55 F.3d 436
United States Court of Appeals,
Ninth Circuit.

Jerry Edmon **FORDYCE**, Plaintiff–Appellee,
v.
CITY OF **SEATTLE**, Defendant–Appellant.
Jerry Edmon **FORDYCE**, Plaintiff–Appellant,
v.
CITY OF **SEATTLE**; M.S. Donnelly; C. Villagracia, Defendants–Appellees. (Two Cases.)
Jerry Edmon **FORDYCE**, Plaintiff–Appellee,
v.
CITY OF **SEATTLE**, Defendant–Appellant,
and
M.S. Donnelly; C. Villagracia, Defendants.

Nos. 93–35824, 93–35840, 93–35991 and 93–36020.
|
Argued and Submitted Oct. 6, 1994.
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Submission Withdrawn Oct. 20, 1994.
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Resubmitted Feb. 27, 1995.
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Decided May 16, 1995.

Synopsis
Action was brought against city and eight of its police officers by plaintiff who was arrested while videotaping public demonstration. On motions for summary judgment, the United States District Court for the Western District of Washington, William L. Dwyer, J., 840 F.Supp. 784, held that police officers were entitled to qualified immunity based on reasonable belief that it was lawful to arrest plaintiff for having recorded private conversation in violation of a Washington statute, that city was entitled to dismissal of § 1983 claims absent evidence that a failure to train police officers occurred or that policy of city caused deprivation of constitutional rights, that judgments would be granted declaring that statute in question does not prohibit recording of conversation held in public street, within earshot of passersby, by means of readily apparent recording device. Parties appealed. The Court of Appeals, Trott, Circuit Judge, held that: (1) material issue of fact as to whether plaintiff was assaulted and battered by police officer in attempt to prevent or dissuade plaintiff from exercising his First Amendment rights to film matters of public interest precluded summary judgment for officer on plaintiff's § 1983 claim or supplemental state law claims of assault and battery; (2) all individual officers were entitled to qualified immunity with respect to plaintiff's § 1983 damages claims relating to his arrest under Washington statute; (3) city was not liable for § 1983 damages claims based on arrest of plaintiff while he was videotaping public demonstration under Washington statute; and (4) failing to provide state an adequate opportunity to be heard when district court contemplated granting an unrequested declaratory judgment ruling on the constitutionality of Washington statute was an abuse of discretion.

Affirmed in part; reversed in part; vacated in part; remanded.

West Headnotes (10)

[1] **Federal Civil Procedure**
Civil rights cases in general
Federal Civil Procedure
Tort cases in general

Material issue of fact as to whether plaintiff, who was arrested while videotaping public demonstration, was assaulted and battered by police officer in attempt to prevent or dissuade plaintiff from exercising his First Amendment rights to film matters of public interest precluded summary judgment for officer on plaintiff's § 1983 claim or supplemental state law claims of assault and battery. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

46 Cases that cite this headnote

[2] **Civil Rights**
Sheriffs, police, and other peace officers

All individual police officers were entitled to qualified immunity with respect to plaintiff's § 1983 damages claims relating to his arrest under Washington statute prohibiting the recording of private conversations; at time of arrest, whether

and under what circumstances conversations in public streets could be deemed private within meaning of privacy statute was not yet settled under state law and under facts, reasonable officer could have believed plaintiff was recording private conversations in violation of statute. 42 U.S.C.A. § 1983; West's RCWA 9.73.030.

4 Cases that cite this headnote

[3] **Civil Rights**
Criminal law enforcement; prisons

City was not liable for § 1983 damages claims based on arrest of plaintiff while he was videotaping public demonstration under Washington statute prohibiting the recording of private conversations; plaintiff failed to show that city was culpable by virtue of policy statement, ordinance, regulation, or decision officially adopted and promulgated by city that was itself unconstitutional or that any city policy or any decision by governmentally authorized decisionmaker was moving force behind any deprivation of his constitutional rights. 42 U.S.C.A. § 1983; West's RCWA 9.73.030.

1 Cases that cite this headnote

[4] **Federal Courts**
Telecommunications

Plaintiff sufficiently demonstrated the existence of a concrete controversy regarding Washington statute prohibiting the recording of private conversations such that district court had subject matter jurisdiction; at time plaintiff was arrested for violation of statute, Washington's highest court had not interpreted statute to permit recording of audible conversations among private citizens on public street, as plaintiff argued statute should have been read, plaintiff was still uncertain and insecure regarding his right to video and audio tape private persons on public street, and plaintiff said he would continue to participate in such activities. U.S.C.A. Const. Art. 3, § 2; West's RCWA 9.73.030.

2 Cases that cite this headnote

[5] **Declaratory Judgment**
Subjects of relief in general

Assuming declaratory relief was issue properly before district court, plaintiff, arrested under Washington statute prohibiting the recording of private conversations, had standing to be eligible for such relief; at time plaintiff was arrested for violation of state statute, Washington's highest court had not interpreted statute to permit recording of audible conversations among private citizens on public street, as plaintiff argued statute should have been read, plaintiff was still uncertain and insecure regarding his right to video and audio tape private persons on public street, and plaintiff said he would continue to participate in such activities. West's RCWA 9.73.030.

3 Cases that cite this headnote

[6] **Federal Courts**
By constitution or statute

Although state may waive protection of Eleventh Amendment's jurisdictional bar by passing statute consenting to be sued, statute consenting to suit in state court does not constitute consent to suit in federal court. U.S.C.A. Const.Amend. 11.

17 Cases that cite this headnote

[7] **Federal Civil Procedure**
Governmental bodies and officers thereof

Even if Washington statute, providing that in suit challenging state statute, Attorney General shall also be served with copy of proceeding and

be entitled to be heard, was statute consenting to suit, it could not be construed to require joinder of state in plaintiff's suit in federal court. West's RCWA 7.24.110.

9 Cases that cite this headnote

[8] **Federal Courts**
Litigation conduct

State may waive Eleventh Amendment protection by voluntarily appearing and defending on the merits. U.S.C.A. Const.Amend. 11.

11 Cases that cite this headnote

[9] **Constitutional Law**
Notice to Attorney General

District court failed to comply with statute requiring district court to notify state attorney general that it might rule on constitutionality of state statute prohibiting the recording of private conversations; no representative of state was party to action challenging constitutionality of state statute. 28 U.S.C.A. § 2403(b); West's RCWA 9.73.030.

2 Cases that cite this headnote

[10] **Declaratory Judgment**
Mode and conduct in general

Failing to provide state an adequate opportunity to be heard when district court contemplated granting an unrequested declaratory judgment ruling on the constitutionality of state statute prohibiting the recording of private conversations was an abuse of discretion. West's RCWA 9.73.030.

2 Cases that cite this headnote

Attorneys and Law Firms

***437** Ted Buck, Stafford Frey Cooper, **Seattle**, WA, for defendants-appellants-appellees.

James E. Lobsenz, Carney, Badley, Smith & Spellman, **Seattle**, WA, for plaintiff-appellee-appellant.

***438** Appeals from the United States District Court for the Western District of Washington.

Before: LAY,* TROTT and T.G. NELSON, Circuit Judges.

Opinion

TROTT, Circuit Judge:

I. *Background*

This case arises from the alleged interference by police officers of the City of **Seattle** with Jerry Edmon **Fordyce's** attempt on August 5, 1990 to videotape a public protest march. **Fordyce**, who apparently considered himself part of the protest, had volunteered to videotape the demonstration for "local television production," presumably for broadcast on a public access channel. Among his subjects were the activities of the police officers assigned to work the event. Not surprisingly, the police themselves became targets of the protest and were subjected to rude and profane insults. Generally, the police reacted to this treatment in a calm and professional manner, but the record suggests that some of these officers were not pleased with **Fordyce's** actions, and that one officer in particular attempted physically to dissuade **Fordyce** from his mission. At the end of the day, in a separate incident, a different officer arrested **Fordyce** when he attempted to videotape some sidewalk bystanders against their wishes. **Fordyce** was charged with violating a Washington State privacy statute, Wash.Rev.Code § 9.73.030, which forbids the recording of private conversations without the consent of all participants.[1] **Fordyce** spent the night in jail. On October 1, 1990, the charges against **Fordyce** were dismissed on motion of the prosecuting attorney.

Subsequently, **Fordyce** brought a civil-rights suit against the City of **Seattle** and eight **Seattle** police officers.

Fordyce sought damages from the officers in their individual capacities pursuant to 42 U.S.C. § 1983 for interfering with his First Amendment right to gather news and for arresting him without the requisite probable cause for allegedly violating Wash.Rev.Code § 9.73.030. He also invoked supplemental jurisdiction in order to seek damages from the officers in their individual capacities for violations of state tort law. **Fordyce** sought permanent injunctive relief against the City of **Seattle** and the officers forbidding enforcement of Wash.Rev.Code § 9.73.030 against amateur journalists such as himself, and sought damages from the City of **Seattle** pursuant to § 1983 and supplemental state tort claims. **Fordyce** demanded attorney's fees pursuant to 42 U.S.C. § 1988.

The defendants moved for summary judgment, and **Fordyce** moved for partial summary judgment. The district court granted the defendants' motion for summary judgment as to **Fordyce's** pre-arrest § 1983 and state tort claims, finding "no evidence that would permit a rational jury to find that he was assaulted." ***Fordyce** v. City of **Seattle***, 840 F.Supp. 784, 788 (W.D.Wash.1993). The district court also granted the defendants' motion for summary judgment as to **Fordyce's** damages claims pursuant to § 1983 and state law torts, concluding that the individual ***439** police officers were qualifiedly immune and the city nonliable. *Id.* at 788–91.

The district court declined to award **Fordyce** the injunctive relief he had requested. Instead, the district court sua sponte awarded **Fordyce** declaratory relief, which he had not requested, declaring that Wash.Rev.Code § 9.73.030 "does not prohibit the videotaping or sound-recording of conversations held in a public street, within the hearing of persons not participating in the conversation, by means of a readily apparent recording device." *Id.* at 794.

After entry of the declaratory judgment, **Fordyce** requested attorney's fees against the City of **Seattle** (but not against the defendant police officers). The defendants requested attorney's fees as well, on the ground that **Fordyce's** suit had been frivolous as to certain individual officers. On October 13, 1993, the district court issued two unpublished orders. The first granted attorney's fees to **Fordyce** as a "prevailing party" under 42 U.S.C. § 1988, but only in the amount of 20 percent of the fees **Fordyce** had requested. The second denied attorney's fees to the defendants.

Both parties appeal the district court's orders. The City of **Seattle** and the individual defendants appeal the district court's award of declaratory relief, award of attorney's fees to **Fordyce** as a "prevailing party," and denial of the defendants' attorney's fees. **Fordyce** appeals the district court's grant of summary judgment to the City and the individual officers and the amount of attorney's fees awarded to him. We affirm in part, reverse in part, vacate in part, and remand.

II. *Liability and Damages*

[1] The district court based some of its dispositive rulings on its conclusion that the record contained "no evidence that would permit a rational jury to find that [**Fordyce**] was assaulted." ***Fordyce***, 840 F.Supp. at 788. We respectfully disagree. As we read the record, a genuine issue of material fact does exist regarding whether **Fordyce** was assaulted and battered by a **Seattle** police officer in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest. **Fordyce** testified in a deposition that his camera was deliberately and violently smashed into his face by Officer Elster while **Fordyce** was publicly gathering information with it during the demonstration. Although corroboration is not required to establish a genuine issue of material fact when the issue is established by sworn testimony, **Fordyce's** allegation is nonetheless corroborated by his videotape, which is in the record and which we have reviewed. Thus, as to Officer Elster, the matter did not merit a grant of summary judgment with respect either to the First Amendment claims under 42 U.S.C. § 1983 or to the supplemental state law claims of assault and battery. These claims merit a trial.

[2] As to the § 1983 claims stemming from **Fordyce's** arrest, we agree with the district court that the officers are entitled to qualified immunity from suit for damages. *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir.1993).

The relevant facts are undisputed. While **Fordyce** was videotaping people on the streets of **Seattle**, he was simultaneously audio-recording them as well. Prior to arresting **Fordyce**, an officer asked him whether the videocamera was recording voices and warned him that a Washington State statute forbade recording private conversations without consent. **Fordyce** refused to stop videotaping two boys after an adult relative supervising them asked him to stop and complained to the police. The police officers also asked **Fordyce** to stop, but he refused. He was then arrested for violating Wash.Rev.Code § 9.73.030.

At the time of **Fordyce's** arrest, whether and under what circumstances conversations in public streets could be

deemed private within the meaning of the privacy statute was not yet settled under Washington state law. Under the facts marshalled pursuant to the motions for summary judgment, a reasonable officer could have believed **Fordyce** was recording private conversations in violation of the statute. The evidence before the district court supports a claim that the officers arrested **Fordyce** for committing in their presence what they believed was a misdemeanor. ***440** Accordingly, all the individual police officer defendants are entitled to qualified immunity with respect to **Fordyce's** § 1983 damages claims relating to his arrest.

[3] We also affirm the district court's decision granting summary judgment to the City of **Seattle**, dismissing it from the § 1983 damages claims. **Fordyce** failed to show that the City of **Seattle** was culpable by virtue of a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by" **Seattle** that was itself unconstitutional. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035–36, 56 L.Ed.2d 611 (1978). **Fordyce** also failed to show that any **Seattle** policy or any decision by a governmentally authorized decisionmaker was the moving force behind any deprivation of his constitutional rights. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986); *Larez v. City of Los Angeles*, 946 F.2d 630, 645–46 (9th Cir.1991).

Because our opinion reinstates Office Elster as a defendant in this case, however, we vacate and remand to the district court the issue of whether **Seattle** can be held vicariously liable under state law for **Fordyce's** state law tort damages claims against Officer Elster.

III. *Declaratory and Injunctive Relief*

The City of **Seattle** argues that the district court should not have granted declaratory relief because (1) **Fordyce** lacked standing; and (2) **Fordyce** never served the Attorney General of Washington State with a copy of his complaint. We vacate the district court's grant of declaratory relief because the procedure resulting in the award was flawed.

First, the City contends that declaratory relief was unwarranted because no "case or controversy" exists, and therefore the district court lacked subject matter jurisdiction. U.S. Const. art. III, § 2. **Seattle** also argues that **Fordyce** did not have standing. We disagree with the City.

At the time **Fordyce** was arrested, and at the time the district court issued its order, the highest court in Washington had not—and still has not—interpreted Wash.Rev.Code § 9.73.030 to permit recording of audible conversation among *private* citizens on public streets.[2] **Fordyce** was, and still is, uncertain and insecure regarding his right *vel non* to videotape and audiotape private persons on public streets. Noting that **Fordyce** says he will continue to participate in such activities, we are unable to conclude from the record that the circumstances culminating in his arrest no longer are a "brooding presence," which cast an adverse effect on his legitimate interests as a citizen of the United States. *Headwaters, Inc. v. Bureau of Land Management*, 893 F.2d 1012, 1015 (9th Cir.1989) (quoting *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122, 94 S.Ct. 1694, 1698, 40 L.Ed.2d 1 (1974)).

[4] [5] We are satisfied that, under the facts of this case as they existed during the time of litigation in district court, **Fordyce** sufficiently demonstrated the existence of a concrete controversy. Furthermore, in a case concerning the constitutionality of a state criminal statute, all that is required for an award of declaratory relief is that the plaintiff show "a genuine threat of enforcement of a disputed state criminal statute." *Steffel v. Thompson*, 415 U.S. 452, 475, 94 S.Ct. 1209, 1223–24, 39 L.Ed.2d 505 (1974). Thus, assuming that declaratory relief as an issue was properly before the district court, **Fordyce** had standing to be eligible for such relief pursuant to the principles enunciated in *Steffel*.[3]

***441** The City next argues that the declaratory judgment was defective because it was awarded without service of "the proceeding" on the Washington State Attorney General in violation of a Washington State statute. In a suit challenging a Washington State statute, Wash.Rev.Code § 7.24.110 provides that "the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard."

[6] [7] We disagree with the City of **Seattle** that a state notice statute can be construed to impose a duty on a federal court. The Eleventh Amendment to the United States Constitution would bar federal court jurisdiction if **Fordyce** sought to sue the State of Washington. Although the State of Washington may waive the protection of the Eleventh Amendment's jurisdictional bar by passing a statute consenting to be sued, a statute consenting to suit in state court does not constitute consent to suit in federal court. *Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149–50, 101 S.Ct. 1032, 1033–34, 67 L.Ed.2d 132 (1981); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 66

S.Ct. 745, 90 L.Ed. 862 (1946). Thus, even if Wash.Rev.Code § 7.24.110 were a statute consenting to suit, it could not be construed to require joinder of the State in **Fordyce's** suit in federal court.

[8] We do agree with the thrust of **Seattle's** argument, however. The State of Washington could waive Eleventh Amendment protection by voluntarily appearing and defending on the merits. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985); *Clark v. Barnard*, 108 U.S. 436, 2 S.Ct. 878, 27 L.Ed. 780 (1883). And the statute on which the City relies certainly manifests a decision by the State that its attorney general has a strong interest in defending the State's statutes in court. Voluntary appearance by the State of Washington assumes, however, that the State has been adequately notified of the pendency of the suit and of the particular matters at issue.

Here the district court never expressly informed the parties that it might render the declaratory judgment. The parties argued their motions for summary judgment on the basis that only injunctive relief and damages were at issue. The district court never indicated otherwise during the oral argument. Subsequent to the hearing on the motions for summary judgment, the district court, sua sponte, issued an order inviting the ACLU of Washington State, several news organizations, and the Washington State Attorney General to file *amicus* briefs addressing six specific questions framed by the district court.[4] The ACLU's *amicus* brief first ***442** raised the possibility of declaratory relief, but even **Fordyce's** reply brief to the *amicus* briefs casts the issues solely in terms of injunctive relief. The parties essentially had no inkling that the district court was silently considering a grant of declaratory relief.

[9] We conclude the district court failed to comply with 28 U.S.C. § 2403(b) by failing to notify the Washington State Attorney General that it might rule on the constitutionality of Wash.Rev.Code § 9.73.030. When neither a state nor "any agency, officer, or employee thereof" is a party to an action where the constitutionality of a state statute "is drawn in question," a federal district court is required to notify the state attorney general and must "permit the State to intervene." 28 U.S.C. § 2403(b). Here, no representative of the State of Washington was a party to the action. The City of **Seattle** was not an "agency" of the state of Washington for purposes of this federal statute. *See Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 572–73, 50 L.Ed.2d 471 (1977) (Eleventh Amendment immunity does not extend to counties or similar municipal corporations). By state law, a municipal corporation is not a state agency. *Plumbers & Steamfitters Union Local 598 v. WPPSS*, 44 Wash.App. 906, 724 P.2d 1030, 1033 (1986) (citing Wash.Rev.Code § 42.17.020(1)).

Fordyce argues that the district court indicated its "intentions" in plenty of time for the State of Washington to intervene, if the State had so desired. We conclude that such "telegraphed" intentions are not enough to avoid the duty to provide adequate notice and a formal opportunity to intervene to the State. Because the City's presence in the suit did not satisfy the requirements of 28 U.S.C. § 2304(b), and the issue was never certified to the Attorney General of Washington State, the district court never had the opportunity fully to hear the views of Washington State. *See Yniguez v. Arizona*, 939 F.2d 727, 739 (9th Cir.1991). Therefore the district court should not have rendered the declaratory relief.

We also conclude that the opportunity to file an *amicus* brief in no way substituted for a formal opportunity to participate fully as an intervening party in the litigation. The "opportunity" for the Washington State Attorney General to participate in this lawsuit was circumscribed along the lines of a jury's special verdict form. If declaratory relief concerning the constitutionality of Wash.Rev.Code § 9.73.030 was an issue under consideration by the district court, the State of Washington should have been invited to intervene. The district court abused its discretion by not formally extending an opportunity to the State of Washington to intervene in this action.

[10] For the foregoing reasons, we conclude that although **Fordyce** may have had standing to be eligible for declaratory relief, the district court abused its discretion in failing to provide the State of Washington (or the City of **Seattle**) an adequate opportunity to be heard when it contemplated granting an unrequested declaratory judgment ruling on the constitutionality of Wash.Rev.Code § 9.73.030.

IV. *Conclusion*

For the foregoing reasons, we REVERSE and REMAND the district court's grant of summary judgment as to Officer Elster because a genuine issue of material fact exists concerning Officer Elster's alleged assault and battery against **Fordyce** prior to **Fordyce's** arrest. We also REVERSE and REMAND the grant of summary judgment as to Officer Elster on the § 1983 claims, because a genuine issue of material fact exists concerning whether he interfered with **Fordyce's** First Amendment

right to gather news. We AFFIRM the grant of summary judgment as to all the individual officer defendants on the § 1983 damages claims relating to **Fordyce's** arrest. We AFFIRM the grant of summary judgment to the City of **Seattle** for **Fordyce's** § 1983 damages claim. We VACATE and REMAND for reconsideration the grant of summary judgment as to the vicarious liability **Seattle** may have for **Fordyce's** state law tort claims for damages against Officer Elster. We VACATE the award of declaratory ***443** relief against the defendants. We do not reach the issue of attorney's fees under 42 U.S.C. § 1988, but VACATE the two attorney's fees orders dated October 13, 1993, and REMAND those matters to the district court for reconsideration in light of our decisions in this appeal.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, and REMANDED.

Each party shall bear its own costs.

All Citations

55 F.3d 436, 147 A.L.R. Fed. 811, 23 Media L. Rep. 2011

Footnotes

* The Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

1 Wash.Rev.Code § 9.73.030 provides in relevant part:

> (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:
>
> ....
>
> (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.
>
> ....
>
> (4) An employee of any regularly published newspaper, magazine, wire service, radio station, or television station acting in the course of bona fide news gathering duties on a full time or contractual or part time basis, shall be deemed to have consent to record and divulge communications or conversations otherwise prohibited by this chapter if the consent is expressly given or if the recording or transmitting device is readily apparent or obvious to the speakers. Withdrawal of the consent after the communication has been made shall not prohibit any such employee of a newspaper, magazine, wire service, or radio or television station from divulging the communication or conversation.

2 *See, e.g.*, ***Fordyce***, 840 F.Supp. at 792–93 (discussing Washington state court decisions interpreting Wash.Rev.Code § 9.73.030). Since the date of the district court's order, the Washington supreme court opinions construing Wash.Rev.Code § 9.73.030 have not clarified whether conversations on public streets may be videotaped and audiotaped with impunity. *See State v. Corliss,* 123 Wash.2d 656, 870 P.2d 317 (1994) (statute does not apply to police officer merely listening to conversation without recording it on same telephone receiver tipped in his direction by informant); *State v. Riley,* 121 Wash.2d 22, 846 P.2d 1365 (1993) (line trap discovering only telephone number is not a recording of a "private communication").

3 We do not rule out a different conclusion on remand based on a demonstration of different facts and circumstances. *See Blair v. Shanahan,* 38 F.3d 1514 (9th Cir.1994).

4 The questions for the *amici curiae* were as follows:

> 1. Can a conversation between two private citizens standing on a public street or sidewalk be a "private conversation" within the meaning of the statute?
> 2. Can a conversation between two on-duty city police officers on a public street or sidewalk be a "private conversation" within the meaning of the statute?
> 3. Section 4 of the statute affords a presumption of consent where the recording is made by an "employee of any regularly published newspaper, magazine, wire service, radio station, or television station" and the "recording or transmitting device is readily apparent or obvious to the speakers." The plaintiff in the present case was videotaping in downtown **Seattle** for the purpose of showing his tape later over a public-access television station, where he had often broadcast before. If section 4 is applied to afford a presumption of consent to a paid employee of, or contractor with, a "regularly published" communications medium, but to deny it to a freelance, unpaid news-gatherer, would the result be to discriminate against the latter in violation of his or her First

Amendment rights?
4. If the answer to the previous question is yes, can and should the statute be read to afford the presumption of consent to all persons "acting in the course of bona fide news gathering"? If so, is there a constitutional way to distinguish between "bona fide newsgathering" and the recording of events for other purposes?
5. If the statute is applied to afford a presumption of consent to one engaged in "bona fide news gathering," while denying it to a person who is recording simply out of interest or curiosity, would the result be an unconstitutional discrimination against the latter in violation of his or her First Amendment rights?
6. If the answer to the preceding question is yes, can and should the statute be read to afford the presumption of consent to any person recording "if the recording or transmitting device is readily apparent or obvious to the speakers"?

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