No. 93904-7

SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR WEST,

Respondent,

v.

STEVE VERMILLION and
THE CITY OF PUYALLUP,

Petitioners.

MEMORANDUM OF AMICUS CURIAE WASHINGTON COALITION FOR OPEN GOVERNMENT IN OPPOSITION TO PETITION FOR REVIEW

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I. IDENTITY AND INTEREST OF AMICUS

Pursuant to RAP 13.4(h) the Washington Coalition for Open Government (WCOG) submits the following argument in opposition to the *Petition for Review* (hereafter "*Petition*") filed by the City of Puyallup and former Councilmember Steve Vermillion (hereafter "Petitioners").

II. STATEMENT OF THE CASE

WCOG relies on the facts set forth in the briefs of the parties and the opinion of the Court of Appeals below.

III. ARGUMENT

The *Petition* does not present any issues that warrant review under RAP 13.4(b). First, the decision of the Court of Appeals does not conflict with *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015), or any other decision of this Court or the Court of Appeals. Second, no significant constitutional issues are presented in this case because the Petitioners relied exclusively on statutory arguments in the lower courts. Third, this case is the wrong vehicle for examining the distinction between public and private records and/or any constitutional limits on retrieving public records from individuals.

A. *Nissen v. Pierce County* disposes of the Petitioners' "constitutional avoidance" argument, leaving no actual constitutional issue for the Court to address in this case.

RAP 13.4(b)(3) provides for discretionary review where a

significant constitutional question is raised by the decision of the lower court. The *Petition* presents no such question, and should be denied. First, Petitioners failed to raise any actual constitutional issues below. Second, even if they had, Petitioners fail to mount a proper constitutional challenge here because the *Petition* raises neither a proper facial nor as-applied challenge. Third, the Court of Appeals resolved any possible constitutional question in this case, consistent with *Nissen*, 183 Wn.2d 863, which this Court decided before the current case was heard by the Court of Appeals. As a result, the Court of Appeals in this case correctly concluded that this Court's decision in *Nissen* disposed of any arguments which the *Petition*, nonetheless, attempts to resurrect. *West v. Vermillion*, 196 Wn. App. 627, 636-639, 384 P.3d 634 (2016).

Petitioners now are attempting to recast their statutory arguments, rejected below, as a "hybrid as applied/facial [constitutional] challenge." *Petition* at 18 n.29. But Petitioners have raised no actual constitutional challenge, either "as-applied" or "facial," for this Court to address.[1]

[1] Challenges to the constitutionality of a statue come in two varieties. The more common variety is an "as applied" challenge which posits that the particular application of a statute in a certain context is unconstitutional. In contrast, a "facial challenge" to the constitutionality of a statute posits that there are no circumstances under which the statute can be constitutionally applied. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 258, 241 P.3d 1220 (2010) (rejecting facial due process challenge to water rights amendment where no water rights had actually been impaired). "[A] facial challenge must be rejected if there are any circumstances where the statute can constitutionally be applied." *Id*. at 258 (emphasis added) (quoting *Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000)).

In the lower courts the Petitioners never made any facial or as-applied constitutional challenges, so they cannot do so now. This Court will not consider issues raised for the first time on appeal. RAP 2.5(a). The City's opening brief (filed in this Court before the case was transferred to Division II) does not contain any "facial" or "applied" challenge, and mentions *Nixon v. Administrator of Gen. Svcs*, 433 U.S. 425 (1977)—upon which the *Petition* heavily relies—only once. *Brief of Pet. Puyallup* (2/9/15). Similarly, Vermillion's opening brief makes no facial or as-applied challenge, and never cites *Nixon*. *Opening Brief of App. Vermillion* (2/10/15). Vermillion's reply brief acknowledged that the Petitioners' arguments were statutory, and that this case "does not require the Court to declare any portion of the PRA unconstitutional or make any constitutional ruling at all." *Reply Br. of Vermillion* (5/27/15) at 3.[2]

Rather than raise constitutional challenges, in the lower courts the Petitioners relied on the doctrine of "constitutional avoidance" to try to persuade either this Court or the Court of Appeals to narrowly interpret the PRA. *Reply Br. of Vermillion* (5/27/15) at 7-11. This did not work, and

[2] The City's reply brief contains no facial or as applied challenge, and cites *Nixon* for only the proposition that Vermillion's constituents have a right to associate privately with Vermillion for political purposes. *Reply Br. of Pet. Puyallup* (5/26/15) at 3. The City and Vermillion filed a *Joint Supplemental Brief* on March 4, 2016. Like all the prior briefs the *Joint Supplemental Brief* makes no facial or as-applied challenge.

the Petitioners are thus precluded from raising any constitutional challenge before this Court.

Petitioners gloss over their failure to properly raise any constitutional issues by suggesting, in a footnote, that the distinction between "as applied" and "facial" challenges is "ill-defined," and that this Court should determine what remedy to apply. *Id*. at 18 n.30. That is not correct. Parties that wish to present constitutional issues must properly brief such issues in compliance with the Rules of Appellate Procedure:

> Parties raising constitutional issues must present considered arguments to this court. We reiterate our previous position: "'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" (Citations omitted).

State v. Johnson, 119 Wn.2d 167, 170-171, 829 P.2d 1082 (1992). No constitutional issues have been presented or properly briefed in this case. The *Petition* should be denied.

B. This case is the wrong vehicle for examining the distinction between public and private records and/or any constitutional limits on retrieving public records from individuals.

RAP 13.4(b)(4) provides for discretionary review where an issue of substantial public interest is raised. The intersection of transparency law and constitutional rights may raise important, potentially difficult and complex legal issues. This Court should wait for an appropriate case to address either the distinction between public and private records, or any

constitutional limits on the enforcement of the PRA. This case is ***not*** an appropriate case for at least four reasons.

First, the constitutional issues in this case have not been presented properly in the briefs below. As explained above, the Petitioners relied on statutory arguments to intentionally avoid reaching any actual constitutional issues in the lower courts. The *Petition* extensively relies on *Nixon*, 433 U.S. 425, which was largely ignored in the Petitioners' briefs until they filed their supplemental briefs after *Nissen* was decided. *Supp. Br. of Petitioners* (3/4/16) at 2, 4, 11). Even then, reliance on *Nixon* was and is misplaced because the Supreme Court found that the government's interest in disclosure outweighed Nixon's interest in protecting Nixon's "political correspondence." Nixon ***lost*** his attempt to prevent the disclosure of public records. *Nixon* addressed only the facial validity of the Presidential Recordings and Materials Preservation Act. The Supreme Court conducted a thorough legal analysis of Nixon's facial challenges before rejecting them. In contrast, the *Petition* fails to mention that *Nixon* addressed only facial challenges, which the Petitioners have not properly presented.

Second, the plaintiff in this case is *pro se*. Mr. West has done an admirable job in litigating this case. Nonetheless, the Court should be reluctant to grant review where important constitutional questions are

presented without the benefit of a constitutional lawyer who can argue on behalf of the requester and the public. That is particularly true where, as here, the agency is completely aligned with a party who asserts that the PRA is unconstitutional. This case pits two represented parties trying to weaken the PRA against an unrepresented party. The ability of amici, such as WCOG, to supplement the briefing in this case is no substitute for a qualified attorney who can address important constitutional issues on behalf of a party.

Third, this Court should not grant review in another case where, like *Nissen*, the Petitioners have ignored the conflicting rights and liabilities of the agency and the employee (or office holder) in the possession of records. For whatever reason, the City has made a political decision to support Vermillion's attacks on the PRA. The City has filed a joint *Petition* that does not discuss the conflicting rights and liabilities of the City and former councilmember Vermillion, or what an agency could or should do in this situation, if it actually wanted to comply with the PRA. The City is not a suitable representative of agencies that would actually attempt to comply with the PRA in this situation, and the interests of such agencies are effectively unrepresented in this case. The Court should wait until a concrete constitutional issue arises in a case where the agency is actually attempting to comply with the PRA.

Finally, Petitioners offer no real solution to the problem of distinguishing between public and private records, or the problem of recovering public records from a recalcitrant public official or employee. Instead, Petitioners suggest invalidating the PRA with respect to "records exclusively in an elected legislative official's possession." *Petition* at 18. That would significantly weaken the PRA, by creating a class of public records that cannot be accessed under the PRA, without solving the underlying problem of distinguishing between public and private records.

If, hypothetically, councilmember Vermillion took a folder of the City's legislative hearing records to his home office those records would still belong to the City. Those records would still be public records as a matter of common law and for purposes of Chap. 40.16 RCW, even if the Court narrowed the definition of "public records" in RCW 42.56.010(3). The City would still have the right to take legal action to recover its public records from Vermillion whether or not anyone had made a PRA request and regardless of whether the records met the definition of "public record" in RCW 42.56.010(3). If Vermillion refused to return the records to the City, then the problem of retrieving those records from Vermillion through litigation without violating his constitutional rights would still have to be addressed. And if Vermillion argued that the records belonged to him

rather than the City, then the distinction between public and private records would still have to be drawn.

Excluding records in the possession of a legislative official from the definition of "public records" in RCW 42.56.010(3), as the Petitioners suggest, would merely prevent the public from obtaining certain types of public records under the PRA. As the Court of Appeals observed in *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 354 P.3d 249 (2015), an agency cannot avoid its statutory obligations under the PRA by placing public records in the custody of a party beyond the reach of the PRA. 188 Wn. App. at 718 (rejecting agency's argument that records in possession of City contractor were not public records). The *Petition* does ***not*** present any issue of substantial public interest that this Court should review under RAP 13.4(b)(4). The Petitioners seek to weaken the PRA without actually solving any of the constitutional issues that they purport to be so concerned about. The Court should refuse to consider such an ill-conceived attempt to weaken the PRA based on speculative, undeveloped constitutional arguments.

The *Petition* does not present any issues that warrant review under RAP 13.4(b). The *Petition* should be denied.

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RESPECTFULLY SUBMITTED this 6th day of February, 2017.

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