No. 76800-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY ENRIQUE JORDEN,

Petitioner.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Other State Cases

Constitutional Provisions

Statutes and Ordinances

Other Authorities

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, prohibiting unreasonable interference in private affairs. It has participated in numerous constitutional and privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

STATEMENT OF THE CASE

This case asks whether Article 1, Section 7 of the Washington State Constitution allows law enforcement to conduct random suspicionless searches of a hotel's guest registration records and enter that information into law enforcement computers to conduct computerized police surveillance.

On March 15, 2003, with absolutely no suspicion that any hotel guest was involved in any criminal activity or other wrongdoing, the Lakewood police searched a hotel's guest register—a register whose existence is mandated by state law regulating business practices. RCW 19.48.020. The search was part of an ongoing fishing expedition:

the Lakewood police regularly conduct random inspections of hotel guest registries and run those names through a law enforcement computer. In the present case, the police found Mr. Jorden's name on the hotel register; they entered his name into the law enforcement computer, and this search revealed outstanding warrants for Mr. Jorden. Police went to Mr. Jorden's hotel room, and entered it without his consent to arrest him. In the process, police discovered drugs and paraphernalia in his hotel room. *See State v. Jorden*, 126 Wn. App. 70, 71-72, 107 P.3d 130 (2005).

After being charged with unlawful possession, Mr. Jorden moved to suppress the evidence of drugs as fruit of an unlawful search of the hotel register. The motion was denied, Mr. Jorden was subsequently convicted, and he appealed the conviction. The Court of Appeals held that searching the hotel register and running names through a law enforcement computer was not an invasion of private affairs because "[c]hecking into the motel was a very public act." *Id.* at 74.

ARGUMENT

Article 1, Section 7 of the Washington Constitution guarantees that "[n]o person shall be disturbed in his private affairs." 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.*

The proper analysis under Article 1, Section 7 "focuses on those privacy interests which citizens of this state have held, and should be entitled to hold," regardless of "advances in surveillance technology." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984); *see also State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994); *State v. Jackson*, 150 Wn.2d 251, 260, 76 P.3d 217 (2003). The examination of hotel registers, and computerized matching of guest names against a law enforcement database, is a type of surveillance that strikes at the heart of our modern society, which depends on the ability to travel freely. It is also exactly the type of suspicionless surveillance that Article 1, Section 7 prohibits.

A. Staying in a Hotel Is a Private Affair

The State argues that guests have no privacy interest in hotel registration information, and bolsters that argument with citations to several cases in which such information was used as evidence. Brief of Respondent at 7-8. In no case cited, however, is there any indication that a hotel register was examined without articulable suspicion of criminal

activity. *Amicus* is unaware of any case in Washington state courts where the type of surveillance used in this case has previously been at issue.

The Court of Appeals correctly determined that the question facing it was whether police "disturb the guest's 'private affairs'" when they search hotel guest registers without suspicion of wrongdoing. *Jorden*, 126 Wn. App. at 73. The court decided that the important factor to consider is "the degree to which the intrusion is likely to reveal affairs conducted in private, as opposed to affairs conducted in public." *Id.* Accordingly, it held the fact of checking into the hotel and going to the hotel room was not a private affair, as it "was a very public act that anyone could observe." *Id.* at 75.

This rule conflicts with this Court's decision in *State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003) (holding the warrantless installation and use of GPS tracking devices to be a violation of Article 1, Section 7). *Jackson* explicitly rejected the theory that the GPS device merely acted as an observer of acts committed in public and thus could not intrude on private affairs. The method used to obtain information is as significant as the type of information obtained: "the question was not whether what the police learned by use of the transmitter was exposed to public view, but whether use of the device can be characterized as a search." *Id.* at 263.

The comparison to the present situation is striking. Although police *could* have followed Mr. Jorden, or *could* have kept the hotel under constant observation, they did not actually do so. Instead, they searched the hotel register and ran all names through a law enforcement computer. In fact, it is doubtful that the police would have apprehended Mr. Jorden even if they had kept the hotel under constant observation. The officers were not specifically looking for Mr. Jorden; instead, they were looking for anyone with outstanding warrants. To accomplish this through conventional surveillance, the officers would have had to know not just the name, but also the *appearance* of every person on the warrants list, and be able to recognize them during the potentially brief period when they walked into the hotel—it's not as if people regularly wear visible name tags.

The only support the Court of Appeals cited for its limited view of "private affairs" was this Court's opinion in *State v. McKinney*, 148 Wn.2d 20, 60 P.3d 46 (2002). *McKinney* held that there is no disturbance of private affairs when police see a vehicle's license plate in a public place and use the number to retrieve information about the vehicle's owner from a Department of Licensing database. An examination of the *McKinney* reasoning shows, however, that its holding is quite narrow, and inapplicable to the present situation.

The Court looked at a variety of factors relating to Department of Licensing records, and held they may be searched by law enforcement without individualized suspicion only because those records meet *all* of the following criteria: the records were created by statute with a law enforcement or public disclosure purpose, *see id.* at 27-28; the subjects of the records voluntarily provide information (by choosing to drive), *see id.* at 31; the public is well aware that the records are available for law enforcement purposes, *see id.* at 30; *and* the records do "not reveal intimate details of the [subjects'] lives, their activities, or the identity of their friends or political and business associates," *id.* In addition, although not explicitly used as part of the reasoning, one must consider the context: license plates are visibly displayed on all vehicles, with the obvious purpose of allowing easy vehicle identification.

Only one of these factors exists in the present case—people voluntarily provide information to hotels in order to rent a room. But there is no equivalent of a visible license plate showing hotel registration; the information contained in hotel records may be quite sensitive, as discussed below; hotel records are created for business purposes, not law enforcement purposes; and the public is not aware that police access those records—to the contrary, people expect their hotel stays to be private.

McKinney's holding regarding licensing information plates simply doesn't extend to hotel registration.

Better guidance for whether hotel registration is a private affair can be found in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), which held that records of telephone calls and dialing information provided to the telephone company are private affairs. Significant factors in this determination were that a "telephone is a necessary component of modern life," *id.* at 67 (quoting *People v. Sporleder*, 666 P.2d 135, 141 (Colo.1983)), and that information was provided to the telephone company "for a limited business purpose and not for release to other persons for other reasons," *id.* at 68 (quoting *State v. Hunt*, 91 N.J. 338, 347, 450 A.2d 952 (1982)).

Gunwall announced a general rule applying to all records, and a specific rule applying to telephone records:

> 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.

Id. at 68-69 (citations omitted).[1]

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[1] *In re Personal Restraint of Maxfield*, 133 Wn.2d 332, 945 P.2d 196 (1997), applied the *Gunwall* rule and reasoning to electrical consumption records, and held that suspicionless police examination of power records was unlawful. Unfortunately, *Maxfield*

Hotel registrations are a form of "records," so they fall squarely within the general rule. The State, however, does not assert *any* authority of law (as defined in *Gunwall*) allowing law enforcement to obtain hotel registration records: no statute, no warrant, no common law, and no court rule.

Hotel records also have the same characteristics that *Gunwall* viewed as significant for telephone records. Registration information is provided to hotels for the very specific and limited purpose of renting rooms; it is not intended to be released for unrelated purposes. Travel and hotel stays, for both business and leisure purposes, are an integral part of modern American life. The travel industry is the third largest retail industry in the United States, and is responsible for more than 10% of American jobs. American Hotel and Lodging Association, *2005 Lodging Industry Profile* 2-3 (2005). The hotel industry itself has revenues of more than $100 billion, with stays about evenly divided between business and leisure. *Id.* at 2, 4. Travel is necessary to participate modern American life,

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has occasioned confusion among the lower courts because only a plurality joined in the lead opinion. *Compare, e.g., Jorden*, 126 Wn. App. at 73 (*Maxfield* held that power consumption records are not private affairs) *with State v. Dane*, 89 Wn. App. 226, 237 n. 15, 948 P.2d 1326 (1997) (Hunt, J., dissenting) (*Maxfield* held that there is "an expectation of privacy in public utility records."). *Amicus* respectfully requests this Court to unambiguously adopt *Maxfield's* plurality opinion to dispel this confusion.

and even more essential to allow Americans to participate in the burgeoning global economy.

This Court's precedent therefore compels the conclusion that hotel registration records are a private affair, protected by Article 1, Section 7.

B. Hotel Guest Registers Contain Sensitive Personal Information

With its unwarranted focus on "affairs conducted in public," *Jorden*, 126 Wn. App. at 73, the Court of Appeals failed to adequately evaluate the intimate information that can be revealed from an examination of hotel registers. It is not merely the contents of the information present in the register (name, address, and the like) that is important; equally significant is *where* that information is found (in a specific hotel's records of current occupants). That is precisely why law enforcement has chosen to access a hotel register rather than a phone book. The type of information explicitly included may be the same in the two cases, but far more information may be gleaned from the context of a hotel register—both current whereabouts and potentially sensitive information bearing on a person's intimate associations, or financial, political, or even medical status.

Guest registrations at a hotel adjacent to a convention center will have a high correlation with attendees of that convention, revealing the

guest's profession, hobbies, or ideological and political leanings, depending on the type of conference. For example, the ACLU plans to host a national membership conference in Seattle in 2007. The ACLU could not constitutionally be required to directly disclose our membership list, or reveal the membership status of an individual. *See NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). Under the State's theory, however, law enforcement will be allowed to discover the identities of our members who attend the conference (by examining the hotel registers), without any judicial oversight or suspicion of wrongdoing.

Similarly, many specialized medical facilities—especially those which offer long-term or intensive care, such as mental health or cancer treatment—have nearby or even integrated hotel facilities for visitors and family members of patients; those family members do not expect the existence of a family medical problem to be disclosed to law enforcement. Of particular concern are hotels adjacent to drug treatment or mental health facilities. The very fact of admission to such a facility is confidential, RCW 71.05.390, but could be deduced from looking at hotel registration records.

Basic socioeconomic status can be ascertained with a high degree of accuracy simply by knowing which hotel a guest chooses to frequent;

the clientele of a Ritz-Carlton has a much different demographic than the guests of a Motel 6. Within the Ritz-Carlton itself, there are significant differences between those who stay in the presidential suite and those who stay in the least expensive room. And none of this information is any business of the government's if there is no suspicion of wrongdoing.

Even details of intimate association can be determined from guest registers by examining which people are registered in the same or adjacent rooms. The example that springs to mind is the discreet extramarital romantic affair, but other private relationships are also at risk, including "closeted" same-sex relationships. For that matter, hotel registrations could also reveal marital discord without a third party being involved—consider a married couple that checks into two rooms instead of one.

Confidential business relationships are also at risk; sensitive business negotiations often require one or both parties to travel to the other's headquarters (and stay in nearby hotels). Those businessmen should not need to check in with pseudonyms—if the hotel even allows that—in order to preserve the secrecy surrounding negotiations.

Basic identifying information is also more sensitive than the Court of Appeals realized. More than 20 years ago, this Court found unconstitutional a statute requiring people to identify themselves to law enforcement officers upon request. *See State v. White*, 97 Wn.2d 92, 640

P.2d 1061 (1982). Similarly, it is unconstitutional for an officer to require identification from a passenger in a lawfully stopped car, absent reasonable suspicion that the passenger is involved in criminal conduct. *See State v. Larson*, 93 Wn.2d 638, 611 P.2d 771 (1980).

The State's theory would allow simple circumvention of this Court's constitutional holdings by laundering the demand for identification through a third party. The State cannot require hotel guests to provide identification to the hotel operator, as RCW 19.48.020 does,[2] if that identification is then going to be accessed by law enforcement with no suspicion of criminal wrongdoing. Surely, a hotel guest has at least as great a privacy interest in his or her identity as a pedestrian or car passenger.

C. Washingtonians Are Entitled to Participate in Modern Society Without Fear of Suspicionless Surveillance

This Court has examined the relationship between Article 1, Section 7 and modern life on a number of occasions, and developed two separate principles. First, Washingtonians are entitled to make use of facilities and services "necessary to the proper functioning of modern

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[2] Although not raised as an issue by either party, the constitutionality of RCW 19.48.020 is doubtful. This Court struck down a similar requirement applied to massage businesses 20 years ago, and the reasoning seems equally applicable to hotels. *See Myrick v. Board of Pierce County Com'rs*, 102 Wn.2d 698, 677 P.2d 140, 687 P.2d 1152 (1984).

society" without sacrificing their right to privacy. *State v. Boland*, 115 Wn.2d 571, 581, 800 P.2d 1112 (1990) (holding unconstitutional a warrantless search of garbage left by the curb for collection); *see also Gunwall*, 106 Wn.2d at 67-69 (recognizing telephones are necessary for modern life and holding unconstitutional a warrantless examination of telephone records). Second, the privacy rights of Washingtonians do not diminish due to "advances in surveillance technology." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984); *see also State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994) (holding unconstitutional the warrantless use of thermal imaging devices); *State v. Jackson*, 150 Wn.2d 251, 260, 76 P.3d 217 (2003) (holding unconstitutional the warrantless use of GPS tracking devices).

Both of these principles are implicated by the warrantless examination of hotel registers and entry of registration information into law enforcement computers. As discussed above, use of hotels is clearly an essential component of participation in modern American society. Police demands for registration information interfere with hotels' regular business operations and raise concern among guests when they become aware of the demands. On more than one occasion, guests have checked out of a hotel early, either because they were upset about the access to

their personal information or because police presence has created the impression that the hotel was unsafe.

Less obvious, but equally significant, is the nature of the advanced surveillance technology at issue in the present case. Computerized analysis of information from diverse sources, sometimes referred to as "data mining" or "data surveillance," is the fastest growing form of surveillance today. In today's world, virtually every action a person takes is recorded in some form, and entered into a database somewhere. Every modern form of payment—credit cards, electronic payments, checks, PayPal, wires, etc.—creates a record of the transaction. Every online interaction creates multiple log entries—whether sending or receiving email, participating in chat rooms or communicating with instant messaging programs, blogging, or simply looking at Web sites. Records are made of virtually every interaction with government agencies, from property registration to licenses and permits to interactions with police officers to communications with elected officials. Every book, magazine or newspaper purchased, every book borrowed from a library, every interaction with a doctor, and every contribution made to a charitable organization or political candidate all generate data entries in some computer.

The State's theory would allow unlimited access to any database of registration information maintained by any hotel. For that matter, if there

truly is no privacy interest in such records, there is no reason to believe that law enforcement is limited to a one-time examination of the records. Instead, the government could easily choose to routinely gather such records from all hotel facilities in the state and accumulate those records in a governmental database. Over time, that database would reveal a detailed picture of a person's travel and meetings with other individuals, even ignoring the other particularly sensitive information discussed above.

Since the State's reasoning on hotel records could easily apply to other transactional records as well, the State apparently believes that people have no privacy interest in most of the myriad records they generate each day. For example, the State's argument would imply that because an officer *could* observe a customer buying a Playboy magazine at a bookstore, there must be no privacy interest in any records of purchases from bookstores. In actuality, courts have recognized a very strong privacy interest in such records, requiring a compelling government interest in order to obtain those records. *See, e.g., Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002).

Even 30 years ago, before the tremendous growth of computerization, Justice Douglas recognized the information that could be gleaned from transactional records:

> It would be highly useful to governmental espionage to have like reports from all our bookstores, all our hardware and retail stores, all our drugstores. These records too might be 'useful' in criminal investigations.
>
> One's reading habits furnish telltale clues to those who are bent on bending us to one point of view. What one buys at the hardware and retail stores may furnish clues to potential uses of wires, soap powders, and the like used by criminals. A mandatory recording of all telephone conversations would be better than the recording of checks under the Bank Secrecy Act, if Big Brother is to have his way. The records of checks—now available to the investigators—are highly useful. In a sense a person is defined by the checks he writes. 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*. These are all tied to one's social security number; and now that we have the data banks, these other items will enrich that storehouse and make it possible for a bureaucrat—by pushing one button—to get in an instant the names of the 190 million Americans who are subversives or potential and likely candidates.

California Bankers Ass'n v. Shultz, 416 U.S. 21, 84-85, 94 S. Ct. 1494, 39 L. Ed. 2d 812 (1974) (Douglas, J., dissenting).

This vision of the future has come to pass. Conventional surveillance, trailing a person, is passé for private investigators. Today, "the majority of [private investigator] work takes place on a computer;" "by searching the online services his company subscribes to, [an investigator] can get the skinny—court records, motor vehicle information, property filings, even photographs—on almost anyone." Warren St. John, *Here Come The Glamour Gumshoes*, N.Y. Times, Oct.

19, 2003, at 9.1. The constitution might not reach this sort of data surveillance by private parties, but Article 1, Section 7 bars the government from invading private affairs in this manner.

The State's theory in this case would place no constitutional limits on data surveillance. This Court's precedent leads to an entirely different result. All of the records described above are generated as an incident of participation in modern life, and remain part of the individual's private affairs vis-à-vis the government. The citizens of this state are entitled to hold privacy interests in these affairs, and not be subject to advanced computerized data surveillance by law enforcement without a warrant or any suspicion of wrongdoing.

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests the Court to reverse the Court of Appeals and hold that suspicionless searches of hotel registers and entry of registration information into law enforcement computers is an unreasonable governmental intrusion into private affairs, and violates Article 1, Section 7 of the Washington State Constitution.

Respectfully submitted this 20th day of December 2005.

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