NO. 95262-1

THE SUPREME COURT
STATE OF WASHINGTON

WASHINGTON PUBLIC EMPLOYEES ASSOC. et al.,
Respondents/Appellants/Plaintiffs,

v.

STATE OF WASHINGTON, et al.,
Respondents/Defendants,

and

FREEDOM FOUNDATION,
Petitioner/Respondent/Defendant.

RESPONDENT UNIONS' ANSWER TO AMICUS CURIAE MEMORANDUM

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I. Identity of Respondents and Relief Requested

Respondent "Unions"[1] submit this Answer to the Memorandum of *Amici Curiae* "Media"[2]. Because the Media restate the arguments articulated in the Freedom Foundation's ("Foundation's") Petition for Review ("Petition") of the Court of Appeals' Decision in *WPEA et al. v. Wash. State Ctr. For Childhood Deafness & Hearing Loss et al.*, 1 Wn. App. 2d 225 (2017) ("Decision"), and raise no additional issues supporting a grant of review, the Unions respectfully request that this Court deny the Petition.

II. Grounds for Relief

The Media make two arguments in their Memorandum. The first reiterates assertions made by the Foundation in its Petition and mischaracterizes the authority cited by the Media. The second raises factual scenarios inapplicable to this case and asks the Court to rule on matters *not* before it. Most importantly, the Media raise no issues

[1] Teamsters Local Union No. 117 ("Local 117"), Washington Federation of State Employees ("WFSE"), International Brotherhood of Electrical Workers Local 76 ("Local 76"), United Association Local 32 ("Local 32"), Washington Public Employees Association Local 365 ("WPEA"), Professional & Technical Employees Local 17 ("PTE Local 17"), and Service Employees International Union Healthcare 1199NW ("SEIU 1199NW") (collectively, "the Unions").

[2] Allied Daily Newspapers of Washington, Seattle Times Company, Washington Coalition for Open Government, Washington Newspaper Publishers Association and the Washington State Association of Broadcasters (collectively "Media").

warranting review under RAP 13.4(b). Thus, review of the Decision should be denied.

A. The Decision Correctly Held That Public Employee Dates of Birth Linked with Names Are Entitled to Protection Under Article I, Section 7, And Is Supported by Established Precedent.

The Media's assertion that dates of birth are not "private affairs" restates the arguments made by the Foundation [Petition, 14-15] and addressed by the Unions in their Answer in Opposition to Petition for Discretionary Review ("Opposition") [at 8-11]. The Opposition explains the Decision's holding that a privacy interest inheres in involuntary disclosure of dates of birth linked with names is consistent with the constitutional provision that "[n]o person shall be disturbed in his private affairs or his home invaded, without authority of law." Const. art. I, § 7. A central consideration in determining whether something is a private affair is the nature of the information sought, and whether the information reveals intimate or discrete details of a person's life. *State v. Haq,* 166 Wn. App. 221, 256-57, 268 P.3d 997 (2012), *rev denied,* 174 Wn.2d 1004 (2012). While some individuals in certain circumstances may *voluntarily* disclose their date of birth in order to gain employment, for example, individuals have a privacy interest in protecting against involuntary

disclosure of their date of birth, with the attendant dangers of identity theft and other injuries.

Additionally, the Media mischaracterize the holdings of the cases they cite. Memorandum, 3. For example, *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002) does not *hold* that "[b]irthdates are 'matters of public record,'" as claimed by the Media. At issue in *Sheehan* was not release of dates of birth of public employees, but release of full names and ranks of police officers. 114 Wn. App. at 331. Further, *Sheehan* involved statutory, not constitutional, privacy provisions. *Id.* at 342-44. In another cited case, *State v. CNH*, 90 Wn. App. 947, 954 P.2d 1345 (1998), the court found that a certified Washington State identification card, admission of which in a criminal proceeding was sought to prove a defendant's age, was not inadmissible hearsay. Like *Sheehan*, *CNH* also did not involve article I, § 7. *Id.* Moreover, *State v. McKinney*, 148 Wn.2d 20, 60 P.3d 46 (2002), does not hold that *dates of birth* are private, but instead that Department of Licensing records – including "the names and addresses of the registered owners associated with license plate numbers, physical descriptions, and license status" – could be disclosed to law enforcement which the court noted was the very purpose of the records and one the driving public was well aware of in providing the information. 148 Wn.2d at 30-31.

The holding in *State v. Jorden*, 126 Wn. App. 70, 74, 107 P.3d 130 (2005) relied upon by Media (Memorandum, 3) that there was no expectation of privacy in a motel's guest register (which included name, address, date of birth, physical description and picture, and driver's license number) was reversed in *State v.* Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007) where the court held "the information contained in a motel registry—including one's whereabouts at the motel—is a private affair under our state constitution." 160 Wn.2d at 130.

Further, *Bellevue John Does 1-11, v. Bellevue Sch. Dist. #404*, 129 Wn. App. 832, 861, 120 P.2d 616 (2005) did *not* broadly hold that the constitutional privacy protection "does not yield a different result" than the PRA's privacy definition. Memorandum, 3. Instead, that court, in applying the constitutional analysis, not the statutory analysis, held disclosure of names of teachers accused of sexual misconduct was not prohibited under either article I, § 7 or the statutory privacy provision, in part because the request was for "information about conduct occurring *in the course of performing a public duty*." 129 Wn. App. at 861 (emphasis added). While the constitutional analysis yielded that same result, the holding was not that the constitutional and statutory rights were identical.[3]

[3] Moreover, on review the Washington Supreme Court held that the case could be resolved on statutory grounds and so found that it would be inappropriate to reach the constitutional question. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wash.

Here, there is no evidence that state employee dates of birth constitute conduct in the course of official duties.

The Media's assertions regarding dates of birth in voter databases and on birth certificates, as well as other provisions in the Public Records Act ("PRA") regarding dates of birth, do not raise issues warranting review of the Decision's holding. While there may be instances where birthdates are publicly available, there may also be instances where they are not. The Decision utilized an individualized analysis of the information requested in this case; it did not create any sort of categorical constitutional protection. *WPEA et al.*, 1 Wn. App. 2d at 234-35. Moreover, providing examples where birthdates are allowed is inapposite to the Decision, as there was no argument of historical protection for state employees' full names and birthdates. *Id.* at 233. Instead, the Decision found that disclosure in this particular instance carries the risk of identity theft and other harms. *Id.* at 234. Highlighting a lack of historical protection does not change the fact that under these circumstances, there is an article I, § 7 privacy interest in involuntary release of state employee dates of birth, together with names, to the Foundation.

2d 199, 208, 189 P.3d 139, 144 (2008). Thus, the value of the Court of Appeal's discussion of the constitutional issue is extremely limited.

B. The Decision Appropriately Found That Based Upon the Facts Before It, Release of State Employee Dates of Birth to the Foundation Is Not in the Public Interest.

The Media find fault with the Decision's holding that, in the circumstances of this case, there was no public interest in allowing access to dates of birth linked with state employee names. Memorandum, 5. The Decision addresses this element as part of the analysis whether the authority of law exception explicit in article I, § 7 applies through the application of the requirement in RCW 42.56.540 that, to enjoin release the court must "find that such examination would clearly not be in the public interest." *See also Ameriquest v. Office of Attorney General,* 177 Wn.2d 467, 487, 300 P.3d 799 (2013). After applying the constitutional privacy exemption, the Decision examined whether, in the circumstances before it, release of "birthdates of individually identified state employees" is in the public interest. 1 Wn. App. 2d at 237. It then properly found that the facts at issue in the case "do not inform the public of facts related to a government function." *Id.* Further, Respondent Unions submit that this aspect of statutory analysis does not apply once there is a determination as a matter of constitutional analysis that a privacy interest would be violated by the disclosure. The "public interest" prong of the statutory analysis is appropriately seen as applying only when statutory, rather than constitutional exemptions are found. However, even if the "public

interest" is considered, as explained herein, the public interest is not served by disclosure

In asserting that general access to dates of birth serves the public interest, the Media rely solely on examples of the use of public employees' birth dates in contexts *not* at issue in this case. Memorandum, 5-7. While the Media highlights examples of using birthdates for benign purposes, selected instances of positive public oversight do not negate the potential for abuse. Indeed, while some valuable reporting might result from free access to all information, substantial harms would arise as well. The recent criminal guilty plea by Seattle Immigration and Customs Enforcement Chief Counsel Raphael Sanchez reveals the danger of information being used for identity theft and other nefarious purposes by individuals with access to private information. *See*, *e.g.*, "Former ICE attorney in Seattle pleads guilty to stealing immigrants' IDs," *Seattle Times*, February 15, 2018 (https://www.seattletimes.com/seattle-news/crime/former-ice-attorney-pleads-guilty-to-stealing-immigrants-ids-to-defraud-credit-card-companies/).

The Media cite their need for public employee dates of birth to investigate "abusive high school coaches and teacher [sic]," university and community college administrators who retired and were rehired, and the number of Seattle employees earning six figure incomes. Memorandum,

5-6. However, with the exception of coaches, the Media do not explain the reasons that dates of birth were necessary for those investigations, or with respect to the coach's investigation, that the facts could not have been verified through some means other than dates of birth. Further, the Media cite their alleged use of dates of birth in investigations surrounding the 2004 election [Memorandum, 6-7], but such use involved voters, not public employees. In fact, whether there would have been a public interest in the release of public records in any of the fact patterns described by the Media was not at issue and was not decided in the Decision below. Thus, they are not relevant to the court below's determination that involuntary release of dates of birth with state employee names to the Foundation is not in the public interest.

The Media have not explained how involuntary release of state employee dates of birth with names to the Foundation, which intends to use the information to contact public employees to opt out of union membership, promotes accountability of public officials and institutions, or how dates of birth are matters of "legitimate concern to the public." Memorandum, 7. Similarly, the Media's sweeping statement that there is no privacy interest in matters of "legitimate concern to the public" is simply not supported by the authority cited, RCW 42.56.050, or *Bellevue John Does.* RCW 42.56.050 is inapplicable because it addresses the

statutory, not constitutional, right to privacy and *Bellevue John Does* holds that information about teachers accused of misconduct - "occurring in the course of performing a public duty, not information of an intimate personal nature" – was not constitutionally protected. 129 Wn. App. at 861. The Media do not explain how the discrete fact of an employee's date of birth, necessarily provided for employment purposes, is of legitimate concern to the public.

C. The Media Raise No Issues Supporting Review Under RAP 13.4.

Contrary to the Media Amici's assertions, the Decision raises no *significant* constitutional question warranting review under RAP 13.4(b)(3). The Decision applied the appropriate article I, § 7 standards for determining whether dates of birth, with state employee names, constitute "private affairs." While the Decision analyzes this constitutional issue, this does not mean that the question is significant mandating review.

There appears to be no mechanical test for whether a question is significant, but the Supreme Court has consistently declined review where the constitutional issue is settled, and the lower court applied the law correctly. *See In re Dependency of P.H.V.S.*, 184 Wn.2d 1017, 389 P.3d 460, 461 (2015) (finding review unwarranted where the Court of Appeals utilized the due process test selected by the Supreme Court). The Court

has also denied review where the constitutional issue presented is unsupported and/or moot. *In re Post-Sentence Petition of Combs*, 182 Wn.2d 1015, 353 P.3d 631, 632 (2015).

The Decision does not conflict with established precedent regarding dates of birth, as set forth above and in the Union's Answer in Opposition to Petition for Review. The Decision also does not conflict with cases proclaiming general propositions regarding the PRA,[4] because release of dates of birth here does not assist with the PRA's purpose: to ensure the people of Washington are "informed so that they may maintain control over the instruments that they have created." RCW 42.56.030. Instead, release of state employee dates of birth would reveal "intimate or discrete details of a person's life" which article I, § 7 protects against. *See, e.g.*, *Haq*, 166 Wn. App. at 256-57.

III. Conclusion

As set forth above, the Media raise no issues warranting review of the Decision. For these reasons and those articulated in the Unions' Answer in Opposition to the Petition for Review, the Unions respectfully request that this Court deny review in this case.

[4] *See* Memorandum, 8, citing *Progressive Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 251, 260, 884 P.2d 592 (1994) and *Dreiling v. Jain*, 151 Wn.2d 900, 903, 93 P.3d 861 (2004).

RESPECTFULLY SUBMITTED this 28th day of February, 2018.

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