No. 93904-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STEVE VERMILLION AND
THE CITY OF PUYALLUP,
appellants,

Vs.

ARTHUR WEST
respondent

ON PETITION FOR
DISCRETIONARY REVIEW

RESPONDENT'S REPLY TO WASHCOG BRIEF

(corrected)

Arthur West
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I. This case does not provide a valid basis for this Court to expend its limited resources to fix constitutional defects in the PRA that do not, in fact, exist.

Respondent concurs with WASHCOG that this case does not provide an appropriate vehicle for determination of large constitutional issues that have not been properly raised or briefed, and which do not exist to begin with.

Like the old observation about Hubert Humphrey[1], the appellants in this case seek to have this Court impose judicially created solutions for constitutional problems that simply do not exist in any substantial form. Further, the particular facts of this case and the quality of the existing parties makes this case an inappropriate vehicle to resolve significant constitutional issues, even if any such issues existed and there was any pressing need to resolve them at this time.

Even if there were substantial unresolved constitutional issues to settle, which there are not, the City and Mr. Vermillion have not shown why these issues are so pressing they must be settled in this present case rather than in a subsequent case where any such substantive issues would be adequately presented and briefed by experienced counsel on both sides and where the agency was actually attempting to comply with the PRA rather than resisting compliance at every turn.

The public interest and the conservation of judicial resources would

[1] "Poor Hubert—he's got solutions the rest of us don't even have problems for"

both be best served by waiting for a more representative set of litigants with actual substantive issues, and fully developed, thorough and adequate briefing rather than embarking upon an unnecessary expedition into uncharted constitutional territory on the basis of such insubstantial, hypothetical, hybrid and ill-formed issues as are presented in this Petition.

Perhaps, sometime in the future, after a properly representative agency has attempted to comply with the requirements of Nissen in good faith and there is a bona fide problem and a legitimate constitutional issue to resolve, there may be a need for some further refinement of the PRA by this Court. But the time is not now and the case is not West v. Vermillion.

In contrast to the representations of the appellants, the reality is that the sky will not fall on anyone's head and no disaster will ensue if this Court simply determines that any actual problems that may result from the application of the well reasoned determination in Nissen should be resolved when they actually occur in the context of a fully developed record with parties capable of adequately representing the interests of not only agencies attempting to comply with the PRA, and those of the public, but those of the State of Washington, as required by State Law.

II. Failure to notify the Attorney General is a jurisdictional defect in a constitutional challenge to a State Statute

Another compelling reason why this Court should await a better case to resolve any possible constitutional issues resulting from Nissen is that the Appellants in this case have failed to take the necessary step of notifying the State of their constitutional challenge and allowing the Attorney General the opportunity to participate.

As Division I of the Court of Appeals recently ruled, in Jackson v. Quality Loan Services, 186 Wn. App. 838, 843–44, 347 P.3d 487, 489, (Div. I, 2015), **review denied**, 184 Wn.2d 1011, 360 P.3d 817 (2015)...

> RCW 7.24.110 requires notification to the state attorney general when there is a constitutional challenge to state legislation. Jackson failed to notify the state attorney general. Dismissal of constitutional claims challenging the facial constitutionality of a state statute is appropriate where the state attorney general has not been notified. See Kendall v. Douglas. Grant. Lincoln, and Okanogan Counties Pub. Hosp. Dist. No. 6, 118 Wn.2d 1,11-12, 820 P.2d 497 (1991) (service on the attorney general is mandatory and a prerequisite); Camp Fin.. LLC v. Brazington. 133 Wn. App. 156, 160, 135 P.3d 946 (2006) (attorney general must be served when a party challenges the constitutionality of a statute)

The Court in Jackson explicitly held that...

> "Notification to the state attorney general is a mandatory prerequisite to challenge a statute's constitutionality."

This is a critical concern in this case where the appellants seek to have important constitutional issues determined on an ad hoc basis in the absence of adequate briefing. It is true that...

> "While an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised." Karlbero v. Often, 167 Wn. App. 522, 531, 280 P.3d 1123 (2012) (citing Smith v. Shannon. 100 Wn.2d 26, 38, 666 P.2d 351 (1983)

However, in this case there is no good reason for the Court to depart from the general rule that parties seeking to have complex issues adjudicated on appeal adequately brief them in the lower Courts.

III. Conclusion: No compelling basis justifies review at this time.

The City and Mr. Vermilion have not identified any compelling basis for this Court to exercise its discretion to review the sound reasoning of Nissen or that of the Court of Appeals at his time. Any such review should await an actual constitutional issue, a better fact situation, better briefing, and a better set of litigants, and include, as a necessary prerequisite, the participation of the Attorney General of the State of Washington.

Respectfully submitted this day of March 1, 2017.

s/Arthur West
ARTHUR WEST

CERTIFICATE OF SERVICE

I, Arthur West, hereby certify that I served a copy of the foregoing corrected Brief of Respondent, by Email on or before March 1, 2017, to William Crittenden and the following counsel of record at the following addresses:

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Dated this 1st day of March, 2017.

s/Arthur West
ARTHUR WEST