No. 78656-9

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL M. MILES,

Petitioner.

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# *AMICUS CURIAE* BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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DOUGLAS B. KLUNDER, WSBA #32987
705 Second Avenue, Suite 300
Seattle, WA 98104
(206) 624-2184

Attorney for *Amicus Curiae*
American Civil Liberties Union of Washington

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## INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, which prohibits unreasonable interference in private affairs. It has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

## STATEMENT OF THE CASE

The parties have presented the case, but a few facts relevant to the argument below bear repeating. In May 2001, the Securities Division of the Department of Financial Institutions received a complaint, alleging that Michael Miles had taken over $100,000 from the complainant in order to invest the funds, but had never returned or accounted for the money. The complainant provided cancelled checks made out to MM Miles, and letterhead describing MM Miles as an investment firm. In response to the complaint, the Securities Division issued a subpoena to Washington Mutual Bank, asking for records of any bank account used by Michael Miles. The records requested included monthly statements, transaction records for both deposits and withdrawals, and even loan applications. The

cover letter sent with the subpoena "initially" limited the records being sought, but still requested a complete record of transactions was requested (via monthly statements), with extra details for all deposits of $1000 or more. The Securities Division issued the subpoena on its own; there was no review by a neutral magistrate, nor did the Division notify Miles of the subpoena. Instead, it specifically asked the bank *not* to notify Miles, effectively eliminating any opportunity for Miles to challenge the subpoena prior to his records being delivered to the State.

The bank delivered the requested records to the State, which conducted further investigation and ultimately charged Miles with securities fraud. Miles moved to suppress the records and all evidence derived from them. The court agreed that the banking records were private and the subpoena did not provide authority of law to access them. The court denied suppression, however, because it decided the subpoena fell within a "pervasive regulation" exception to constitutional privacy protections. The court agreed to an interlocutory appeal of this controlling issue.

## ARGUMENT

Article 1, Section 7 of the Washington Constitution guarantees that "[n]o person shall be disturbed in his private affairs ... without authority of

law." It is well settled that Article 1, Section 7 protects individual privacy rights more than the Fourth Amendment, so no *Gunwall* analysis is needed. *See, e.g., State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). Since the facts are undisputed, this Court reviews *de novo* whether Article 1, Section 7 has been violated. *See id.*

**A. Bank Records Are Private Affairs**

This Court settled over 20 years ago that records of one's private affairs remain private even when provided to a third party in order to participate in modern society. *See State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). *Gunwall* held that telephone records are protected by Article 1, Section 7, describing them as "a personal and business necessity indispensable to one's ability to effectively communicate in today's complex society." *Id.* at 67 (quoting *People v. Sporleder*, 666 P.2d 135, 141 (Colo. 1983)).

In determining whether particular types of records are private, "this court has also considered the nature and extent of the information that police learn about a person's personal contacts and associations" through access to those records. *State v. McKinney*, 148 Wn. 2d 20, 29, 60 P.3d 46 (2002). Financial records are among the most private of records. "By examining them the agents get to know his doctors, lawyers, creditors,

political allies, social connections, religious affiliation, educational interests, the papers and magazines he reads, and so on ad infinitum." *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 85, 94 S. Ct. 1494, 39 L. Ed. 2d 812 (1974) (Douglas, J., dissenting).

Even in the few instances in which justices of this Court have opined that Article 1, Section 7 does not protect some types of relatively innocuous records, those justices have distinguished financial records, implicitly finding that financial records are private affairs. *See McKinney*, 148 Wn.2d at 32 (driver's licensing records are not private because they "reveal little about a person's associations, *financial dealings*, or movements") (emphasis added); *In re Personal Restraint of Maxfield*, 133 Wn.2d 332, 354, 945 P.2d 196 (1997) (Guy, J., dissenting) ("Electrical consumption information, unlike telephone or *bank records* or garbage, does not reveal discrete information about a customer's activities.") (emphasis added).

Because Miles' banking records were private, the only question is whether obtaining them via an administrative subpoena without notice to him disturbed his private affairs without "authority of law." The trial court correctly held that such a subpoena is not "authority of law," but incorrectly found that Miles was not protected by Article 1, Section 7 because he was part of a "pervasively regulated" industry.

## B. An Administrative Subpoena Without Notice to the Subject Is Not "Authority of Law"

This Court has consistently viewed warrants as the touchstone against which the validity of any disturbance of private affairs must be measured. *See, e.g.*, *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) ("Our analysis of art. I, § 7 of the Washington Constitution begins with the proposition that warrantless searches are unreasonable *per se*."). As a result, it is not surprising that the present case is apparently the first time Washington courts have been called upon to determine the validity of a subpoena under Article 1, Section 7; the normal method of obtaining evidence prior to filing criminal charges is through a warrant.

The starting point for an examination of the scope of "authority of law" is *Gunwall*:

> Generally speaking, the "authority of law" required by Const. art. 1, 7 in order to obtain records includes authority granted by a valid, (i.e., constitutional) statute, the common law or a rule of this court. In the case of long distance toll records, "authority of law" includes legal process such as a search warrant or subpoena.

*Gunwall*, 160 Wn.2d at 68-69 (citing *State v. Fields*, 85 Wn.2d 126, 530 P.2d 284 (1975); *State v. Hunt*, 450 A.2d 952 (N.J. 1982); George R. Nock, *Seizing Opportunity, Searching for Theory: Article 1, Section 7*, 8 Puget Sound L. Rev. 331 (1985)).

At first blush, this would seem to indicate that all subpoenas qualify as authority of law. A closer examination of the context and history, however, reveals that *Gunwall* had a much narrower point. None of the authorities cited in *Gunwall* for this point so much as mention subpoenas. Instead, one of the questions at the time was the extent of the authority of the judicial branch. *See, e.g., Fields, supra* (upholding search warrants issued pursuant to court rule). Similarly, the cited law review discussed multiple theories of "authority of law," including whether or not the judiciary could be a source of that authority. *See* Nock, *supra.* This line in *Gunwall* must be read, therefore, as an illustration of authority provided by court rules.

As such, it refers solely to search warrants and subpoenas issued according to court rules—not the broader realm of administrative subpoenas. Subpoenas are authorized by Washington court rules in only a few instances, as part of the normal discovery associated with a filed proceeding: as part of a civil action, *see* CR 45, as part of a criminal proceeding after arraignment, *see* CrR 4.8, and issued by a court in place of a search warrant, *see* CrR 2.3(f)(2); RCW 10.79.015(3). *Gunwall* did not contemplate wider use of subpoenas in pre-arrest investigations to circumvent the judicial oversight of searches that is provided by search warrants.

This Court reiterated the importance of judicial oversight as a necessary component of constitutional "authority of law" in *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999). It adopted the view espoused two years earlier by Justice Madsen:

> Except in the rarest of circumstances, the 'authority of law' required to justify a search pursuant to article I, section 7 consists of a valid search warrant or subpoena *issued by a neutral magistrate*. This court has never found that a statute requiring a procedure less than a search warrant or subpoena constitutes 'authority of law' justifying an intrusion into the 'private affairs' of its citizens.

*Id.* at 352 n. 3 (quoting *In re Personal Restraint of Maxfield*, 133 Wn.2d 332, 345-46, 945 P.2d 196 (1997) (Madsen, J., concurring)) (emphasis added).

The *Ladson* requirement of subpoena issuance by a neutral magistrate is compatible with *Gunwall's* limited view of subpoenas authorized by court rule. Both are concerned with assuring judicial oversight of searches—*Ladson* through the direct requirement of a neutral magistrate, and *Gunwall* through limiting subpoenas to extant proceedings supervised by a court. There may be additional, equally protective, procedures to prevent unreasonable intrusions by the state into a person's private affairs, but that question need not be decided here. The privacy interest in financial records is at least as great as the privacy interest in telephone records, so the procedural protections necessary for access to

banking records must be at least those afforded by *Gunwall* for access to telephone records.

The procedure actually used in this case, however, contained no protective procedures whatsoever. An investigative agency issued the subpoena, with no neutral oversight. The agency requested that the bank not notify the subject of the requested records. Although there may have been a formalistic opportunity for judicial oversight—the bank could have moved to quash the subpoena—that opportunity was hollow at best. The only person who had an actual interest in his own privacy and thus an incentive to seek judicial oversight, Mr. Miles, was prevented from learning of the existence of the subpoena until long after his private records had been delivered to the state.

As an alternative to prior approval by a magistrate, the trial court in this case found that prior notice to the subject of subpoenaed records would suffice to protect that person's privacy interest. Such a procedure would at least allow the subject to bring a motion to quash the subpoena. This Court need not decide in the present case, however, whether notice to the subject of a subpoena directed to a third party is sufficient procedural protection to qualify as "authority of law" under Article 1, Section 7; it need only hold that an administrative subpoena issued without application

to a neutral magistrate and without notice to the affected party, as present here, is not such authority.

The State argues that a notice requirement would undermine the agency's investigatory capability. Brief of Respondent at 12-13. This argument misses the point—neither the trial court, the defendant, nor *amicus* has ever suggested that a suspect must always be notified of a pending investigation and demand for records. Instead, notice to the subject was one *option* available to the agency in this case. Since the entire point of notice to the subject is to enable judicial oversight, the agency could have simply dispensed with notice to Miles and gone directly to a court, asking for issuance of either a subpoena or warrant. It seems likely that the evidence the agency had at hand—the complaint, cancelled checks, and stationery—would have provided probable cause for a magistrate to issue the requested subpoena or warrant.

The experience of other jurisdictions also demonstrates that a notice requirement is both reasonable and workable. The Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 requires federal agencies to notify the subject of financial records prior to serving either an administrative or judicial subpoena. 12 U.S.C. § 3405(2); 12 U.S.C. § 3407(2). Similar statutes exist in many states. *See, e.g.*, Cal. Gov't Code §§ 7470-7476; Conn. Gen. Stat. § 36a-43(a); 205 Ill. Comp. Stat.

5/48.1(d); La. Rev. Stat. § 6:333(C); Me. Rev. Stat. tit. 9-B, § 163; N.C. Gen. Stat. § 53B-5; Okla. Stat. tit. 6, § 2204. Colorado requires notice as matter of constitutional law. *See People v. Mason*, 989 P.2d 757 (Colo. 1999). There is no indication that investigations are hindered by the notice requirement in any of these jurisdictions. Considering Washington's long-standing status as one of the country's most privacy-protective states, it would indeed be strange if all of these other states—and the federal government—protected banking records to a greater degree than our state.

In sum, the trial court correctly found that access to a person's banking records without any opportunity for judicial oversight—neither application to a neutral magistrate nor notice to the affected person—is a disturbance of his private affairs without authority of law, in violation of Article 1, Section 7.

### C. Pervasive Regulation Does Not Create a Broad Exception to the Protections Required by Article 1, Section 7.

The trial court erroneously decided that the normal protections of Article 1, Section 7 did not apply to Miles because of his alleged participation in a pervasively regulated industry. There are several flaws in the court's decision.

### 1. Pervasive Regulation Has Not Been Recognized Under Article 1, Section 7

The United States Supreme Court first recognized an exception to the Fourth Amendment's warrant requirement based on participation in a pervasively regulated industry in 1972. *See United States v. Biswell*, 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972) (finding firearms dealers are pervasively regulated). The pervasive regulation exception has not, however, ever been recognized under Article 1, Section 7.

There have been only a few state cases dealing with pervasively regulated industries, and most were decided before the development of a separate state constitutional jurisprudence. *See Washington Massage Foundation v. Nelson*, 87 Wn.2d 948, 558 P.2d 231 (1976) (striking down unbounded searches of massage parlors); *State v. Mach*, 23 Wn. App. 113, 594 P.2d 1361 (1979) (upholding search of commercial fishing boat); *State v. Rome*, 47 Wn. App. 666, 736 P.2d 709 (1987) (approving inspection of commercial fishing boat); *State v. Thorp*, 71 Wn. App. 175, 856 P.2d 1123 (1993) (finding forest products industry is not pervasively regulated). This Court's closest examination of the pervasive regulation exception was in a challenge to drug testing of nuclear plant maintenance workers. *See Alverado v. WPPSS*, 111 Wn.2d 424, 759 P.2d 427 (1988). Although the plaintiffs in *Alverado* raised both state and federal

constitutional claims, the Court held "the doctrine of preemption renders our state constitution irrelevant to the issues presented by this drug testing program and the case must be decided on Fourth Amendment grounds alone." *Id.* at 441.

The case that comes closest to examining pervasive regulation and Article 1, Section 7 involved pharmacy records. *See Murphy v. State*, 115 Wn. App. 297, 62 P.3d 533 (2003). *Murphy* upheld a state statute allowing warrantless access to pharmacy records, finding that the long-standing statute limited the expectation of privacy in those records. Although not clearly stated in the opinion, one could interpret *Murphy* as finding a combination of pervasive regulation, authority of law, and limited expectations of privacy in pharmacy records. Its precedential value under the state constitution is quite limited, as it erroneously held that the protections of the Fourth Amendment and Article 1, Section 7 were coterminous. *See id.* at 311-12. By so doing, *Murphy* ignored the broad swath of state cases finding heightened state protection for a variety of records. *Murphy* is also not binding on this court, as it was decided by the Court of Appeals.

Thus, none of these cases provide support for the trial court's decision that pervasive regulation is an exception to Article 1, Section 7. *Amicus* respectfully requests that this Court not create such an exception

today. Such an exception would turn our constitutional scheme of checks and balances on its head. As *Ladson* stated,

> This court has never found that a statute requiring a procedure less than a search warrant or subpoena constitutes 'authority of law' justifying an intrusion into the 'private affairs' of its citizens. This defies the very nature of our constitutional scheme and would set a precedent of legislative deference that I am unwilling to accept in our state's constitutional jurisprudence. It is the court, not the Legislature, that determines the scope of our constitutional protections.

*Ladson*, 138 Wn.2d at 352 n. 3 (quoting *In re Personal Restraint of Maxfield*, 133 Wn.2d 332, 345-46, 945 P.2d 196 (1997) (Madsen, J., concurring)). If the Legislature lacks constitutional authority to intrude into private affairs via an isolated statute, there is no reasoned basis to allow the intrusion simply because the Legislature enacts a web of pervasive regulations. The pervasive regulation doctrine would create an end run around Article 1, Section 7.

The breadth of industries that are pervasively regulated, or argued to be so, shows that the exception would quickly swallow the rule. A sampling of cases around the country demonstrates the few industries thus far cited in Washington are but the tip of the iceberg. *See, e.g., New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987) (junkyards); *Donovan v. Dewey*, 452 U.S. 594, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981) (mining); *Leroy v. Illinois Racing Bd.*, 39 F.3d 711 (7th Cir.

1994) (horse racing); *Schwartz v. Pridy*, 94 F.3d 453 (8th Cir. 1996) (auto parts); *United States v. Dominguez-Prieto*, 923 F.2d 464 (6th Cir. 1991) (commercial trucking); *United States v. Johnson*, 994 F.2d 740 (10th Cir. 1993) (taxidermy); *Rush v. Obledo*, 756 F.2d 713 (9th Cir. 1985) (family day care homes); *People v. Wells*, 136 P.3d 810 (Cal. 2006) (all automobiles); *Hill v. Com.*, 624 S.E.2d 666 (Va. App. 2006) (goat cheese); *United States v. Acklen*, 690 F.2d 70 (6th Cir. 1982) (pharmacies). The present case certainly does not create a compelling case for breaching our state constitutional privacy protection in such a dramatic way.

### 2. Searches of Pervasively Regulated Industries Must Be Strictly Limited to the Business Sphere

If this Court does nonetheless recognize a pervasive regulation exception under Article 1, Section 7, that exception must be at least as limited as it is under the Fourth Amendment. Any warrantless inspections or records requests must be "authorized by a statute which sufficiently delineates the scope, time and place of inspection. And the authorized inspection must be relevant to the purposes of the statute." *Washington Massage Foundation v. Nelson*, 87 Wn.2d 948, 953, 558 P.2d 231 (1976).

Most significantly, any regulatory inspection must be limited to the regulated business; there must be a bright line prohibition on using regulatory searches to intrude into the personal sphere. The Ninth Circuit

addressed this point when considering inspections of day cares operated out of people's homes. It held that such inspections must be limited to the portions of the homes actually used for child care, and only during operating hours:

> The state's warrantless inspection authority should not extend beyond the "closely regulated business" in which the provider engages. Warrantless inspections are permissible in those portions of the provider's home where day care activities take place only when the home is being operated as a family day care business. Such inspections, however, cannot be justified in purely private contexts.

*Rush v. Obledo*, 756 F.2d 713, 721 (9th Cir. 1985).

Thus, even assuming pervasive regulation allows the Securities Division to access some records without judicial oversight, the Division is limited to examining records related to the securities industry, not unrelated personal records. Of course, if the Division had reason to believe personal records were relevant, it could simply have gone to a magistrate for a warrant to obtain all records. Choosing instead to rely on an assumed pervasive regulation exception, the Division was required to strictly limit its request to business records.

The subpoena issued in the present case failed to pay even lip service to this requirement. It cast the broadest net possible, demanding records pertaining to *all* accounts used by Miles, whether for business or personal uses—potentially including personal accounts with absolutely no

connection to the complaint under investigation. Nor did the Division attempt to limit records within the requested accounts, instead asking for statements listing all transactions. Although it initially requested details only on deposits greater than $1000, no attempt was made to segregate deposits related to the alleged investment activity, such as limiting the request to deposits made out to MM Miles, the name under which the Division believed Miles conducted an investment business. As issued and served, without notice to Miles, the subpoena in this case violated the privacy guarantee afforded by Article 1, Section 7—even if this Court finds the existence of a pervasive regulation exception.

The problems with the subpoena illustrate why judicial oversight is needed. If the Division had gone to a neutral magistrate to issue the subpoena—or had even given Miles a chance to do so by providing notice—it is likely the magistrate would have discovered the deficiencies. The magistrate could then have appropriately narrowed the scope of the requested records, to ensure that only relevant business records were requested. Instead, by proceeding without judicial assistance at a time when it was still possible to correct problems, the Division brought this constitutional confrontation upon itself.

### 3. Investigations of Pervasively Regulated Industries Require Judicial Oversight

A slight twist on the facts of the current case demonstrate a wider problem with the pervasive regulation exception. At the time the Division issued the subpoena, it suspected, based on a single complaint, that Miles was in the securities industry. Let us suppose that the banking records obtained by the Division had shown that the complaint was false, and that Miles was not, in fact, a securities trader. In such a scenario, the Division would have invaded Miles' privacy with no justification, since the pervasive regulation exception can hardly apply to a person who is not a part of that industry. And Miles would have had no recourse for this invasion of privacy—in fact, he may well never have discovered it even took place, since he was not notified of the subpoena. An investigator's potentially erroneous judgment is exactly why judicial oversight is necessary; just as probable cause by itself does not justify a search without a warrant, a belief that a subject is regulated should not justify a subpoena without at least the opportunity for judicial oversight.

Approving the subpoena in the present case would encourage the Division to issue future subpoenas with little concern as to whether the subject is actually a securities trader. If the subject is a securities trader, the Division will use the pervasive regulation exception, and if the subject

turns out not to be a trader, there will likely be no after-the-fact challenge to the subpoena. At best, this will lead to considerable *ex post facto* wrangling over whether or not subjects are sufficiently regulated to be unprotected by Article 1, Section 7. And at worst, the overall result would allow the Division to rummage through banking records of just about any Washingtonian.

Such unlimited and unsupervised access to Washingtonians' banking records is not what the Legislature intended when it granted subpoena power for securities investigations, now codified at RCW 21.20.380. A strong argument exists that the Legislature intended such subpoenas to be issued to subjects of investigation, not third parties. The original statute included a provision for a claim of self-incrimination by the target of subpoenas, a provision that is only meaningful if the subpoena is issued to the subject. *See* Laws of 1959, ch. 282, § 38. That procedure allows judicial oversight, because the subject can move to quash the subpoena. Although the self-incrimination provision was removed in 1975, *see* Laws of 1975, 1st Ex. Sess., ch. 84, § 22, there is no reason to believe the Legislature simultaneously abandoned its desire for judicial oversight of access to banking records. To the contrary, just two years later, the Legislature reaffirmed its concern about the privacy of banking records when it passed a confidentiality statute for banking

information held by the Department of Financial Institutions—and that statute required notice to the subject of that information before making it available to criminal investigators. *See* Laws of 1977, Ex. Sess., ch 245, § 1 (now codified as RCW 30.04.075).

That scheme reflects the best view of how regulated industries fit into the constitutional scheme of privacy protection. An unregulated or minimally regulated business can be investigated solely through the use of search warrants for criminal investigations and subpoenas as part of the discovery process in an existing civil action. In contrast, the Legislature provides subpoena power to regulatory agencies for highly regulated industries—but that power extends only to subpoenas issued with either judicial oversight or notice to the subject of the subpoenas.

## CONCLUSION

For the foregoing reasons, the ACLU respectfully requests the Court to reverse the trial court's order, and hold that Article 1, Section 7 prohibited access to Miles' bank records without either judicial oversight or notice to Miles.

Respectfully submitted this 10th day of October 2006.

By _____
Douglas B. Klunder, WSBA #32987

Attorney for *Amicus Curiae*
American Civil Liberties Union of
Washington