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I. INTRODUCTION

The present case will determine whether police have infinite discretion to initiate criminal investigations by randomly searching various databases without a warrant to gather information about Washington motorists without any quantum of individualized suspicion. In keeping with Washington's well-established tradition of protecting citizens' private affairs from undue government intrusion, this Court should reverse the judgment of the Court of Appeals, and hold that Article I, Section 7 of the Washington Constitution prevents "random" records searches.

This Court consistently has interpreted Article 1, Section 7 to prohibit police from targeting our state's citizens for enforcement action without individualized justification. Article I, Section 7 proscribes "general fishing expeditions" by police into records and affairs warranting even a "minimal" expectation of privacy. *Matter of Maxfield,* 133 Wn. 2d 332, 341, 945 P.2d 196 (1997). Similarly, selective enforcement of the traffic code to initiate criminal investigations for which there is no individualized suspicion is prohibited, even when facially valid reasons for the initial police contact exist. *State v. Ladson,* 138 Wn. 2d 343, 359, 979 P.2d 833 (1999). Random stops of motorists at DUI checkpoints absent individualized suspicion violate Article 1, Section 7. *City of Seattle v.*

Mesiani, 110 Wn.2d 454, 458, 755 P.2d 775 (1988).

Uniting *Maxfield, Ladson* and *Mesiani* is the principle that Washington citizens have a right not to have our private affairs invaded by law enforcement fishing for evidence of possible criminal activity, unless we have done something to create particularized suspicion justifying the investigation. In other words, unless we forfeit it by our actions creating reasonable suspicion that we are engaged in criminal activity, Article 1, Section 7 protects our right "to be left alone." *C.f. State v. Lee*, 135 Wn.2d 369, 390-391, 957 P.2d 741 (1998).

Across the nation, law enforcement agencies have begun collecting data on routine traffic stops in order to address allegations of racial profiling, also known as racially-biased policing. While these data almost universally show that enforcement of the traffic code has a disproportionate impact on minority motorists, the even more striking revelation is the correlation between greater police discretion and *greater* disproportionate impact on minorities. The more discretion police have in making different kinds of traffic stops and searches, the greater the disparity between the percentage of searches involving minorities and their representation in the baseline population. *See, e.g., State v. Soto,* 324 N.J.Super. 66, 734 A.2d 350 (N.J.Super.L. 1996). The decision to search

databases with no articulable suspicion to believe that a person is or has engaged in criminal activity is a moment of *infinite* discretion. It is, therefore, a moment at which conscious or unconscious race bias is highly likely to influence police choices. The resulting disparate impact of traffic stops on motorists of color undermines the community's confidence in law enforcement, the legal system, and in government as a whole.

Good policing is based on keen observation of suspicious behavior. Data collected by law enforcement agencies on searches of different racial groups indicate that where insufficient safeguards are present in the exercise of discretion, "hit rates" (the percentage of stops and searches that uncover evidence of criminal activity) for seizures of minorities are actually lower than they are for whites. Yet when discretion is focused on observable behavior, hit rates go up.

This Court need not, and ought not to, decide that police can *never* access WACIC, DOL, and other records; rather it is a question of *when.* By requiring that police have reasonable suspicion of law violations before accessing these records, this Court will not only protect Washington citizens' right to be free from undue government surveillance, but will simultaneously protect against conscious or unconscious racial bias and promote efficient, legal police practices.

II. FACTUAL BACKGROUND

The facts of this case are adequately addressed in the parties' briefing, and *amici* will not repeat them at length here. *Amici* wish only to reiterate for purposes of the argument below that Petitioner McKinney is an African-American man in his twenties. He was parked in his red Ford Explorer when an officer of the Federal Way Police Department decided to gather information about him by accessing two different databases, presumably in an attempt to find a reason to initiate contact. At the time these searches were made, the officer lacked probable cause, articulable suspicion, or indeed any quantum of individualized suspicion, to believe that Mr. McKinney was engaged in criminal activity or had committed a traffic violation of any kind.

III. ARGUMENT

A. Article I, Section 7 Protects Washington Citizens From Becoming Targets Of Discretionary Law Enforcement Action Absent Particularized Grounds For Suspicion

The protection of our personal privacy is intrinsically intertwined with the regulation of police discretion – the scope of the right to privacy defines when and under what circumstances the government can start looking into our private affairs. This Court has consistently held that Article I, Section 7 defines the boundaries of police discretion to pick and

choose which citizens to investigate for criminal activity. In case after case, this Court has required police to articulate a reasonable and individualized suspicion relating to specific alleged criminal behavior before allowing unwarranted forays into any person's private affairs.

In *Matter of Maxfield*, 133 Wn. 2d 332, 945 P.2d 196 (1997), this Court invalidated the practice of conducting general searches of power usage records to single out for investigation those persons using abnormally high amounts of electricity. 113 Wn. 2d at 341. There, a Public Utility District official initiated investigations by notifying police when a customer appeared to be using large amounts of energy, under the assumption that such a customer may be growing marijuana. *Id.* at 335. This Court recognized the dangers of allowing general police "fishing expeditions," and held that disclosure of the power usage record violated Article I, Section 7 by intruding into the Maxfields' private affairs without authority of law, either statutory or based on reasonable suspicion. *Id.* at 344. Just as the Court restricted random discretionary searches of public utility records, so should the Court prevent random discretionary searches of license plate and driving records. *Id.*

In *State v. Ladson*, 138 Wn. 2d 343, 979 P.2d 833 (1999), officers on "proactive gang patrol" selectively enforced the traffic code in order to

initiate criminal investigations against motorists *they believed* might be involved in criminal activity. 138 Wn. 2d at 345-46. The officers began to tail Mr. Ladson and a companion, both African Americans, on an unsubstantiated rumor that the companion was involved with drugs. *Id.* at 346. The officers then used the pretext of expired license tabs to stop the vehicle, and a full-blown search and arrest ensued. *Id.*

In suppressing evidence obtained in the search and invalidating pretextual traffic stops, this Court expressed distaste for "speculative criminal investigation," and stated:

> Pretext is therefore a triumph of form over substance; a triumph of expediency at the expense of reason. . . . Pretext is result without reason.

Ladson, 138 Wn.2d at 351. The Court went on to delineate when an officer may initiate investigative contact by requiring a reasonable, articulable, and individualized suspicion to believe that a person is engaging in the alleged activity for which the contact is made. *Id.* at 842.

Mr. McKinney and others on the road are entitled to similar protections against officers' choosing to search their records for no articulable reason whatsoever, looking for a reason to stop them. Like pretext, "random" records searches are "expediency at the expense of reason . . . result without reason."

For similar reasons, in *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988), this Court held that Article I, Section 7 protects Washington drivers from police sobriety checkpoints. 110 Wn. 2d at 458. The Court recognized the City's interest in "assuring that all drivers comply with applicable laws," but rejected the notion that this interest justified suspicionless government intrusion into the private affairs of persons in their vehicles. *Id.* at 456. In interpreting the Fourth Amendment,[1] the Court expressed concern over "unbridled discretion" of the police to conduct roadside investigations on whichever cars they might please. *Id.* at 459. Likewise, the Court should curb the unbridled discretion of the police to "run" the plates and then the identity of any motorist without any quantum of suspicion.

Washington's Article I, Section 7 case law rests on the benchmark principle that government intrusion into even minimally private affairs should not be "random" or without reason. Surveillance and investigation should be undertaken in response to observed behavior, rather than at the discretion of a particular officer. At best, such discretion is a whimsical basis to intrude into a citizen's affairs. More troubling is the invitation to

[1] Although the Court's holding under the Fourth Amendment was subsequently superceded by *Michigan v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481 (1990), the policy rationale is nonetheless useful in assessing the scope of Article I, Section 7.

biased, not merely whimsical, policing.

B. High-Discretion Police Actions Have A Disproportionate Impact On Minority Motorists

Concern over racial profiling[2] and related litigation, *see, e.g., Soto*, 734 A.2d 350, has led cities, states and law enforcement agencies across the nation to begin collecting data on routine traffic stops and searches. Washington State is among these.[3] Nearly without exception, these data show a racially-correlated disparity between the "benchmark" used and the measured stop and search rates. Simply stated, minority motorists, especially African Americans and Latinos, are stopped and searched far more frequently than their representation in the relevant comparison population would predict.[4] While this can be explained in several ways,

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[2] "Racial profiling" and "racially-biased policing" have been defined as "any action taken by an [officer] . . . based on racial or ethnic stereotypes that has the effect of treating minority motorists differently that non-minority motorists" other than the investigation of a specific known criminal suspect. New Jersey Attorney General, Interim Report, *infra*. Washington statute will soon define racial profiling as "the illegal use of race or ethnicity as a factor in deciding to stop and question, *take enforcement action*, arrest, or search a person or vehicle with or without a legal basis under the United States Constitution or Washington state Constitution." Engrossed Senate Bill 5852, Sec. 1 (Chapter 14, Laws of 2002; signed March 12, 2002) (emphasis added).

[3] In 2000, the Washington State Legislature enacted RCW 43.43.480 and 490, which require the Washington State Patrol to collect demographic and cause-of-stop data. Local law enforcement agencies will be required to collect similar information under legislation passed by the 2002 Legislature. Engrossed Senate Bill 5852, Sec. 2(1)(f) (Chapter 14, Laws of 2002; signed March 12, 2002).

[4] *See e.g.*, Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling, New Jersey Attorney General, April 20, 1999; Final Report: Police Vehicle Stops in Sacramento, California, October 31, 2001; Garber, Andrew, "Seattle Blacks Twice as Likely to Get Tickets," Seattle Times, June 14, 2000.

some implicating racial bias and others not, one undisputed fact has emerged from the plethora of studies: the racially disproportionate impact *increases* as the amount of officer discretion increases.

The amount of discretion an officer has in a given situation is inversely proportional to justifiable suspicion. Where probable cause to suspect criminal activity or a hazardous traffic infraction exists, an officer has little discretion in deciding to take investigative or enforcement action. At the other end of the spectrum, where zero suspicion exists, the decision to initiate an investigation is completely discretionary. "Random" license plate checks are infinitely discretionary investigations—there is no duty to engage in them and no standard to guide officers in when to initiate them other than their instinct. Such random checks are thus an open door to conscious or unconscious racial bias.

Nearly all studies show that on a percentage basis, minority drivers are stopped more often, ticketed more often, and searched more often than white drivers.[5] Law enforcement agencies explain these results in several ways. The most common argument is that driver age is the true critical factor in the propensity to commit infractions, and since the minority driving population is disproportionately young, it allegedly "makes sense"

that minority drivers are stopped more often. Others insinuate that minority motorists simply speed more often and commit more infractions, and therefore deserve more citations and to be searched more often.

But what is much more difficult to explain in terms other than racial bias is that studies that measure stops and searches carried out at different levels of police discretion show that *racial disproportionality increases with discretion.* Even if it were true that age is the determinative factor or that certain groups commit more infractions, one would expect to find that non-white drivers are stopped at the same percentage rate (albeit greater than their background population percentage) regardless of whether they are stopped for speeding (low-discretion stop) or lane usage (high-discretion stop). One would expect that non-white motorists would be searched at the same rate whether the search is based on probable cause (low-discretion search) or consent (high-discretion search). Instead, minority drivers, in particular African Americans and Latinos, are stopped and searched at increasingly greater rates the more discretion is involved.

One of the first studies correlating discretion and disproportionate impact on minority motorists was recognized in *Soto,* 734 A.2d 350, where African-American defendants moved to suppress evidence obtained after

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[5] *See, e.g.*, New Jersey Interim Report, *supra.*

traffic stops along the New Jersey Turnpike. *Id.* at 352. That study revealed, and the court found, that although African-Americans comprised only 15% of speeding motorists (this study used a violator survey as a benchmark), they made up 46.2% and 35.6% of people stopped in two stretches of highway, respectively. *Id.* at 352-3.

While these numbers alone are striking, the far more revealing results came when the researchers looked at discretion. The study looked at three teams of law enforcement officials, each with different levels of discretion in stopping and ticketing speeders, described as follows:

> [T]he Radar Unit focused mainly on speeders using a radar van and chase cars and exercised limited discretion regarding which vehicles to stop. The Tac-Pac concentrates on traffic problems at specific locations and exercises somewhat more discretion as regards which vehicles to stop. Responsible to provide general law enforcement, the Patrol Unit exercises by far the most discretion among the three units.

Id. at 354. The court found that on the two stretches of highway, 18% and 19.4% of the tickets issued by the Radar Unit were to African Americans (close to the benchmark of 15%), 23.8% and 0.0% of the tickets issued by the Tac-Pac were to African Americans, and 34.2% and 43.8% of the tickets issued by the Patrol Unit were to African Americans. *Id.*[6]

[6]The court held that this unrebutted evidence demonstrated a violation of the Fourteenth Amendment, and suppressed evidence obtained in the unconstitutional traffic stops.

The *Soto* litigation prompted the New Jersey State Attorney General to conduct his own study to determine the extent to which officers were engaging in racial profiling on the New Jersey Turnpike. *See* Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling, New Jersey Attorney General, April 20, 1999, attached hereto as Appendix A. Analysis of traffic stop data from two stretches of highway revealed similar stop rates as were found in the *Soto* case. *Id.* at p. 26. Yet the most striking revelation involved the use of "consent" searches, a highly discretionary tactic used by police to investigate when there is little or no individualized suspicion of criminal activity. *Id.* at p. 27. The report showed that nearly 80% of all consent searches were conducted on African-American and Hispanic-American motorists. *Id.*

These findings led the Attorney General to implement radical changes in State Patrol procedure, all focused on channeling and limiting officer discretion. *Id.* at p. 86. The report identified at least five moments of high discretion in traffic stops in which race should *never* be a factor: the decision to stop a vehicle, the decision to ask a driver to exit a vehicle, the decision to engage in "routine questioning" to elicit contradictory answers, the decision to deploy drug scent dogs, and the decision to seek consent to search vehicles. *Id.* at pp. 53-56.

The Attorney General specifically concluded that officers should not ask a driver for consent to search his vehicle without a reasonable, articulable suspicion of criminal activity, and that the driver must be advised of his right to refuse to give consent. *Id.* at p. 100. Notably, the report also recommended that comprehensive criteria be developed to safeguard against racial bias regarding the use of computer checks of databases. *Id.* at p. 99.

Despite these executive branch assurances, the New Jersey Supreme Court recently held that suspicionless "consent" searches violate New Jersey Constitution Article 1, Paragraph 7, which is nearly identical to the Fourth Amendment and thus less protective of privacy than Washington's Article 1, Section 7 privacy provision. *State v. Carty*, --- A.2d ---, 2002 WL 334169 (NJ 2002). Quoting Professor Wayne LaFave, the court noted that "a police procedure is less threatening to Fourth Amendment values when the discretionary authority of the police (and thus the risk of arbitrary action) is kept at an absolute minimum." *Id.* The court went on to require a minimum of reasonable, articulable suspicion before asking for consent to search. *Id.*

In Sacramento, California, the Sacramento Police Department commissioned a study of traffic enforcement. *See* Sacramento Study,

attached hereto as Appendix B. The study specifically concluded that "[t]he greatest over-representation of minorities occurs in 'high-discretion' stops, which officers often carry out for investigative purposes." *Id.* at 7. Specifically, the disproportionate impact on minorities was greater for "non-hazardous" traffic violations (high-discretion stops) than for hazardous traffic violations (low-discretion stops). *Id.* at 25.

Closer to home, the Seattle Times recently analyzed rates at which Seattle residents of various races are stopped by Seattle police for various infractions.[7] Overall, the study revealed that while African-Americans make up only 9% of the driving-age population of Seattle, 18.6% of traffic tickets are given to African American drivers. *Id.* But even more compelling are the data related to specific infractions. While African-Americans accounted for 14.5% of motorists ticketed for speeding and 12% of those ticketed for running a stop sign (relatively low-discretion citations), they represented 20.4% of those ticketed for improper lane change, 27% of those ticketed for equipment violations, and 35.7% of those ticketed for not turning on their lights at night, all relatively high-discretion stops. *Id.* Overall, the general trend for all types of citations recorded indicated that African-Americans received a more

disproportionate number of tickets the more discretionary the stop. *Id.*

Finally, in an as-yet-unpublished study of the random use of Mobile Data Terminals ("MDTs") by police, the exact technology used in the present case, researchers at the University of Oakland found that officers made two to three times as many suspicionless MDT queries on African-American drivers as on white drivers, highly disproportionate to African-American drivers' representation on the roadways.[8] The research also showed that the disparity grew the farther away from urban centers, where blacks are considered "out of place."[9]

In sum, "random" running of plates by definition represents a situation of zero suspicion, and therefore infinite discretion. From traffic infractions, to consent searches, to random use of the MDT, studies prove that increased police discretion leads to an increased disproportionate impact on minority motorists. Given the propensity of greater discretion to lead to conscious or unconscious racial bias in policing, Article 1, Section 7 should be read to restrict this predictably dangerous practice.

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[7]Garber, Andrew, "Seattle Blacks Twice as Likely to Get Tickets," Seattle Times, June 14, 2000, attached hereto as Appendix C.

[8]*See* Meehan, Albert J, and Michael Ponder, "Race and Place: The Ecology of Racial Profiling African American Motorists" (Oakland University, Rochester, Michigan, submitted for publication, 2001), attached hereto as Appendix D.

[9] Meehan & Ponder, *cited in* Harris, David A., "Profiles in Injustice," New Press, New York, 2002, at pp. 69-71.

C. Forcing Police To Rely On Observations Of Suspicious Behavior Rather Than Stereotypes Will Increase Police Efficiency And Investigative Success

One of the common justifications for *consciously* using race as a factor in profiling of criminal behavior is a widespread, stereotypical belief among law enforcement agents and the public alike, that certain racial groups have a greater propensity to commit certain crimes. If this belief were true, one would expect racially directed law enforcement strategies to show better success in uncovering criminal activity. In search terminology, this is what is known as a "hit rate," the percentage of searches that actually result in the discovery of contraband. But studies of hit rates show that, when race is used in the decision to conduct a search, hit rates actually go down.

One of the most striking discoveries of unconscious use of race in conducting searches concerned the United States Customs Service. In the late 1990s, the Customs Service came under fire for pervasive use of strip searches and body cavity inspections directed at minority travelers, particularly African-American women. A General Accounting Office ("GAO") study revealed that black women were more than twice as likely to be strip-searched in drug interdiction efforts as were white men and women, and nearly nine times as likely to be x-ray searched than white

women.[10] Yet strip-search hit rates for black women were *half* of what they were for white women, and x-ray hit rates for black women were the *lowest* of any race/gender group.[11]

In response to these disturbing findings, Commissioner of Customs Raymond Kelly implemented wholesale changes in policy regarding personal searches that included greater oversight of discretionary decisions to search (e.g., requiring supervisor permission for strip searches), as well as greater focus on objective factors to be considered in that decision. Harris, David A., "Profiles in Injustice," New Press, New York, 2002, at pp. 219-21. Specifically, low-level customs officials could no longer unilaterally decide to conduct a personal search, even if based on consent. Officials were also instructed to consider passenger behavior, oddities in appearance, inconsistencies between documents and interview information, intelligence information, and drug scent dog alerts. *Id.*

The impact of these changes was as dramatic as the hit-rate percentages that brought them on. While the new procedures drastically reduced the number of searches conducted, the *hit rates improved*

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[10] *See* GAO, U.S. Customs Service, "Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results," report to the Honorable Richard J. Durbin, U.S. Senate, March 2000, at 2, attached hereto as Appendix E.

[11] *Id.*

dramatically. From an overall hit rate of 3.5 percent in 1998, Customs searches improved to a hit rate of 5.8 percent for 1999, and 13 percent for the first half of 2000. Harris, at p. 221, *citing* Sanford Cloud Jr., Independent Advisor's Report to Commissioner Kelly on the U.S. Customs Service's Personal Search Review Commission's Findings and Recommendations, 21 June 2000, 18. These figures demonstrate how, when steps are taken to remove racial stereotypes from the equation and to increase reliance on objective factors, law enforcement does a better job of intercepting criminal activity. The Customs Service's amazing turnaround is "an example of what can be achieved when police leadership determines to remove race and ethic appearance from its arsenal." Harris, at 208.

Similar hit rate results are found in Washington. Pursuant to RCW 43.43.480, the Washington State Patrol has collected traffic stop data since May 2000.[12] The data indicate that while both African-American and Hispanic-American drivers are more than twice as likely to be searched than white drivers, hit rates were highest in searches of *white* drivers (32.6 percent), as compared with 24.7 percent for African Americans and 18.6

[12] *See* Report to the Legislature on Routine Traffic Stop Data, Washington State Patrol and Criminal Justice Training Commission, Olympia, Washington, January 2001, attached hereto as Appendix F.

percent for Hispanic Americans.[13] A logical explanation for these results is that when white drivers are searched, it is for reasonable, articulable reasons that are not skewed by racial stereotypes. Yet when stereotypes enter the discretionary decision-making process, even unconsciously, the effectiveness of intervention activities goes down because race is being used as a proxy for suspicious behavior.

Good policing is based on keen observation of behavior that is used to form individualized suspicion. The use of race as part of a profile distracts police, either consciously or unconsciously, from forming objective suspicions of criminal activity. By reading Article I, Section 7 to limit discretion in the use of database searches, this Court will promote effective and efficient law enforcement by forcing police to rely on objective, observable facts rather than unfounded stereotypes.

IV. CONCLUSION

This Court has consistently held that Article I, Section 7 "clearly recognizes an individual's right to privacy with no express limitations." *State v. Simpson,* 95 Wn.2d 170, 178, 622 P.2d 1199 (1980). That individual privacy right includes the right to be left alone and the right to be free from "random" and reasonless surveillance by the government. In

[13] *Id.* at Appendix C.

keeping with Washington State's strong tradition of protecting personal liberties under Article I, Section 7, this Court should prevent police from conducting "fishing expeditions" through computerized databases. Such fishing is by definition infinitely discretionary, and recent studies prove that unchecked discretion invites racially-biased policing. They also show that the bias inherent in discretionary techniques actually leads to *less effective, less efficient investigative results*. For the aforementioned reasons, *amici* respectfully request that this Court reverse the judgment of the Court of Appeals, and hold that "random," suspicionless searches of computerized databases violates Article I, Section 7 by invading the private affairs of Washington citizens without authority of law.

Respectfully submitted this 15th day of April, 2002.

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