simultaneously ordering their violation, warrants review. *See* RAP 13.4(b)(3).

3. Nissen Raises Issues of Significant Public Interest That Should Be Decided by the Supreme Court

The above-described intrusions into constitutionally protected private affairs, property, and speech are of substantial interest to hundreds of thousands of public employees in our state – as well as to the far greater number of their family members and others with whom they communicate. *See* RAP 13.4(b)(4). This interest is not passing or abstract; exposure of employees' own personal records to those constitutional violations will be unavoidable and universal under *Nissen's* breathtaking holdings.

Government workers have no choice but to communicate on occasion on private devices "relating to government business in his official capacity." *See Nissen, supra.* at 584 n. 15. The requirement that public employees use private devices in an official capacity includes the teacher, firefighter, and law enforcement official whose employer must be contacted if work will be missed due to illness. It includes employees running for office since they also are required by RCW 42.17A.555(1) and RCW 42.52-.180(1) to use private devices to make constitutionally protected political campaign communications related to government business. *See John Doe*

No. 1 v. Reed, 561 U.S. 186, 194-95 (2010) ("compelled disclosure" by Washington's PRA of citizens' political views "is subject to review under the First Amendment" since it "implicates a First Amendment right"). Under *Nissen,* public service will subject all public employees' "personal cellular phone call detail log and text message records to agency scrutiny before release in response to a PRA request." *Nissen, supra.* at 583.

Though "government cannot compel persons to relinquish their First Amendment right ... as a condition of public employment," *Edwards v. Dept. of Transp.,* 66 Wn.App. 552, 559, 832 P.2d 1332 (1992), absent review, this is the unconstitutional effect of *Nissen* on all public employees and all with whom they privately communicate. *See e.g. Rickert v. State, Public Disclosure Com'n,* 129 Wn.App. 450, 119 P.3d 379 (2005) (striking down provision of PDC because it "is unconstitutionally overbroad").

D. CONCLUSION

Nissen's overbroad definitions of "agency" and "public record" expose personal records of every public employee to seizure under the PRA and to violation of their constitutional rights. Thus, review should be granted.

RESPECTFULLY SUBMITTED this 5th day of December, 2014.

s/ SCOTT PETERS
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Pierce County Deputy Prosecutor
On Behalf of PCPAA

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All,

Attached please find:

- Public Employee Associations' Motion for Leave to File Amici Curiae Brief in Support of Petition for Review; and
- Brief of Amici Curiae Washington Federation of State Employees, International Association of Fire Fighters, Washington Education Association, Washington Counsel of Police and Sheriffs, Washington State Patrol Troopers Association, Pierce County Prosecuting Attorneys' Association

for e-filing, as well as e-service pursuant to the agreement of the parties. If any of the parties would like hard copies, please advise and I will mail them today.

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