SUPREME COURT OF THE STATE OF WASHINGTON

NO. 1033222

Review of Division II Cause 57601-5
22-2-02806-34
Before the Honorable Judge Wilson
Thurston County

Joe Patrick Flarity, a marital community
v.
Unknown Officials, in their official and personal capacities,
State of Washington, Et Al.

MOTION TO INCLUDE

SUPPLEMENTAL AUTHORITY SUPPORTING RIGHT TO PRIVACY

STATE V. McGee, 102134-8

Treated as a Statement of Additional Authorities

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1. IDENTITY OF PETITIONER

Joe Flarity, as an individual, residing at:

101 FM 946 S

Oakhurst, TX 77359

piercefarmer@yahoo.com

2. AUTHORITY TO INCLUDE

Supplements are allowed for recent decisions that influence the outcome by RAP 10.8(b).

3. APPLICABILITY

Div. II has allowed “”fruit of the poisonous tree” evidence that benefits officials. Flarity’s Brief, P17, AP-136; Flarity’s Reply to State, P8.

4. REASONS

For Flarity, Judge Wilson and Div. II are inconsistent with widely accepted 42 U.S.C. §§ 1983 protections as expertly demonstrated when Judge Bryan allowed trespassing Appraiser Heather Orwig to escape accountability by refusing to toll the case for RCW 4.92 delays. Our private affairs where then made public records and proved beneficial to the BOE whom brazenly cited *Vohnof* as authority. It would be *shocking to the conscious* if drug-dealing convicted murderers enjoy a higher level of protection for privacy than law abiding citizens.

I made a personal promise to permanently damaged Jon Vonhof that I would do everything in my power to remove his name from further trampling of Art. I, Sec. 7. **AP-15-17.**

I respectfully request consistency with *McGee* for *all the people* and enforcement of *Matter of Maxfield, 945 P.2d 196, 133 Wash. 2D 332 (1997),* to eliminate further abuses by officials openly defying the Panel's authority as an independent branch of government:

> The narrow exceptions to the warrant requirement are "`jealously and carefully drawn.'" *Id.* (quoting *Houser,* 95 Wash.2d at 149, 622 P.2d 1218).

The "but for," and *attenuation doctrine* also do not apply to Flarity. Per *McGee*:

> ...we know unlawful searches and arrests happen notwithstanding the protections called out in our founding documents, raising the question of **how** individuals may vindicate their rights in the wake of violations, and **when,** if ever, **illegally obtained evidence may be used against them.**

5. CONCLUSION

For the reasons stated, *McGee* should be included in the decision and the "how and when" question answered as required per Art. 1, Sec. 29.

CERTIFICATION OF WORD LIMIT. The Word Count is 272 words and is within the limit of the RAP for Supplemental Authorities.

CERTIFICATION AND SIGNING:
Per RCW 9A.72.085, I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and I have followed the RAP 13 to the best of my knowledge for this Motion.

Date of Signing: November 29, 2024
Signature of plaintiff: /*S*/

Joe Flarity, for himself
101 FM 946 S.
Oakhurst, TX 77359
piercefarmer@yahoo.com

APPENDIX TABLE OF CONTENTS

DESCRIPTION PAGE

DECLARATION CONCERNING VONHOF…… AP-2

United States Court of Appeals for the Ninth Circuit

Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

JOE PATRICK FLARITY, a marital community Appellant V. Argonaut Insurance Company, David H. Prather, Heather Orwig, Kim Shannon, Daniel Hamilton, Mary Robnett, Pierce County, a municipal corporation, Et Al. Appellee	§ § § § § § § § § § § § § § §	No. 21-35580 DC No. 3:20-cv-6083-RBL MOTION TO CERTIFY FEDERAL QUESTIONS TO WASHINGTON SUPREME COURT

MOTION TO CERTIFY FEDERAL QUESTIONS

1. Comes Flarity, a pro se marital community, Moves the Panel for submission to the Washington Supreme Court Federal Questions per RAP 16.16 citing RCW 2.60 for questions raised in Pierce County's Answer DK#11.

I. LEGAL AUTHORITY TO CERTIFY

2. Per *Hillsborough Tp Somerset County v. Cromwell*, 326 U.S. 620, 66 S.Ct. 445, 90 L.Ed. 358 (1946), with emphasis:

> We have held that where a federal constitutional question turns on the interpretation of local law and the local law is in doubt, **the proper procedure is for the federal court to hold the case until a definite determination of the local law can be made by the state courts.**

3. WASHINGTON LAW CONFIRMS *HILLSBOROUGH*. Per RCW 2.60.20:

Federal court certification of local law question:

> When in the opinion of any federal court before whom a proceeding is pending, it is necessary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined, such federal court may certify to the supreme court for answer the question of local law involved and the supreme court shall render its opinion in answer thereto.

4. Per RCW 2.60.030: **Practice and procedure**, with emphasis:

> Certificate procedure shall be governed by the following provisions:
>
> (1) Certificate procedure may be invoked by a federal court upon its own motion **or upon the motion of any interested party in the litigation involved** if the federal court grants such motion.

II. QUESTION: ARE TAX APPRAISERS ABOVE THE LAW

5. WHEN A SEARCH IS NOT A SEARCH. Pierce County contends that inspection by a tax appraiser is NOT a search nor an invasion and is authorized by State law. The practice is purported as approved by Division Three's *State v Vonhof* 751 P2d 1221 51 WnApp 33 Wash App 1988. **If true, the bulk of Flarity's 14th Amendment claims disappear**.

6. *RIDGWAY* SUPERCEDES *VONHOF*. Pierce County's Answer surreptitiously neglected to include the subsequent ruling almost identical to *Vonhof*: *State v Ridgway* 790 P2d 1263 57 WnApp 915 Wash App 1990. In *Ridgway*, Division Two conflicted *Vonhof* and confirmed the "*sanctity*" of state privacy protections for curtilage. But that Panel dodged the assessor issue by reversal of Ridgway's criminal conviction resulting from the illegal search:

> We need not discuss Ridgway's contentions about the assessor, for we conclude that his photo and information did not supply probable cause for the warrant. We agree with Ridgway's contention that the investigative entry was unlawful.

III. QUESTION: BOE COURT DUE PROCESS WHEN VIOLATING THE LAW

7. The BOE Court, as Flarity suffered in January 2018, IS NOT A PUBLIC FORUM as required by local law and rules. This policy was not established specifically for Flarity's hearing, but was an illegal *prior agreement* affecting all Petitioners to this Court as a CLASS. This practice violates the Washington State Constitution Article 1, Section 10 ADMINISTRATION OF JUSTICE, **Justice in all cases shall be administered openly,** and without unnecessary delay; Section 4, Right of Petition and assemblage; RCW 84.48, for BOE meetings to be "**open**"; Pierce County's DESK REFERENCE MANUAL, 12.5: **All private residence meetings are public.**

8. The Supreme Court of Washington is the appropriate place to determine the effect of systemic violation on the **jurisdiction of the court,**

due process, and the implication of **constructive fraud** on the public. Per Article one of the Washington State Constitution:

> **SECTION 3 PERSONAL RIGHTS.** No person shall be deprived of life, liberty, or property, without due process of law. "

Flarity relies on *Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690, for activity ***inconsistent with due process.*** The immunity afforded a quasi-judicial court, whether absolute or qualified, must depend on the officials adhering to a standard of acceptable behavior. If the officials are held to no standard—the available immunity should likewise be liquid. From *Ashelman v. Pope*, 793 F.3d 1072, 1078 (1986) with emphasis:

> The immunity afforded judges and prosecutors **is not absolute**....The factors relevant in determining whether an act is judicial "**relate to the nature of the act itself**, ... **and to the expectations of the parties….**

IV. ARGUMENT FOR CERTIFICATION

9. CONFLICTED LOWER COURTS. Both *Vonhof* and *Ridgway* argued their arrests were directly related to an appraiser search in which the "*enforcement official*" went to considerable effort to invade protected curtilage in a warrantless invasion of privacy. Certainly the assessors' photographs and report of suspicious smells were compelling enough to provoke police action.[1] But unlike *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), neither case resulted in liability for privacy violations.

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[1] Hypocrisy undermines the people's confidence in our government. "I have smoked & been around marijuana in the past years & around the type that is grown indoors & is highly cultivated & that is the type of odor I smelled coming from this area of the bldg." *State v. Vonhof,* 751 P.2d 1221, 51 Wn.App. 33 (Wash. App. 1988).

10. WHEN COMITY AND CIVIL RIGHTS CONFLICT. This particular search issue has not reached the Washington Supreme Court. Because the collection of taxes is involved, comity and civil rights conflict as Justice Alito explained in *Knick v.Twp. of Scott*, 139 S. Ct. 2162, 204 L.Ed.2d 558 (2019). Per *Knick*, the state enjoys a *"home court advantage"* with civil rights sent to the back of the bus in Washington State. Washington State should be requested to justify the right of tax agents to violate fundamental liberties.[2]

HOME COURT ADVANTAGE EVIDENT ON TAX ISSUES

11. PROTECTION OF PRIVACY SHOULD BE CONSISTENT. The Panel should consider that the protection of privacy by the Washington State Supreme Court must be consistent throughout the circumstances. By precedent, the Washington Supreme Court is fond of privacy and proud to assert elevation above the 4th Amendment—when taxes are NOT involved. See the cases Pierce County cited protecting privacy: *State v Bowman* 196 Wash2d 1031 479 P3d 1161Table Wash 2021, *State v Hinton* 319 P3d 9 179 Wash2d 862 Wash 2014, and *State v. Boland,* 115 Wash.2d 571, 800 P.2d 1112 (1990). In *Boland*, the Court went to the extraordinary effort to protect the privacy of trash in a container on a public street.

12. PRIVACY MADE SACRED. Flarity cited even better Washington Supreme Court protections of privacy per DK#78-3, p4, NOT PROVIDED IN THE EXCERPTS, SEE APPENDIX. Per *T.S. v. Boy Scouts of America*, 138 P.3d 1053, 157 Wn.2d 416 (Wash. 2006):

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[2] The Court defies *Knick* in *Trucking Associations, Nonprofit Corp. v. State*, 188 Wash. 2D 198, 393 P.3d 761 (Wash. 2017): "This holding is in line with the underlying purpose of comity—avoiding disruption of state tax administration to ensure the State can collect the revenue it depends on to function."

> Our Founding Fathers recognized one's privacy deserved heightened protection exceeding the Fourth Amendment, favoring a broader constitutional directive *explicitly* protecting our citizens' private affairs; whereas the United States Constitution never even mentions privacy. So doing, the framers created a "broad and inclusive privacy protection." *See, e.g.,* Sanford E. Pitler, Comment, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy,* 61 WASH. L. REV. 459, 520 (1986). Contemporaneous accounts describe the framers of article I, section 7 as having made private affairs "sacred." THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, *supra,* at 497 n. 14

13. In addition, the Supreme Court in *City of Seattle v. McCready*, 123 Wn.2d 260, 868 P.2d 134 (Wash. 1994) and confirmed in *Bosteder v. City of Renton*, 155 Wn.2d 18, 36-37, 117 P.3d 316 (2005), determined that even "*well meaning*" officials and *Superior Court Judges* **could not invade domicile privacy for petty reasons**. **PC SER 101.**

TIPTOEING AROUND AUTOMATIC STANDING [3]

14. Pierce County argues RCW 84.40.025 has removed the Article 1, Section 7 standing for personal and business property domiciles in the State with no clear indication on how privacy rights might be restored. The current precedent, *State v Ridgway* 790 P2d 1263 57 WnApp 915 Wash App 1990, **avoided this issue.**[4] It is significant the State showed an uncharacteristic lack of enthusiasm to have the Supreme Court clarify the reversal of their *Ridgway* cannabis defeat on appeal. The criminal conviction

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[3] The "**automatic standing"** phrase was used in *State v Bowman* 196 Wash2d 1031 479 P3d 1161Table Wash 2021.

[4] The Supreme court often cites *Ridgway* for other situations. "Ignoring a visible 'No Trespassing' sign 'is an important factor that is looked at to determine if an alleged trespasser is aware that the owner of the premises does not welcome uninvited visitors.' *State v. Cairnes*, No. 53684-2-I (WA 3/21/2005) (Wash. 2005)

of *Vonhof* was NOT appealed to the Supreme Court. SEE DECLARATION herein.

OPENNESS INCONSISTENT AT THE WASHINGTON SUPREME COURT

15. There is no clear precedent on how closure of the BOE to the public affects due process and jurisdiction. Many of the decisions respond to custody battles and conflict with other decisions. *In re Guardianship of Stamm v. Guardianship Services of Seattle*, No. 53334-7-I (WA 11/28/2005) (Wash. 2005)

> The Washington Constitution does not establish a right to court access, other than the right to open proceedings and speedy trials.

Dependency of K.R., In re, 904 P.2d 1132, 128 Wn.2d 129 (Wash. 1995):

> The majority today denies Washington parents this safeguard of a heightened burden of proof by misinterpreting the relevant statute and case law and turning a blind eye to the constitution….I dissent because I believe adherence to the constitution requires more than clever word play.

Aslo *State v. W.R.*, 336 P.3d 1134, 181 Wash.2d 757 (Wash. 2014) and *H.J.P., Matter of*, 789 P.2d 96, 114 Wn.2d 522 (Wash. 1990), noting the *K.R.* dissent.

16. EVERY PART OPEN. The Panel takes on a completely different tone when evaluating the openness issue for convicted murderer Michael Lynn Sublett. Per *Wash v. Sublett*, 176 Wash.2d 58, 292 P.3d 715 (Wash. 2012), their emphasis with footnote references removed:

> *See* John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts,* 26 Wake Forest L.Rev. 237, 284–88 (1991) (collecting open courts provisions)….Thus, our constitution contains a stand-alone open administration of justice clause that was

> entirely unique to our constitution when it was adopted. This suggests our framers were especially preoccupied with the open administration of justice.
>
> Under article I, section 10, *every part* of the administration of justice is presumptively open. Section 10 says that justice in *all cases* must be administered openly, the purpose being to ward off corruption and enhance public trust in our judiciary…
>
> ….In short, the United States Supreme Court is much freer to limit courtroom openness than we are.

17. WHEN OPENNESS DOES NOT APPLY. Precedent established limits to the "every part" idea of *Sublett*. Per *Seattle Times Co. v. Eberharter*, 713 P.2d 710, 105 Wn.2d 144 (Wash. 1986), with emphasis:

> Seattle Times next argues that even if we decide that the federal constitution [713 P.2d 716] does not provide for a right of access to the document at issue here, we should allow access under article 1, section 10 of the Washington State Constitution….**The applicability of the provision to a search warrant affidavit has never before been addressed**….We conclude that neither the federal nor state constitution provides for a public right of access to a search warrant affidavit in an unfiled criminal case, and **we decline to issue a writ of mandamus.**

18. OPENNESS APPLIES TO ADMINISTRATIVE HEARINGS. The Panel has ruled on the State Constitution's applicability to administrative hearings. *Mills v. Western Wash. Univ.*, 170 Wash.2d 903, 246 P.3d 1254, 264 Ed. Law Rep. 426, 31 IER Cases 1494 (Wash. 2011):

> **"To have the force of law, an administrative regulation must be properly promulgated pursuant to a legislative delegation."**...The basis of the court's decision was that the University violated the Administrative Procedure Act (APA), chapter 34.05 RCW, **by closing Mills's disciplinary hearing to the public.** We reverse the Court of Appeals."

19. STRICT SCRUTINY FOR 1ST AMENDMENT CLAIMS. Flarity has made a **1st Amendment claim** to stop the conspiracy to defy the public's right to attend BOE hearings. *Grant County v. Bohne*, 89 Wn.2d 953, 577 P.2d 138 (Wash. 1978), with emphasis:

> In this case, **unlike First Amendment cases**, we are not concerned solely with whether the language of the ordinance is vague on its face. Rather, the language should be tested in light of the conduct of the person alleged to have violated the ordinance.

20. FAIRNESS OF COURT HEARINGS SUPPORTED. The Washington Supreme Court has protected citizens when failure of due process and court prejudice are evident. Per *Tonga Air Services, Ltd. v. Fowler,* 118 Wn.2d 718, 826 P.2d 204 (Wash. 1992), with emphasis:

> Mr. Fowler makes the broad-based contention that "[t]he socio-legal system in Tonga made it impossible for [him] to obtain a fair trial.... Mr. Fowler alleges the attorney he initially consulted in Tonga regarding issues to be litigated subsequently represented TAS against Mr. Fowler....he was forced by the trial court in Tonga to go to trial in "complex business litigation" without an attorney,... he was denied the right at trial to proceed with counterclaims and setoff defenses.

TAXES APPEAR TO FLIP THE SCRIPT FOR CIVIL RIGHTS DECISIONS

21. While the Washington Supreme Court questioned the 9th Circuit's willingness to protect *"personal liberties"* in *Gunwall* [5], the tables are turned when it comes to the collection of taxes. Per *Nichel v. Lancaster* 647 P2d 1021 97 Wn2d 620 (Wash 1982), Justice Dimmick:

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[5] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (Wash. 1986), with emphasis:...being "increasingly necessary for the States in our federal scheme to assume a role of activism designed to adapt our law and libertarian tradition to changing civilization", and to **hail this trend as a triumph of personal liberty**...."

> *"I dissent. I find the duties imposed on the county assessors by the tax assessment statutes to be mandatory....I cannot join in the majority's circumvention of a clear legislative mandate...."*

The Washington State Supreme Court demonstrates a measurable shift in jurisprudence where taxes are involved. *Morrison v. Rutherford* 516 P2d 1036 83 Wn2d 153 (Wash 1973):

> "...not due to arbitrary, capricious or intentional discrimination by any Kitsap County official, **but rather due to a lack of adequate funds...**"

The paradigm is further supported by the recent *Trucking* decision,[6] which defies the 9th Circuit's direction that officials should provide a **fair court in the first instance** for tax due process defying *Clements* citing *Ward*.[7] Washington State seems infamous for abuse of taxpayers seeking relief in a fair court long recognized in other states. Per *First National Bank v. Christensen* [39] Utah [568], 118 P. 778:

> "Such an arbitrary policy is vicious in principle, violative of the Constitution, and operates as a constructive fraud upon the rights of the property holder discriminated against. In such cases equity will grant relief." *Andrews v. King County, 1 Wash. 46, 23 P. 409, 22 Am. St. Rep. 136; Case v. San Juan County, 59 Wash. 222, 109 P. 809; Doty Lumber & Shingle Co. v. Lewis County,…*

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[6] "At oral argument, counsel for the Department explained that ALJs have limited power to review constitutional claims, but that such issues may be preserved for appeal. Wash. Supreme Court oral argument, *supra,* at 10 min., 5 sec. through 10 min., 30 sec." *Wash. Trucking Associations, Nonprofit Corp. v. State*, 188 Wash. 2D 198, 393 P.3d 761 (Wash. 2017).

[7] *Clements v. Airport Authority of Washoe County*, 69 F.3d (9th Cir. 1995). *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

V. TIMING

22. Now is the time for the Supreme Court to examine these issues and either endorse or prohibit state practices. The Washington Supreme Court already has Pierce County's NOTICE on record for a similar matter on unconstitutional RCW 84.40.038, Cause 100504-1**,** in addition to *State of Washington v. Palla Sum*, No. 99730-6 for Art. 1 Sec. 7 issues.

VI. OPPORTUNITY TO ESTABLISH PRECEDENT

23. BORDER PATROL NOT ABOVE THE LAW. Like the DEA agents in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)*,* the 9th Circuit per *Boule v. Egbert*, 998 F.3d 370 (9th Cir. 2020) determined that border agents were NOT above the law. Even with previous documented smuggling activity—property owners still enjoy the full protection of 4th Amendment rights. This decision is under review by the U.S. Supreme Court, 21-147. Reversal could result in a new category of *enforcement agents* causing a marked degradation of civil rights for property owners along our borders.

24. TAX APPRAISER STATUS UNDETERMINED. In contrast, enforcement agents in Pierce County currently enjoy relief from privacy restrictions to the insult of Pierce County domiciles by undisputed county policy. The Panel is requested to have the Washington Supreme Court clarify Pierce County's NOTICE per RCW 84.40.025 as constitutional by Art. 1 Sec. 7 of the Washington State Constitution. *Ridgway* 790 P2d 1263 57 WnApp 915 Wash App 1990 should be extended to the Washington Supreme Court for clarification as is currently underway for Palla Sum for

expansion of Art. 1 Sec 7 for considerations due to race. The ACLU Amici is attached for *State of Washington v. Palla Sum*, No. 99730-6.

25. JURISDICTION AND DUE PROCESS OF BOE OPERATING IN DEFIANCE OF THE LAW NOT DEFINED. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (Wash. 1986) should be reflected. The Supreme Court of Washington State should analyze the impact of closure on due process and fairness with a decision pertaining to Flarity's equal protection by State Rights. The state founders made considerable efforts to bolster gaps in the U.S Bill of Rights as described in detail for *Wash v. Sublett*, 176 Wash.2d 58, 292 P.3d 715 (Wash. 2012).

VII. CERTIFICATION BENEFITS ALL PARTIES

26. BENEFIT TO THE 9TH CIRCUIT. Clarification will directly affect Flarity's Reply to Pierce County and **relieve the 9th Circuit's burden for specificity in the ruling as to 14th Amendment protection**.

CERTIFICATION OF WORD LIMIT FOR MOTION: The word count is 3500 and within the limits of the FRAP for word count.

CERTIFICATION AND SIGNING:

By signing below, I certify that this MOTION complies with the requirements of Federal Rules of Appellant Procedure, to the best of Flarity's knowledge and is sworn to be true under penalty of perjury.

DATE: January 27, 2022

/s/ Joe Flarity

Joe Patrick Flarity
101 FM 946 S
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253 951 9981

United States Court of Appeals for the Ninth Circuit

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JOE PATRICK FLARITY, a marital community Appellant V. Argonaut Insurance Company, David H. Prather, Heather Orwig, Kim Shannon, Daniel Hamilton, Mary Robnett, Pierce County, a municipal corporation, Et Al. Appellee	No. 21-35580 DECLARATION for CERTIFICATION

DECLARATION OF JOE PATRICK FLARITY

I, Joe Patrick Flarity, being over the age of 18 and of sound mind, do DECLARE (or affirm) by 28 U.S. Code § 1746 under the penalty of perjury the following is true to the best of my knowledge:

John C. Vonhof, defendant of *State v Vonhof* 751 P2d 1221 51 WnApp 33 Wash App 1988, is 73 years old, is in good health and resides in Port Orchard, Washington, which is less than an hour's drive from Olympia,

location of the Washington State Supreme Court. I talked with John Vonhof about his case by telephone on January 24, 2022. Mr. Vonhof related the following facts:

a) Mr. Vonhof was never presented with any search warrant subsequent to his arrest for growing cannabis inside a building on his 80 acre parcel in Perry County, Washington State.

b) Mr. Vonhof's property was fenced and gated with several No Trespassing signs.

c) Numerous items were seized, including antiques; funds were limited for defense. The several attorneys that were hired to defend came from Seattle and insisted on a private chartered plane to avoid the seven hour drive to court in Republic, Washington.

d) Mr. Vonhof was convicted and served a 6 month prison term.

e) After the appeal was lost in Division Three, Mr. Vonhof had no funds to appeal to the Supreme Court due to the seizures and expense of trial and appeal.

It does appear the legislature has prevented similar constitutional situations by creating of the **Office of Public Defender in 2008**. Per RCW 2.70.005:

Office of public defense established.

In order to implement the constitutional and statutory guarantees of counsel and to ensure effective and efficient delivery of indigent defense services funded by the state of Washington, an office of public defense is established as an independent agency of the judicial branch.[2008 c 313 § 2; 1996 c 221 § 1.]

Here is the section the Office of Public Defender is chartered to enforce.

WASHINGTON STATE CONSTITUTION

ARTICLE I, SECTION 22 RIGHTS OF THE ACCUSED. In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases:

CERTIFICATION AND SIGNING:

By signing below, I certify that this DECLARATION complies with the requirements of Federal Rules of Appellant Procedure, to the best of Flarity's knowledge and is sworn to be true under penalty of perjury.

DATE: January 27, 2022

/s/ Joe Flarity

Joe Patrick Flarity
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JOE PATRICK FLARITY, a marital community Appellant V. Argonaut Insurance Company, David H. Prather, Heather Orwig, Kim Shannon, Daniel Hamilton, Mary Robnett, Pierce County, a municipal corporation, Et Al. Appellee	No. 21-35580 DC No. 3:20-cv-6083-RBL MOTION TO CERTIFY FEDERAL QUESTIONS INDEX OF ATTACHMENTS

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT Tacoma Division

The Honorable Judge ROBERT J. BRYAN

JOE PATRICK FLARITY, a marital community Plaintiff, V. ARGONAUT INSURANCE COMPANY, DAVID H. PRATHER, HEATHER ORWIG, KIM SHANNON, DANIEL HAMILTON, MARY ROBNETT, PIERCE COUNTY, a municipal corporation, Et Al. Defendants	§	CAUSE No. 3:20-cv-06083-RJB **MOTION FOR LEAVE TO AMEND** ORAL ARGUMENT REQUESTED NOTE ON MOTION CALENDAR MAY 21, 2021 (third Friday)

MOTION FOR LEAVE TO AMEND

1. NOW COMES the Plaintiff, pro se, representing the marital community, MOVES the Court for Leave to Amend the Complaint. A redlined copy and clean copy of the proposed amended complaint are

attached. No changes are requested for the EXHIBITS submitted in the first Amended Complaint.

2. Flarity addresses the Order of this Court in DK#42. ALL parties have been served, except for ex-DPA Prather, who has been tipped off and won't come to the door for repeated attempts for service.

3. THE QUESTION OF CAPACITY. Because the title of Cause asks for PENALTIES, this Cause has always been a PERSONAL CAPACITY SUIT. The Proposed changes leave no doubt as to capacity.

4. STATUTE OF LIMITATIONS: The added defendants are all employees or ex-employees of Pierce County. Statute of Limitations does not apply as numerous parties have been served within the 3 year tort limit. DPA Hamilton has alluded to incorrect defendants in the Motion to dismiss. Through the power of his position, DPA Hamilton has intimate knowledge of the offenders but has refused to give names of the "correct" defendants. SEE EXHIBIT 1. Given this limitation, FRCP 15(a) is directed to all existing and added defendants and should be granted.

5. ALL PARTIES RELATE BACK. All parties *relate back* to the original charge. Per Edwards v. Occidental Chemical Corp., 892 F.2d 1442 (9th Cir. 1990), with emphasis:

> *We first note that the "principal function of procedural rules should be to serve as useful guides* ***to help, not hinder, persons who have a legal right to bring their problems before the courts****," …Under Rule 15(c) a defendant not accurately named in an original complaint may be added after the statute of limitations has expired. Korn v. Royal Caribbean Cruise Line, Inc., 724 F.2d 1397, 1399 (9th Cir.1984); Craig v. United States, 413 F.2d 854, 857 (9th Cir.), cert. denied, 396 U.S. 987, 90 S.Ct. 483, 24 L.Ed.2d 451 (1969). An amendment relates back to the date of the original filing* ***if the claim asserted by the***

amendment arose out of the same conduct, transaction or occurrence upon which the first complaint was based,..

6. TOLLING PER STATE LAW. Limitations do not apply because of State Law. These details have been added to the complaint and herein.

FACTS

7. Flarity filed the original Complaint on November 3, 2020.

8. On December 8, 2020, DPA Hamilton filed a motion to dismiss by FRCP 12(b).

9. December 29, 20, Flarity filed the Amended Complaint as a matter of course.

10. January 14, 2021, the Court dismissed all Pierce County defendants without a new Motion from Pierce County addressing the Amended Complaint.

11. January 21, 2021, the Court denied Flarity's Motion for Reconsideration.

12. AIC claims that all defendants were properly served as acknowledged in the Joint Status Report DK#66 at 15. This is an error. ex-DPA Prather has not been "properly" served, although numerous attempts have been made.

13. There has been no useful information provided for initial discovery provided by any defendant. AIC defied this Court's order issued, 15 on December 10, 2020 , DK#14, 15. There has been no production for requested information of any kind. The proposed amended complaint suffers from lack of disclosure by all defendants.

14. May 5, 2021, AIC filed a Motion for judgement by FRCP 12(c), which is still pending. This attached proposed Complaint is intended to address the AIC FRCP 12 (c) issues.

ARGUMENTS

15. FRCP 15(a)(2) provides that after a responsive pleading is filed, "*a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires*." Amendments should be allowed with "***extreme liberality***" per *Morongo Band of Mission Indians v. Rose,* 893 F.2d 1074, 1079 (9th Cir. 1990).

16. "*[F]our factors generally guide a court's determination regarding whether to allow an amendment to a pleading: (1) undue delay, (2) bad faith, (3) prejudice to the opposing party, and (4) futility of amendment."*[1] None of the factors apply to this case. There has been no undue delay. Flarity has been working on this amendment 7 days a week since DK#42 Order was filed. There is no bad faith. Flarity expects to prevail on the merits and stop an illegal conspiracy in Pierce County for invasion of privacy. Success will provide relief for over 750,000 residents. There will be no prejudice to defendants. Pierce County still commands an immense upper hand by the "power of the sovereign" allied with AIC consortium of foreign insurance companies.

17. CAPACITY. Because the title of Cause has always asked for PENALTIES, this Cause has always been a PERSONAL CAPACITY SUIT. The WITH PREJUDICE language in the Order applies to individuals in their

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[1] *Butler v. Robar Enterprises, Inc.*, 208 F.R.D. 621, 622 (C.D. Cal. 2002) (citing *Forsyth v. Humana, Inc.,* 114 F.3d 1467, 1482 (9th Cir. 1997)).

OFFICIAL CAPACITIES. The Cause is restated to remove this confusion to the Court. All individual defendants should have interpreted the suit as personal, since no “official capacity language" was used in any claim other than Monell, which specifically addresses Pierce County. The capacity confusion issue was first discussed in *Biggs v. Meadows*, 66 F.3d 56 (4th Cir. 1995):

> *Biggs sought compensatory damages in the amount of $10,000. As the appellant notes in his brief, "it would have been both illogical and futile for Mr. Biggs to sue the defendants in their official capacities and to* ***then request a form of relief that would clearly be unavailable to him in such a suit.****"...Because the district court wrongly dismissed Biggs' complaint based on its erroneous conclusion that he intended to sue the defendants in their official capacity only, we reverse the court's judgment and remand this case for further proceedings.*

CAPACITY was later visited by the 9th Circuit in *Cmty. House, Inc. v. City of Boise*, 623 F.3d 945 (9th Cir. 2010):

> *Proper application of this [immunity] principle in damages actions against public officials requires careful adherence to the distinction between personal- and official-capacity suits. Because this distinction apparently continues to confuse lawyers and confound lower courts, we attempt to define it more clearly through concrete examples of the practical and doctrinal differences between personal- and official-capacity actions.*

18. TOLLING PER STATE LAW. Limitations used in the Order do not apply because of State Law. All claims should toll to Flarity’s Petition for review of the WSBTA ruling shown on page 36 of EXHIBIT 6, using the submission date of October, 29, 2019. Per *Nichols v. Hughes*, 721 F.2d 657 (9th Cir. 1983):

> *In this circuit, the general rule is that if prior resort to an administrative body is a prerequisite to review in court, the running of the limitation period will be tolled during the administrative proceeding. See Mt. Hood Stages, Inc. v. Greyhound Corp., 616 F.2d 394, 400-02, 405 (9th Cir.), cert. denied, 449 U.S. 831, 101 S.Ct. 99, 66 L.Ed.2d 36 (1980).*

EXHAUSTING ALL Administrative Remedies is REQUIRED before proceeding to a "judicial" Court per RCW 34.05.534: ***Exhaustion of administrative remedies:***

> *A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review.*

19. CIVIL RICO Added. The actions of defendants also meet the elements of civil RICO. This charge has been added. The statute of limitations for CIVIL RICO is FOUR YEARS. No Tolling is necessary.

ARGUMENT for CONSPIRACY

20. CIVIL CONSPIRACY ADDED. Defendants meet all the elements as defined by the 9th Circuit and this Court in numerous cases for civil conspiracy with details added. The conspiracy is undisputed. AIC is liable even as a passive participant of civil conspiracy. *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959): ***Thus a cause of action for conspiracy or joint action based on § 1983, is broader than either of the two conspiracies (§ 1985(2) and (3) referred to above***.

21. CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS per U.S. § 1985(3) added. Because Defendants have attacked the people's rights as a class, 1985(3) is applicable. This is important to bring in the ***"refusing to act***

portion" of both both state and federal laws such as 28 U.S. Code § 1343-Civil rights and elective franchise, with emphasis:

> *(a)* ***(2)*** *To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which* ***he had knowledge were about to occur and power to prevent****;*

22. INVIDIOUSLY DISCRIMINATORY MOTIVATION particulars have been added and defined to solidify the class per U.S. § 1985(3).

23. IMMUNITY seems an unlikely defense of this charge. There is no immunity possible for trespass or conspiracy. But it is still very rare that an official pays out of pocket for any judgements, including punitive damages, which can only be assigned to individuals. This practice has become the defacto standard for governments and has reduced much of its promise for corrective action.[2] By avoiding personal responsibility, official misconduct is reinforced, even if damages are awarded.[3] This is why inclusion of AIC is vital.

CONCLUSION

24. Flarity has come forward as the State founders intended to correct illegal behavior by the Pierce County officials as abetted by AIC.[4] Flarity requests the Court allow submission of the amended complaint and provide a forum for the people to enforce the 4th amendment.

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[2] "During the study period, governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement." *Police Indemnification* by Joanna C. Schwartz

[3] From EX 5, p25, Moral Rationalization and the Integration of Situational Factors and Psychological Processes in Immoral Behavior, Author Jo-Ann Tsang, with emphasis: *Finally, when perpetrators are* ***seen to commit crimes without apparent remorse****, they serve as models, teaching people that these acts are acceptable.*

[4] *ART 1, SECTION 32 FUNDAMENTAL PRINCIPLES***.** A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.

CERTIFICATION AND SIGNING:

By signing below, Flarity certifies MOTION FOR LEAVE TO FILE AMENDED COMPLAINT complies with the requirements of Federal Rule of Civil Procedure 11, 15, and LCR 15 to the best of Flarity's knowledge. Flarity certifies that the address is correct and the Clerk will be notified if there is any change.

Flarity certifies Defendant attorneys were notified electronically:

DPA Daniel Hamilton representing Pierce County
Dan Hamilton <dan.hamilton@piercecountywa.gov>

Mathew Sekits of Bullivant Houser, representing Argonaut Insurance
"Sekits, Matthew" <matthew.sekits@bullivant.com>

Date of Signing: May 6, 2021

Signature of Plaintiff: /s/ Joe Flarity

249 Main Ave S, STE 107, #330

North Bend, WA 98045

f_v_piercecountywa@yahoo.com
253 951 9981

UNITED STATES DISTRICT COURT

WESTERN DISTRICT

Tacoma Division

The Honorable Judge ROBERT J. BRYAN

JOE PATRICK FLARITY, a marital community Plaintiff, V. ARGONAUT INSURANCE COMPANY, (AIC) DAVID H. PRATHER, HEATHER ORWIG DANIEL HAMILTON MARY ROBNETT MARK LINDQUIST MIKE LONERGAN in their PERSONAL CAPACITIES, PIERCE COUNTY, a municipal corporation, Et Al. Defendants	§	CAUSE No. 3:20-cv-06083-RJB-JRC **PROPOSED SECOND AMENDED COMPLAINT** COLOR OF LAW VIOLATIONS, DAMAGES, PENALTIES AND DECLARATORY RELIEF JURY DEMANDED

This proposed Second Amended Complaint modifies the Amended Complaint filed December 28, 2020 as a "*matter of course.*"

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PLEADING

1. NOW COMES the PLAINTIFF, PRO SE, moves the Court to order the Defendants, hereafter called ***the officials***, to pay damages as a result of violated Constitutional Amendments, laws, rules, and the officials' sworn oaths. When ***the people*** is used, it refers to the allied citizens and residents of Pierce County in general, with Flarity included.

1.1 Flarity is not advocating "unique treatment."[1] Flarity is similarly situated with thousands of other Pierce County Residents suffering violations of basic civil rights.

2. The officials' abuses of power, process, and the rule of law damage the people regardless of political affiliation, race, sex, age or citizenship. The officials' abuse is widespread and represents a PATTERN and PRACTICE.

3. Flarity repeats and re-alleges all the allegations contained herein as if fully set forth throughout. For pleading clarity, this vernacular applies to all counts, remedies, and reliefs herein and will not be repeated.

COUNT 1

42 U.S. Code § 1983, Claim for Violation of

Equal Protection of the Law ~~and Due Process~~

(Against Officials in their Personal Capacities ~~all Defendants~~)

4. The authority of the 14th amendment invokes the US Constitution on the defendants for constitutional amendments, laws, rules, procedures and oaths.

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[1] *Gerhart v. Lake County*, 637 F.3d 1013 (9th Cir. 2011)

> *14th Amendment: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."*

5. Officials damaged Flarity by violations of the US Constitution as the employees refused to obey amendments, laws or other established codes of conduct. The violations of individual employees were taken jointly, in concert, and with shared intent. They constitute a continuing civil conspiracy to deny civil rights. The violations are ***deliberate, reckless*** or ***callous*** with ***evil intent*** and ***bad faith.*** Flarity suffered intentional emotional damage and ambient abuse by officials violating the laws they swore to uphold, as well as significant financial damages.[2]

5.1 ENHANCED PRIVACY PROTECTION. The Art. 1 Sec. 7 intent by the founders of Washington State is documented as a ***heightened*** enhancement of 4th Amendment rights. Per *T.S. v. Boy Scouts of America*, 138 P.3d 1053, 157 Wn.2d 416 (Wash. 2006):

> Our Founding Fathers recognized one's privacy deserved heightened protection exceeding the Fourth Amendment, favoring a broader constitutional directive *explicitly* protecting our citizens' private affairs; whereas the United States Constitution never even mentions privacy. So doing, the framers created a "broad and inclusive privacy protection." *See, e.g.,* Sanford E. Pitler, Comment, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy,* 61 WASH. L. REV. 459, 520 (1986). Contemporaneous accounts describe the framers of article I, section 7 as having made private affairs

[2] "***The government is constrained by the Constitution***." Justice Merrick Garland before the Senate AG confirmation committee, February 22, 2021.

> "sacred." THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, *supra,* at 497 n. 14
>
> …Further, we declared over 25 years ago that article I, section 7 "clearly recognizes an individual's right to privacy with no express limitations." *State v. Simpson,* 95 Wash.2d 170, 178, 622 P.2d 1199 (1980).

5.2 COUNT 1a—**Heather Orwig**. EQUAL PROTECTION OF THE LAW VIOLATION, Art. 1 Section 7 of the Washington State Constitution for ***Invasion of Private Affairs or Home Prohibited.***

Government enforcement agent, Heather Orwig, in her PERSONAL capacity, through the power of her position by color of law,[3] and in defiance of her oath of office, did violate Flarity's privacy in furtherance of a Pierce County conspiracy to destroy Art. 1 Sec. 7. On or about May of 2017, Ms Orwig entered Flarity's curtilage without permission or warrant on posted and gated real estate in Buckley, Washington for Parcels 2 and 3 of Valley Garden Estates. Numerous damages to Flarity resulted from this invasion. This live conspiracy is ongoing in Pierce County.

5.3 COUNT 1b—**Ex-DPA David H. Prather, Assessor-Treasurer Mike Lonergan, and ex-DA Mark Lindquist**. EQUAL PROTECTION OF THE LAW VIOLATION: Art. 1 Section 7 of the Washington State Constitution for ***Invasion of Private Affairs or Home Prohibited.***

Defendants, in their PERSONAL CAPACITIES, did violate Flarity's privacy by fomenting a conspiracy to destroy Art. 1 Section 7 of the

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[3] …***"that private citizens never could have."*** See *West v. Atkins*, 487 U.S. 42, 49 (1988). *"...in order to establish **personal liability**, it is enough to show that the official, acting under **color of state law, caused the deprivation of a federal right**." Doe*, 161 Ill. 2d at 401 (citing *Graham*, 473 U.S. at 166). This citation is applicable to all references to PERSONAL CAPACITIES and will not be repeated.

Washington State Constitution. This conspiracy resulted in Ms. Orwig's invasion of Flarity's privacy. The practice is documented in the undisputed NOTICE shown in EX 5, p7of 15, signed by David Prather with coordination by Mike Lonergan and Mark Lindquist. This live conspiracy is ongoing in Pierce County.

5.4 COUNT 1c—**Heather Orwig.** EQUAL PROTECTION OF THE LAW VIOLATION, RCW 84.40.025 with emphasis:

RCW 84.40.025 states, "***In any case of refusal to such access, the assessor shall request assistance from the department of revenue which may invoke the power granted by chapter 84.08 RCW***. Ms Orwig, in her personal capacity and in furtherance of an ongoing civil rights conspiracy, did NOT "request assistance" per the law, but simply invaded Flarity's privacy on gated, posted property without a warrant. This live conspiracy is ongoing in Pierce County.

5.5 Count 1d—**Ex-DPA David H. Prather, Assessor-Treasurer Mike Lonergan, and ex-DA Mark Lindquist.** EQUAL PROTECTION OF THE LAW VIOLATION, RCW 84.40.025.

RCW 84.40.025 states, "***In any case of refusal to such access, the assessor shall request assistance from the department of revenue which may invoke the power granted by chapter 84.08 RCW***. Defendants under color of state law and in their personal capacities in furtherance of a civil rights conspiracy did NOT "request assistance" per the law, and allowed Ms. Orwig to invade Flarity's privacy on gated, posted property without warrant. This live conspiracy is ongoing in Pierce County.

COUNT 2

42 U.S. Code § 1983, Monell Policy Claim

(Against Defendant Pierce County)

6. The actions of employees were taken under the authority of one or more ***policies, patterns, practices or customs.*** The officials failed to train, supervise, discipline, or otherwise control individuals responsible to ensure the rights of the people are protected. The policies represent unconstitutional practices. The policies were further established by ratification, approval or indifference by supervisors and policy makers. Employees have a good reason to believe their misconduct will not be challenged and that they are immune from consequences, such as RCW 9A.52.070, RCW 9A.80.010, and RCW 84.40.025. Defendant Pierce County has taken overt steps to hide ***bad faith*** official misconduct and slip the financial burden onto the people. SEE EXHIBIT 1.

6.1 COUNT 2a—**Ex-DA Mark Lindquist.** As the "final person with policy making authority",[4] Mark Lindquist authorized an **enforced** policy that deprived the people he swore to protect of their basic constitutional rights per the 4th Amendment by the NOTICE shown in EXHIBIT 2, a less poetic reconstruction of the British General Writ for warrantless searches. This practice is still ongoing in Pierce County and demonstrates illegal Pierce County policy prohibited by *Monell v. Department of Social Services*, 436

[4] From this Court's ruling in *Nelson v. Lewis Cnty*. (W.D. Wash. 2012), with emphasis: "*This can be established through any one of the following theories: (1) that a county employee was acting pursuant to an expressly adopted official policy; (2) that a county employee was acting pursuant to a longstanding practice or custom; (3) that the individual who committed the wrong had final decision-making authority; or (4)* ***that someone with final decision-making authority ratified a subordinate's action and its basis.*** *Lytle v. Carl, 382 F.3d 978, 982, 987 (9th Cir. 2004).*"

U.S. 658 (1978). The policy continued after the election of DA Robnett, even though Flarity made numerous presentations to the Pierce County Council demanding the practice CEASE. All Council meeting are public, are televised and have a DPA in attendance. SEE EXHIBIT 1, 2,3, and 7.

COUNT 3

Fourth Amendment Violation of Flarity's Right to Privacy

(Against HEATHER ORWIG, IN HER PERSONAL CAPACITY, et al.)

7. Government enforcement agent, Heather Orwig under color of state law and in her personal capacity, violated plaintiff's right to privacy by entering the Flarity's curtilage and searching their private *effects* on or about May 2017, a violation of the 4th Amendment's protection on searches as well as Flarity's Common Law Rights to Privacy. Ms. Orwig is a participant in an ongoing conspiracy fomented by the NOTICE shown in Exhibit 2. Per the 4th Amendment:

> *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*

8. TOLLING. All damages are tolled in accordance with Washington law by stare decisis.[5] Per *Nichols v. Hughes*, 721 F.2d 657 (9th

[5] *Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001). "Obviously, binding authority is very powerful medicine. A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it. Judges of the inferior courts may voice their criticisms, but follow it they must. See, e.g., Ortega v. United States, 861 F.2d 600, 603 & n.4 (9th Cir. 1988)…**if a controlling precedent is determined to be on point, it must be followed…**."*

Cir. 1983), the minimum tolling should start at the January 17, 2018 BOE ruling, with the later date of the 2019 WSBTA ruling also tolling. Flarity's Petition for review of the WSBTA ruling is shown on page 27 of EXHIBIT 6, with submission date of October, 29, 2019, shown on page 36:[6]

> *In this circuit, the general rule is that if prior resort to an administrative body is a prerequisite to review in court, the running of the limitation period will be tolled during the administrative proceeding. See Mt. Hood Stages, Inc. v. Greyhound Corp., 616 F.2d 394, 400-02, 405 (9th Cir.), cert. denied, 449 U.S. 831, 101 S.Ct. 99, 66 L.Ed.2d 36 (1980).*

EXHAUSTING ALL Administrative Remedies is REQUIRED before proceeding to a "judicial" Court per RCW 34.05.534: ***Exhaustion of administrative remedies:***

> *A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review.*

> ***"Tyranny is defined as that which is legal for the government but illegal for the citizenry."*** **-** Thomas Jefferson.

COUNT 4

Civil Conspiracy to Interfere with Civil Rights per U.S. § 1983

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[6] Also per this Court's ruling in *Spencer v. Peters* (W.D. Wash. 2012): "*In the instant case, Davidson cites to no admission by the employing government entity that his alleged tortuous actions, at all times relevant to the allegations in this suit, constitute conduct within the scope of his employment. In fact, the government Defendants' and Davidson and Krause's combined answer expressly disclaims that conduct involving "personal relationships" and "conspiracies" constitute actions taken "under the color of state law." Dkt. 58 at 4. Given the legal authority cited above and the admissions in the employer's and Davidson's combined answer,* ***Mr. Spencer is not barred from pursuing his state law claims, including defamation, against Davidson, in his individual capacity, on the basis that he failed to file a tort claim.***"

(Against Officials of Pierce County in their Personal Capacities.)

9. CIVIL CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS. Per *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959), a civil conspiracy per U.S. § 1983 is broader than § 1985(2) and (3) and may stand alone. Per *Hoffman*:

> *Agnew v. City of Compton, supra, holds that an action based on § 1983 is not limited to deprivation of due process, but extends also to denial of equal protection, citing Hague v. C.I.O., 307 U.S. 496, 526, 59 S.Ct. 954, 83 L.Ed. 1423. We agree.Thus a cause of action for conspiracy or joint action based on § 1983, is broader than either of the two conspiracies (§ 1985(2) and (3) referred to above.*

Per this Court's reasoning [7] (1) two or more people have combined to accomplish an unlawful purpose as described in Count 1 and 3. (2) The conspirators were so brazen that they published the conspiracy as shown in EX 2 for undisputed proof. (3) The underlying actionable claim is a violation of Flarity's state and federal rights for privacy and illegal search which resulted in immediate and ongoing damages. *Hoffman* adds two more criteria: a) Defendants acted under color of state law. This is obvious for all the officials named. b) the overt acts were done pursuant to the conspiracy. Invocation of § 1985(2) and (3) is not necessary.

COUNT 4.1 CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS per U.S. § 1985(3) (Against Officials of Pierce County in their Personal Capacities.)

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[7] *Spencer v. Peters* (W.D. Wash. 2012): *To establish a civil conspiracy, Mr. Spencer must prove by clear, cogent, and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy. …The plaintiff must be able to show an underlying actionable claim which was accomplished by the conspiracy for the civil claim of conspiracy to be valid.*

10. 42 U.S. Code § 1985. Conspiracy to interfere with civil rights DEPRIVING PERSONS OF RIGHTS OR PRIVILEGES with emphasis:

> *(3) If two or more persons in any State or Territory conspire or go in disguise on the highway* ***or on the premises*** *of another, for the purpose of depriving, either directly or indirectly,* ***any person or class of persons of the equal protection of the laws****, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws…*

Heather Orwig, by undisputed *overt act pursuit to the conspiracy,* and in collusion with David H. Prather, Mark Lindquist and Mike Lonergan by undisputed coordination on the NOTICE shown in Exhibit 2, have instigated a conspiracy that has destroyed Flarity's right to privacy promised in Art. 1 section 7 of the Washington State Constitution, and the 4th Amendment of the U.S. Constitution as described in Counts 1 and 3. This practice is ongoing in Pierce County and damage to Flarity continues with the illegal practice. 42 U.S. Code § 1985 is applicable because the illegal policy pertains to the CLASS of citizens with residences or businesses located in Pierce County. Per *Life Ins. Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979). The Courts have expanded Code § 1985 beyond its original race related purpose. *Reichardt* with emphasis:[8]

> *"The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of* ***rights secured by the law to all****.' Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)…Following Griffin and Lopez, we perceive the first requirement of this second element of § 1985(3) to require the deprivation of* ***any legally protected right. Other courts have reached a similar conclusion….****by the requisite* ***invidiously***

[8] INVIDIOUS from Merriam Webster: *"of a kind to cause harm or resentment, of an unpleasant or objectionable nature,"* of which every term applies to Flarity's Cause.

discriminatory animus. McLellan v. Mississippi Power and Light Co., 545 F.2d 919 (5th Cir. 1977) …Courts construing § 1985(3) ***have not limited its protection to racial or otherwise suspect classifications****. Means v. Wilson, 522 F.2d 833 (8th Cir. 1975) (political opponents are a sufficient class); Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973) (supporters of a political candidate are a sufficient class); Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972) (a single family is a sufficient class). See also Harrison v. Brooks, 446 F.2d 404 (1st Cir. 1971)."*

11. 28 U.S. Code § 1343 - **Civil rights and elective franchise,** calls out section 1985 damages specifically, with emphasis:

(a) ***(2)*** *To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which* ***he had knowledge were about to occur and power to prevent****;*

DPA Hamilton, the reigning civil litigator in Pierce County, possesses *a unique position of official power* and is not likely to be able to convince a jury that these conspiracies occurred without his knowledge or approval.[9] DPA Hamilton is liable for damages per 42 U.S. Code § 1985(a)(3).

COUNT 4.2 RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

12. ***18 U.S. Code Chapter 96, known as RICO.***

Per Section 1962(c) for "conduct or participate, directly or indirectly, in the conduct of an enterprise through a pattern of racketeering activity" is interpreted to punish the individuals rather than the enterprise. The persons includes "any individual or entity capable of holding a legal or beneficial interest in property" which is applicable to the named defendants. The elements are (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity:

[9] The intricate, expensive and ultimately futile involvement of DPA Hamilton with DA Lindquist is shown in the Sebris Busto James Report, filed DK#29-4, p42, 43, and 55 of 68.

1) CONDUCT: The Officials have conspired to violate the privacy rights of the people as A CLASS shown in the undisputed NOTICE (EXHIBIT 2). Officials arbitrarily trespass without warrant, increase property values, then demand tax increases **by wire and USPS mail**. Defendants have executed on their scheme and Flarity has been damaged by payments through USPS to the Pierce County Assessor-Treasurer. These payments were shown in DK#49.

2) ENTERPRISE: Pierce County Corporation is the immediate beneficiary of the illegal tax gains, and ultimately—the defendant's victim as the county typically assumes all the liability by agreement with AIC avoiding the liability coverage AIC promised the taxpayers in the policy.

3) PATTERN: The pattern of county-wide trespass is established in Prather's NOTICE, with the ongoing illegal policy demonstrated by Heather Orwig and other officials. This practice is also confirmed by the sworn testimony of supervisor Jim Hall before the WSBTA on or about Sept. 3, 2019, as shown in EXHIBIT 7, page 2 of 4.

4) RACKETEERING ACTIVITY: Conspiracy, Section 1341 wire and mail fraud.[10] Also offenses "chargeable under state law" at the time the underlying conduct was committed.[11] Activities chargeable under the

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[10] WIRE or MAIL FRAUD AS AN BASE ELEMENT per FRCP 9(b). Conspiracy profits funds collected by wire or USPS mail in violation of 940. 18 U.S.C. Section 1341. Flarity was a resident of Texas at the time of these violations.

[11] See, e.g., *United States v. Licavoli,* 725 F.2d 1040, 1045-47 (6th Cir. 1984); United States v. Malatesta, 583 F.2d 748, 757 (5th Cir. 1978); *United States v. Forsythe*, 560 F.2d 1127, 1134-35 (3d Cir. 1977) .

Washington criminal codes are: *Official misconduct,*[12] *Criminal trespass,*[13] *Criminal conspiracy.*[14]

12.2 RICO ALSO PROHIBITS CONSPIRACY. Section 1962(d) prohibits violation of 1962 (a) (b) or (c). Defendant's joined the conspiracy and authorize or commit invasion and trespass in the furtherance of increased enterprise tax revenues. As BAR certified attorneys with decades of experience, defendants Lindquist, Hamilton and Prather certainly knew this activity was illegal. Prather, Lonergan and Lindquist participation is easily documented as undisputed fact by the undated NOTICE shown in EXHIBIT 2. The missing NOTICE policy start date is not relevant because the practice is ongoing. That Mike Lonergan was included on the NOTICE shows agreement and liability per 28 U.S. Code § 1343. Ms. Orwig's action of trespass and

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[12] *RCW 9A.80.010 Official misconduct: with emphasis*
(1) A public servant is guilty of official misconduct if, with intent to obtain a benefit or to deprive another person of a lawful right or privilege:
(a) He or she intentionally commits an unauthorized act under color of law; or
(b) He or she ***intentionally refrains from performing a duty imposed upon him or her by law.***

[13] RCW 9A.52.070: Criminal trespass in the first degree.
(1) A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building.

[14] RCW 9A.28.040 Criminal conspiracy (with emphasis)
(1) A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and **any one of them takes a substantial step in pursuance of such agreement**.

(2) It shall not be a defense to criminal conspiracy that the person or persons with whom the accused is alleged to have conspired:

(a) **Has not been prosecuted or convicted**; or…

(f) Is a law enforcement officer **or other government agent who did not intend that a crime be committed**.

invasion of privacy demonstrates furtherance of that agreement. Flarity suffered harm due to Ms. Orwig's unlawful tortious act.

COUNT 5: Civil Rights Tort Claims are liable to the Argonaut Insurance Company

13. Flarity alleges that there is a bad faith agreement at work in Pierce County. The Argonaut Insurance Company knew or should have known that tens of millions of taxpayer dollars for civil rights violations of which they were liable was instead being sneaked onto Pierce County taxpayers. SEE EXHIBIT 1. In 2017, Argonaut was paid premiums of about $306,963. The people expect them to honor their contract. Public insurers have a moral and legal responsibility to restrain the officials they insure. Argonaut has breeched its duty, contributing to Pierce County's pattern and practice of civil rights violations. This failure was an intentional, or negligent tort, by strict or implied liability.

13.1 CIVIL CONSPIRACY. AIC is no stranger to punitive damages relating to insurance fraud.[15] From *Fiedler v. Incandela*, 222 F. Supp. 3d 141 (E.D. N.Y. 2016) citing fraud in *Bellefonte Re Ins. Co. v. Argonaut Ins*. Co., 757 F.2d 523 (2nd Cir. 1985), with emphasis:

> *To prevail on a Section 1983 conspiracy claim, the plaintiff must establish: "(1) an agreement between two or more state actors or between a* ***state actor and a private entity****; (2) to act in concert to inflict an* ***unconstitutional injury****; and (3) an* ***overt act*** *done in furtherance of that goal causing damages.*

[15] *Diamond Woodworks, Inc. v. Argonaut Ins.*, 135 Cal.Rptr.2d 736, 109 Cal.App.4th 1020 (Cal. App. 2003). The jury's three separate general verdicts were in favor of Diamond on its claims for breach of contract, insurance bad faith and fraud.…the jury found Argonaut did not act with malice or oppression as statutorily defined (Civ.Code, § 3294), but assessed $14 million in punitive damages based on fraud.

AIC is complicit by cooperation with the obvious invasion of privacy policy (the OVERT act), in violation of Art. 1, Sec. 7 of the Washington Constitution, and the 4th Amendment to the U.S. Constitution (the unconstitutional injury). Based on Flarity's numerous presentations with undisputed evidence of the policy to the Council, AIC knew or should have known about this illegal policy. Refusing to act constitutes callous indifference at the very least. Proof of the agreement, if not produced from records, is allowed to be assumed as an obvious ***"tacit understanding will suffice to show concerted plan."***[16]

13.2 AIC SPECIFIC ELEMENTS OF FRAUD. Per this Court's reasoning and addressed individually. *Spencer v. Peters* (W.D. Wash. 2012):

> *To establish a civil conspiracy, Mr. Spencer must prove by clear, cogent, and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy. …The plaintiff must be able to show an underlying actionable claim*

---

16 Quote from *Adickes v. Kress Company*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). ALSO these AIC cases with emphasis:

Cnty. of Dutchess v. Argonaut Ins. Co., 150 A.D.3d 672, 54 N.Y.S.3d 78 (N.Y. App. Div. 2017):A plaintiff may demonstrate "the existence of a policy or custom by showing that the acts of the municipal agent were part of a widespread practice that, ***although not expressly authorized***, constituted a custom or usage of which a ***supervising policy-maker must have been aware***" (Nasca v. Sgro, 101 A.D.3d 963, 965, 957 N.Y.S.2d 246).

Lugar v. Edmondson Oil Company, Inc, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982): "Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. ***To act "under color" of law does not require that the accused be an officer of the State.*** It is enough that he is a willful participant in joint activity with the State or its agents,' " quoting *United States v. Price*, 383 U.S., at 794, 86 S.Ct., at 1157.…While ***private misuse of a state statute*** does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and ***properly may be addressed in a § 1983 action***…

> *which was accomplished by the conspiracy for the civil claim of conspiracy to be valid.*

13.3 UNLAWFUL PURPOSE. As of yet undisclosed people at AIC and Pierce County conspired to produce an insurance binder for which AIC does not intend to support. This agreement resulted in a substantial discount in premium costs to Pierce County by agreement that officials have a practice of slipping civil rights violations through opaque legislative practices onto the taxpayers, rather than by lawful AIC payments. One purpose was to meet state liability insurance requirements, and the other to trick the taxpayers into believing that they had a legitimate liability policy. The net result of this conspiracy is that civil rights abuses by Pierce County officials skyrocketed.

13.3 THE AGREEMENT. The absurdly low insurance premium paid is tacit evidence of conspiracy between AIC and the most egregious civil rights offender in the State of Washington. At this stage of the proceedings, MORE EVIDENCE IS NOT NECESSARY. *Glesenkamp v. Nationwide Mutual Insurance Company*, 344 F.Supp. 517 (N.D. Cal. 1972), with emphasis:

> *"…fraud consisted of a misrepresentation by an insurer as to its willingness to honor the terms of a policy. Wetherbee v. United Insurance Company of America, 265 Cal.App.2d 921, 71 Cal.Rptr. 764, 769 (1968). The Court stated that: …"While plaintiff may well have a significant problem of proof as to the factual basis underlying her claim of fraud, as defendant appears to suggest, the* ***issue of proof is one for trial and such difficulties are not sufficient to sustain this motion to dismiss.****"*

13.4 UNDERLYING ACTIONABLE CLAIM. The *overt* conspiracy and damage to Flarity is undisputed per the NOTICE and Heather Orwig's actions in furtherance of the conspiracy. Flarity has suffered significant

property and emotional damage due to this conspiracy. All the elements are met. AIC should be required to come forward and **defend this behavior**.[17]

BASIS FOR JURISDICTION

15. The basis for jurisdiction is a federal question pursuant to Civil Rights Act, 42 U.S. Code § 1983, et seq; 28 U.S. Code § 1331; 28 U.S. Code § 1332, 28 U.S. Code § 1343 (a)[18]; the 1st, 4th, 5th and 14th Amendments of the Constitution of the United States.

16. Supplemental jurisdiction over any state law claims may be invoked by the Court pursuant to 28 U.S. Code § 1367.

17. This Court has further remedial authority under the Declaratory Judgment Act, 28 U.S. Code § 2201 (a) and 28 U.S. Code § 2202. 28 U.S. Code § 1343 - **Civil rights and elective franchise**: with emphasis:

> *(a)* ***(2)*** *To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which* ***he had knowledge were about to occur and power to prevent****;*

---

[17] "Malice, intent, knowledge, and other condition of mind of a person may be averred generally.'..See, e.g., *Anderson v. Clow* (In re Stac Elecs. Sec. Litig.), 89 F.3d 1399, 1404-05 (9th Cir.1996)."

Per *Olympic Club v. Those Interested Underwriters at Lloyd's London*, 991 F.2d 497 (9th Cir. 1993) with emphasis: '[T]here exists a ***duty on the insurer to defend an action if potential liability to pay exists, even though that potential liability to pay is remote***.' California Union Ins. Co. v. Club Aquarius, Inc., 113 Cal.App.3d 243, 247, 169 Cal.Rptr. 685, 686 (1980)…."."The insurer's obligation to defend is not dependent on the facts contained in the complaint alone; ***the insurer must furnish a defense when it learns of facts from any source that create the potential of liability under its policy."***

[18] (a) **(2)** To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which **he had knowledge were about to occur and power to prevent**;

PLAINTIFF AND STANDING

18. The plaintiff is a marital community of lots 2 and 3 located in rural Pierce County; address 28719 Borrell Rd E, Buckley, WA 98321 and approximately 11 acres. This land is productive pasture since the Wickersham and Valley saw mills were removed around 1910, and the fertile land short-platted into the Valley Garden Estates. Flarity proceeds on behalf of the community via FRCP R17 and RCW 4.08.040 "When either spouse or either domestic partner may join or defend."

19. The officials have valued Flarity's property at approximately $450,000, removed the property from farm status and forced enormous penalties and taxes suitable to fully developed property onto Flarity. The officials' actions make further farming impossible, wrecked the finances of Flarity as irreplaceable savings are depleted to pay unplanned expenses, penalties and taxes. The officials' actions force Flarity to repurpose for sale land they had improved for livestock and wildlife for over twenty-five years. The official's push for development is inconsistent with Flarity's lifelong goals of sustainable land that could be used by a variety of native species already suffering from intense urban pressure. The officials' actions defeat the legislature's interest in preserving rapidly diminishing natural resources.[19]

20. Precedent has been established that Federal Court is the proper forum for 42 U.S. Code § 1983 claims at any stage of the litigation

---

[19] From RCW 84.34.300:
The legislature further finds that despite this potential property tax reduction, farmlands and timberlands in urbanized areas are still subject to high levels of benefit assessments and continue to be removed from farm and forest uses.

process. Flarity will show suffering from an "*injury-in-fact,*" that its injury is "*traceable*" to state and county actions, and that Flarity's injury will likely be "*redressed*" by this action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

DEFENDANTS

21. The actions of the county officials whom violated Flarity's civil rights were covered by Argonaut Insurance Company, a Bermuda company with Domiciliary Address listed as 225 W. Washington Street, 24th Floor Chicago, IL 60606.

22. David H. Prather signed the undated NOTICE in EXHIBIT 2 in his capacity as a Pierce County deputy prosecutor.

23. Pierce County's active conspiracy to deny the peoples' 1st, 4th and 14th Amendment rights could not exist or continue without the tacit or direct approval of Pierce County's leading civil attorney, DPA Daniel Hamilton and Prosecutor Robnett.

24. Heather Orwig is a Pierce County Residential Appraiser who physically executes the illegal policy for invasion of privacy.

25. Mark Evan Lindquist was the elected prosecutor and senior official authorizing the illegal policy of trespass and invasion.

25.1 Mike Lonergan is the Assessor-Treasurer conspiring to the illegal policy as shown on Prather's NOTICE by CC.

26. Pierce County is a municipal corporation formed under the laws of Washington State. Pierce County is represented by the County Executive, Bruce Dammeier.

27. Et Al: UNNAMED INDIVIDUAL DEFENDANTS: The fracture of laws and constitutional amendments Flarity suffered required substantial

assistance from a variety of officials whom will be added to the complaint when identified during discovery.

VENUE

28. Venue is the Western District of Washington under 28 U.S. Code § 1391 (b)(3). "a defendant not resident in the United States may be sued in any judicial district…", 28 U.S. Code § 1332 and 28 U.S. Code § 1441. The family of Argonaut Insurance Companies are based in Bermuda.

29. Venue is proper in the Western District of Tacoma because the violations occurred in Pierce County, Washington.

JURY DEMANDED

30. Flarity respectfully demands a jury per Fed. R.Civ. P. 38 (a) and prays for relief sufficient to change the behavior of the officials.

DUTY TO DISCLOSE

31. Per Federal Rule 26. Initial Disclosure: The officials have a duty to disclose all possible defendants, documents, and insurance agreements within 30 days of service.

DELIVERY OF SERVICE

32. Delivery of service per FRCP Rule 5 and proof of service will be filed with the Court except for Argonaut Insurance Company.

33. The actions of the county officials whom violated Flarity's civil rights were covered in 2017 by Argonaut Insurance Company, a Bermuda company. Per Washington State Insurance Commissioner's website, service is to:

Office of the Insurance Commissioner
Service of Legal Process
P.O. Box 40255
Olympia, WA 98504-0255

"…with a cover letter stating the insurer, the summons and complaint, two sets of all documents for each entity and a $10 check or money order per insurer made payable to Washington State Office of the Insurance Commissioner."

STATEMENT OF FACTS

34. Parcels 9815000014 and 9815000015 were listed as 100% wetlands in 2017 and recognized as an **open space corridor** for wildlife in the tax records. The land has been in continuous farm production since 1910 for hay and grazing and other livestock.

35. In 2016 Flarity constructed a 40x60 foot barn on lot 3 for farm storage from scrap cedar logs, using a small RV on lot 2 during the construction period.

36. In May of 2017 government enforcement agent, Heather Orwig, trespassed on Lot 3, crossing a gate and 2 NO TRESPASSING signs, then proceeded down a driveway of approximately 300 yards in length to Flarity's barn. Ms. Orwig entered the curtilage of the barn, took pictures and measurements of the exterior and interior, examined Flarity's personal affects and made the presumption that the barn was a 50% completed residence. Ms. Orwig then trespassed on lot 2, crossing another gate and two more No Trespassing signs, entering into the curtilage of Flarity's small travel trailer.

37. Shortly after, government enforcement agent Sue Testo notified Flarity that the property would be removed from farm status due to the report from Ms. Orwig. A hearing with the BOE was arranged to contest these decisions.

38. On or about January 9, 2018, Flarity arrived early for his scheduled BOE hearing and was denied entry to the meeting room by Kim Shannon and deputy clerks in defiance of the 1st amendment, the Washington State Constitution and state law. The BOE consisted of Ken Roberts, Dee Martinez, and Jean Contanti-OEHLER.

38.1 On or about January 23, 2018, Flarity received a copy of DPA Prather's undated NOTICE, giving Flarity effective Notice that a conspiracy was afoot in Pierce County. See Declaration 2 in DK#49. Receipt was acknowledged during Flarity's repairs of the aftermath of Hurricane Harvey.

39. Flarity filed a claim for damages per Washington law: **RCW 4.96.020**. SEE EXHIBIT 4. This was denied in full with no explanation by Pierce County Risk Management on November 15, 2018, after Risk Management had received guidance from DPA Prather, whose comments were redacted from the public records. SEE EXHIBIT 5. The WSBA claim was denied with no explanation. The public has no forum to appeal WSBA decisions in the State of Washington.

40. In May of 2019, Flarity packed personal items by Allied shipping and moved to the northwest for the single purpose of contesting the loss of the peoples' civil rights in Pierce County.

41. On May 28, 2019, Flarity presented to the Pierce County Council details of the violation of our civil liberties, possible remedies, and purchased a website to document Flarity's presentations: http:// inthejawsofjackals.com. SEE EXHIBIT 2.

42. On June 18, Flarity presented to the Council this quote from Mary Robnett, the current prosecutor:

> https://truthaboutmark.com/the-promising-start-the-fall-from-grace/
>
> *…Lindquist's terms have been marked by multiple scandals, an obsession with image management and politics, poor decision-making, retaliation, besieged subordinates, a damning independent investigation, and piles of wasted taxpayer dollars.*

At this meeting, the Council did approve a claim for $649,999. in the case of ***Ames v. Pierce County*** ,374 P.3d 228 (2016) with no discussion.

43. Flarity's investigation of ***Ames*** revealed the ***damning independent investigation*** Mary Robnett referred to above: Mark R. Busto of Sebris Busto James, dated October 22, 2015. REPORT FILED IN DK#29-4. The report provided details about ***Ames*** and a related one, ***Nissen v. Pierce County***, 182 Wash.2d 1008, 343 P.3d 759 (2015). Multiple millions were needed to resolve these cases for similar callous behavior to peoples' rights by Prosecutor Mark Lindquist. Like in *Ames*, the Council had forced the *Nissen* costs onto the taxpayers with no discussion.

44. Flarity had submitted numerous petitions to the Washington State Board of Tax Appeals (WSBTA) concerning the unconstitutional activity of Pierce County officials for trespass and due process. SEE EXHIBIT 6. On September 3, 2019, Flarity appeared before Mark Pree at the WSBTA in a hearing on the presumed characteristic of the barn on lot 3. Under oath, Jim Hall, Division Manager at the Assessor-Treasurer's office, testified that his employees peek in windows and enter open doors as a standard practice of tax valuation of real and personal property in Pierce County.

45. On September 10, 2019, Flarity described to the Council Jim Hall's testimony, reminding them that DPA Prather's NOTICE violating the peoples' Fourth Amendment rights was still in active use. SEE EXHIBIT 7

46. On November 6, 2019, the WSBTA denied Flarity's claim for review on Cause 93983 and 94396, ending the last nonjudicial remedy available to rectify the tax issues on property damages.

47. On December 6, 2019, Flarity separated, clarified and resubmitted the Claims to Risk Management. EXHIBIT 8 shows the claims for Invasion of Privacy and Denial of Access to a Public hearing. Despite the recent changes to the law requiring the Council to specifically review all claims over $100,000, Flarity's claims were again denied with no explanation.

48. After three years of jumping through myriads of "required" non-judicial hoops with no acknowledgement of a scintilla of culpability by Pierce County, Flarity now prays for relief in Federal Court.

DECLARATORY RELIEF REQUESTED

49. INVASION OF PRIVACY PROHIBITED: Flarity asks the Court to declare that the officials conducted an illegal search and invasion of privacy ~~by invaded Flarity's privacy~~ in accordance with an ongoing illegal Pierce County policy. The policy resulted in significant emotional damage, ambient abuse, and economic damage. The official's actions were deliberate, callous, with evil motive or intent, or reckless, but the required label to invoke personal responsibility per Washington law is **BAD FAITH**; and

50. The Court is requested to declare that Flarity's right to privacy for this and similar circumstances is reasonable—the expected right of

every resident in America. Exclusion of arbitrary government inspections is a vital aspect of the "bundle of rights" the people expect in their domiciles and businesses; and

51 DELETED.

REMEDIES REQUESTED

52. Burden of proof for remedies shall be by preponderance of evidence.

53. Flarity shall be paid $500,000 per incident for invasion of privacy due to the damages of emotional pain, distress, loss of privacy, and disruptions in living and farming practices. This shall include the suffering of ambient abuse, as well as abuse of power and process; and

54. DELETED.

55. DELETED.

56. Award Flarity legal and moving expenses pursuant to **42 U.S. Code § 1983 or 1985**; and

57. The Court is requested to levy all the liability portions of claims directly to the Argonaut Insurance Company; and

58. Award any other relief that serves the interests of equitable justice or could encourage future restraint of lawbreaking officials; and

59. Allow amendment of this complaint if the interests of justice require amendment; and

60. Grant Injunctive relief to Flarity.

CERTIFICATION AND SIGNING:

By signing below, Flarity certifies that this Amended Complaint complies with the requirements of Federal Rule of Civil Procedure 11 and 15 and LCR 15, to the best of Flarity's knowledge. Flarity certifies that the address is correct and the Clerk will be notified if there is any change.

Flarity certifies Defendant attorneys were notified electronically:

DPA Daniel Hamilton representing Pierce County
Dan Hamilton <dan.hamilton@piercecountywa.gov>

Mathew Sekits of Bullivant Houser, representing Argonaut Insurance
"Sekits, Matthew" <matthew.sekits@bullivant.com>

Date of Signing: May 6, 2021

Signature of Plaintiff: /s/ Joe Flarity

249 Main Ave S, STE 107, #330

North Bend, WA 98045

f_v_piercecountywa@yahoo.com
253 951 9981

No. 99730-6

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

PALLA SUM,
Petitioner.

BRIEF OF AMICI CURIAE KING COUNTY DEPARTMENT OF PUBLIC DEFENSE, ACLU OF WASHINGTON, FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AND WASHINGTON DEFENDER ASSOCIATION

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I. IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interests of Amici Curiae King County Department of Public Defense, The American Civil Liberty Union of Washington, Fred T. Korematsu Center for Law and Equality, and Washington Defender Association are set forth in the Motion for Leave to Participate as Amici Curiae, filed concurrently with this brief.

II. STATEMENT OF THE CASE

Amici adopt the Statement of the Case in Petitioner Sum's Petition for Review.

III. INTRODUCTION

The laws and rules that govern people's daily lives should reflect the reality of those lives. There can be no serious debate that law enforcement interacts with Black, Indigenous, and People of Color (BIPOC) in a way that is fundamentally different than how they interact with white people, and that this historical reality has

consequences. This is borne out not only by damning statistics,[1] but by the experience of generations of BIPOC. So entrenched is this reality that a conversation known as The Talk—in which BIPOC parents coach their children on how to navigate interactions with law enforcement safely—has become a critical survival skill for BIPOC community members.[2] This phenomenon is engrained

---

[1] *See* Part IV.B, *infra*.

[2] A recent Eleventh Circuit concurrence describes The Talk:

> Generations of Black children are familiar with "The Talk." [] Generally, parents have "The Talk" with their kids about how to interact with law enforcement so no officer will have any reason to misperceive them as a threat and take harmful or fatal action against them. So for example, Black children are taught that, if stopped by an officer while in their car, they should roll down all car windows, place both hands open and in plain view (or on the steering wheel), keep their composure and be perfectly respectful even if they feel the officer is mistreating them, ask for permission before moving their hands, and comply with all the officer's requests.

United States v. Knights, 989 F.3d 1281, 1297 n.8 (11th Cir. 2021) (Rosenbaum, J., concurring) (internal citations omitted).

by history[3] and sustained by relentless examples of police violence against BIPOC to this day.[4] BIPOC parents often must initiate this conversation with their children while they are still in elementary school.[5]

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[3] As Bryan Stevenson explains:

> [T]hat history of violence, where [America] used terror and intimidation and lynching and then Jim Crow laws and then the police, created this presumption of dangerousness and guilt. It doesn't matter how hard you try, how educated you are, where you go in this country—if you are black, or you are brown, you are going to have to navigate that presumption, and that makes encounters with the police just rife with the potential for these specific outcomes which we have seen.

Isaac Chotiner, *Bryan Stevenson on the Frustration Behind the George Floyd Protests*, The New Yorker, June 1, 2020, available at https://www.newyorker.com/news/q-and-a/bryan-stevenson-on-the-frustration-behind-the-george-floyd-protests.

[4] *See, e.g., Jamison v. McClendon*, 476 F. Supp. 3d 386, 390–91 (2020) (listing 19 innocuous activities BIPOC individuals were engaged in when they were killed by police, mostly recent).

[5] In 2014 the American Psychological Association published research finding that "Black boys as young as 10 may not be viewed in the same light of childhood innocence as their white peers, but are instead more likely to be mistaken as older, be perceived as guilty and face police violence if accused of a crime[.]" *Black Boys*

In contrast to this reality, the current standard to determine when a law enforcement contact amounts to a constitutional seizure employs an objective reasonable person standard, and pivots on the moment when such a fictitious individual would believe they were not free to terminate the encounter.[6] The nominally objective reasonable-person standard has been criticized for defining "reasonable" behavior as that of the protected, rule-making majority group, thereby perpetuating discrimination—and denial of the well documented racial disparities in policing—through a facially race-neutral standard.[7]

Viewed as Older, Less Innocent Than Whites, Research Finds, American Psychological Association, available at https://www.apa.org/news/press/releases/2014/03/black-boys-older.

[6] *See State v. Young*, 135 Wn.2d 498, 509–10, 957 P.2d 681 (1998) (a "seizure…under article I, section 7" occurs "when, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave") (quoting *State v. Stroud,* 30 Wn. App. 392, 394–95, 634 P.2d 316 (1981)).

[7] Professor Devon Carbado explains:

Protection of BIPOC's right against unlawful seizure requires a meaningful, reality-based determination of when an individual is truly seized. Such a determination must account for the fact that law enforcement target and treat BIPOC communities differently than white communities. The "totality of the circumstances" test can and must account for this reality.[8]

> Because, for example, whites and African Americans are not similarly situated with respect to how their racial identity might affect this sense of constraint [in the course of a law enforcement contact], the Court's failure to consider race is not race-neutral. It creates a racial preference in the seizure doctrine for people who are not racially vulnerable to, or who do not experience a sense of racial constraint in the context of, interactions with the police.

Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 142 (2016).

[8] It must be noted that this "objective" standard dates back to *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), more than 40 years ago. *See Young*, 135 Wn.2d at 509 ("Previous Washington cases adopted the *Mendenhall* test of a seizure to analyze a disturbance of a person's private affairs under article I, section 7."). To say that our appreciation of implicit and explicit bias within the criminal legal system has evolved over those four decades is an understatement. The law too must evolve.

In recent years this Court has taken direct action to modernize long-existing standards where those standards "[did] not sufficiently address the issue of race discrimination."[9] Indeed, precisely as Petitioner and Amici ask here, this Court has elsewhere defined an "average reasonable person" as one "who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated, ways."[10] The Court should act here as it has in other areas such as jury selection and review of jury deliberations, and recognize that the unique role of race in our history, our criminal legal system, and policing must be considered when analyzing a contact between an individual and law enforcement as well.[11] Specifically, this Court should adopt a seizure standard which analyzes the law enforcement contact in light of the known history

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9 *State v. Jefferson*, 192 Wn.2d 225, 239, 429 P.3d 467 (2018).
10 *Id*. at 249–50.
11 *See* Part IV.C, *infra*.

of racialized policing in America, and its impact on individuals and communities of color.

In analogous circumstances, the United States Supreme Court has explained that a standard for determining whether a person has been seized can remain objective while accounting for known, directly relevant dynamics.[12] Applying the same considerations, this Court can provide BIPOC the full constitutional protections to which they are entitled, without departing from the current objective standard.

IV. ARGUMENT

A. As Presently Applied, the Objective, Totality-of-the-Circumstances Standard to Determine Whether One Is Seized by Law Enforcement Fails to Account for Generations of Disparate Policing of BIPOC Communities

As currently applied, "a seizure occurs [] under article I, section 7, when considering all the circumstances, an individual's

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[12] *See J.D.B. v. North Carolina*, 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011).

freedom of movement is restrained and the individual would not believe [they are] free to leave or decline a request due to an officer's use of force or display of authority."[13] As the Court of Appeals below explained, "whether a seizure has occurred" requires consideration of the "totality of the circumstances" as "viewed from the perspective of a reasonable person[.]"[14]

But by failing to recognize the direct relationship our history of racialized policing has on communities of color and in turn a person's reasonable belief that they might freely and safely terminate a law enforcement contact, this facially race-neutral standard perpetuates existing disparities in the criminal legal system.[15] Applying the current standard below, the Court of

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[13] *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (citing *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003)).

[14] *State v. Sum*, 17 Wn. App. 2d 1009, 2021 WL 1382608 at *3 (2021) (unreported) (citing *Rankin*, 151 Wn.2d at 695 and *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009)).

[15] The failure of the law to recognize that race impacts how one experiences law enforcement will also continue to erode confidence in the law. In a 2019 study by the Pew Research Center,

Appeals failed to consider how our history of racialized policing could have affected Mr. Sum's reasonable understanding of whether he could simply drive away when Officer "Rickerson knocked on the driver's side window," awoke Mr. Sum, and immediately began investigative questioning.[16] Given what we know about the policing of communities of color and its impact on

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respondents were asked whether Black individuals "are treated less fairly than whites" in a variety of settings, including employment, lending, voting, and the provision of medical care. The *only* categories for which a majority of white respondents agreed that Black people are treated less fairly were "In dealing with the police" (63%) and "By the criminal justice system" (61%). By contrast just over a third (37%) of white respondents agreed Black people face discrimination in places of public accommodation, like "stores or restaurants." Even those members of the public who have not experienced discrimination in policing recognize that it exists. Of course, as reflected by the ubiquity of The Talk, Black respondents overwhelmingly recognized that Black people are treated less fairly by the police (84%) and in the criminal legal system (87%). Juliana Menasce Horowitz, Anna Brown & Kiana Cox, *Race in America*, Pew Research Center, April 9, 2019, available at https://www.pewresearch.org/social-trends/2019/04/09/race-in-america-2019/#majorities-of-black-and-white-adults-say-blacks-are-treated-less-fairly-than-whites-in-dealing-with-police-and-by-the-criminal-justice-system.

16 *Sum*, 17 Wn. App. 2d 1009, 2021 WL 1382608 at *1 (unreported).

those communities, this suspicionless investigation of Mr. Sum violated his right to be free in his private affairs.

B. BIPOC Experience and Expect Violence from Police

By virtually every conceivable measure, BIPOC have more adverse experiences with law enforcement than white people. BIPOC are contacted more frequently than white individuals by law enforcement.[17] Those contacts are more likely to result in the threat or use of force by law enforcement against BIPOC than against white people.[18] Those contacts are more likely to result in

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[17] Discussing a study of Seattle residents, the National Institute of Health reported that "African American teens are almost twice as likely as Whites to report having had a police contact." Robert D. Crutchfield, et al, *Racial Disparity in Police Contacts*, (Dec. 2013), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3868476/pdf/nihms477348.pdf

[18] A recent report revealed that Black and Hispanic individuals "experienced nonfatal threats or use of force during contacts with police" at more than twice the rate of white people. *Contacts Between Police and the Public, 2018* at 5, Table 3, Bureau of Justice Statistics, December 2020, available at https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf.

the killing of BIPOC.[19] This is true even though Black people killed by police are more likely to be unarmed than white people.[20] Black boys fare almost incomprehensibly badly; those between the ages of 15 and 19 are a staggering "21 times more likely than their white counterparts" to be killed by police.[21] These disparities exist not only nationally, but right here in Washington.[22]

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[19] A study by researchers from the Harvard School of Public Health found that "during police contact…Black people were 3.23 times more likely to be killed compared to white people." Gabriel Schwartz and Jaquelyn Jahn, *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities, 2013-2017*, June 24, 2020, available at https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0229686#references.

[20] Sarah DeGue, Katherine Fowler & Cynthia Calkins, *Deaths Due to Use of Lethal Force by Law Enforcement*, 51 AM. J. PREVENTATIVE MED. 173, 173 (2016) (reporting that 14.8 percent of black victims killed by police were unarmed, compared to than 9.4 percent of white victims).

[21] *See Knights*, 989 F.3d at 1296 (Rosenbaum, J., concurring).

[22] Based on available data, Black people in Washington are 4 times more likely than white people to be stopped by police, between 4 and 10 times more likely to be subject to the use of force by police, and more than 3 times more likely to be killed by police. *See Race and Washington's Criminal Justice System: 2021 Report to the*

In light of the experience of generations of communities of color, it is a fact that BIPOC "often tread more carefully around law enforcement than the Court's hypothetical reasonable person does because of the grave awareness that a misstep or discerned disrespectful word may cause the officer to misperceive a threat and escalate an encounter into a physical one."[23] A recent study showed that "Black adolescent males exposed to nationally publicized cases of police killings through the media disclosed fear of police and a serious concern for their personal safety and mortality in the presence of police officers."[24] Directly relevant to

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Washington Supreme Court, Task Force 2.0, Fred T. Korematsu Center for Law and Equality (2021), at 11–13 (available at https://digitalcommons.law.seattleu.edu/korematsu_center/116).

[23] *Knights*, 989 F.3d at 1297.

[24] Jocelyn R. Smith Lee & Michael A. Robinson, *"That's My Number One Fear in Life. It's the Police": Examining Young Black Men's Exposures to Trauma and Loss Resulting From Police Violence and Police Killings*, 45 J. OF BLACK PSYCHOLOGY 143, 146 (2019) (citing R. Staggers-Hakim, *The Nation's Unprotected Children and the Ghost of Mike Brown, or the Impact of National Police Killings on the Health and Social Development of African American Boys*. 26 J. HUMAN BEHAVIOR IN THE SOCIAL ENVIRONMENT 390 (2016)).

the constitutional question, this means that BIPOC "are likely to feel seized earlier in a police interaction than whites, likely to feel 'more' seized in any given moment, and less likely to…feel empowered to exercise their rights."[25]

C. This Court Should Adopt a Standard That Incorporates Awareness of Our History and That History's Impact, as It Has Elsewhere to Combat Racial Disparity

In recent years this Court has taken action in multiple ways to address systemic racism within the legal system. Both in its judicial decisions and through its rulemaking power, the Court has updated long existing standards in recognition that those standards perpetuated racial disparities in the legal system.[26] Indeed, precisely as Petitioner and Amici ask here, this Court has elsewhere defined an "average reasonable person" as one "who is aware of the history of explicit race discrimination in America and aware of how

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[25] Carbado, *supra* n.7 at 142.

[26] *See Jefferson*, 192 Wn.2d at 243 ("This court adopted GR 37 in order to address [] problems with the *Batson* test."); *see also Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

that impacts our current decision making in nonexplicit, or implicit, unstated, ways."[27]

Just as racial bias and racial disparity concerns called the Court to action in those circumstances, the historic racially disparate policing of communities of color calls for this Court's action. The Court should similarly update Article I Section 7's seizure standard to include consideration of "the history of explicit race discrimination in America" and its effects.

1. The Court updated the historic "no-impeachment" rule surrounding jury deliberations in order to remedy racial disparity.

This Court elsewhere has recognized that rules and standards must evolve where the rule or standard "does not sufficiently address the issue of race discrimination."[28] In *State v. Berhe* the Court "addresse[d] the standards and procedures that apply when trial courts must determine whether an evidentiary hearing is

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[27] *Jefferson*, 192 Wn.2d at 249–250.

[28] *Id.* at 239.

necessary on a motion for a new trial based on allegations that jury deliberations were tainted by racial bias."[29] Despite the fact that the secrecy of jury deliberations historically has been held sacrosanct,[30] the Court concluded that "[b]ecause racial bias raises unique concerns, the no-impeachment rule must yield to allegations that racial bias was a factor in the verdict."[31]

While accepting the "general rule that 'a trial court has significant discretion to determine what investigation is necessary on a claim of juror misconduct,'"[32] the Court explained that "there

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[29] *State v. Berhe*, 193 Wn.2d 647, 649, 444 P.3d 1172 (2019).

[30] *See Long v. Brusco Tug & Barge, Inc.*, 185 Wn.2d 127, 131, 368 P.3d 478 (2016) ("Central to our jury system is the secrecy of jury deliberations. Courts are appropriately forbidden from receiving information to impeach a verdict based on revealing the details of the jury's deliberations.").

[31] *Berhe*, 193 Wn.2d at 657. The "no impeachment rule" provides that "what considerations entered into [the jury's] deliberations or controlled its action[s]" ordinarily may not be divulged. *Id*. (quoting *Long,* 185 Wn.2d at 132).

[32] *Id*. at 661 (quoting *Turner v. Stime,* 153 Wn. App. 581, 587, 222 P.3d 1243 (2009)).

are limits to that discretion, *particularly in* cases of alleged racial bias[.]"[33] The Court found it necessary to craft a unique standard because racial bias is not simply ordinary legal error, but rather "a common and pervasive evil that causes systemic harm to the administration of justice."[34]

Even though "identifying the influence of racial bias generally, and implicit racial bias specifically, presents unique challenges," this Court held that trial courts "*must account* for all of these considerations when confronted with allegations that explicit or implicit racial bias was a factor in the jury's verdict."[35]

This Court's announcement of an evolved, racially-aware standard in *Berhe* was compelled because "racial bias in jury deliberations is 'a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of

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[33] *Id*. at 649.

[34] *Id*. at 657.

[35] *Id*. (emphasis added).

justice.'"[36] The same is true of our nation's history of the policing of BIPOC and communities of color.[37] As the Court did in *Berhe*, in order to mitigate known systemic bias in the criminal legal system, the Court should announce the evolution of the Article I Section 7 seizure standard to include consideration of our history of racial disparities in policing and police violence.

2. The Court updated the outdated *Batson* standard through its adoption and implementation of GR 37.

The evolution of standards around race and jury selection provides a powerful example of how longstanding rules can and must be updated to mitigate racial disparities in the criminal legal system. Mapping almost precisely to Petitioner and Amici's call for an evolved, race-aware seizure standard, the Court in the area

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[36] *Id*. at 659.

[37] Our "system of policing and incarceration [has] evolved in a way to maintain racial hierarchy after the Civil War. We will eliminate the scourge of police violence and abuse only if we address the centrality of racial injustice and inequality in America." *Policing in America*, Equal Justice Initiative, available at https://eji.org/issues/policing-in-america/.

of jury selection has defined an "average reasonable person" as one "who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated, ways."[38]

While in recent years this Court has undertaken to protect the right to an impartial jury meaningfully, for a half-century Washington's BIPOC residents were subject first to a standard which imposed upon them a "crippling burden of proof"[39] and later to one which the Court has acknowledged did "very little to make juries more diverse or to prevent prosecutors from exercising race-based challenges," ultimately "fail[ing] to eliminate race discrimination in jury selection."[40]

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38 *Id*. at 249–50.

39 *See Batson*, 476 U.S. at 92–93 (1985) (discussing unworkable "purposeful discrimination" test of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) (internal citations omitted)).

40 *Jefferson*, 192 Wn.2d at 240 (citing *Miller-El v. Dretke,* 545 U.S. 231, 270, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (Breyer, J., concurring) (noting twenty years after *Batson* that "the use of race-

More than 30 years after *Batson*, and in light of the failures noted above, "[i]n 2017, [the Court]…adopted the bright-line rule...that trial courts must recognize a prima facie case of discriminatory purpose in violation of *Batson* and the equal protection clause when the sole remaining member of a racially cognizable group is struck from the jury with a peremptory challenge."[41] Despite this progress, however, the Court recognized

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and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before.").

Under the *Batson* framework:

> [T]he defendant must first establish a prima facie case that "gives rise to an inference of discriminatory purpose."… Second, "the burden shifts to the State to come forward with a [race-]neutral explanation for [the challenge]."…If the State meets its burden at step two, then third, "[t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination."

Id. at 231–32 (internal citations omitted).

41 *Id*. at 241 (citing *City of Seattle v. Erickson,* 188 Wn.2d 721, 732, 398 P.3d 1124 (2017)).

that it "did not address the ongoing concerns of unconscious bias…or the best way to approach *Batson*'s third step."[42]

The Court continued this evolution with the creation and implementation of GR 37 in 2018.[43] The rule's explicit purpose is "to eliminate the unfair exclusion of potential jurors based on race or ethnicity."[44] The rule employs an objective reasonable-person standard, but in service of the rule's purpose this objective observer is explicitly one who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."[45] As the Court later explained, GR 37 was intentionally created to serve as "[a]s a prophylactic measure to ensure" constitutional protections.[46]

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42 *Id*. at 241–42.
43 *See id*. at 243 ("GR 37 was adopted on April 5, 2018.").
44 GR 37(a).
45 GR 37(f)
46 *See Jefferson*, 192 Wn.2d at 242–43.

The Court also created a list of reasons commonly used to justify peremptory challenges against people of color and deemed them "presumptively invalid" because "historically [those defenses] have been associated with improper discrimination in jury selection in Washington State."[47]

This evolution has resulted in meaningful protection of BIPOC's constitutional rights. In *State* v. *Jefferson*, for example, the Court found that a prosecutor's use of a peremptory strike that would have survived challenge under the *Batson* framework was reversible error under the new, race-aware standard.[48] The Court reached that conclusion by applying its new, updated test:

> In order to meet the goals of *Batson,* we must modify the current test…[W]e hold that the question at the third step of the *Batson* framework is *not* whether the proponent of the peremptory strike is acting out of

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[47] GR 37(h).

[48] *See Jefferson*, 192 Wn.2d at 239 ("[U]nder *Batson, the question for us is*…whether the trial court's conclusion that this did not amount to purposeful race discrimination was clearly erroneous. Based on this record, the answer is no."); 250–51 (finding under the new standard that "race could be viewed as a factor in the peremptory strike" and reversing and remanding).

> purposeful discrimination. Instead, the relevant question is whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." If so, then the peremptory strike shall be denied.[49]

Applying the GR 37 standard and making this determination from the perspective of one "who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated ways,"[50] the Court concluded:

> [O]ur current *Batson* standard fails to adequately address the pervasive problem of race discrimination in jury selection. Based on the history of inadequate protections against race discrimination under the current standard and our own authority to strengthen those protections, we hold that step three of the *Batson* inquiry must change: at step three, trial courts must ask if an objective observer could view race as a factor in the use of the peremptory challenge. In this case, an objective observer could view race as a factor in the [challenged] peremptory strike.[51]

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[49] *Id*. at 249.
[50] *Id.* at 249–50.
[51] *Id*. at 252.

Where standards which are meant to protect constitutional rights fail to do so, this Court can and must intervene. Because "our current [seizure] standard fails to adequately address the pervasive problem of race discrimination in [the policing of people of color]," this Court must "strengthen those protections."[52]

D. The Objective Standard Can Be Applied in a Way that Reflects the Reality of Race and Law Enforcement

The Court can better protect BIPOCs right to be free of unconstitutional seizure by clarifying that the existing totality-of-the-circumstances standard requires awareness of America's history of racially disparate policing and police violence and what effect that history could reasonably have on a person's understanding of whether they are free to terminate a law enforcement encounter. This is consistent with the standard's plain language and better reflects reality. Further, the United States

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[52] *Id.*

Supreme Court has approved analogous considerations in a closely related context.

In *J.D.B. v. North Carolina*,[53] the Court considered "whether the age of a child subjected to police questioning is relevant to the custody analysis" of the Fifth Amendment.[54] Like the current Article I, Section 7 standard discussed above, the Fifth Amendment custody test "is an objective inquiry" which asks "what were the circumstances surrounding the interrogation; and [] given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave."[55]

"Seeing no reason for police officers or courts to blind themselves to [] commonsense reality," the Court held "that a child's age properly informs the *[]* custody analysis."[56] In so holding, the Court believed "it clear that courts can account for []

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53 564 U.S. 261 (2011).
54 *Id.* at 264.
55 *Id.* at 270 (quoting *Thompson v. Keohane*, 516 U.S. 112, 116, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)).
56 *Id.* at 265, 277.

reality without doing any damage to the objective nature of the custody analysis."[57] The objective totality-of-the-circumstances inquiry can account for known dynamics, particularly when as here those dynamics "apply broadly…to a class,"[58] and "are self-evident."[59] The test remains objective even when accounting for the individual's age because "officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age."[60] Rather, they simply need "common sense."[61]

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57 *Id.* at 272.
58 *Id.*
59 *Id.*
60 *Id.* at 279–80.
61 *Id.* at 280.
Given our nation's history of racial infantilization, it must be stated that while both age and race should be considered in the free-to-leave analysis, this is not in any way intended to ascribe the limitations of youth to BIPOC. While the young must be protected because they lack experience and their physical brains and personal character are as yet undeveloped, making them less likely to know their rights and more susceptible to submit to the pressure of police

In short, the *J.D.B*. Court thus permitted consideration of age in the otherwise objective custody analysis because of its "objectively discernible relationship to a reasonable person's understanding of his freedom of action" to terminate a law enforcement contact.[62]

Likewise, there is an objectively discernable relationship between America's longstanding history of racially biased policing and police violence and BIPOC community members' assessment of their control of encounters with law enforcement and consequences of attempting to terminate a law enforcement contact.

Application of the law in a way that ignores this plain reality and essentially prohibits its consideration fails to consider fully the

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questioning, race must be considered because the historic brutalization of BIPOC by law enforcement has resulted in survival strategies of over-compliance with police within communities of color. The common denominator is that in each instance the relevant phenomenon "appl[ies] broadly" to the class and is "self-evident." *See id.* at 272.

62 *Id.* at 275.

"totality of the circumstances." This results in judicial findings that a "reasonable person" would have felt free to terminate a law enforcement encounter without having to consider how the history of racial disparities in policing and police violence may impact a person's determination of whether they were seized or not. This directly erodes the constitutional protections owed to the communities that racially biased policing and police violence have harmed and marginalized historically. Because the history of racially disproportionate policing and police violence has an "objectively discernible relationship to a reasonable person's understanding of his freedom of action" vis-à-vis law enforcement, the objective totality-of-the-circumstances test under Article I Section 7 must take race into consideration.

V. CONCLUSION

Centuries of violence and dehumanizing treatment of people of color have required BIPOC communities to develop survival strategies that demand over-compliance with law enforcement. For courts to continue to blind themselves to that reality when

evaluating the freedom an individual would feel to unilaterally terminate a law enforcement contact is to further enshrine existing racial disparities into the legal system. As it has elsewhere, this Court should update a standard that perpetuates racial disparities and announce that a seizure analysis under Article I, Section 7 must account for "the history of explicit race discrimination in America and…how that [history] impacts our current decision making in nonexplicit, or implicit, unstated ways."[63]

RESPECTFULLY SUBMITTED this 21st day of January 2022.

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63 *Id.* at 249–50.

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VI. CERTIFICATE OF COMPLIANCE WITH RAP 18.17

I certify that the word count for this brief, as determined by the word count function of Microsoft Word, and pursuant to Rule of Appellate Procedure 18.17, excluding title page, tables, certificates, appendices, signature blocks and pictorial images is 4,879.

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2022, I filed the foregoing brief via the Washington Court Appellate Portal, which will serve one copy of the foregoing document by email on all attorneys of record.

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