No. 94109-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL MOCKOVAK,

Petitioner,
v

KING COUNTY et al.

Respondents.

MEMORANDUM OF AMICI CURIAE NATIONAL LAWYERS GUILD, WASHINGTON COALITION FOR OPEN GOVERNMENT AND ALLIED DAILY NEWSPAPERS OF WASHINGTON

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A. ISSUE OF CONCERN TO AMICI CURIAE

In a Public Records Act ("PRA") case, under RCW 42.56, does a local federal official have the power to prohibit a city police officer, working on a joint local-federal task force, from producing records he or she created and used in the course of a joint federal/state investigation?

B. INTEREST OF AMICI CURIAE

As explained more fully in the motion to file this memorandum, attorneys affiliated with the Seattle Chapter of the National Lawyers Guild represent political activists and dissidents who challenge the actions of our government, both in civil and criminal cases, and therefore have an interest in insuring that there is free access to records and witnesses affiliated with local law enforcement agencies.

Allied Daily Newspapers of Washington ("Allied") is a trade association representing 25 daily newspapers across the state. The Washington Coalition for Open Government ("WCOG") is a nonprofit, nonpartisan group dedicated to promoting the right to know about government. Allied and WCOG both advocate for full access to government records.

C. STATEMENT OF THE CASE

Amici accept the statements of the case made by Petitioner Michael Mockovak and Respondent State of Washington.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Since September 11, 2001, at least, there has been a dramatic increase in federal and local law enforcement coordination. From the expansion of joint task forces, like the one used in the *Mockovak* case, to the creation of "Fusion Centers",[1] federal and state law enforcement agencies have cooperated in an unprecedented manner, raising political issues about federalism, local control, and the centralization of power in federal institutions.

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[1] Since 2003, the Department of Homeland Security created at least 78 "fusion centers" around the country as "focal points for the receipt, analysis, gathering, and sharing of threat-related information between federal; state, local, tribal, territorial (SLTT); and private sector partners." DHS, https://www.dhs.gov/state-and-major-urban-area-fusion-centers (accessed 4/5/17). The Washington State Fusion Center ("WSFC") describes its mission as follows:

> The WSFC is a unified counterterrorism, "all crimes," fusion center, incorporating agencies with intelligence, critical infrastructure, public safety and preparedness, resiliency, response and recovery missions.
>
> The WSFC is Washington State's single fusion center and concurrently supports federal, state, and tribal agencies, regional and local law enforcement, public safety and homeland security by providing timely, relevant and high quality information and intelligence services.

Http://www.wsfc.wa.gov/ (accessed 4/5/17).

While this federal-local coordination is often justified by reference to vague threats of "terrorism," in practice, there is a very real fear that federal and local law enforcement agencies will collaborate to surveil and oppress political dissidents in our community. For instance, in the late 2000s, federal military authorities worked together with state law enforcement allegedly to infiltrate and spy on local peace activists in the Olympia and Tacoma area.[2]

Some local governments in Washington State, such as Seattle, have had ordinances on their books for years that restrict spying on political dissidents. *See* Seattle Municipal Code Chapter 14.12.[3] The impetus for the adoption of such ordinances was the widespread spying on civil rights and anti-war activists in the 1960s to 1970s by so-called "Red Squads." Nationally, the infiltration reached its peak in the FBI's COINTELPRO

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[2] *See generally Panagacos v. Towery*, 782 F. Supp. 2d 1183 (W.D. Wash. 2011), *aff'd* 501 Fed. Appx. 620, 2012 U.S. App. LEXIS 25703 (2012), *dis'd on remand*, No. 10-CV-05018-RBL, 2014 U.S. Dist. LEXIS 98982, 2014 WL 3579648 (W.D. Wash. 2014), *second appeal pending* Ninth Cir. Nos. 14-35598 &14-35816 (argued 4/7/17).

[3] The "Seattle Police Intelligence Ordinance" (Seattle Municipal Code Chapter 14.12; Ordinance 108333 (1979) as amended by Ordinance 110572 (1982) and Ordinance 110640 (1982)), generally prohibited the Seattle Police Department from spying on people based upon their lawful exercise of constitutional rights. Compliance with the ordinance's terms is monitored by an auditor. The 2015 auditor's report notes how the SPD Intelligence Unit is now part of "Seattle Shield," a cooperative "information sharing endeavor" with federal, state, local and private security forces. *See* D. Boerner, "Report of Police Intelligence Audit Pursuant to Seattle Municipal Code 14.12," Aug. 25, 2015 (http://clerk.seattle.gov/~public/meetingrecords/ 2014/cf_313792.pdf) (accessed 4/7/17).

actions against various "New Left" groups.[4] Seattle had its own variation, and the victims of local Red Squad spying on activists in Seattle included now King County Council President Larry Gossett and former Seattle Mayor Charles Royer.[5]

Yet, even Seattle's anti-spying ordinance is not being properly enforced. The required audits allegedly have been performed in a "perfunctory" manner, with lingering questions about Seattle police spying on Black Lives Matters protestors.[6] Nationally, the same pattern exists, as there have been recent news reports of police spying on political activists in other parts of the country.[7]

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[4] *See* Wikipedia, COINTELPRO (https://en.wikipedia.org/wiki/COINTELPRO) (accessed 4/6/17).

[5] *See* Gary Atkins, *Gay Seattle: Stories of Exile and Belonging* (2013 ed) at 251; A. Herz, "This Is Why Seattle's Police Intelligence Ordinance Matters," *The Stranger*, Jan. 7, 2015, (http://www.thestranger.com/slog/archives/2015/01/07/ this-is-why-seattles-police-intelligence-ordinance-matters) (accessed 4/7/17).

[6] A. Herz, "Is the Seattle Police Intelligence Auditor Doing His Job?" *The Stranger*, Dec. 17, 2014 (http://www.thestranger.com/seattle/is-the-seattle-police-intelligence-auditor-doing-his-job/Content?oid=21234523) (accessed 4/5/17).

[7] G. Joseph, "NYPD sent undercover officers to Black Lives Matter protest, records reveal," *The Guardian*, Sept. 29, 2016 (https://www.theguardian.com/ us-news/2016/sep/29/nypd-black-lives-matter-undercover-protests) (accessed 4/5/17); G. Joseph, "NYPD officers accessed Black Lives Matter activists' texts, documents show," *The Guardian*, April 4, 2017 (https://www.theguardian.com/us- news/2017/apr/04/ nypd-police-black-lives-matter-surveillance-undercover) (accessed 4/5/17).

The involvement of federal law enforcement in local police matters therefore raises significant issues about democracy, civil liberties and local control of the law enforcement. When federal law enforcement agencies essentially commandeer local law enforcement for their own ends, transparency and local control of government are severely diminished.

For instance, recently, a privacy activist in Seattle, Philip Mocek, filed a PRA request to Seattle City Light for information of FBI surveillance cameras on the city's utility poles. To prevent city officials from complying with this request, the U.S. Government filed a complaint in federal court to prevent the release of this information in response to Mr. Mocek's requests, *United States v. City of Seattle*, Western Wash. Dist. No. 16-CV-00889-RAJ, with Judge Richard Jones granting a TRO against compliance with the PRA after review of "classified material." *Id*. at Dkt. No. 6 (6/13/16)[8]

The United States based its claims of privilege on "new information sharing initiatives" implemented after 9/11, which were designed "to better serve and protect the nation's interests. [Footnote omitted] These initiatives

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[8] *See also* M. Carter, "Judge blocks Seattle from revealing locations of FBI's hidden cameras on utility poles," Seattle Times, June 14, 2016 (http://www.seattletimes.com /seattle-news/crime/judge-blocks-seattle-city-light-from-disclosing-locations-of-fbi-surveillance-cameras/) (accessed 4/5/17).

have permitted United States law enforcement and national security agencies to communicate more freely among one another and with state and local partners, when necessary, to work cooperatively to protect the United States from criminal and national security threats." "United States' Motion for Summary Judgment," *United States v. City of Seattle*, *supra*, Dkt. No. 18 (filed 9/12/16) at 6. Ultimately, in January 2017, Judge Jones granted summary judgment in favor of the United States. *United States v. City of Seattle*, 16-CV-00889-RAJ, 2017 U.S. Dist. LEXIS 12751 (W.D. Wash. 1/17/17). Thus, a Seattle resident's attempts to find out how much government surveillance there is in public places in Seattle has been thwarted by the assertion of a federal privilege.[9]

Concerns about local control of local law enforcement have also taken on a heightened urgency in light of the current federal attempts to force local governments to enforce what has been perceived as racist and discriminatory immigration policies.[10] In accordance with this perception, the City of Seattle recently filed a federal lawsuit to challenge, on Tenth Amendment grounds,

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[9] *See also* J. Sullivan, "Seattle City councilmember wants federal surveillance cameras removed," KOMONews.com, Jan. 24. 2017 (http://komonews.com/news/local/seattle-city-councilmember-wants-federal-surveillance-cameras-removed) (accessed 4/6/17).

[10] *See Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

the current Administration's attempts to "punish" local governments who do not wish to use their resources to enforce federal immigration policies.[11] The City of Seattle is greatly and legitimately concerned about federal attempts to commandeer local law enforcement to advance the immigration program of the current administration.

All of these concerns directly impact litigation that Guild attorneys are involved in while representing political activists. A simple Public Records Act request for police files connected to the planning of responses to a peaceful protest, for instance, will lead to a dead-end if the Court of Appeals decision in *Mockovak* is allowed to stand. If local law enforcement are simply deemed "federal" employees due to some secret task force focused on political dissenters, attorneys and others will not be able to uncover any documentation to assist in defending activists through the Public Records Act or even a subpoena duces tecum.

Similarly, the simple attempt to obtain an officer's internal affairs file – to find out if the officer has lied or used excessive force in the past – will be pointless if the police agency can simply respond, "This is now a federal

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[11] *See City of Seattle v. Donald Trump et al.*, W.D. WA 17-CV-00497-BAT; B. Chappell, "Seattle Sues Trump Administration Over 'Sanctuary City' Threat," KNKX/NPR, 3/30/17 (http://www.npr.org/ sections/thetwo-way/2017/ 03/30/522030259/ seattle-sues-trump-administration-over- sanctuary-city-threat (accessed 4/6/17).

matter, and you must make a *Touhy*[12] request." The impact on local enforcement of ordinances and statutes adopted through the democratic process will be substantial.[13]

Even putting the PRA to the side, the consequences to the entire subpoena process in state court is severe if local law enforcement officers are considered to be "federal" employees because of their involvement in federal-local task forces. Under *Touhy* and its progeny, such officers could not be compelled to testify in state court proceedings, and attorneys and local judges would have to go through very time-consuming processes to make *Touhy* requests, not only to have the witness appear at trial but even to interview the witness.[14] The result is that a large portion of the criminal justice system – a matter that traditionally under our federal system is in the hands of state

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[12] *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

[13] *See Printz v. United States*, 521 U.S. 898, 920 (1997) ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens.").

[14] *See State v. Vance*, 184 Wn. App. 902, 916, 339 P.3d 245 (2014) ("Thus, a state court lacks jurisdiction to compel a federal employee to testify in a state court action to which the United States is not a party, concerning information acquired during the course of his or her official duties."); *State v. Youde*, 174 Wn. App. 873, 882, 301 P.3d 479 (2013) ("A state court cannot enforce a state subpoena issued to an agent of the Federal Bureau of Investigation."); *In re Elko County Grand Jury*, 109 F.3d 554 (9th Cir. 1997) (state court lacked jurisdiction to compel a forest service employee to appear and testify before grand jury in contravention of United States Department of Agriculture regulations).

governments – will be at the mercy of unknown federal bureaucrats, in distant locations, who wish to advance their own political agendas. This will severely limit the rights particularly of criminal defendants, to secure at trial the presence of law enforcement witnesses, hampering their rights under the Compulsory Process Clauses of the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution.

The entire process will also slow down even the most routine trials. By way of a hypothetical example, imagine a Seattle resident who peacefully protests against the current federal administration's anti-Muslim immigration regulations, but is pepper-sprayed and arrested by a Seattle Police Department officer who has a personal animus against such protests. When the protestor is charged with the crime of "obstruction" in Seattle Municipal Court, the protestor might want to subpoena as witnesses other SPD officers who were on the scene to show that he or she did nothing wrong.

However, if such other officers just so happen to be on a special federal-local task force, designed to monitor political dissidents, those officers can simply claim "sovereign immunity" and refuse to come to court upon being served with a subpoena. Thus, the political biases of the federal government can easily lead to a situation where a person accused of a

political offense in Seattle, by a SPD officer, and charged in Seattle Municipal Court, cannot avail themselves of the most basic of rights, the right to Compulsory Process, and end up being convicted as a result.[15]

This situation is not tolerable. The Court should grant review of Mr. Mockovak's petition under RAP 13.4(b)(4), because the petition involves "an issue of substantial public interest that should be determined by the Supreme Court."

E. CONCLUSION

For the foregoing reasons, the Court should accept review of Mr. Mockovak's petition.

DATED this 7th day of April 2017.

Respectfully submitted,

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[15] The same result could take place in a non-political case. If a criminal defendant in a "routine" VUCSA case, for instance, wishes to subpoena a city police officer who is on some joint narcotics task force with federal agents, the same result can take place with the police officer claiming to be a "federal employee" immune from state process.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL MOCKOVAK, Petitioner, v. KING COUNTY et al. Respondents	No. 94109-2 CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare as follows:

On April 7, 2017, I deposited into the United States Mail, with proper postage affixed, copies of the MEMORANDUM OF AMICI CURIAE NATIONAL LAWYERS GUILD, WASHINGTON COALITION FOR OPEN GOVERNMENT AND ALLIED DAILY NEWSPAPERS OF WASHINGTONin envelopes addressed to:

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I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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