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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

GLEND A NISSEN, Respondent

v.

PIERCE COUNTY, a public agency; PIERCE COUNTY  
PROSECUTOR'S OFFICE, a public entity, Petitioners

v.

MARK LINDQUIST, Petitioner

Filed  
Washington State Supreme Court

MAY 13 2015

Ronald R. Carpenter  
Clerk

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

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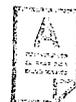
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## I. INTRODUCTION

Amici (hereinafter "Public Employee Amici") – organizations representing hundreds of thousands of public employees<sup>1</sup> – have grave concerns about the significant harmful effects of *Nissen v. Pierce County*, 183 Wn. App. 581, 333 P.3d 577 (2014), on members' privacy and property rights, as well as their constitutional freedoms of speech and association.

Under *Nissen*, requestors can use the Public Records Act (hereinafter "PRA") for warrantless search and seizures of personal records involving private phones, computers, diaries, and social media accounts of public employees on the theory that if those employees' communications have touched upon work in some undefined way, they have created "public records." Requestors can demand employers obtain and fish through employees' personal records for anything "work-related." The reasoning of *Nissen* undermines the statutory and constitutional rights of every governmental employee – from first responders to those who teach our children.

*Nissen's* interpretation of the PRA would render it unconstitutional. Public employees do not waive their constitutional rights by serving their communities.

For this reason, these Public Employee Amici support the trial court's

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<sup>1</sup> Washington Federation of State Employees, Washington Education Association, Washington Counsel of Police and Sheriffs, Washington State Patrol Troopers Association, International Association of Fire Fighters, and Pierce County Prosecuting Attorneys' Association.

protection of our constitutional rights and its dismissal of Glenda Nissen's (hereinafter "Nissen") PRA lawsuit. This Court should reverse the Court of Appeals decision and reinstate the trial court's thoughtful decision.

II. IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of amici curiae, as required by RAP 10.3(e), are set forth in detail in their motion for leave to submit this brief.

III. STATEMENT OF THE CASE

Statements of the case in prior briefing of Pierce County and the Pierce County Prosecutor's Office (hereinafter "County") and Pierce County Prosecutor Mark Lindquist (hereinafter "Prosecutor") submitted to the Court of Appeals and this Court conform to the requirements of RAP 10.3(a)(5). Accordingly, they are adopted by the Public Employee Amici.

IV. ARGUMENT

Supplemental briefs of the County and Prosecutor effectively address core issues the Court must confront in this case. The Public Employee Amici, however, believe this Court should not overlook additional key points. First, this Court's decision will affect every Washington public employee and their constitutional rights. Second, the decision could entangle local governments and public employees in endless litigation and harassment if public employee constitutional rights are not observed.

A. UNLESS REVERSED, *NISSEN* PLACES THE PERSONAL COMMUNICATION RECORDS OF ALMOST FOUR HUNDRED THOUSAND PUBLIC EMPLOYEES IN JEOPARDY

Just as an elected official is not an "agency" under the PRA, nor are individual public employees. Consequently, neither are repositories for public records as the legislature determined and courts have agreed. The PRA definition of "agency" does not include natural persons. RCW 42.56.010(1). Elsewhere in the PRA, when the Legislature intended for the PRA to apply to natural persons, it identified specific public employees.<sup>2</sup> This Court has never expanded the definition of "agency" beyond the statute's plain language. *See e.g. Nast v. Michels*, 107 Wn.2d 300, 306, 730 P.2d 54 (1986) (courts are not "agencies" where the PRA's definition did not "specifically include" them). For this reason, in *West v. Thurston Cy*, 168 Wn.App. 162, 183-84, 275 P.3d 1200 (2012) (footnotes omitted), Division II rejected extending the term "agency" to agents of an "agency":

But West cites 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. On the contrary, we assume that the legislature "means exactly what it says"; and, in this instance, our state's legislature has not yet chosen to extend the PRA this far, expressly designating "agencies" as the only entities that can prepare "public records" subject to disclosure under the PRA ....

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<sup>2</sup> *See e.g.* RCW 42.56.060 (listing "public agency, public official, public employee, or custodian" separately); RCW 42.56.230(3) (listing "employees, appointees, or elected officials" separately); RCW 42.56.540 (differentiating "an agency or its representative or a person").

*Nissen* jeopardizes the personal communications of nearly 400,000 Washington public employees.<sup>3</sup> As Division Two stated: "At issue is whether a government employee's private cellular telephone call log records and text messages are 'public records' subject to disclosure under the PRA." 183 Wn.App. at 585 (emphasis added). *Nissen's* arguments impose on every employee unforeseen and uncompensated duties and expenses.<sup>4</sup> For example, if private records are somehow deemed "public," employees will face the burden and expense of preserving them or risk criminal prosecution if they fail to preserve their own property. See RCW 40.16.010.

The only other basis for claiming a public employee's private communications records are "public" is if those records have become the property of the public employer as a condition of employment. Such a theory creates takings issues under the Washington and United States Constitutions.

B. UNDER *NISSEN*, PUBLIC EMPLOYEES' PERSONAL COMMUNICATION RECORDS WILL BE AVAILABLE FOR "SCRUTINY" AND "RELEASE"

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<sup>3</sup> The total full and part-time state and local government employees in Washington State in March 2013 was 396,511, U.S. Census Bureau, 2013 Annual Survey of Public Employment and Payroll, State and Local Government Employment and Payroll Date: March 2013 (Washington); available at <http://www.census.gov/govs/apes/>.

<sup>4</sup> *Nissen* Supp. Br. 14-16 (quoting RCW 36.01.030: "The power of the county prosecutor's office can only be exercised by its agents or officers acting under their authority or authority of law") (emphasis added); *Nissen* Ans. to Pet. 9 ("[a]gencies act through the actions of their employees and officials") (emphasis added) with Corrected *Nissen* Br. 20-22. In fact, she expressly asks courts to apply the PRA to employees. See e.g. *Nissen* Supp. Br. 11 ("[a] court is to examine whether or not the employee has a reasonable expectation of privacy in the material to be searched or seized, and to examine further whether the alleged privacy interest is one which society if [sic] prepared to honor") (emphasis added). See also *Nissen* Ans. to Pet. 9.

Many public employees do not have land-line service, are not provided government cell phones, and possess only a personal cell phone<sup>5</sup> to communicate with their public employers for work-related purposes, such as absence notification due to their illness or a child's, checking a work schedule, working at home, notifications to family concerning a work matter, receiving notifications from a supervisor or co-worker,<sup>6</sup> or unsolicited communications about work from members of the public. *Nissen* punishes these basic communication necessities and appears to elevate the PRA into an unconstitutional implied waiver of fundamental employee rights when it holds that once a public employee uses a "cellular phone to conduct government-related communications" the phone is "no longer purely personal" and "potentially" subjects "personal cellular phone call detail log and text message records to agency scrutiny before release in response to a PRA request." *Id.* at 593, 598. As a result, presented with a employer demand for their personal records, public employees will justifiably fear potential adverse employment action if they exercise their constitutional rights and refuse. This decision creates a frightening intrusion into public

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<sup>5</sup> As of 2014 nearly 7 in 10 of those aged 25-29 (69.3 percent) lived in cell phone only households. The rate was 64.9 percent for age 30-34, 57.8 percent for age 18-24, and 52.5 percent for age 35-44. The rate for all adults in cell phone only households doubled from 2009 to 2014. See "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, Jan.-June 2014" at [www.cdc.gov/nchs/data/nhis/earlyrelease/wireless/201412.pdf](http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless/201412.pdf).

<sup>6</sup> Sixty-seven percent of employees at every level of federal, state, and local government use their personal telephones for work purposes. See GovLoop, "Exploring 'Bring Your Own Device' In the Public Sector," p. 9 (2012).

employees' privacy, property, speech, and associational rights, without any indication as to when or how those rights can ever be regained.

Public employees' personal records are likely to be deemed "public records" because *Nissen* holds that the PRA applies to all text or telephone conversations which "relate to government business," 183 Wn.App. at 585. Employees have the right to call home when they work late, to talk to each other about work conditions, to act as whistleblowers, or to organize to address grievances, without such "work-related" conversations being subject to the PRA. *See e.g.* 29 U.S.C. §157 (right to organize and engage in concerted activities).

Once a decision makes a public employee's private communications records "fair game" under the PRA, employers can use it to investigate union activities and whistleblowers, chilling such activities. Similarly, accused and convicted criminals will harass police, corrections officers, and prosecutors with PRA fishing expeditions into their private records.

Even if a public employee were willing to review personal records, *Nissen* holds that such review, whether at work or at home, may convert them into public records. *Id.* at 594-95. Many public employees will not be able to afford private legal counsel. Yet, if they seek guidance from their office, under *Nissen* such guidance may convert previously personal records into public records subject to disclosure under the PRA. *Id.*

C. THERE IS NO MECHANISM BY WHICH EMPLOYERS CAN SEIZE PUBLIC EMPLOYEES' PERSONAL RECORDS

The PRA was written to regulate government records to which an agency has access, not the personal records of its employees. Accordingly, the PRA contains no mechanism for government to seize personal records from employees or their telecommunications service providers.

While *Nissen* recognizes that "purely private cellular phone text messages are not 'public records' and not subject to disclosure under the PRA," *see* 183 Wn. App. at 596, it never addresses how a government employer can actually or lawfully seize its employees' personal records in order to "scrutinize" them in response to a PRA request. Nor does *Nissen*, who can only suggest an *in camera* review process after litigation has begun, but a requestor must show at the time of the request that the records are public. A requestor has the burden to show records are "public records." *See e.g. Smith v. Okanogan County*, 100 Wn. App. 7, 16, 994 P.2d 857 (2000); *Bonamy v. City of Seattle*, 92 Wn.App. 403, 409, 960 P.2d 447 (1998), *rev. denied*, 137 Wn.2d 1012 (1999). A requestor cannot first seize records by a PRA suit and then determine afterward if they are subject to the PRA. Records must be public records prior to *in camera* review. *In camera* review is not an exception to the Fourth Amendment or Art. I, §7.

Discovery in PRA litigation cannot compel production of records that

would not be available under the PRA, including personal records that an employee has a right to protect. *See 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 of its directors and 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"); *Fuller v. City of Homer*, 113 P.3d 659, 666-67 (Alaska 2005) (documents sought by public records statute were not discoverable under discovery rules because their production was object of the suit). *See also* WAPA Amicus Br. 10-13. Public employees will resist production of their personal records. Nowhere does Division Two assess the impact of such resistance on public employees, who will bear the cost of administrative and court proceedings to preserve their rights against employers and harassing requestors. Under the plain language of the PRA, the legislature did not impose this burden on public employees.

Moreover, the use of *in camera* review to determine if personal records are subject to the PRA, as Nissen suggests, would presumptively turn every such record into a public record, by operation of the open courtroom provision of Article I, §10 of our state constitution. *See also e.g. Bennett v. Smith Bundy Berman Britton PS*, 176 Wn.2d 303, 308-12, 291 P.3d 886 (2013); *but see King v. Olympic Pipeline Co.*, 104 Wn.App. 338, 362, 16

P.3d 45 (2000) (Art. I, §10 does not override federal constitution protections). No citizen should be compelled by the PRA to have personal records on their personal phone or computer subject to court or public review.

The reason neither Division Two nor Nissen articulate a basis for public employers to obtain employees' personal records is that none exists.

D. "SCRUTINY" AND "RELEASE" OF PERSONAL RECORDS UNDER *NISSEN* REQUIRES AN UNLAWFUL SEARCH AND SEIZURE THAT WOULD VIOLATE PUBLIC EMPLOYEE'S RIGHTS TO PRIVACY, PROPERTY, DUE PROCESS, SPEECH, AND ASSOCIATION

Public employees enjoy the same constitutional rights as other citizens. They do not forfeit those rights when entering public service. *See Gardner v. Broderick*, 392 U.S. 273, 277 (1968) (quoting *Garrity v. State of New Jersey*, 385 U.S. 493, 500 (1967) (constitution protects "policemen or other members of our body politic"). As this Court has ruled, "the PRA must give way to constitutional mandates." *Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013). The trial court here considered the constitutional arguments and ruled that the record could not be further developed without violating constitutional rights:

I have absolutely no power to require the third-party provider, without a search warrant application with probable cause, to disclose records. I have no power to do so under [the PRA]. Whether or not [the PRA] violates the elected official or public official's constitutional rights, be either state or federal, I find that they still have those rights; that just because you run for public office does not make you exempt in your maintaining of your right against

search and seizure, either under the state constitution or the federal constitution, and that's my ruling.

*Id.* at 588 n. 9. The *Nissen* decision, however, declines to address the employee's "constitutional privacy arguments" but "leave[s] these arguments for the superior court," *id.* at 596, despite the fact that the trial court had considered and ruled upon the constitutional arguments.

The *Nissen* decision implicates several constitutional rights and protections. *Nissen* claims that the County and the Prosecutor raised only "unconstitutional search and seizure" and that it was Amici alone who "raised a host of other constitutional arguments, which are not properly before this Court[.]" *Nissen* Supp. Br. 4. This is untrue.<sup>7</sup> *Nissen's* argument also ignores RAP 2.5(a)(3). *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 758, 709 P.2d 1200 (1985) ("the judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in the decision of the trial judge"). More critically, this Court can count on the fact that public employees, when pressed by their employers, will invoke all of their state and federal constitutional rights.

After erroneously and largely limiting the constitutional inquiry to

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<sup>7</sup> See Corrected *Nissen* Br. 35, 40-44, 46, 48, 50; Prosecutor Br. 14-22, 26-27; Cy Ans. to COA Amicus A.G. 10-11, 13-14; Prosecutor Ans. to COA Amici 7-8, 10-13; Cy Pet. 14-15, 17-20; Prosecutor Pet. 14; Prosecutor Resp. to Amici in Supp. of Pet. 6-7, 9 (addressing how compelling production would disturb "private affairs" under Art. I, §7, take private property under Art. I, §16, chill free speech under Art. I, §5, and deny due process under Art. I, §3 as well as chill free speech under the First Amendment, be an uncompensated taking under the Fifth, and deny due process under the Fourteenth Amendment.

search and seizure, Nissen only superficially addresses other constitutional barriers by citing to *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977).<sup>8</sup> Rather than addressing all public employees' state and federal constitutional concerns, Nissen ignores them. This Court, as the trial court did, should issue an opinion that respects the constitutional rights of public employees.

1. The Compelled Production Here Violates Public Employees' Right Against Unlawful Search and Seizure

In Washington, seizure by warrant is available only upon probable cause of a crime or where authorized by a specific statutory provision. *City of Seattle v. McCreedy*, 123 Wn.2d 260, 273-74, 868 P.2d 134 (1994); *State v. Walker*, 101 Wn.App. 1, 6, 999 P.2d 1296 (2000). Here there is neither. As one commentator recently observed: "Without such authorization, an attempt by a court to compel production of the 'private affairs' of an individual, even for *in camera* review, would be of questionable legality under article I, section 7 precedent." *See Comment*, "Public Records in Private Devices: How Public Employees' Article I, Section 7 Privacy Rights Create a Dilemma for State and Local Government," 90 Wash.L.Rev. 544, 569, 576 (2015) ("Where a public employee or elected

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<sup>8</sup> Nissen Supp. Br. 8-14, 17-20. However, *Nixon* did not involve an *in camera* review, a warrantless search, an invasion of privacy, or an infringement on associational rights because the few personal records at issue created by government, paid for by government, and already in government possession would not become presumptively public by the non-judicial confidential archival review at issue there. *See* Prosecutor Supp. Br. 8-10.

official properly invokes the privacy protection of article I, section 7 of the Washington State Constitution to resist disclosure of a private electronic device, the public records inquiry should be at an end").

At issue in this case are call logs that are at the public employee's home and texts that, if they still exist, are held by the private service provider. CP 58, 81, 200-02, 251, 444-46, 490, 598, 615-18. These locations are protected by the Fourth Amendment and Art. I, §7. *See State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014). Nissen claims the Court of Appeals decision allows these records be compelled for *in camera* review, but fails to explain how a warrant requirement is met. Indeed, Nissen does not acknowledge Art. I, §7 precedent – *State v. Hinton, supra*, where this Court ruled text messages are "a private affair protected by the state constitution from warrantless intrusion." 179 Wn.2d at 865.

The Fourth Amendment also protects public employees against unlawful search and seizure. In *O'Connor v. Ortega*, 480 U.S. 709, 715, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987), a majority of the justices recognized that even when personal property is in the work place, the "strictures of the fourth amendment appl[y] to the conduct of governmental officials in various civil activities" so that "[s]earches and seizures by government employers ... of the private property of their employees ... are subject to

the restraints of the Fourth Amendment." (emphasis added).<sup>9</sup> *See also City of Ontario v. Quon*, 560 U.S. 746, 756, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010) ("The Fourth Amendment applies ... when the Government acts in its capacity as an employer"). Though *Ortega* addressed the search standard applicable to a desk or file cabinet in government owned workplaces, the Court expressly declined to reach the appropriate standard for a government employer search of the *contents* of an employee's personal property, e.g. briefcase, purse, or luggage placed at work, *Ortega*, 480 U.S. at 716, and clearly never envisioned a search of personal cell phone content.

Though here, call logs were briefly brought into an employee's workplace, CP 81, 445, *Ortega* establishes that bringing personal property to a workplace does not divest it of its constitutional protections. Therefore, *Nissen's* conclusion that "personal call logs" "would be public records" by the act of "storing them in the prosecutor's office or some other government office", 183 Wn.App. 595, is contrary to the Fourth Amendment.

Public employees all over this state carry their cell phones, purses, wallets, and briefcases into the workplace. These items remain constitu-

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<sup>9</sup> Nissen mischaracterizes *Ortega's* holding by claiming the court "found no Fourth Amendment violation" where a state employer conducted a warrantless search of its employee's personal property. Nissen Supp. Br. at 10. To the contrary, *Ortega* merely defined a standard for employer searches of government-owned spaces. On remand, a jury found the public employer's search and seizure of the employee's personal property was unconstitutional, in violation of 42 U.S.C. §1983, and the Ninth Circuit affirmed. *Ortega v. O'Connor*, 146 F.3d. 1149 (9<sup>th</sup> Cir. 1998). The Public Employee Amici also believe such public employer searches/seizures violate the more stringent provisions of Art. I, §7.

tionally protected. In *Riley v. California*, \_\_ U.S. \_\_, 134 S. Ct. 2473, 189 L.Ed.2d 430 (2014), a unanimous United States Supreme Court held: "With all they contain and all they may reveal, [cellular telephones] hold for many Americans 'the privacies of life,'" and therefore "[o]ur 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." *Id.* at 2494-95 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Public employees, like all other citizens, maintain an expectation of privacy in their own phones and records pertaining to those devices. If the government – be it an employer or the court at the demand of a PRA plaintiff – wants to examine such personal records, there is no option but to get a warrant.

2. The Compelled Production Here Chills Public Employees' Rights to Free Speech and Association

Washington law recognizes that public employees do not forfeit their state and federal constitutional free speech rights by entering public employment. *Edwards v Dept. of Transp.*, 66 Wn. App. 552, 559, 832 P.2d 1332 (1992) (persons cannot be compelled to relinquish First Amendments rights as a condition of public employment). Courts have recognized a cause of action if government action infringes upon public employee free speech rights, *White v. State*, 131 Wn.2d 1, 929 P.2d 396 (1997); *Smith v. Bates Tech. College*, 139 Wn.2d 793, 991 P.2d 1135

(2000), and a general common law cause of action for invasion of privacy. *Reid v. Pierce County*, 136 Wn.2d 195, 961, P.2d 333 (1998); *See also Resident Action Council v. Seattle Housing Authority*, 162 Wn.2d 773, 174 P.3d 84 (2004) (government bears the burden of justifying free speech restrictions - agency violated tenants' First Amendment free speech rights).

Public employees are legitimately concerned that subjecting the records of their personal communication devices, including text messages, to disclosure under the PRA would have a profound and unconstitutional chilling effect on the exercise of free speech and association when any communication is "work-related." Public employees are left to speculate as to what single personal communication might result in all such communications being subject to "scrutiny and release" to the public.

For example, if a firefighter calls or texts another firefighter on his personal cell phone to let his co-worker know he is safe after a dangerous rescue, or if he calls his state legislator to relate how a certain regulation made the rescue more dangerous, *Nissen* would subject all the data in his personal cell phone to "scrutiny and release" under the PRA.

If a parent calls or texts a school coach to ask what time a practice session will end in order to schedule picking up a child, *Nissen* would subject that and other data in the coach's phone to PRA "scrutiny and release." Further, under *Nissen*, the coach, like the firefighter, would be obligated to

preserve all of her personal data on the phone, potentially for years. Even if *Nissen's* definition of "work-related" were clear, it still improperly subjects personal devices and records to scrutiny and release. A teacher who must use her personal phone or email to communicate with a student's working parents after school hours would face having personal records seized and reviewed to see if any communications are "work-related."

Our public employees have a right to make such calls without fearing their personal communications will be examined and publicly released. *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) (PRA disclosure enjoined for chilling free speech). An employee cell call to a union steward or co-worker about a grievance creates a "work-related" record. The exercise of union rights and First Amendment speech will be chilled if such records are "public."

*Nissen* blindly discounts the intrusiveness of having an employer review every personal cell phone communication or home computer email simply because someone made a PRA request. Such requestors might be inmates, ex-spouses, or disgruntled former co-workers. *Nissen* could even

be used by employers to monitor communications between workers and union representatives.

In addition, many public employees are engaged in political activities. Public employees are uniquely qualified to discuss matters of government related to their own work, and it is beyond dispute that they have the right to "express their opinions" and thereby communicate on "all political subjects." RCW 41.06.250.<sup>10</sup> It is fundamental that "politics" relates to "[t]he activities or affairs of a government." The American Heritage Dictionary, 2<sup>nd</sup> Coll. Ed. 1985. Such political activities may well touch upon work-related topics, but cannot be conducted on publicly-funded devices. *See* RCW 42.17A.555(1); RCW 42.52.180(1). Political speech is entitled to the highest form of protection. *See Meyer v. Grant*, 486 U.S. 414, 422, 425, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). *See also In Re Anonymous Online Speakers*, 661 F.3d 1168 (9<sup>th</sup> Cir. 2011) (nature of speech affects civil discovery rights with political speech given highest protection).

Public Employee Amici are highly concerned that in order to make public employee personal records into a public record, the court would necessarily need to convey to the government employer a property interest

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<sup>10</sup> RCW 41.06.250 provides:

Employees of the state or any political subdivision thereof have the right to . . . express their opinions on all political subjects and candidates and to hold any political party office . . . Nothing in this section shall prohibit an employee of the state or any political subdivision thereof from participating fully in campaigns relating to constitutional amendments, referendums, initiatives, and issues of similar character[.]

in the employee's personal devices and personal records. Yet, such a government ownership interest in privately owned material would constitute a taking under article I, § 16 of the Washington Constitution. *See State v. Superior Court of King County*, 26 Wash. 278, 286, 66 P. 385 (1901); *Manufactured Housing Cmty. of Wash. v. State*, 142 Wn.2d 347-363-68; 13 P.3d 183 (2000). Similarly, such a conversion of personal property would violate federal constitutional rights. *See e.g. Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (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 (1<sup>st</sup> Cir 2002) ("Disclosure Act violates the Takings Clause by taking appellees' property without just compensation").

*Nissen* also violates precedent requiring a prior stringent constitutional analysis before a party's associational records can be subject to *in camera* review. *See Snedigar v. Hoddersen*, 114 Wn.2d 153, 158, 786 P.2d 781 (1990). *Nissen's* failure to consider the free speech and associational rights of public employees alone is a basis for reversal and cannot be avoided. *See e.g. 16 C.J.S. Constitutional Law §157* (2009) ("The 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"). *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").

In sum, *Nissen* ignores the constitutional free speech and associational rights of public employees as well as their constitutional rights against unlawful search and seizure and takings.

#### E. CLARIFICATIONS OF THE PRA ARE A JOB FOR THE LEGISLATURE

Any concerns that public employees may use personal devices for work purposes to circumvent the PRA cannot be resolved by disregarding the U.S. and Washington Constitutions. It is for the legislature to amend the PRA to govern public employee use of private devices. Any legislation must respect the constitutional and statutory rights of public employees who enjoy the same rights as all citizens. Legislation would have the benefit of public hearings and appropriate debate where all interested parties could participate. For now, though, this Court should interpret the PRA as it is written and respect the constitutional rights of public employees.

V. CONCLUSION

Public employees, like other citizens, have constitutional rights that the PRA cannot invalidate. Public employees are not "agencies" under the plain language of the PRA, and cannot be so treated under the state and federal constitutions. Neither requestors, public employers, nor the courts have lawful authority to seize and review the personal records of public employees to determine if they have been involved in "work-related" communications. Public employees have a right to discuss work in their private lives. They do not waive their constitutional rights by discussing work, or by bringing personal devices and records at work.

The trial court ruling correctly upheld the statutory and constitutional rights of public employees. *Nissen* should be reversed and the trial court's dismissal of *Nissen*'s suit upheld.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of May, 2015.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing document was delivered this 4th day of May, 2015, by electronic mail pursuant to the agreement of the parties as follows:

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# APPENDIX

29 U.S.C. §157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

RCW 36.01.030

Its powers can only be exercised by the county commissioners, or by agents or officers acting under their authority or authority of law.

RCW 40.16.010

Every person who shall willfully and unlawfully remove, alter, mutilate, destroy, conceal, or obliterate a record, map, book, paper, document, or other thing filed or deposited in a public office, or with any public officer, by authority of law, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than one thousand dollars, or by both.

RCW 41.06.250

(1) Solicitation for or payment to any partisan, political organization or for any partisan, political purpose of any compulsory assessment or involuntary contribution is prohibited: PROVIDED, HOWEVER, That officers of employee associations shall not be prohibited from soliciting dues or contributions from members of their associations. No person shall solicit on state property or property of a political subdivision of this state any contribution to be used for partisan, political purposes.

(2) Employees of the state or any political subdivision thereof shall have the right to vote and to express their opinions on all political subjects and candidates and to hold any political party office or participate in the management of a partisan, political campaign. Nothing in this section shall prohibit an employee of the state or any political subdivision thereof from participating fully in campaigns relating to constitutional amendments, referendums, initiatives, and issues of a similar character, and for nonpartisan offices.

(3) A classified civil service employee shall not hold a part time public office in a political subdivision of the state when the holding of such office is incompatible with, or substantially interferes with, the discharge of official duties in state employment.

(4) For persons employed in state agencies or agencies of any political subdivision of the state the operation of which is financed in total or primarily by federal grant-in-aid funds political activity will be regulated by the rules and regulations of the United States civil service commission.

(5) The provisions of this section shall supersede all statutes, charter provisions, ordinances, resolutions, regulations, and requirements promulgated by the state or any subdivision thereof, including any provision of any county charter, insofar as they may be in conflict with the provisions of this section.

RCW 42.17A.555

No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any

person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency. However, this does not apply to the following activities:

(1) Action taken at an open public meeting by members of an elected legislative body or by an elected board, council, or commission of a special purpose district including, but not limited to, fire districts, public hospital districts, library districts, park districts, port districts, public utility districts, school districts, sewer districts, and water districts, to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body, members of the board, council, or commission of the special purpose district, or members of the public are afforded an approximately equal opportunity for the expression of an opposing view[.]

RCW 42.52.180

(1) No state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition. Knowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using public resources in violation of this section constitutes a violation of this section. Facilities of an agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of state employees of the agency during working hours, vehicles, office space, publications of the agency, and clientele lists of persons served by the agency.

RCW 42.56.010

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Agency" includes all state agencies and all local agencies. "State

agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

RCW 42.56.060

No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter.

RCW 42.56.230:

The following personal information is exempt from public inspection and copying under this chapter:

....

(3) Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy;

RCW 42.56.540

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice.

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**Subject:** Nissen v. Pierce County, No. 908753, Motion for Extension of Time/Motion to File Amici Brief

**\*\*Correct attachments to earlier email\*\***

Clerk of the Court,

Attached please find for e-filing, as well as e-service by agreement of the parties, the following documents:

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

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