No. 103795-3
(COA No. 86195-6)

THE SUPREME COURT
OF THE STATE OF WASHINGTON

RAMIRO VALDERRAMA,

Petitioner-Plaintiff,

v.

CITY OF SAMMAMISH,

Respondent-Defendant.

CITY OF SAMMAMISH'S RESPONSE TO THE AMICUS CURIAE MEMORANDUM FILED BY WASHINGTON COALITION FOR OPEN GOVERNMENT

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I. INTRODUCTION

Washington Coalition for Open Government's ("WCOG") Memorandum fails to engage with the relevant facts or dispositive issues. Rather than aiding this Court's decision-making, WCOG: (i) casts unfounded aspersions on the City of Sammamish ("City") and other unrelated public agencies; (ii) mischaracterizes the record; (iii) offers unsupported conclusory allegations; and (iv) improperly raises new issues outside the record and Petitioner Ramiro Valderrama's ("Valderrama") Petition for Review ("Petition"), including issues Division I properly rejected under RAP 2.5(a).

Both the trial court and Division I separately concluded as a matter of law, based on an extensive and uncontroverted record, that the City conducted an adequate search in response to Valderrama's vague and ever-evolving records request, consistent with the City's statutory duties and obligations under *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015).

That was the only relevant question on appeal, and neither Valderrama, nor WCOG, offer any competent reason for this Court to review Division I's opinion.

As WCOG's brief makes clear, what Valderrama and WCOG want is not for this Court to review *this* case, but rather for the Court to revisit its prior holding in *Nissen*. Because neither the record, nor the lower courts' decisions in *this* case justify such an inquiry, however, Valderrama and WCOG resort to manufacturing a factual scenario that is belied by the record and/or distorting Division I's opinion, to fabricate an unsupported basis for re-evaluating *Nissen*. But, as Division I correctly confirmed, the City followed *Nissen* to the letter, and the procedure worked as this Court contemplated. Valderrama's Petition should be denied.

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II. ARGUMENT

A. WCOG's Insertion of New and/or Unfounded Arguments on Appeal Does Not Support Review.

1. Division I Properly Rejected WCOG's Attempt to Add a New Argument on Appeal Regarding the City's PRA Policies.

The crux of Valderrama's case has always been whether the City's search relating to PRR 4280 was adequate. *See* CP 1-11; 1470-71; 2897, 2899. Valderrama asserted that the search was inadequate because the City did not initiate legal action against Councilmember Kent Treen[1] and/or former councilmembers and compel forensic searches of their personal devices to confirm the accuracy of their *Nissen*

[1] As Division I noted, the City Attorney requested Treen's permission to examine his personal device, but Treen declined. *See* CP 99. Treen, however, conducted searches and provided declarations and deposition testimony regarding those searches, consistent with *Nissen*. (CP 103-104; 2776-77; 2782-83, 2788-90). He also confirmed under oath that he did not communicate on the specific applications identified in PRR 4280 regarding City business (thus, there would be no responsive records). *Id*.

affidavits/declarations. Valderrama considered this further step necessary based on mere assertions of bad faith against Treen and three former councilmembers, without supporting evidence.

Valderrama made no claim before the trial court or on appeal that the City's policies as implemented with respect to his records request, or otherwise, failed to comply with RCW 42.56.100. Further, his complaint did not include a claim for injunctive relief, and he sought relief only under RCW 42.56.550(1) and (4). *See* CP 1-11.

The only mention Valderrama ever made to the trial court regarding the City's PRA policy was in the introduction to his motion for partial summary judgment when he misquoted the City's updated 2023 policy. CP 1470.[2] He did not reference RCW 42.56.100 or advance any legal argument regarding the policy. Instead, he focused on actions the City will take after

[2] WCOG similarly mischaracterizes the City's policy at page 15 of its Memorandum. The correct policy language can be found at CP 291-92.

receiving a records request that implicates records on a *former* employee's or *former* councilmember's personal device. *See* CP 2819, n.93.[3] In any event, PRR 4280 was still open while this case was pending below, and the City spent the better part of a year working with Valderrama and many current *and* former Councilmembers to fulfill Valderrama's request,[4] so language in the 2023 policy about circumstances under which the City will close a request was irrelevant. *See* CP 1999.

In this Court, Valderrama restricted his Petition to: (i) Division I's holding that the City conducted an adequate search, which he asserted conflicted with *Nissen*; and (ii) the question of whether a forensic review is required as part of an agency's search obligations when a requester asserts "bad faith"

[3] The City's Response to Valderrama's Opening Brief ("Respondent's Brief"), at pp. 69-72, addressed why Valderrama's limited criticism of this portion of its policy was inaccurate and irrelevant.

[4] *See, e.g.*, Respondent's Brief, pp. 17-25.

by the person completing a *Nissen* affidavit. Valderrama further limited the allegation of any particular "bad faith" to Treen.

Notwithstanding these limited questions—and without citing the record or any evidence regarding any other PRA case involving the City, and relying on alleged *settlements* by other unrelated public agencies—WCOG spends half its Memorandum winding up to a baseless argument that the City failed to preserve responsive public records *before* its receipt of Valderrama's request and/or has a history of disregarding RCW 42.56.100. Even if that could form the basis for a claim under the PRA here—it cannot[5]—or, if there was any supporting evidence—there is none—this argument merely recycles WCOG's briefing before Division I, which the Court properly rejected under RAP 2.5(a) because it was first raised on appeal.

[5] It is well-established that there is no requirement under the PRA to produce records that do not exist at the time an agency receives a records request. *See West v. Washington State Dep't of Nat. Res.*, 163 Wn. App. 235, 245, 258 P.3d 78 (2011), and internal citations therein.

Valderrama v. City of Sammamish, 33 Wn. App. 2d 318, 325 n. 5, 561 P.3d 288 (2024); *accord Hikel v. City of Lynnwood*, 197 Wn. App. 366, 389 P.3d 677 (2016) (courts were not required to consider a claim that the agency violated RCW 42.56.100 when the requester made no such claim in his complaint and first argued it in a reply brief to the trial court).

WCOG, as amicus curiae, cannot inject new issues into this appeal. Its invitation to this Court to look outside the record and/or consider new claims, arguments, or even issues not raised in Valderrama's Petition—including a facial challenge to the City's policies—should be rejected. *See, e.g.*, *M.G. by Priscilla G. v. Yakima Sch. Dist. No. 7*, 2 Wn.3d 796, 804-805, n.5, 544 P.3d 460 (2024) (not proper to take judicial notice of facts provided by amicus outside the record); *see also Darkenwald v. State, Employment Sec. Dep't*, 183 Wn.2d 237, 246, n.3, n.4, 350 P.3d 647 (2015) (argument raised by amici was waived where appellant failed to challenge the appellate court's related holding

in her petition); *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) ("appellate courts will not enter into the discussion of points raised only by amici curiae").

WCOG's references to *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 327 P.3d 600 (2013), and *Kilduff v. San Juan County*, 194 Wn.2d 859, 453 P.3d 719 (2019) are inapposite. In *Resident*, the requester's complaint specifically sought an injunction ordering the agency to establish policies and procedures applicable to PRA requests. 177 Wn.2d at 427. In *Kilduff*, the respondent county asserted its own policy as an affirmative defense. 194 Wn.2d at 865. Neither case allows WCOG to invoke review of an agency policy that was not the subject of a request for relief below.

2. The Record Confirms that the City's Policies Comply with RCW 42.56.100.

Even if this Court could consider WCOG's argument regarding the City's policy, it would fail. The City's PRA policies in place at the time it received Valderrama's request, and

then as updated in 2023, align with RCW 42.56.100.[6] *See* CP 239-53; 255-73; 271-73; CP 253, 290 (PRA Rule 140, Retention of Records).

Further, and concurrently with updating its PRA policy in 2023, the City enacted a "Public Records Policy Regarding Personal Devices and Accounts" that specifically prohibits councilmembers from utilizing their personal devices and/or accounts for City business and instructs them how to provide any public records to the City should they inadvertently create or receive them. CP 294-98. This policy is consistent with the precautions the City has long utilized to prohibit the use of personal devices and accounts for City business and the City's collection of records that might exist—even before the City received PRR 4280. For example, in addition to its robust

[6] Contrary to WCOG's speculation that the City "amended its PRA policy…in direct response to this lawsuit" (Amicus Memorandum, pp. 14-15), the updated policy was in process before the lawsuit was filed. *See* CP 405-06.

policies referenced above, and consistent with the procedures outlined in *Nissen*, 183 Wn.2d at 887, the City has historically provided its councilmembers with cell phones, tablets, and laptops for City business (CP 234), plus training and advice prohibiting the use of personal devices and accounts (CP 233-34, 698-700).

The City also regularly worked with its elected officials, including its departing councilmembers from whom Valderrama later sought records, to retrieve any public records they might inadvertently still have had on their personal devices or accounts and obtain *Nissen* declarations regarding the same. CP 235-36.

Valderrama himself—who was a councilmember from January 2012 through December 31, 2020—testified about these measures in his declaration:

> I know from my two terms on the City Council that the City provides each council member with a City-issued cell phone, tablet computer, and email account. Councilmembers are instructed that all city business is to be conducted on these devices and accounts, including notes taken on council packets

> issued as part of city agendas, and notes taken during special sessions, public hearings, and general business meetings. Council members are instructed that text messages, emails, documents, etc. that are received from other sources are to be forwarded to our city emails or to the city staff so that they would be stored and kept on the City servers. Such training was given to new Councilmembers and to all Councilmembers at least every four years, and I understand the City and State continues such training today.

CP 2880-81, ¶¶ 2, 4.

Therefore, WCOG's assertion that the City has a history of allowing the creation of public records on personal devices is demonstrably wrong.

3. The City Complied with Its PRA Obligations to Conduct Adequate Searches Consistent with *Nissen*.

Extrapolating its argument on the fallacy explained above, WCOG leaps to the unsupportable conclusion that councilmembers were also regularly "storing" public records on personal devices. WCOG's only support for this bare assertion boils down to former councilmember Christie Malchow using

her personal device to communicate with her friend, Stephanie Rudat, via WhatsApp, and the three screenshots found on pages 12-13 of WCOG's Memorandum.[7] WCOG offers no explanation why these snippets would dictate review by this Court. Nor does WCOG deny these communications were part of the City's production of records to Valderrama.[8] That Malchow produced these records to the City, and the City in turn disclosed them to Valderrama, not only undermines WCOG's argument, but also demonstrates that Malchow conducted an adequate search for potentially responsive records and complied with *Nissen*.

[7] As Malchow is not a subject of Valderrama's Petition, the City did not detail facts relating to her searches or records in its Answer to the Petition but did so in Respondent's Brief (pp. 21-23, 45-49) and its Answer to WCOG's Amicus Curiae Brief filed in Division I (pp. 5-14).

[8] Valderrama did not argue before the trial court, Division I, or to this Court, that the City withheld any of these communications, or any particular public record. *See, e.g.*, CP 1467, 2913.

The City thoroughly documented its strict adherence to *Nissen* throughout this litigation, including in hundreds of pages of declarations and exhibits. *See*, *e.g.*, City's Answer to Petition, pp. 4-12; Respondent's Brief, pp. 9-25. Included in the record offered by the City are 43 *Nissen* affidavits/declarations and transcript excerpts from depositions of Treen and former councilmembers taken by Valderrama. Contrary to WCOG's arguments otherwise, this record demonstrates that the City's efforts to respond to PRR 4280 were arduous *not* because the City did not have appropriate policies in place but because PRR 4280 was vague and repeatedly modified by Valderrama, thus requiring extensive follow-up efforts by the City. *Id.*

B. WCOG's Invitation to Revisit *Nissen* Does Not Support Review.

WCOG also complains that Division I published its decision but cites no case holding that publication alone provides a basis for review. Division I's opinion addressed whether the City performed an adequate search of records located on private

devices and whether the officials who executed declarations/affidavits attesting to their searches did so in compliance with *Nissen* and in good faith. In this analysis, Division I reviewed the extensive record *de novo* and, noting that Valderrama offered no competent evidence otherwise, confirmed that the City established an adequate search for responsive records. *Valderrama*, 33 Wn. App. 2d at 332.

Division I's opinion neither extended, nor contradicted *Nissen*. It simply reaffirmed *Nissen* and noted that while this Court did "not specifically address[] whether an agency suspecting bad faith must sue to forensically examine an employee's personal device, it has suggested that such an infringement on employees' privacy rights is unnecessary to conduct an adequate search." *Id*. As explained in the City's Answer, Division I's opinion is entirely consistent with *Nissen*.

At bottom, WCOG and Valderrama are asking this Court to ignore all the evidence that supports the trial court's dismissal

and Division I's *de novo* review and affirmance and—without suggesting the appropriate legal mechanism—consider in a vacuum the theoretical question of whether an agency *could* have the obligation to file litigation against its current and/or former elected officials to compel forensic searches of their personal devices. Even if this Court ultimately *might* hold that such searches in a **public records setting**—the exact type of "unbridled search[]" *Nissen,* 183 Wn.2d at 885, specifically held "the PRA has never authorized"—*could* be appropriate in *some* context, the record here does not support such an expansion of *Nissen*.

Additionally, the City never asserted that communications from the applications named in PRR 4280 could not constitute public records (assuming they were prepared, owned, used, or retained "within the scope of" an official's public duties), and the City appropriately asked its current and former elected officials to search for the same. Further, everyone subject to PRR 4280

testified via affidavit/declaration and/or deposition regarding their searches for responsive public records. This case thus contrasts with *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 150, 240 P.3d 1149 (2010), and *Nissen*, wherein this Court remanded the cases so the respective agencies could conduct searches not previously conducted. Here, because the City already conducted the searches that *Nissen* requires, there is no further action for this Court to consider or order on remand.

III. CONCLUSION

WCOG's Memorandum offers no support for this Court's review. The Petition should be denied.

RESPECTFULLY SUBMITTED this 21st day of April, 2025.

I certify that the City's Response to the Amicus Curiae Memorandum filed by Washington Coalition for Open Government contains 2,494 words, excluding words contained in the title sheet, table of contents and authorities, certificate of service, signature blocks, any pictorial images or appendices, and this certificate.

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CERTIFICATE OF SERVICE

On said day below I electronically served a true and accurate copy of the City's Response to the Amicus Curiae Memorandum filed by Washington Coalition for Open Government in the Supreme Court of Washington, Cause No. 103795-3, to the following parties:

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

Dated this 21st day of April, 2025 at Seattle, Washington.

/s/ *Linda Vandiver*
Linda Vandiver,
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OGDEN MURPHY WALLACE, PLLC

April 21, 2025 - 9:57 AM

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