Supreme Court No. 92963-7

Court of Appeals No. 73391-5-I

COURT OF APPEALS FOR THE STATE OF WASHINGTON,
DIVISION I

THE REPUBLIC OF KAZAKHSTAN,

Respondent/Plaintiff

v.

DOES 1-100 inclusive,

Defendants

v.

LLC MEDIA-CONSULT,

Appellant/Third Party.

APPELLANT LLC MEDIA-CONSULT'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF ANSWERING PARTY AND INTRODUCTION

LLC Media-Consult ("LMC") is a Russian limited liability company that publishes a newspaper in Kazakhstan. LMC respectfully submits this answer to the Republic of Kazakhstan's petition for discretionary review.

Kazakhstan claims that the Court of Appeals decision involves an issue of "substantial public interest" in Washington under RAP 13.4(b)(4). Not so. This dispute is between a foreign nation and a foreign newspaper that published emails that were allegedly stolen from that government. The only connection to Washington is tangential. Kazakhstan filed lawsuits in California and New York against the "John Doe" hacker defendants. Kazakhstan then filed a limited action in Washington to serve a subpoena duces tecum on the newspaper's internet domain registrar—located in Kirkland, Washington—for records about the newspaper. Because Kazakhstan's admitted purpose was to identify the news source, the subpoena is barred by the Shield Law, specifically RCW 5.68.010(3).

Kazakhstan argues that this is the first time a court has interpreted RCW 5.68.010, so there must be a substantial public interest at issue. But if that were true, then every Court of Appeals decision interpreting a statute for the first time would also require this Court's discretionary review, which is absurd. This statute is nearly a decade old, and there is evidently no

pressing need to further interpret its clear dictate that news sources are off limits in discovery.

Throughout its petition, Kazakhstan complains that the Court of Appeals unfairly expanded a common-law privilege that should be limited to "confidential" sources. In fact, the Court of Appeals straightforwardly applied RCW 5.68.010(3), which does not even use the word "confidential."

In any event, Kazakhstan's position is that it now knows the source. The source was a third-party website that LMC does not control or operate. Kazakhstan knows that this subpoena will not yield any information about the "John Doe" hackers. Yet Kazakhstan has appealed this action to the highest court in Washington, insisting that its subpoena be enforced anyway. Assisting Kazakhstan in tracking down the owners/operators of the opposition free press is not an issue of substantial public interest in Washington.

Kazakhstan clearly disagrees with the Court of Appeals decision, but that alone does not merit discretionary review under RAP 13.4(b)(4). This Court should deny Kazakhstan's petition. However, if this Court grants review, then LMC requests that this Court also review the other legal bases for quashing the subpoena that were argued by LMC but not reached by the Court of Appeals—that is, Kazakhstan's improper claim-splitting, the oppressive nature of this subpoena, and the Washington Constitution's

prohibition on helping a foreign nation chill free speech and the freedom of press with abusive discovery.

II. COURT OF APPEALS DECISION

On February 22, 2016, Division One of the Court of Appeals published an opinion that straightforwardly applied RCW 5.68.010(3) to these facts. The opinion is appended to Kazakhstan's petition. The opinion is also available on Westlaw at *Republic of Kazakhstan v. Does 1-100*, __ Wn. App. __, __ P.3d __, 2016 WL 698409 (2016) ("Opinion"). For clarity, LMC cites to the Westlaw version because it includes paragraph numbers.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

This Court should deny Kazakhstan's petition for discretionary review. This foreign dispute does not involve a substantial public interest to Washington's citizens, so Kazakhstan has not satisfied RAP 13.4(b)(4).

However, if Kazakhstan's petition is granted, then this Court should also review the other legal bases for quashing Kazakhstan's subpoena that were argued by LMC but not reached by the Court of Appeals—that is, the claim-splitting, oppression, and constitutional arguments—which are included conditionally in this brief as a precautionary measure.

IV. STATEMENT OF THE CASE

Because this case involves a long-standing dispute between a foreign nation and a foreign newspaper, and also involves a subpoena duces

tecum for technical records about internet domain registration, LMC has had to summarize the facts for this brief. For a full recitation of the facts, the Court should review pages 5-21 of LMC's Brief of Appellant.

A. Respublika is a Kazakh newspaper that has used eNom, Inc., an internet domain registrar here in Washington.

Kazakhstan is widely considered to be one of the world's most repressive countries. Clerk's Papers (CP) at 117. Respublika is a Russian-language newspaper based in Kazakhstan covering the business and political establishment of Kazakhstan. CP at 77 ¶ 3. Its news articles are made available on its websites, including www.respublika-kaz.info. *Id.* After years of governmental crack-downs, Respublika is now one of only a few remaining in-country sources of news and information about scandals in Kazakhstan's government. CP at 79, 85, 87 (¶¶ 9, 30, 43), 113, 137.

LMC is a Russian limited liability company that operates the online publication of Respublika. CP at 78 ¶ 4. LMC holds the Russian mass media license. *Id.* eNom, Inc. is a domain registration company in Kirkland, Washington, that has kept the newspaper's main domain, www.respublika-kaz.info, registered for years. CP at 86, 88 (¶¶ 35, 45).

In early 2015, Respublika published a news article about a Kazakh politician; the article was critical of the government and contained copies

of email exchanges with government officials.[1] Report of Proceedings (RP) at 6:25 – 7:15, 12:24 – 13:5. The source of those emails was a third-party website, kazaword.wordpress.com, which neither LMC nor Respublika own or operate. CP at 86 ¶ 36; Opinion at *7 ¶ 35.

B. Kazakhstan filed suit in California and served an out-of-state subpoena here in Washington.

On February 20, 2015, Kazakhstan filed a lawsuit in the Superior Court of Santa Clara County, California, alleging that, on or about January 21, 2015, 100 "John Doe" defendants[2] stole and disseminated Kazakh government emails in violation of California and U.S. federal law. CP at 50-52 (¶¶ 6-10), 202 (¶ 4), 203 (¶ 7). On March 4, 2015, Kazakhstan filed

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[1] This newspaper article is not in the appellate record. In addition to filing suit in California state court, Kazakhstan also filed a federal lawsuit in the Southern District of New York. At Kazakhstan's request, U.S. District Judge Edgardo Ramos issued an order on March 20, 2015, that enjoined several broad, undefined classes of individuals from "using, disclosing, disseminating, posting, displaying, sharing, distributing, hosting, copying, viewing, accessing, providing access to or making available to anyone, in any matter whatsoever" the emails allegedly stolen from the government. CP at 192-93, 200-01.

When LMC moved to quash Kazakhstan's subpoena in April 2015, it was unclear exactly whom that order enjoined from republishing (or even viewing or accessing) those emails. Therefore, out of an abundance of caution, no copies of the newspaper article containing those emails are in the appellate record. To be clear, it was Kazakhstan, not LMC, who created this situation by requesting an overly broad injunction. At oral argument before the King County Superior Court, both counsel discussed the fact that LMC published a news article containing copies of government emails. RP at 6:25 – 7:15, 12:24 – 13:5. This Court can also take judicial notice that the newspaper article was published. RCW 5.68.010(4).

On October 27, 2015, Judge Ramos granted LMC's motion for clarification and found that his preliminary injunction *did not* apply to LMC based on the evidentiary record before him. LMC has ordered a certified copy of that federal order and can formally supplement the appellate record at this Court's request.

[2] Kazakhstan did not name a single identifiable defendant.

this limited action in King County Superior Court in order to serve an out-of-state subpoena duces tecum on eNom, Inc., requesting all information known to eNom about LMC/Respublika. CP at 1, 5-6, 12, 86 ¶ 35. Though Kazakhstan withdrew parts of the subpoena, the remaining records requested (and ordered by the trial court to produce) are extensive:

> 1.Documents sufficient to show all details of all current and former registrants, including any underlying registrants using a privacy or proxy service, of the Domain Name including, but not limited to, his or her email address, physical address, phone number, ~~and billing information,~~ including any updated or revised details since registration.
>
> 2.Documents sufficient to show the dates, times and corresponding IP Addresses and/or Mac [*sic*] Addresses from which the Domain Name was registered, created or modified.

Compare CP at 3-4, 10, 16, *with* CP at 411-12 (the trial court removed the request for "billing information"). The trial court ordered that eNom product documents revealing "all details" about the people connected to the newspaper's website, specifically including their names, physical addresses, telephone numbers, email addresses, Internet Protocol (IP) addresses, and Media Access Control (MAC) addresses. CP at 3-4, 10, 16.

C. Kazakhstan also filed a virtually-identical lawsuit in federal court in the Southern District of New York.

In addition to filing suit in California, Kazakhstan also filed a federal lawsuit in the Southern District of New York, also against 100 "John Doe" defendants for allegedly stealing and disseminating Kazakh government

emails on or about January 21, 2015, and also in violation of 18 U.S.C. § 1030. *Compare* CP at 50-57, 202, *with* CP at 192-93, 196, *and* Appendix B to Brief of Appellant, ¶¶ 3-4, 8-16 (federal complaint). The highly-detailed nature of the federal court's preliminary injunction also shows that Kazakhstan makes the same allegations in both cases. CP at 192-93.

D. The trial court denied LMC's motion to quash, but the Court of Appeals reversed the trial court and dismissed this limited subpoena action.

LMC moved to quash Kazakhstan's subpoena duces tecum based on RCW 5.68.010 and other grounds. CP at 20-31. That motion was heard on April 30, 2015. RP at 1. At the close of that hearing, the trial court signed Kazakhstan's proposed order denying LMC's motion. CP at 411-12.

On appeal, Division One of the Court of Appeals reversed that order, holding that Kazakhstan's subpoena fell within the plain language of RCW 5.68.010(3)'s prohibition. Opinion at *5-7, ¶¶ 28-30, 37-38.

V. ARGUMENT

A. Kazakhstan has not met the test of RAP 13.4(b)(4).

Kazakhstan seeks discretionary review under RAP 13.4(b)(4), which requires that a case "involve[] an issue of substantial public interest." Respondent's Petition for Review (Resp. Pet.) at 11. Citing no case law, Kazakhstan summarily concludes that this is such a case. *Id.* It is not.

In *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005), this

Court identified a "prime example" of a substantial public interest under RAP 13.4(b)(4). There, the Court of Appeals decision affected every drug offender sentencing proceeding in Pierce County and created unnecessary confusion in the courts. *Id.* Similarly, in *In re Marriage of Ortiz*, 108 Wn.2d 643, 646, 740 P.2d 843 (1987), this Court held that there was a substantial public interest at stake because the Court of Appeals decision retroactively applied to all child support decrees that used an automatic escalation clause to calculate payments.

These cases require a litigant seeking discretionary review under RAP 13.4(b)(4) to demonstrate how a Court of Appeals decision affects the Washington public in a significant way. *Watson*, 155 Wn.2d at 577; *Ortiz*, 108 Wn.2d at 646. Kazakhstan has not, and cannot, make that showing here. This is a dispute between a foreign nation and a foreign newspaper. The only connection to this state is tangential. Kazakhstan filed suits in California and New York against "John Doe" defendants. Then, Kazakhstan domesticated a California subpoena duces tecum in King County Superior Court for the sole purpose of serving that subpoena on the newspaper's domain registrar, which happens to be located in Kirkland, Washington. If anything, this situation may be a prime example of a case with no substantial public interest at stake for Washington's citizens.

Kazakhstan throws out a handful of reasons why this case could

involve a substantial public interest, but none survives close scrutiny. First, Kazakhstan argues RAP 13.4(b)(4) is met because this is the first time a Washington appellate court has interpreted RCW 5.68.010. Resp. Pet. at 3, 11. But if that were true, then every Court of Appeals decision interpreting a statute for the first time would also require this Court's discretionary review, which is absurd. There is no prong under RAP 13.4(b) for cases of first impression—quite the opposite. RAP 13.4(b)(1) and (2) permit this Court to take cases in order to (1) resolve conflicts between this Court and the Court of Appeals and (2) resolve conflicts among the divisions of the Court of Appeals. No such conflicts exist here.

Second, Kazakhstan claims RAP 13.4(b)(4) is met because this case can "determine the scope of the journalist's privilege" and because the Court of Appeals decision "exceeds the First Amendment and public policy principles that underlie that privilege...." Resp. Pet. at 11. Contrary to Kazakhstan's briefing, the Court of Appeals *did not* rule on a common-law privilege. Opinion at *1 ¶ 3 ("On appeal, we must interpret Washington's news media shield law, RCW 5.68.010, and determine whether it protects the information sought by this subpoena."). The court did not need to address any constitutional tests or public policies. Instead, it read the plain language of the statute and applied it to this case. Opinion at *6-7 ¶¶ 33, 36.

Third, Kazakhstan maintains RAP 13.4(b)(4) is met because the

Court of Appeals decision "unnecessarily inhibits legitimate discovery...." Resp. Pet. at 11. But whether the subpoena was "legitimate discovery" just begs the question: Kazakhstan may disagree, but its subpoena was not legitimate because it was explicitly barred by statute.

Finally, Kazakhstan argues RAP 13.4(b)(4) is met because the Court of Appeals decision "unnecessarily inhibits ... criminal investigations." Resp. Pet. at 11. That argument makes no sense. This is a civil action. Kazakhstan issued a subpoena under Civil Rule 45. CP at 12-14. Kazakhstan has zero authority to conduct criminal investigations here in Washington. In fact, Kazakhstan's counsel represented to the trial court that this was not a criminal investigation. RP at 25:11-13 (emphasis added) ("Now, *I am not saying that I am leading a criminal investigation*, but the point is, is that the Shield Law has limits.").

Enacted and effective in 2007, the Shield Law is nearly a decade old, and this is the first interpretation by an appellate court, either published or unpublished. There does not appear to be any pressing public need for interpretation of the statute at this time. This Court should deny discretionary review.

B. The plain language of the statute bars Kazakhstan's subpoena duces tecum.

Besides, the Court of Appeals ruled correctly.[3] RCW 5.68.010(3) bars subpoenas that are issued to non-news entities seeking records about newspapers "for the purpose of discovering the identity of a source." The statute is not limited to subpoenas for records about sources.[4]

RCW 5.68.010(3) applies here. LMC published a news article with emails that were allegedly stolen from the Kazakh government. Kazakhstan filed lawsuits against the "John Doe" hacker defendants. Kazakhstan then served a subpoena on eNom, the newspaper's domain registrar, seeking records about the opposition newspaper's location and its owners/operators.

Critically, Kazakhstan has stated that the purpose of its subpoena was to identify the source of the news article, in order to find the alleged hackers. Kazakhstan said that to the trial court.[5] RP at 18:5-14. Kazakhstan

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[3] LMC sets out its Shield Law argument more fully in pages 24-37 of LMC's Brief of Appellant and in the Reply Brief of Appellant.

[4] The reason for this is simple. Otherwise, litigants could easily avoid this statute by mouthing a different purpose, even when the circumstances make it transparent that the purpose is to identify a news source. Here, however, Kazakhstan has affirmatively stated that its purpose in serving the subpoena was to identify a source of news published by LMC. *See* footnote 5.

[5] At oral argument before the trial court, Kazakhstan's counsel stated:

> **All we're asking is to identify an individual. If and when we were to take the next step and subpoena them** if we could, if they were even in the United States, which we don't know and it's probably likely that they're not -- but if they were and we were then to do some kind of compulsory process exercising the laws of the state of Washington,

said that to the Court of Appeals. Oral Argument at 11:06-11:16, 14:05-14:16.[6] Kazakhstan all but stated that in its appellate brief as well. Brief of Respondent at 43 (the information "can help confirm who hacked into Kazakhstan's computers").

In its petition, Kazakhstan again ties itself in knots trying to explain how it could have used the subpoenaed information about the newspaper to find the *hackers* without also, necessarily, discovering the newspaper's *source*. The Court of Appeals recognized that Kazakhstan's subpoena for newspaper records had the transparent purpose of identifying a source, and the court straightforwardly applied RCW 5.68.010(3) to bar the subpoena. Opinion at *5-6, ¶¶ 28-31.

Unable to articulate a plausible purpose for this subpoena that does not offend the Shield Law, Kazakhstan instead suggests that the Court of Appeals unfairly broadened the scope of a common-law privilege about "confidential" sources. That is incorrect. This case is governed by RCW 5.68.010(3), which defines precisely where and how it applies. No court-

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> **saying we want to ask you questions, we want to know, "What did you publish, did it involve the stolen emails, *where did you get it from*," then those questions *would* implicate the Shield Law, but those questions aren't being asked *right now*.**

RP at 18:5-14 (emphasis added).

[6] A recording of oral argument at the Court of Appeals is available at the following website: http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20151110.

made privilege is at issue here.

> RCW 5.68.010(3) does not even use the term "confidential":
>
> (3) The protection from compelled disclosure contained in subsection (1) of this section also applies to any subpoena issued to, or other compulsory process against, a nonnews media party where such subpoena or process seeks records, information, or other communications relating to business transactions between such nonnews media party and the news media **for the purpose of discovering the identity of a source** or obtaining news or information described in subsection (1) of this section.

(Emphasis added.) Even so, in its petition, Kazakhstan characterizes the legal issue as one about "confidential sources," defines "confidential source" in Black's Law Dictionary (rather than "source"), and otherwise uses the word "confidential" approximately two dozen times to brief this Court on what Kazakhstan thinks is the proper standard and how this subpoena avoids the statutory bar. Resp. Pet. at 1-2, 5, 8-9, 12-13, 15-16, 18, 20. Subsection (3) bars a subpoena when its purpose is to identify a "source," not a "confidential source."

Citing three foreign statutes[7] and a case from Indiana, Kazakhstan

[7] These foreign statutes do not support Kazakhstan's argument. It is true that Delaware's statute defines "source" as a "person from whom a reporter obtained information," but the statute then defines "person" as any "individual, corporation, statutory trust, business trust, estate, trust, partnership or association, governmental body, or any other legal entity." DEL. CODE ANN. tit. 10, § 4320(3), (5). Illinois's shield law also broadly defines "source" to mean not just a "person," but also a "means from or through which the news or information was obtained." 735 ILL. COMP. STAT. 5/8-902(c). Accordingly, the statutory definitions of "source" from Delaware and Illinois would bar Kazakhstan's subpoena here. Finally, Michigan's shield law applies only to criminal cases, which explains why it uses the term

claims that the Legislature must have meant the word "source" to be a "term of art" actually meaning "confidential source." Resp. Pet. at 13-14. But if that were true, then the Legislature would not have written "confidential source" in a different part of the same statute, in RCW 5.68.010(2)(b)(iv). *See, e.g.*, *Ralph v. Dep't of Natural Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014) ("We must interpret a statute as a whole so that, if possible, 'no clause, sentence, or word shall be superfluous, void, or insignificant.'").[8]

Failing to explain how subsection (3) is limited to "confidential" sources, Kazakhstan moves on to RCW 5.68.010(1)(a). That subsection is about subpoenas issued directly to newspapers. Leaving out several words, Kazakhstan misquotes the statute in a way that fundamentally changes its meaning. Resp. Pet. at 12. It actually says:

> (1) Except as provided in subsection (2) of this section, no judicial, legislative, administrative, or other body with the power to issue a subpoena or other compulsory process may compel the news media to testify, produce, or otherwise disclose:
>
> (a) **The identity of a source of any news or information** *or* **any information that would tend to identify the source**

"informant" instead of "source." MICH. COMP. LAWS § 767.5a(1); *see, e.g.*, *Compuware Corp. v. Moody's Investors Servs., Inc.*, 222 F.R.D. 124, 132 (E.D. Mich. 2004).

[8] Kazakhstan cites a dissenting opinion from nearly 70 years ago, *State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 57, 182 P.2d 643 (1947) (Simpson, J., dissenting), for the proposition that Washington courts should give a technical, statutory term its technical meaning. Resp. Pet. at 14-15. Even if "source" could be considered a "technical word," as Kazakhstan claims, defining it to mean "confidential source" here would render RCW 5.68.010(2)(b)(iv)'s use of "confidential source" wholly superfluous, which violates basic statutory construction.

> **where such source has a reasonable expectation of confidentiality**[.]

(Emphasis added.) There are two parts to subsection (1)(a), and they are separated by the disjunctive "or." First, a subpoena to a newspaper is barred if it seeks "[t]he identity of a source of any news or information...." *Id.* Second, a subpoena to a newspaper is barred if it seeks "any information that would tend to identify the source where such source has a reasonable expectation of confidentiality...." *Id.* There is no way to read in the word "confidential" in the first part of subsection (1)(a), as Kazakhstan suggests.

Kazakhstan also argues that LMC did not meet its evidentiary burden under the Shield Law to show that the subpoena would have revealed a news source. Resp. Pet. at 17-20. No such burden exists. RCW 5.68.010(3) bars subpoenas seeking records about newspapers "for the purpose of discovering the identity of a source." The statute is not limited to subpoenas for records about sources, so LMC had no reason to prove that Kazakhstan's subpoena would reveal a source. By its own admission, Kazakhstan's subpoena targeted the newspaper's records in an effort to identify the source of the published emails. LMC easily established that RCW 5.68.010(3) applied here.

There are no "startling" ramifications to the Court of Appeals decision. *See* Resp. Pet. at 16. It stands for the proposition that a litigant

cannot target newspapers or their non-news affiliates with discovery when the purpose is to identify the source of a news article. Opinion at *6 ¶ 31. That is exactly what the Legislature intended to happen in this situation. Kazakhstan claims that this decision unduly hampers criminal investigations. *See* Resp. Pet. at 16. Again, this is not a criminal investigation. Even if it were, Kazakhstan has apparently served discovery in its U.S. cases on a variety of entities (like Google, Microsoft, Facebook, and others) in order to chase down possible leads and gather information. *See, e.g.*, RP at 13:22 – 14:20. But Washington properly draws the line at subpoenas designed to identify the source of a news article.

In any event, Kazakhstan now knows the source of the news article. Resp. Pet. at 14. The source was a third-party website, which neither LMC nor Respublika own or operate, making this case an exercise in futility for Kazakhstan. However, that disclosure does not change the fact that Kazakhstan issued this subpoena with the purpose of identifying a source.

In short, the Court of Appeals correctly applied RCW 5.68.010(3). There is no reason to grant Kazakhstan's petition for discretionary review.

C. If discretionary review is granted, this Court should also review the bases for quashing the subpoena that were argued at, but were not reached by, the Court of Appeals.

1. Kazakhstan is improperly claim-splitting.

If this Court grants review, then the Court should first grapple with

a threshold problem: Kazakhstan filed virtually-identical actions in California and New York, and it has now dragged our courts into that sprawling litigation.[9] Washington prohibits this type of claim-splitting, which promotes unseemly, expensive, and dangerous conflicts of jurisdiction and process. *E.g.*, *Am. Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 317, 796 P.2d 1276 (1990); *Bunch v. Nationwide Mut. Ins. Co.*, 180 Wn. App. 37, 42, 50, 321 P.3d 266 (2014). Kazakhstan filed neither of its complaints in Washington, so this Court cannot apply this rule (also called the "priority of action" rule) directly to a complaint. But Washington policy is clear: Our courts do not tolerate litigants bringing concurrent or successive suits about the same subject matter against the same defendants. If review is accepted, the Court should reverse the trial court on this basis alone.

2. Kazakhstan's subpoena is unfairly oppressive.

If this Court grants review, the Court should also review the oppressive nature of Kazakhstan's subpoena.[10] It bears repeating that Kazakhstan now knows the source of the published emails. One would have expected Kazakhstan to withdraw its subpoena and move on to other

[9] LMC sets out its claim-splitting argument more fully in pages 22-23 of LMC's Brief of Appellant and in the Reply Brief of Appellant.

[10] LMC's oppression argument is made in pages 37-44 of LMC's Brief of Appellant and in the Reply Brief of Appellant.

discovery targets. And yet Kazakhstan has not done so. Instead, Kazakhstan has appealed this discovery matter to the highest court in Washington, insisting that the subpoena still be enforced.

There are two apparent reasons for this, both of which are unlawful. First, Kazakhstan doubts that the "kazaword" website was really the newspaper's source. If so, then Kazakhstan's *continued* purpose is to identify the source, which still violates RCW 5.68.010(3).

The second reason is more perverse and, frankly, more likely. Kazakhstan separately wants the names, addresses, and contact information for LMC's and Respublika's people, as well as the specific location of the newspaper's online "printing press," for reasons that are quite unrelated to the allegedly-stolen emails or the lawsuits about them. Kazakhstan will use any records obtained by this subpoena to further threaten and intimidate this newspaper. Kazakhstan's agents will locate the newspaper's hosting server and shut it down again. CP at 84-85 (¶29). Kazakhstan will use these records as a stepping stone to discover more information about the newspaper, and on and on until its journalists quit criticizing Kazakhstan's autocratic regime and the newspaper stops publishing for good. This is not a "parade of horribles." These are a sober predictions based on actual events. *See, e.g.*, CP at 80-86, 88-89 (¶¶ 9-13, 18-19, 21-22, 25-29, 32-33, 45, 47-49); CP at 94, 97, 99, 102-03, 106-07, 113-14, 137.

eNom, Inc. has been Respublika's domain registrar for years and therefore probably has years' worth of identifying information about the newspaper, including individuals' names, addresses, telephone numbers, email addresses, and all other information. CP at 86, 88-89 (¶¶ 35, 45-50). It would be a disaster if Kazakhstan were to discover this information. These facts are as dire as any Washington courts have encountered, and this situation is the *raison d'etre* for a prohibition on oppressive discovery—when the stakes very well may be life or death. In stark contrast to LMC's concerns, Kazakhstan's counsel told the trial court that his client merely wanted those records as "just as another piece of evidence that we may or may not use." RP at 17:20-22.

The trial court erroneously weighed the overwhelming oppression demonstrated by the newspaper against Kazakhstan's weak showing of need. If review is accepted, the Court should reverse the trial court on this basis.

3. Washington's Constitution prohibits our courts from helping Kazakhstan conduct this discovery.

Finally, if this Court grants discretionary review, the Court should also review a significant constitutional hurdle to the enforcement of this subpoena: Article I, sections 1 and 5 of Washington's Constitution prohibit our courts from helping Kazakhstan chill speech and the press with abusive

discovery targeting a newspaper.[11] This constitutional issue satisfies RAP 13.4(b)(3). Like other branches of government, Washington's courts were established to protect and maintain, among other rights, the freedom of the press. WASH. CONST. art. I, § 5. The framers of our Constitution would never have agreed to open our courts to a foreign nation operating in this manner, and the factors of *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), confirm that our Constitution offers greater protections than the U.S. Constitution in these circumstances.

VI. CONCLUSION

Because this dispute is between a foreign nation and a foreign newspaper, there is no substantial public interest at stake for Washington's citizens under RAP 13.4(b)(4). RCW 5.68.010 is nearly a decade old, and there is evidently no pressing need for its further interpretation. The purpose of Kazakhstan's subpoena was to identify the newspaper's source, so the Court of Appeals properly recognized the subpoena was unlawful. This Court should deny Kazakhstan's petition for discretionary review.

Respectfully submitted this 22nd day of April, 2016.

HELSELL FETTERMAN LLP

By _____
Andrew J. Kinstler, WSBA No. 12703
Attorneys for LLC Media-Consult

[11] LMC sets out its constitutional argument in pages 44-50 of LMC's Brief of Appellant.

CERTIFICATE OF SERVICE

I, KYNA GONZALEZ, hereby declare and state as follows:

I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

I am now and at all times herein mentioned employed by the offices of Helsell Fetterman LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.

In the appellate matter of Kazakhstan v. Does, et al., I did on the date listed below (1) cause to be filed with this Court LLC Media-Consult's Answer to Petition for Review; (2) cause it to be delivered via messenger to Ryan P. McBride and Abraham K. Lorber of Lane Powell PC, 1420 Fifth Avenue, Suite 4200, Seattle, WA 98111; and (3) cause it to be delivered via electronic mail to Robert N. Phillips and David J. de Jesus of Reed Smith LLP, 101 Second Street 1800, San Francisco, CA 94105, who are counsel of record for Respondent The Republic of Kazakhstan.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: April 22, 2016

Kyna Gonzalez

KYNA GONZALEZ

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Good morning:

Case Name: Republic of Kazakhstan v. Does v. LLC Media-Consult
Supreme Court Case No.: 92963-7
Information of filing attorney: Andrew Kinstler for Appellant LLC Media-Consult, 206-292-1144, Kinstler WSBA No. 12703

Please see attached Appellant LLC Media-Consult's Answer to Petition for Review in this matter for filing. If the Court requires a hard copy, please let me know. Thank you.

Kyna D. Gonzalez
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