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No. 96219-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Donna and Jeff ZINK,

Petitioner

v.

CITY OF MESA,

Respondent/Conditional Cross-Petitioner

OPPOSITION TO PETITION FOR REVIEW / CONDITIONAL CROSS-PETITION

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I. IDENTITY OF THE RESPONDENT/CROSS-PETITIONER

The City of Mesa ask the Court to deny the Zinks' petition for review of the Court of Appeal's decision in *Zink v. City of Mesa*, 4 Wn. App. 2d 112, 419 P.3d 847 (Div. III, 2018). Alternatively, if the Court grant the Zinks' petition, the City ask that the Court also grant review on the issue of whether the penalty awarded was excessive, based on the City of Mesa's small size and limited resources.

II. INTRODUCTION

This case involves two competing visions of the Public Records Act ("PRA") and the function of its daily-penalty provision.[1] The Zinks argue that the PRA gives a requestor a vested "right" to penalties and mandates that courts apply the 16 *Yousoufian*[2] factors in a rigid two-step process without taking into account the final penalty award and how that award will impact an agency with limited resources:

> a court does not have the authority to eye the forest and count the trees or assess their health. The court only has the authority to make sure there are trees in the forest and that they are in their proper place. A court must award penalties on a per-day basis as mandated by our legislature.

Zinks' Petition for Review at 25.

The Court of Appeals properly recognized that this Court's decision in *Yousoufian IV* was not intended to rigidly restrain the trial court's discretion to set penalties in this manner:

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[1] *See* RCW 42.56.550(4).

[2] *See Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2000) ("*Yousoufian IV*")

> We emphasize that the factors may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate considerations. Additionally, no one factor should control. These factors should not infringe upon the considerable discretion of trial courts to determine PRA penalties.

Zink v. City of Mesa, 4 Wn. App. 2d 112, 124, 419 P.3d 847 (2018) ("*Zink IV*") (quoting *Yousoufian IV,* 168 Wn.2d at 468) (emphasis added). Therefore, the Court of Appeals ruled that the trial court acted within its discretion when it made a global reduction of its preliminary penalty award against the City of Mesa based on the deterrent function of the penalty award because "it was probably not possible to assess the ninth deterrence aggravator other than on a cumulative basis. To butcher an aphorism, as long as one is eying one tree at a time, one cannot see the forest." *Zink IV,* 4 Wn. App. 2d at 121.

The Court of Appeal's rulings – that (1) a court may reduce a penalty award based on an agency's small size and limited resources and (2) a court may account for deterrence through a global change in the penalty award once a preliminary award has been determined – is fully supported by this Court's decision in *Yousoufian IV* and does not warrant review by this Court. *See, e.g.*, *Yousoufian IV,* 168 Wn.2d at 463 ("the penalty needed to deter a small school district and that necessary to deter a large county may not be the same.") (*citing ACLU v. Blain School Dist.*, 95 Wn. App. 106, 975 P.2d 536 (1999)).

Nor does the Court of Appeal's ruling that the 2011 amendment to the PRA penalty provision applied in this case warrant review by this Court.

Under black-letter Washington law, an amendment to a penalty provision is remedial and presumed to apply to all pending cases, "even if they relate to transactions predating their enactment." *State v. Pillatos*, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007). Moreover, the application of the amended penalty provision did not violate the Zinks' vested right in a higher penalty award because prior to the entry of a final judgment and the exhaustion of all appeals, a person cannot have a vested right based on statutorily created cause of action. *See Ballard Square Condo. Owners' Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 617-18, 146 P.3d 914 (2006) ("a cause of action that exists only by virtue of a statute is not a vested right, and it can be retroactively abolished by the legislature."). Thus, neither issue raised by the Zinks warrants review.

If the Court does elect to accept review (and only if this is the case), the City asks the Court to also agree to review the City's claim that the trial court did abuse its discretion by not reducing the penalty by a greater amount. The $175,000 penalty imposed by the trial court equaled 100% of the City of Mesa's annual general fund tax revenue and amounts to approximately $375 per resident. This is grossly disproportionate to any prior PRA penalty and greatly exceeds the amount to sufficiently deter any future conduct. By way of contrast, the penalty award in *Yousoufian IV* amounted to a mere $0.19 per resident. The ultimate purpose of the PRA is to empower the people to control government and prevent waste and corruption. This purpose is undermined when the actions of a few public officials can result in the forfeiture of a City's entire year of tax revenue.

In summary, the City asks this Court to deny the Zinks' petition for review. But if the Court elects to hear the case, the City asks that the Court also agree to hear the City's challenge to the excessive penalty award.

III. ISSUES RELATED TO CONDITIONAL CROSS-PETITION

Does a trial court abuse its discretion when it imposes a PRA penalty award that exceed 100% of the agency's annual general fund tax revenue when there is no evidence that the agency's violations of the PRA caused any financial harm to the requestor?

IV. STATEMENT OF THE CASE

The City adopts the summary of the facts in the Court of Appeal's 2018 decision.

V. ARGUMENT IN OPPOSITION TO REVIEW

A. The Court of Appeals Properly Ruled that the Trial Court Had the Discretion to Reduce the Total Penalty Award Based on Deterrence and the City of Mesa's Limited Resources

When the Supreme Court adopted the 16 *Yousoufian* factors, it stressed that the factors were "offered only as guidance" and "should not infringe upon the considerable discretion of trial courts to determine PRA penalties." *Yousoufian IV,* 168 Wn.2d at 468.

Here, trial court explained that to determine the appropriate penalty award, it intended to first conduct an objective analysis of the 16 *Yousoufian* factors for each of the 33 violations, and then based on his training as an engineer, the trial court intended to "stand back and look at your results to make sure that it really makes sense." *Zink IV,* 4 Wn. App. 2d at 129. Thus,

after holding a three-day hearing, the trial court set preliminary daily penalty rates of each of the 33 violations to reach a preliminary penalty award of $352,955. The trial court found that it was unsettled by this high award, which was more than two times the City's annual general fund tax revenue and would amount to over $700 per resident of the City of Mesa. *Zink IV,* 4 Wn. App. 2d at 120-21. The trial court therefore asked the parties to prepare briefing on a final penalty amount.

After considering that briefing and additional arguments from the parties, the trial court determined the preliminary award "was greater than needed to serve the purposes of PRA penalties" and should be reduced by 50% to $175,000 based on "Mesa's small size, limited resources, and the deterrent purposes of PRA penalties." *Zink IV,* 4 Wn. App. 2d at 121 (quoting trial court's finding). The trial court explained that he believed the reduced penalty was "sufficient to deter future conduct … . It is such an amount that would avoid this windfall to the plaintiffs. It will certainly sting the city but will not, in my judgment, cripple them." *Zink IV,* 4 Wn. App. 2d at 121 (quoting trial court's oral ruling).

1. The Court's *Yousoufian IV* Decision Emphasizes that Deterrence Is a Primary Consideration When Imposing Penalties

The Court of Appeals properly held that trial court's reliance on deterrence as a primary factor for setting the total penalty award was well within the discretion recognized by this Court in *Yousoufian IV*.

"[T]he purpose of the PRA's penalty provision is to deter improper denials of access to public records. The penalty must be an adequate incentive to induce future compliance." *Yousoufian IV,* 168 Wn.2d at 462-63. Along with agency culpability, deterrence has long been considered the most important role for the imposition of penalties. *See, e.g., Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978) ("Strict enforcement of these provisions where warranted should discourage improper denial of access to public records and adherence to the goals and procedures dictated by the statute."); *Armen v. City of Kalama*, 131 Wn.2d 25, 36, 929 P.2d 389 (1997) ("This court has emphasized that strict enforcement of this provision will discourage improper denial of access to public records. Since the award has been treated as a penalty it is not necessary for a party to show actual damages to receive the statutory award.") (quotations omitted).

Deterrence, in fact, played a central role in all of the factors identified in *Yousoufian IV*. For factors related to an agency's procedural compliance with the PRA, the penalty serves as a deterrent/motivator for agencies to strictly comply with the procedures. *See Yousoufian IV,* 168 Wn.2d at 459 (penalties are imposed to "[encourage] adherence to the … procedures dictated by the statute.") (alteration original, quotation omitted). For the factors related an agency's culpability, penalties serve to deter bad-faith conduct. *Yousoufian IV,* 168 Wn.2d at 461 ("[a] purpose of a PRA penalty … is to discourage improper denial of access to public records") (quotation omitted). Finally, deterrence underlies the factors related to the potential harm. *See Yousoufian IV,* 168 Wn.2d at 461 ("[I]t is appropriate

to increase penalties as a deterrent where an agency's misconduct causes a requestor to sustain actual personal economic loss."). Based on the Supreme Court's analysis of deterrence in *Yousoufian IV,* Division II characterized deterrence as one of four "principal" factors in addition to the 16 aggravators and mitigators. *West v. Thurston County*, 168 Wn. App. 162, 188-89, 275 P.3d 1200 (2012).

Given this strong emphasis on deterrence, the trial court acted within its discretion when it placed significant emphasis on the importance of deterrence for setting the penalties in this case.

While the Zinks claim that Court of Appeal's decision makes the rest of the *Yousoufian* factors irrelevant, this claim ignores that the fact that the trial court's penalty award is rooted in its preliminary analysis of each of the factors for each of the 33 violations, and the final penalty is approximately half of that preliminary determination. Thus, nothing in that ruling should even suggests that in the future, trial courts will be free to "simply decided what penalty they feel is appropriate[.]" Zinks' Pet. For Review at 23.

2. Under *Yousoufian IV,* the Trial Court Properly Relied on Deterrence to Justify Its Reduction of the Preliminary Penalty Award

The Zinks also claim that *Yousoufian IV* precludes the use of deterrence as a justification for reducing a potential penalty award. While it is true that the Court listed deterrence as an aggravating factor in *Yousoufian IV,* neither the reasoning nor the express language of that

decision precludes a trial court for using deterrence as a justification for awarding a lower penalty amount. First, as noted, the Court made it clear that the 16 factors were not exclusive. *Yousoufian IV,* 168 Wn.2d at 468. Second, the Court expressly recognized that deterrence works both ways when it noted that "the penalty needed to deter a small school district and that necessary to deter a large county may not be the same." *Yousoufian IV,* 168 Wn.2d at 463 (citing *ACLU v. Blain School Dist*., 95 Wn. App. 106, 975 P.2d 536 (1999)). Finally, there is no logical reason why the legislature would have intended to punish smaller jurisdictions in a disproportionately harsh manner.

3. Under *Yousoufian IV,* the Trial Court Had the Discretion to Account for Deterrence by Making a Global Reduction of the Preliminary Penalty Award

One of the lessons courts appear to have learned from this decision is that the deterrence effect of the total penalty award is significantly more relevant than the specific daily penalty rate, which can vary widely from decision to decision. *Compare, e.g., Bricker v. Dep't of Labor & Indus*., 164 Wn. App. 16, 29, 262 P.3d 121 (2011) (affirming $90 per day penalty despite no finding of bad faith) *with Francis v. Dep't of Corr*., 178 Wn. App. 42, 66, 313 P.3d 457 (2013) (affirming variable-rate penalty of $5 & $10 per day despite finding of bad faith); *Adams v. Dep't of Corr*., 361 P.3d 749, 361 P.3d 749 (2015) ($35-per-day penalty for bad faith conduct was sufficient and properly accounted for the size of the agency).

Division II thus approved a global reduction based on deterrence in *Bricker*, when it reviewed the trial court decision to reduce its preliminary award by 95%. There, the requestor made the same claim as the Zinks – that the trial court could not consider the total penalty amount when assessing deterrence. Division II rejected that claim and ruled that "the total penalty clearly is a legitimate consideration" to determine whether the award will have the proper deterrent effect. *See Bricker*, 164 Wn. App. at 25.[3]

Here, the Zinks criticize the trial court for making a global reduction of its preliminary award rather than accounting for deterrence when setting the preliminary daily penalty rates. But as the Court of Appeals noted, the only practical way to determine the deterrent impact of a penalty award is to consider the cumulative award. *Zink IV,* 4 Wn. App. 2d at 130 ("With the benefit of hindsight, it was probably not possible to assess the ninth deterrence aggravator other than on a cumulative basis."). In summary, review of this Court is not warranted because the trial court properly accounted for deterrence to justify its global reduction of the penalty award.

B. The Court of Appeals Properly Found that the 2011 Amendment to the PRA Penalty Provision Applied in This Case

In a partial summary judgment ruling, the trial court ruled that it would apply the version of the penalty provisions currently in effect, which

[3] While the court in *Bricker* reduced the penalty award by adjusting how it was calculated (per request rather than per record), it was motivated to reduce the award for the same reason as the trial court in the case at bar – because the trial court in *Bricker* was troubled by the amount of the preliminary award. *Bricker*, 164 Wn. App. at 20.

accounted for the 2011 amendment (SHB 1899, enacted at Laws of 2011, Ch. 273, amending RCW 42.56.550(4)) that eliminated the $5-per-day minimum penalty requirement. Thus, in its penalty ruling, the trial court reduced the rate to $0.50 per day per violation from the date of the original judgment in Mesa's favor to the date that judgment was reversed by the Court of Appeals in *Zink v. Mesa*, 140 Wn. App. 328, 166 P.3d 738 (2007). See *Zink IV,* 4 Wn. App. 2d at 119-20.[4]

When affirming this ruling, the Court of Appeals simply applied black-letter law that holds "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[5] *In re A.M.M.*, 182 Wn. App. 776, 789, 332 P.3d 500 (2014). Thus, amendments to "remedial statutes are generally enforced as soon as they are effective, even if they relate to transactions predating their enactment." *State v. Pillatos*, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007). "A statute is remedial when it relates to practice, procedure, or remedies[.]" *Pillatos*, 159 Wn.2d

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[4] The daily penalties were set at $1.00 per day in the preliminary award, and were cut in half when the court reduced the award.

[5] While the application of remedial statutes to past conduct is sometimes referred to as the "retroactive" application of the new law (*see, e.g., Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986) ("A remedial statute is presumed to apply retroactively."), *overruled on other grounds by State v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002), technically, this is incorrect. "A retrospective law, in the legal sense, is one which takes away or impairs vested rights acquired in the existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Pillatos*, 159 Wn.2d at 471 (citation omitted). In contrast, "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law." *Pillatos*, 159 Wn.2d at 471 (quotation omitted).

at 473 (quotation omitted). Statutes that provide for penalties are by definition remedial. *See Marine Power & Equipment Co. v. Human Rights Comm'n*, 39 Wn. App. 609, 620, 694 P.2d 697 (1985).

The presumption that a court should apply the law currently in effect is particularly strong when the legislature has amended a statutory penalty provision. Thus, if the application of the statute to prior conduct "would further the remedial purposes of the statute and amendment," courts will presumptively apply it to actions pending at the time of the amendment, even when that action is pending on appeal. *Marine Power*, 39 Wn. App. at 618. This is because "the legislature is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one." *Addleman*, 107 Wn.2d at 510 (discussing amendment to criminal penalty). "[I]t would be anomalous for an appellate court to apply an obsolete law where no vested right or contrary legislative intent is disturbed by applying a more current law." *Marine Power*, 39 Wn. App. at 621 (discussing civil penalties). Courts therefore have routinely applied legislative amendments to remedies created by statute to actions that occurred prior to the amendment, even when a cause of action was filed prior to the amendment.[6]

[6] *Marine Power*, 39 Wn. App. at 621 (discussing civil penalties); *Bayless v. Community College Dist.*, 84 Wn. App. 309, 927 P.2d 254 (1996) (statutory amendment to allow damages for whistleblowers applied to lawsuit filed before amendment); *Robin L. Miller Const. Co. v. Coltran*, 110 Wn. App. 883, 43 P.3d 67 (2002) (statutory amendment that eliminated a loophole in the homestead statute applied to judgment entered prior to the amendment).

Here, the 2011 Amendment was remedial because it amended an existing statutory penalty provision – RCW 42.56.550(4) – and therefore a presumption exists that penalties in this case should have been set using the amended version of the statute. That presumption was properly applied in this case because the Zinks did not have right to a penalty award under the old version of the statute and there is no evidence of any legislative intent to only have the amendment apply prospectively.

The Zinks claim that the application of the amended statute is improper because it will not further the legislative intent of the amendment. While there is no official declaration of legislative intent, the timing and function of SHB 1899 strongly suggest that the purpose of the amendment was to eliminate the "harsh" effect of the minimum daily penalty requirement, as highlighted just months before SHB 1899 was introduced in *Sanders v. State*, 169 Wn.2d 827, 864, 240 P.3d 120 (2010). Here, the City of Mesa faced over 22,000 penalty days. It thus furthered the purpose of the 2011 Amendment to have it apply in this case.

The Zinks also claim that the 2011 should not be presumed to apply in this case because RCW 42.56.550 is substantive rather than procedural provision. This would only be true if the purpose of the PRA was to impose penalties – but the purpose of the PRA is the provide access to public records and the penalty provision is merely a procedural tool to enforce that access.

The Zinks' assertion that the Court of Appeal's 2011 decision[7] in this case ruled that pre-2011 version of RCW 42.56.550 applied, making that ruling the "law of case" also fails. As the Court of Appeals notes, it did not make any such ruling in its 2011 decision and it would have been improper for it to opine on the newly enacted legislation in the first instance. See *Zink IV,* at ¶56 (unpublished portion) (citing *Franklin County Sheriff's Office v. Parmelee*, 175 Wn.2d 476, 481, 285 P.3d 67 (2012) (appellate court should remand case to trial court to determine retroactive application of newly enacted amendment)).

Next the Zinks claim they have a vested right to a penalty award under the old version of the statute. But a person cannot have a vested right in a statutorily created cause of action. *Ballard Square Condo. Owners' Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 146 P.3d 914 (2006). None of the cases the Zinks cite hold to the contrary. The absence of any vested right also resolves the Zinks' due process and equal protection claims. Finally, the Zink's ex post facto claim fails because the PRA is not a criminal provision and the change reduces, rather than increases the penalty at issue. *In re Estate of Haviland*, 177 Wn. 2d 68, 81, 301 P.3d 31, 38 (2013) (holding statute that disinherited persons did not violate ex post facto because it was civil in nature) (*citing State v. Schmidt*, 100 Wn. App. 297, 299, 996 P.2d 1119 (2000), *aff'd* 143 Wn.2d 658, 23 P.3d (2001)).

The Zinks' last argument based on separation of powers fails because it is based on case law that was overruled by this this Court's

[7] *Zink v. City of Mesa (Zink III)*, 162 Wn. App. 688, 256 P.3d 384 (2011)

decision in *Hale v. Wellpinit School Dist.*, 165 Wn.2d 494, 509 n.6, 198 P.3d 1021 (2009) and *In re Hambleton*, 181 Wn.2d 802, 822, 335 P.3d 398 (2014), where the Court affirm the Legislature's ability to amend statutes even after the statute has been construed by the appellate courts.

In summary, this Court should not accept review of the Zinks' challenge to the trial court's decision to apply the 2011 amendment because that ruling is based on black letter law and the Zinks' constitutional challenges to that ruling ignore controlling precedent.

VI. ARGUMENT IN SUPPORT OF CONDITIONAL CROSS-PETITION

In the event that the Court elects to accept review in this case, the Court should also accept review of the Court of Appeals ruling that rejected the City's claim that $175,000 was excessive in light of the City's small size and limited resources. But the City is only requesting that the Court review this issue if it otherwise grants the Zinks' petition.

A. The Trial Court Abused Its Discretion by Imposing a Penalty Award that Amounts to $350 Penalty of Each of Mesa's 500 Residents

While the trial court had the discretion to make an across-the-board reduction of its preliminary penalty award, it still abused its discretion when it only reduced that award to $175,000, which still exceeds the City's annual general fund unrestricted tax revenue for all of 2015. A penalty is sufficient to serve as a deterrent when the penalty exceeds the amount the agency

would need to spend on compliance.[8] A penalty that greatly exceeds that amount is therefore wasteful. A penalty that exceeds an agency's available revenue is by definition more than an amount needed to deter future violations because the agency could not spend more than 100% of its budget on PRA compliance. Moreover, best practices suggests an agency should spend significantly less than 1% of its available revenue on PRA compliance.[9] Thus it should not be a surprise that, with the exception of the decision in *Wade's Eastside Gunshop*, no PRA penalty recorded in a published decision has ever exceeded 1% of an agency's general fund budget, and the award in *Wade's* was only 2.1%.

Finally, no court would ever impose a PRA penalty that equaled 100% of an agency's budget or amounted to $350 per resident on substantially larger jurisdiction such as the City of Marysville or King County.

The trial court therefore should have reduced the total penalty award by a substantially greater amount, so that on average the penalty for each violation did not exceed 1% of the City's annual general fund unrestricted revenue. Here, this would provide for a total penalty award of approximately $58,000, or $116 per resident. This reduced penalty award

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[8] *See Vasbinder v. Scott*, 976 F.2d 118, 121 (2nd Cir. 1992) ("Accordingly, an award [punitive damages] should not be so high as to result in the financial ruin of the defendant. … even outrageous conduct will not support an oppressive or patently excessive award of damages. Further, … an award should not be so large as to constitute a windfall to the individual litigant."). Punitive damage awards and statutory penalty awards serve similar purposes.

[9] Supp. Desig. CP: Ramerman Dec. RE Penalty Reduction Exh. A.

does not give Mesa a "pass" or otherwise minimalize its violation of the RPA. Rather, on a per resident basis, this would be the equivalent of imposing a $224 million penalty on King County.

1. No PRA Penalty Has Ever Exceed 3% of an agency's annual general fund budget

As noted, the only PRA penalty recorded in a published decision that exceeds 1% of an agency's annual general fund budget is the penalty in *Wade's* and that penalty was 2.1%. Here is a summary of the published decisions

Case[10]	Penalty	General Fund Budget
Yousoufian v. Office of Ron Sims	$371,340	$3.1 billion[11]
Cedar Grove v. City of Marysville	$143,740	$42.2 million
Lindell v. City of Mercer Island	$90,560	$22.775 million
Bricker v. Dep't of L&I	$29,445	$22.224 million
Adams v. DOC	$24,535	$1.6 billion
Wade's v. Dep't of L&I	$502,827	$22.224 million
West v. Thurston County	$16,020	$81 million
Sanders v. State	$18,112	$4 million
Kitsap Cy. Pros. Att'ys Guild v. Kitsap Cy.	$845	$80 Million
ACLU v. Blaine School District	$5770	$5 million (est.)
Lindberg v. Kitsap County	$500 (est.)	$39 million (est.)

While some of the violations at issue in this case were egregious, penalties in other cases that involved bad faith or otherwise egregious

[10] The penalty amounts are taken from the appellate decisions. The budget amounts are supported by Mesa Tr. Br. At 32-27; Supp. Desig. CP: Ramerman Dec. re Penalty Hearing exh. 402-406.

[11] This number reflects the county's entire budget, rather than the general fund budget. But it can be assumed the general fund portion exceeded $38 million.

conduct still have not exceeded the 1% threshold. The trial court should have used the 1% as a benchmark for setting its penalties.

2. No Court Would Impose a Comparably Large Penalty on a Larger Jurisdiction

Nothing in the PRA supports the idea that persons who live in small jurisdictions like Mesa should be punished at a significantly greater rate than persons who live in large jurisdictions. Consider King County and Marysville. Both jurisdictions were found to have committed egregious violations of the PRA. *Yousoufian IV,* 168 Wn.2d 444; *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 354 P.3d 249 (2015). If those violations were punished at the same rate as the current penalty on Mesa – $350 per resident – the penalties would amount to $675,000,000 for King County[12] and $21,000,000 for Marysville.[13] Instead, the penalty for King County in *Yousoufian* amounted to $0.19 per resident. And the penalty for Marysville in *Cedar Grove* amounted to approximately $2.40 per resident.

While it can be argued that Mesa's violations were more egregious than the violations in *Yousoufian* and *Cedar Grove*, Mesa's violations were not egregious enough to justify such a massive disparity.

[12] King County's population is 1,931,281. See U.S. Census Bureau, "Quick Facts, King Count, Washington" (available at https://www.census.gov/quickfacts/fact/table/kingcountywashington/PST045216))(last visited 6/24/17).

[13] Marysville's population in 2010 was 60,020. See Wikipedia, "Marysville, Washington" (available at https://en.wikipedia.org/wiki/Marysville,_Washington) (last visited 6/25/17).

If penalty awards were only imposed per-request, it would be nearly impossible for a large jurisdiction to face a multi-million dollar penalty award that would reach the magnitude of the penalty Mesa faces. But after the Supreme Court's ruling in *Wade's* permitting penalties to be set per page, the threat of such massive penalties are now quite realistic.[14] Given this threat, it is especially important for the Court to place some upper limits on what qualifies as a reasonable penalty. Otherwise, the threat of massive PRA penalties becomes leverage for persons to extract taxpayer dollars out of jurisdictions who have already suffered from employee misconduct. The 1%-per-violation presumptive cap that the City proposes serves that role while still serving the deterrent purpose of PRA penalties because no jurisdiction can ignore the threat of losing even 1% of its annual budget. Marysville would not ignore a $420,000 any more than King County could ignore a $30,000,000 penalty.

PRA penalties are not paid by the bad actors – they are paid by the taxpayers. PRA penalty awards should not be set at rates that cause the very waste the PRA was meant to help prevent. And taxpayers who live in small jurisdictions should not be required to shoulder massive penalty awards that a court would never impose on the taxpayers in larger jurisdictions.

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[14] *See Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.,* 185 Wn.2d 270, 372 P.3d 97 (2016) (5,431 pages of records withheld for 231 days, allowing for maximum penalty of $125,456,100).

3. The Excessive Penalty in this Case Undermines the Purpose of the PRA

The ultimate purpose of the PRA is to allow the people to "maintain control over the instruments they have created"[15] while being "mindful of … the desirability of the efficient administration of government."[16] Nothing evidences a loss of control of government more than the imposition of rules that allow a handful of government employees to forfeit a full year of taxpayer funds.[17] If anything, this is the type of massive waste that the PRA is meant to help prevent. Yet the trial court's $175,000 penalty award – equal to more than 100% of Mesa's annual tax revenue – imposes this exact harm.

The Court of Appeals refused to adopt a 1% presumptive cap on penalty awards because it believed that such a ruling was within the legislative domain, rather than the judicial. *Zink IV,* 4 Wn. App. 2d at 131. While that typically might be true, this Court has recognized that the PRA specifically directs courts to liberally interpret its provisions to further the legislative goals of the PRA. *See, e.g., Yousoufian IV,* 168 Wn.2d at 465 (liberal construction mandate supported Court's authority to adopt 16 factors for setting penalties); *Nissen v. Pierce County*, 183 Wn.2d 863, 884, 357 P.3d 45 (2015) (citing liberal construction mandate to support the adoption of procedures for obtain emails on private cell phones). As

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[15] RCW 42.56.030.

[16] RCW 42.17A.001(11).

[17] *See, e.g., Hoffman v. Kittitas County*, 4 Wn. App. 2d 489, 499, -- P.3d -- (2018) (penalty should be set based on the "overarching concern for deterrence," not the misconduct of single employee).

explained, a presumptive cap furthers the purposes of the PRA by avoiding excessive penalties that are paid by the taxpayers, not wrongful actors.

VII. CONCLUSION

The Court of Appeals properly applied settled law when if rejected the Zinks' claims on appeal and therefore this Court should deny this petition. If the Court does accept review, however, it should also review the Court of Appeal's ruling that rejected the City's claim that the penalty imposed was excessive. Courts should not impose excessive PRA penalties on the taxpayers based on the actions of a few public servants when lesser penalties are sufficient to deter future violations. Penalties are paid by the taxpayers and excessive penalties like the one imposed in this case undermine the goals of the PRA by depriving the people control over how their tax dollars are spent.

RESPECTFULLY SUBMITTED this 17th day of September 2018.

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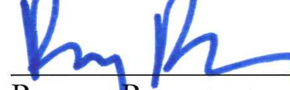

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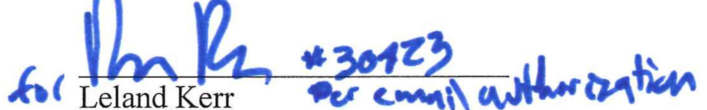

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