FILED
SUPREME COURT
STATE OF WASHINGTON
12/28/2018 3:02 PM
BY SUSAN L. CARLSON
CLERK

No. 96578-1

SUPREME COURT OF THE STATE OF WASHINGTON

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925,
Petitioner,

V.

EVERGREEN FREEDOM FOUNDATION, d/b/a FREEDOM FOUNDATION,
Respondent,

And

STATE OF WASHINGTON DEPARTMENT OF EARLY LEARNING,
Respondent.

RESPONDENT FREEDOM FOUNDATION'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

The Freedom Foundation ("Foundation") submits this Answer to Service Employees International Union Local 925 ("Local 925")'s Petition for Review by the Supreme Court. The Foundation is a Washington nonprofit organization that informs public employees of their First Amendment right to choose to financially support unions, or not. The Foundation made a public records request to the then-Department of Early Learning ("DEL") in early November 2016, for information identifying family child care providers. DEL was ready to release the information by the end of the month, but Local 925 filed for an injunction to enjoin it from doing so. While this litigation was pending, Initiative 1501, which barred release of the type of information requested by the Foundation, came into effect, thus introducing the issue of retroactivity into the case. It is this issue alone which is contested.

II. DECISIONS BELOW

The trial court denied Local 925's request for an injunction, finding in part that I-1501 was not retroactive, but staying release of the information pending appeal. The Court of Appeals, Division II, below, in *Serv. Employees Int'l Union Local 925 v. Dep't of Early Learning*, 49726-3-II, 2018 WL 4455865 (Wash. Ct. App. Sept. 18, 2018), agreed with the Trial Court, denied Local 925's request for an injunction and found, in part, that

I-1501 did not apply retroactively to bar release of the records the Foundation requested before I-1501's enactment. Now, Local 925 seeks Supreme Court review of that decision.

The Foundation files this Answer in response.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Decision of the Court of Appeals, below, is in conflict with *State v. Rose*, 191 Wn. App. 858, 365 P.3d 756 (2015), where in *Rose* the Court was considering an exception to a rule abrogating the common law, whereas here the general rules of statutory interpretation apply?

2. Whether a comparison between the Decision below with *Puget Sound Advocates for Ret. Action v. Dep't of Soc. & Health Servs.*, 50430-8-II, 2018 WL 5617942 (Wash. Ct. App. Oct. 30, 2018) ("*PSARA*") creates a substantial question as to whether Courts should apply the law governing at the time of the PRA request or the law at the time the agency was obliged to release information, where the *PSARA* decision was predicated upon constitutional considerations distinct from those in the Decision below, and where the *PSARA* decision overtly distinguishes between its rational and the theory upon which the conclusion of the Decision below is based: that a PRA requestor may have a vested right in documents duly requested under the PRA.

IV. STATEMENT OF THE CASE

The Foundation substantially agrees, for purposes of this Answer only, with the Court of Appeals, Division II's characterization of the facts below, as recorded in its opinion *Serv. Employees Int'l Union Local 925 v. Dep't of Early Learning*, 49726-3-II, 2018 WL 4455865 (Wash. Ct. App. Sept. 18, 2018).

V. ARGUMENT

Review of this case should not be granted. First, A) the Decision of the Court of Appeals, below, is not in conflict with *State v. Rose*, which involved a distinct analysis and standard than what was required in the decision below. Second, B) comparing the Decision below with *PSARA* does not raise any issues of substantial public interest.

A. The Petition for Review Should be Denied Because the Decision Below is Not in Conflict with Any Published Opinion of the Court of Appeals.

In determining whether to grant a petition for review, the Supreme Court considers whether the decision of the Court of Appeals below "is in conflict with a published decision of the Court of Appeals." RAP 13.4(b)(2). Local 925's petition for review should be denied because the decision below

does not conflict with *Rose*, nor any other published Court of Appeals decision.

Local 925 argues that the decision below conflicts with *State v. Rose*, 191 Wn. App. 858, 365 P.3d 756 (2015). Local 925's Petition for Review ("Petition for Review") at 10-13. According to Local 925, the intent language of I-1501 ("it is the intent of this initiative to protect the safety and security of seniors and vulnerable individuals by… prohibiting the release of certain public records…." CP 299) is so similar to the intent language of I-502 construed by the *Rose* court ("The people intend to stop treating adult marijuana use as a crime and try a new approach." *Rose*, 191 Wn. App. at 868 (quotations omitted)), that for the Court below to have found otherwise is a conflict with a published decision that must be addressed by the Supreme Court. Petition for Review at 10.

This argument is unfounded for several reasons.

First, the language of I-1501 and I-502 is sufficiently different for the Court below to have distinguished the two. I-502's language of intent focuses on the infinitive form of the verb, "to stop," for example ("the people intend <u>to stop treating</u>"). On the other hand, while the introductory language of I-1501 includes the infinitive form "to protect," it narrows the infinitive by employing the preposition and gerund form of the verb as it applies to the release of records ("it is the intent of this initiative to protect

the safety and security of seniors and vulnerable individuals by… prohibiting...." CP 299). *See also* CP 304 ("It is the intent of part three of this act to protect… by preventing…."). The Court below seemed to have appreciated at least some of these differences when it stated that "[h]ere, the language in I-1501 is not as direct as the language in *Rose*…. [It] contains no suggestion that the exemption provisions would apply to PRA requests prior to the effective day of the act." *Serv. Employees Int'l Union Local 925 v. Dep't of Early Learning*, 49726-3-II, 2018 WL 4455865, at *5 (Wash. Ct. App. Sept. 18, 2018).

More fatal, however, is that Local 925 is mistaken when it asserts that the Court of Appeals was bound to follow *Rose* as the standard for determining if I-1501 was retroactive, at all. Local 925 asserts that "*State v. Rose* established the test for determining whether a voter initiative applies retroactively," Petition for Review at 10, but this far-reaching assertion is unsupported by the *Rose* decision or the Supreme Court cases it is based on.

The general rule is that legislative (or initiative-based) changes are presumed prospective, but that presumption may be overcome, in addition to other circumstances not relevant here, where the legislature *explicitly* provides for retroactive application. *See Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 223, 173 P.3d 885, 891 (2007). The Court in *Rose* did not abrogate this rule, but instead applied a special standard specific to the case

before it: that where the Court construes an amendment that could fall within an exception to a statute, and that statute is contrary to the common law, then the Court construes the exception broadly such that statements of intent in the amendment need only "fairly convey" retroactive intent—instead of *expressly* convey retroactive intent.

A review of *Rose* is informative: In *Rose*, Mr. Rose committed a marijuana offense and the State initiated criminal proceedings against him. *Rose*, 191 Wn. App. at 861-63. During the State's prosecution of him, however, Initiative 502 was passed. *Id.* The State continued prosecuting Mr. Rose, and he was convicted. Mr. Rose argued that this continuing prosecution was illegal under I-502, and Division III of the Court of Appeals had to decide if the voters intended I-502 to apply retroactively to pending prosecutions, or not. Fortunately, this was relatively well-trodden territory: while under common law principles, prosecution for an offense would normally cease upon repeal of the law in question, *id.* at 863, the legislature had passed RCW 10.01.040 in 1901, which "saved" criminal prosecutions of pre-amendment offenses, unless the legislature intended for criminal prosecutions to cease. *Id.* at 864. Because RCW 10.01.040 was derogation of the common law, the usual rule requiring an explicit statement of retroactive intent did not apply. Instead, RCW 10.01.040—the saving statute—*itself* was strictly construed: "the saving force of the statute is

applied narrowly and its exception… is interpreted broadly." *Id.* (internal quotations and citations omitted). In other words, the test used in *Rose* to determine voter intent—whether the words "fairly convey" a retroactive intent—is reserved for that limited context where the Court is considering whether a repeal of a criminal statute is intended to fall within the exception under RCW 10.01.040. *See also id.* at 865-68.

In other words, Local 925's argument that the Court below failed to apply the "fairly convey" standard under *Rose* is inapposite because the *Rose* standard was not the correct standard for the Court below to apply in the first place. The "fairly convey" standard is an exception to the general standard that otherwise requires explicit language of retroactive intent.

Local 925 also argues that the Decision of the Court of Appeals, below, is in conflict with *Rose* insofar as it does not follow *other* aspects of the *Rose* analysis: the Court below concluded that there was "no clear policy statement showing voter intent to prevent the disclosure of provider information in a retroactive manner," *Serv. Employees Int'l Union Local 925*, 49726-3-II at *5, for example, and, according to Local 925, the Court below did not consider the voter's guide, as the *Rose* Court did. Petition for Review at 12-13. For the same reason as detailed above, however, these arguments are unavailing, since *Rose* did not establish a new standard for determining retroactive intent in voter initiative cases.

B. The Petition for Review Should be Denied Because It Does Not Involve an Issue of Substantial Public Interest.

In determining whether to grant a petition for review, the Supreme Court considers whether the petition "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). Local 925's petition for review should be denied; it does not raise any issues of substantial public interest.

Local 925 argues that *Puget Sound Advocates for Ret. Action v. Dep't of Soc. & Health Servs.*, 50430-8-II, 2018 WL 5617942 (Wash. Ct. App. Oct. 30, 2018) ("*PSARA*"), an unpublished opinion decided *after* the decision below, creates an open issue as to in a PRA case whether the Court should apply the law governing at the time of the request or the law at the time the government agency was under the obligation to release the information. Local 925's Petition for Review at 13. A comparison of the two cases, however, does not create such a question, since *PSARA* was decided on different grounds from the Decision below, and the *PSARA* Court specifically did not address the rationale employed in the underlying case: that a PRA requestor may have a vested right in documents duly requested.

There is no conflict between the Decision below and *PSARA*, first, because the *PSARA* Decision relied primarily on article I, section 7 of the

State Constitution. Its conclusion flowed directly from its recent decision in *Washington Pub. Employees Ass'n v. Washington State Ctr. for Childhood Deafness & Hearing Loss*, 404 P.3d 111, 114 (Wash. Ct. App. 2017) ("*WPEA*"), which is on review before the Supreme Court now, in 190 Wn.2d 1002, 413 P.3d 15 (2018):

> The appellants argue that under *WPEA*, DSHS cannot release the requested records because the names and associated birthdates of individual providers are protected from disclosure under article I, section 7. We agree.
>
> …
>
> Here, the Seattle Times requested the same information from state agencies regarding the same state employees that this court addressed in *WPEA*. Applying *WPEA*, we hold that article I, section 7 protects from PRA disclosure individual providers' names and associated birthdates.

PSARA, 50430-8-II, at *3-4.

Local 925 focuses on the portion of the *PSARA* decision, separate from its Constitutional analysis, relating to RCW 43.17.410(1). The *PSARA* Court found that RCW 43.17.410(1) operates prospectively to prohibit an agency from releasing the information requested. *Id.* at *4-5. By this Local 925 seeks to make an issue as between *PSARA* case and the decision below. Local 925's Petition for Review at 13-15.

The *PSARA* Court, however, avoided ruling on I-1501's retroactivity, overtly acknowledged that a PRA requestor potentially has a

vested right in documents due her under a PRA request, and even identified this possibility as an "exception." *PSARA*, 50430-8-II, at *5 (Heading: "Vested Right Exception."). This overt acknowledgement is consistent both with *Dragonslayer, Inc. v. Washington State Gambling Comm'n*, 139 Wn. App. 433, 449, 161 P.3d 428, 435 (2007) ("[T]he Statute is not remedial because it would affect Edward Fleisher's vested right in the financial statements that he was entitled to under the PDA."), and the decision below, decided a little over a month prior to *PSARA. Serv. Employees Int'l Union Local 925*, 49726-3-II at *6 ("Therefore, the Foundation obtained a vested right in the requested records when it made its initial request."(citing *Dragonslayer*, 139 Wn. App. at 449)).

Not only did the *PSARA* Court acknowledge the vested right exception, but the Court specifically identified why it did not address it in *PSARA*: "DSHS does not make a vested right argument even though the appellants discuss it at length in their brief in the context of their retroactivity analysis." *Id.* Indeed, that DSHS did not make this argument needs no explanation: it is difficult to imagine the *agency* from whom records are requested having a vested right in release of those records.

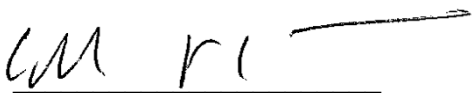
The *PSARA* case, unpublished and decided after the Court of Appeals Decision below, was based on article I section 7 of the State Constitution. Furthermore, *PSARA* did not address the retroactivity of I-

1501, and in fact overtly acknowledged the possibility of a PRA requestor having a vested right in documents requested under the PRA. None of these conclusions in *PSARA* conflict with the Court of Appeals Decision below. A comparison of the two cases raises no issue of substantial public interest.

VI. CONCLUSION

For the foregoing reasons, this Court should deny Local 925's request for discretionary review of the Decision below.

RESPECTFULLY SUBMITTED on December 28, 2018.



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FREEDOM FOUNDATION

December 28, 2018 - 3:02 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96578-1
Appellate Court Case Title:	Service Employees International Union Local 925 v. Department of Early Learning, et al.
Superior Court Case Number:	16-2-04580-1

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