

Court of Appeals No. <sup>48601-6</sup>~~48606-6-II~~

IN THE COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

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ARTHUR WEST,

Respondent

v.

STEVE VERMILLION & CITY OF PUYALLUP,

Petitioners

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COURT OF APPEALS  
DIVISION II  
2016 MAR -7 PM 2:19  
STATE OF WASHINGTON  
BY *[Signature]*  
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JOINT SUPPLEMENTAL BRIEF OF PETITIONERS TO ADDRESS  
*NISSEN V. PIERCE COUNTY*

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## I. INTRODUCTION

The central question in this case, which will require the Court to interpret the Public Records Act (PRA) definition of “public record” in the context of the First Amendment, is as follows:

Is an email exchange between an individual city councilmember and his constituent a “public record,” when an individual legislator has no unilateral power to take “action” on behalf of an agency, and when the councilmember and constituent enjoy strong First Amendment rights to associate for political purposes?

The Washington State Supreme Court did not address the First Amendment, and therefore did not answer this precise question in *Nissen v. Pierce County*. The key to the court’s ruling in *Nissen* was its recognition of a new element in the definition of “public record” – that the record must be created or received by the employee “acting within the scope of employment.”<sup>1</sup> As explained below, this new test is critical for protecting constitutional privacy rights because it excludes an employee’s private, personal records even though they may be co-mingled with public records on the employee’s personal electronic device.

The Petitioners here do not dispute this ruling or wish to contravene it. The *Nissen* decision, however, begs the question: When an individual elected legislator, like a city council or school board member, exchanges one-to-one correspondence with a constituent, is that elected legislative official acting as an “employee,” as contemplated in *Nissen*, or is he acting as a politician? Furthermore, is all correspondence of an individual elected

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<sup>1</sup> *Nissen v. Pierce County*, 183 Wn.2d 863, 876, 357 P.3d 45 (2015).

official automatically a public record, despite strong First Amendment protections for political communication and association?

In a case relied upon by the *Nissen* court, the U.S. Supreme Court recognized that elected officials have a First Amendment right to privately correspond with constituents and supporters, because “involvement in partisan politics is closely protected by the First Amendment, and that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”<sup>2</sup> Other courts, including the Washington State Supreme Court, have protected the right of elected legislative officials to privately communicate with their constituents because as elected representatives, they need to learn how the constituents want the official to vote.<sup>3</sup>

Yet, the *Nissen* “within the scope of employment” test potentially includes constituent communications within the ambit of “public records.” Thus, absent further guidance from this Court, elected city councilmembers will face an unconstitutional catch-22: either sacrifice First Amendment rights by turning over constitutionally-protected constituent communications, or subject the city to the costs of litigation and possible penalties for violating the PRA. To avoid this result, the Court should

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<sup>2</sup> *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 467, 97 S.Ct. 2777 (1977); see also *Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004) (recognizing constituent communications are protected by First Amendment associational privacy).

<sup>3</sup> See, e.g., *Westside Hilltop Survival Com. v. King County*, 96 Wn.2d 171, 179, 634 P.2d 862 (1981) (“[E]x parte contacts between the legislator and his constituents advocating specific legislation ... is an integral part of representative government at every level.”).

provide additional guidance that excludes political correspondence from the ambit of the PRA.

## II. ARGUMENT

### A. The *Nissen* Court Acknowledged the Constitutional Privacy Rights of Public Employees, and Developed a New Standard to Protect Those Rights

#### 1. Public Employees Do Not Waive Their Privacy Rights when They Use Personal Devices for Agency Business

In *Nissen*, the Supreme Court re-affirmed that personal records on a private electronic device warrant constitutional protection. *Nissen*, 183 Wn.2d at 883 (citing *State v. Hinton*, 179 Wn.2d 862, 869, 319 P.3d 9 (2014)). The requestor in *Nissen*, like the requestor in this case,<sup>4</sup> demanded an independent search of the elected prosecutor’s personal phone, claiming the prosecutor waived his constitutional right to privacy by using the phone for agency business. *Id.* at 871 (noting requestor sought *in camera* review).

The Supreme Court rejected this “waiver” argument, recognizing that any “public records” on a private device would be commingled with private records that contain “a wealth of detail about [a person’s] familial, political, professional, religious, and sexual associations.” *Id.* at 883 (quoting *Hinton*, 179 Wn.2d at 869) (alteration in original, additional quotation omitted), 887 (“The people enacted the PRA ‘mindful of the right of individuals to privacy,’ Laws of 1973, ch. 1, § 1(11), and individuals

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<sup>4</sup> Clerk’s Papers (CP) at 97 (demand for forensic search of Mr. Vermillion’s personal computer).

do not sacrifice all constitutional protection by accepting public employment.”).

The *Nissen* court was left with a two-part constitutional dilemma: (1) how can the agency identify the “public records” that are commingled with private records on a personal electronic device without an unconstitutional “search”; and (2) how can an agency obtain those public records without an unconstitutional seizure?<sup>5</sup>

**2. The *Nissen* Court Protected Privacy Rights by Adopting a New Test to Define “Public Records” and a New Procedure for the Production of those Records**

To resolve the dilemma, the *Nissen* court first ruled that there is no privacy interest in “public records” located on a personal electronic device, even when those records are commingled with private records. *Nissen*, 183 Wn.2d at 883 & n.10. The *Nissen* decision found this dichotomy between public records and private, constitutionally-protected records in the U.S. Supreme Court’s *Nixon* decision. *Id.* at 883 n.10 (*citing Nixon*, 433 U.S. at 467). The Petitioners here accept the conclusion that public records necessarily are not “private”; the Petitioners are not, as the Respondent asserts, seeking to withhold any public records from disclosure simply by virtue of the fact that those records are in a personal email account.

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<sup>5</sup> Although the constitutional privacy issue was not before the Supreme Court in *O’Neill v. City of Shoreline*, 170 Wn. 2d 138, 240 P.3d 1149 (2010), because the councilmember had consented to the search, the significance of the search and seizure issue still prompted four Justice to dissent. *Compare id.* at 150 n.4 (noting search was only proper based on consent) *with id.* at 156-57 (noting compelled production would violate Article 1, Section 7) (Alexander, J., dissenting, joined by Madsen, C.J., C. Johnson, J. and Owens, J.).

But the *Nissen* court implicitly recognized that the existing definition of “public record” failed to provide sufficiently-detailed guidance to employees for sorting out any public records commingled amongst private records on a personal device. The court found that the PRA definition of “public records” (records “containing information relating to the conduct of government”) was broad enough to include private records on a personal device to the extent they “refer to, comment on, or mention the employee’s public duties,” and thus contain information relating to the conduct of government. *Id.* at 880-81 & n.8, 887.

Instead of turning the issue over the Legislature,<sup>6</sup> the *Nissen* Court “interpreted” the definition of “public record” to include a new element: whether the record was created or received by the employee while acting “within the scope of employment.” *Id.* at 877. An act is within the scope of employment “when the job requires it, the employer directs it, or it furthers the employer’s interests.” *Id.* at 878. The Court ruled that this new test was justified because agencies “act exclusively through their employees and other agents, and when an employee acts within the scope of his or her employment, the employee’s actions are tantamount to ‘the actions of the [body] itself.’” *Id.* at 876 (citation omitted).

The Court then ruled that an agency can fully comply with its obligations under the PRA by having the employee sort his own records to

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<sup>6</sup> The defendants in *Nissen*, like the Appellants at the case at bar, argued that the Court should have protected privacy rights by ruling any records maintained by employees, like records maintained by courts, fell outside of the definition of “public record.” This would have spurred the Legislature to expand the scope of the PRA while taking constitutional privacy rights into account.

identify and turn over only “public records.” *Id.* at 885-86. Because the sorting may be done exclusively by the employee without *in camera* review,<sup>7</sup> and because with the new “scope of employment test”, the employee can assure no private records are disclosed, the Court found that this new procedure would not “infring[e] on an individual’s constitutional privacy interest.” *Id.* at 885. Thus, the *Nissen* Court articulated a practical standard for ensuring production of public records from personal devices—a standard that avoided interpreting the PRA in a manner that infringes constitutional rights.

**B. The *Nissen* Decision Does Not Resolve the Constitutional Issues Raised in *West v. Vermillion***

Despite the *Nissen* Court’s general discussion of constitutional search and seizure principles, there are at least three significant facts in *West v. Vermillion* that distinguish this case from *Nissen* and require further consideration of the PRA in the context of First Amendment rights.

First, unlike the focused request at issue in *Nissen* for six identified text messages, Mr. West made a broad, general request for all emails “concerning city business” sent to an email address associated with Mr. Vermillion’s personal website.<sup>8</sup> This means that Mr. Vermillion will have

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<sup>7</sup> The Washington Supreme Court has ruled that subjecting records protected by the First Amendment to *in camera* review itself can infringe on privacy rights. *See, e.g., Snedigar v. Hodderson*, 114 Wn.2d 153, 158, 786 P.2d 781 (1990); *see also Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 704, 310 P.3d 1252 (2013); *see also* Opening Brief of Vermillion (“Vermillion Op. Br.”) at §VI.B.2.b.

<sup>8</sup> Compare CP at 40-41 with *Nissen*, 183 Wn.2d at 873 (noting case “does not involve a request for every pierce of data on a smartphone”). Every email Mr. Vermillion sent to a city employee and every email a city employee sent to Mr. Vermillion have already been produced by the City and those emails are not at issue in this appeal.

to sort through a significantly greater number of records to identify any “public records.” A broader search necessitates narrower guidance as to what meets the definition of “public record.”

Second, an elected legislative official like a city councilmember is not an employee or head of an agency, and has no ability to take unilateral action on behalf of a city.<sup>9</sup> Thus, neither the plain language of the new “within the scope of employment” test, nor the reasoning behind that rule, provide the precise guidance needed.

Third, as discussed fully in the following section, while a city councilmember is acting in his role as an elected official when he communicates with constituents, those communications are protected by his First Amendment right to associate privately regarding political matters.<sup>10</sup>

**C. City Councilmembers have a First Amendment Right to Associate Privately with Their Constituents and Supporters.**

**1. Representative Democracy Requires the Free Flow of Communication Between Constituents and Elected Officials.**

Political speech and association, as hallmarks of a free, democratic society, are entitled to the highest levels of protection under the

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<sup>9</sup> *See, e.g.*, RCW 42.30.030 (prohibiting members of a government body from taking action outside of an open public meeting). In fact, as a city councilmember of code city, Mr. Vermillion could not even unilaterally give directions to city employees, other than to request information. *See* RCW 35A.13.120; *see also* Vermillion Op. Br. at 42-43; Brief of Petitioner City of Puyallup (“Puyallup Op. Br.”) at §V.F; Reply Brief of Appellant Vermillion (“Vermillion Reply Br.”) at §III.E.

<sup>10</sup> *See also* Vermillion Op. Br. at §VI.B; Puyallup Op. Br. at §§V.C-V.E.

Constitution. Democracy in a free society demands that the constituents who put public officials in office be able to associate and speak freely to those officials. Moreover, the Constitution guarantees, as part of the First Amendment, the right to associate privately,<sup>11</sup> the right *not* to speak publicly,<sup>12</sup> and the right to keep personal beliefs private.<sup>13</sup>

Furthermore, the city councilmember's primary duty is to vote on the matters that come before the city council. That right to vote "is not personal to the legislator but belongs to the people." *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 131 S. Ct. 2343, 2350 (2011). Thus, the councilmember must communicate and associate with his constituents to fulfill his role as a representative.<sup>14</sup>

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<sup>11</sup> *NAACP v. Alabama*, 357 U.S. 449, 462, 78 S. Ct. 1488 (1958) (recognizing "the vital relationship between the freedom to associate and privacy in one's associations").

<sup>12</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 532 n.20, 121 S. Ct. 1753 (2001) (right to keep speech private).

<sup>13</sup> *See Doe v. Reed*, 561 U.S. 186, 207, 130 S. Ct. 2811 (2010) (Alito, J., concurring) (disclosure obligations must be narrow to avoid violating the "firmly establish[ed]" rights of "privacy of belief and association").

<sup>14</sup> *Williams-Yulee v. Florida Bar*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 1656, 1667 (2015) (quotation omitted) ("Politicians are expected to be appropriately responsive to the preferences of their supporter. Indeed such responsiveness is key to the very concept of self-governance through elected officials."); *see also E. R. R. Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137, 81 S. Ct. 523 (1961) ("[T]he whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."); *Nevada Comm'n*, 131 S. Ct. at 2352 (Kennedy, J. concurring) ("The democratic process presumes a constant interchange of voices.... This speech and expression often finds powerful form in groups and associations with whom a legislator or candidate has long and close ties, ties made all the stronger by shared outlook and civic purpose. The process is so intricate a part of communication in a democracy that it is difficult to describe in summary form, lest its fundamental character be understated."); *Eugster v. City of Spokane*, 121 Wn. App. 799, 807, 91 P.3d 117 (2004).

Protecting the privacy of associational communications, including communications between constituents and elected officials, is essential to democracy, because “[a]wareness that the Government may be watching chills associational and expressive freedoms[.]” *Hinton*, 179 Wn.2d at 877; *see also Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9<sup>th</sup> Cir. 2009) (“Implicit in the right to associate with others to advance one’s shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private.”); *Bartnicki*, 532 U.S. at 533 (“In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one’s speech is being monitored ... can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.”); *Eugster*, 121 Wn. App. at 807 (“Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association[.]”).<sup>15</sup>

The *Nissen* Court did not address whether a city councilmember’s individual political communications—despite constitutional protections—are public records simply because they “further the city’s interests.” *See Nissen*, 183 Wn.2d at 878 (holding that employee actions that further the employer’s interests are “within the scope of employment”). The *Nissen* Court did not address the First Amendment at all. To avoid violating the

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<sup>15</sup> *See* Ashutosh Bhagwat, “Associational Speech,” 120 Yale L.J. 978, 981 (2011). Professor Bhagwat’s article traces the Supreme Court’s recognition and development of the right of association and posits that this non-textual First Amendment right is the most important right in the First Amendment because it enhances all of the other First Amendment rights.

elected legislative official’s First Amendment rights, the rules governing a disclosure obligation must be “sharply drawn” and provide the official with “wide latitude” to engage in political communications privately.<sup>16</sup> The Petitioners respectfully request that this Court now sharply draw such a rule, in a manner that does not compel production of constitutionally protected records<sup>17</sup> in order to avoid exposure under the PRA.

## 2. Records Covered by the First Amendment Receive Heightened Privacy Protections

As explained in the prior briefing,<sup>18</sup> and recently reaffirmed by the Washington State Supreme Court in *State v. Besola*, First Amendment materials receive special privacy protections.<sup>19</sup> When associational privacy materials are subject to disclosure, the First Amendment requires additional restrictions on secondary uses.<sup>20</sup>

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<sup>16</sup> *Wash. State Republic Party v. Pub. Disclosure Comm’n*, 141 Wn.2d 245, 266, 4 P.3d 808 (2000) (“WSRP”). For more details on this requirement, see Vermillion Op. Br. at §VI.C.3.

<sup>17</sup> The compelled production of private papers qualifies as a Fourth Amendment search and seizure and would require a warrant under Article 1, Section 7. See *City of Los Angeles v. Patel*, -- U.S. --, 125 S. Ct. 2443 (2015) (statutory requirement that business owners to turn over business records to police on demand was an illegal search under the 4th Amendment); *Seymour v. State*, 152 Wn. App. 156, 167, 216 P.3d 1039 (2009) (same under Washington law).

<sup>18</sup> Vermillion Op. Br. at §IV.B.2.b.

<sup>19</sup> *State v. Besola*, 184 Wn.2d 605, 611, 359 P.3d 799 (2015) (search warrants require heightened particularity); *Snedigar v. Hoddersen*, 114 Wn.2d 153, 158, 786 P.2d 781 (1990) (additional showing of need in civil discovery).

<sup>20</sup> *Rhinehart v. Seattle Times*, 98 Wn.2d 226, 654 P.2d 673 (1982), *aff’d*, 467 U.S. 20 (1984). When government is seeking First Amendment associational material, its right to obtain such information can turn on whether public records provision will require them to re-disclose that material. Compare *AFL/CIO v. FEC*, 333 F.3d 168, 178 (D.C. Cir. 2003) (ruling FEC could not subpoena internal records protected by associational privacy when FEC also took the position that those records would be subject to disclosure under FOIA); *with Am. for Prosperity Found. v. Harris*, 809 F.3d 536, 542 (9th Cir. 2015) (upholding state attorney general’s authority to subpoena records of a political group that were protected by

While these Washington cases all involve protections of First Amendment material from court-controlled disclosure obligations, two out-of-state cases reach similar results under public records statutes. In the first case, *Nixon v. Administrator*, the U.S. Supreme Court ruled that even disgraced President Nixon’s political correspondence was protected by First Amendment associational privacy, and thus protected from disclosure, to the same extent that his personal correspondence was protected.<sup>21</sup> *Nixon*, 433 U.S. at 466-67.

In the second case, the Louisiana court of appeals recently ruled that the First Amendment protection for political correspondence meant that emails sent from a public computer by an employee for private political purposes were not “public records.” *Shane v. Parish of Jefferson*, 150 So.3d 406, 414, 416 (La. App. 2014) (“[T]he right to freedom of association prohibits compelled disclosure of political groups engaged in political activity.”)

In summary, Courts have consistently recognized that First Amendment associational privacy protects political correspondence and records exchanged in exercise of the right of association are entitled to

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associational privacy as long as attorney general was not required to publicly disclose those records in response to public records requests).

<sup>21</sup> The *Nixon* case is particularly relevant here because that case served as the *Nissen* Court’s sole legal authority for its assertion that there is no privacy right in public records. *Nissen*, 183 Wn.2d at 883 & n.10. While the *Nissen* Court did not address where political records fell in its dichotomy between public records and private records, its reliance on the *Nixon* case suggests the *Nissen* Court would consider political emails as private rather than public records.

special protection.<sup>22</sup> This Court should recognize that a city councilmember's correspondence with constituents qualifies as First Amendment protected political records.

**D. No Sufficiently Important Government Interest Justifies Applying the PRA to a City Councilmember's Constitutionally Protected Correspondence with Constituents**

**1. Compelled Disclosure of Expressive Associational Speech Would Trigger at least "Exacting Scrutiny."**

While courts agree that forced disclosure infringes on associational rights, courts subject disclosure requirements to either exacting scrutiny or strict scrutiny, depending on whether the disclosure obligation merely applied to information showing the fact of association<sup>23</sup> or actually interfered with expressive associational conduct.<sup>24</sup> The former obligations are only subject to "exacting scrutiny," while the latter are subject to strict

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<sup>22</sup> These records would meet Professor Bhagwat's definition of "associational speech." See Bhagwat, *supra* note 15, at 981.

<sup>23</sup> See *Doe v. Reed*, 561 U.S. 186, 213 (2010) (Sotomayor, J., concurring) (noting disclosure of petitions was warranted in part because the disclosure did not involve significant expressive conduct). At least four other justices agreed in various concurring opinions that the disclosure of the referendum petitions was justified in part because disclosure would not disclose significant expressive conduct. See *id.* at 207-08 (Alito, J., concurring) (contrasting minimal amount of information in petition with broader disclosure requirement for expressive information); *id.* at 212-13 (Sotomayor, J., concurring, joined by Stevens, J., and Ginsburg, J.) (noting disclosure of petition at issue is a "step removed" from expressive activity); *id.* at 216 (Stevens, J., concurring, joined by Breyer, J. (noting disclosure of petition has minimal burden on First Amendment rights because it does not include interactive communications or any more fundamental methods of political expression).

<sup>24</sup> *ACLU v. Heller*, 378 F.3d 979, 987-88 (9th Cir. 2004) (noting requirement that speaker disclose identity on any written communication directly impacted expressive conduct and was materially different for a requirement to disclose membership lists or other campaign finance information).

scrutiny.<sup>25</sup> Alternatively, strict scrutiny also applies if the disclosure obligation turns on the content of a record. *Reed v. Town of Gilbert*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2218, 2226 (2015). Moreover, when a disclosure obligation applies to records containing expressive associational content rather than just facts of association, harm can be presumed.<sup>26</sup>

The Petitioners submit that forced disclosure of actual communications between persons associating for political purposes should be subject to strict scrutiny because it discloses expressive content. Any authority that allows probing into expressive associational rights must be carefully circumscribed and controlled.<sup>27</sup> Nevertheless, even if compelled disclosure would only be subject to exacting scrutiny, it would fail such review.

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<sup>25</sup> *Heller*, 378 F.3d at 987-88 (noting strict scrutiny applied when disclosure obligation impacted expressive conduct); *Doe*, 561 U.S. at 196 (apply exacting scrutiny where no expressive conduct was subject to disclosure).

<sup>26</sup> *See Eugster*, 121 Wn. App. at 808 (“An assumed potential chilling effect arises when the discovery requests include membership lists, minutes of meetings, financial records, documents and correspondence regarding political activities.”); *see also Britt v. Superior Court*, 574 P.2d 766,772-73 (Cal. 1978) (First Amendment protects associational privacy rights even when group is not persecuted).

<sup>27</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 245, 77 S. Ct. 1203 (1957) (“It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas[.]”); *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 829, 86 S. Ct. 1148 (1966) (“the First Amendment prevents the use of the power to investigate ... to probe [associational privacy interests] at will and without relation to existing need.”); *Britt*, 574 P.2d at 773 (“private associational affiliations and activities ... are presumed immune from inquisition”) (quotation omitted).

A regulation that infringes on speech can only be upheld under strict scrutiny if restrictions “are narrowly tailored to serve a compelling interest” and the least restrictive means of accomplishing the goal are employed. *Williams-Yulee*, 135 S.Ct. at 1664.

## 2. No Sufficiently Important Government Interest Justifies Applying the PRA to Constituent Communications

If the regulation is only subject to “exacting scrutiny,” then the regulation must be tailored so there is a “substantial relationship” between the disclosure requirement and a “sufficiently important government interest.” *Doe*, 561 U.S. at 196. When determining what government interest supports an infringement on First Amendment rights, “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” *Id.* at 196. Moreover, even when an “important” interest is identified, the Court must still consider how this regulation uniquely serves that interest, taking into account how that interest is already served by other laws.<sup>28</sup>

The *Nissen* Court relied on the public’s right to observe the actions of government to justify its ruling that the PRA could be applied to an employee’s or executive official’s private cell phone. *Nissen*, 183 Wn.2d at 876. This interest does not justify the forced disclosure of a city *councilmember*’s communications—when such communications never reach the *agency*—because those communications will not guarantee any insight into the agency’s actions.<sup>29</sup>

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<sup>28</sup> See, e.g., *Washington Initiatives Now v. Ripple*, 213 F.3d 1132, 1139 (9<sup>th</sup> Cir. 2000) (while information interest qualified as an important government interest in election campaigns, the disclosure requirement at issue was not justified where the “panoply of the State’s other [disclosure] requirement” better served that interest); *Ex rel. Perry*, -- S.W.3d --, 2016 WL 738237 at \*19-\*20 (Tex. Feb. 24, 2016) (restriction on speech did not serve important government interest when government justifications are already served by other statutes).

<sup>29</sup> See *supra* note 9. Moreover, the PRA’s purposefully broad disclosure obligation is not tailored to serve any interest. See RCW 42.56.080 (cannot consider purpose of request); see also *Vermillion Op. Br.* at §V.C.1; *Britt*, 574 P.2d at 777 (finding First Amendment

Mr. West invokes “smoky back rooms” and asserts that disclosure is necessary to detect if elected officials are casting votes to benefit campaign contributors.<sup>30</sup> But any legitimate interest in monitoring the effect of political contributions is already protected by Washington’s campaign finance laws.<sup>31</sup> Moreover, this argument reflects an unfortunate cynicism about representative democracy, the cornerstone of which is communication between elected officials and constituents. Our State Supreme Court has not been so cynical about the inner workings of a democratic system. *Westside Hilltop Survival Com. v. King County*, 96 Wn.2d 171, 179, 634 P.2d 862 (1981) (“[E]x parte contacts between the legislator and his constituents advocating specific legislation ... is an integral part of representative government at every level.”); *see also Barry v. Johns*, 82 Wn. App. 865, 870, 920 P.2d 222 (1996) (“[I]n a representative democracy, we elect our legislators precisely to carry out agendas and promote causes with full knowledge that their own personal predilections and preconceptions will affect their decisions.”); *McCormick v. United States*, 500 U.S. 257, 272, 111 S. Ct. 1807 (1991) (“Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator.”).

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violation based on breath of disclosure request, even if more focused request could pass constitutional muster).

<sup>30</sup> Respondent West’s Amended Opening Brief (“West Br.”) at 7 & 8.

<sup>31</sup> *Wash. Initiatives*, 213 F.3d at 1139 (noting broad range of campaign disclosure requirements in Washington state); *see also* Puyallup Op. Br. at §V.F.1; Vermillion Op. Br. at §VI.C.3.d.

Finally, the public’s interest in uncovering violations of other laws can be fully protected by the enforcement of those laws and use of discovery.<sup>32</sup>

**E. Additional Guidance is Essential to Ensure that the PRA is Applied in a Constitutional Manner.**

**1. In Camera Review Cannot Substitute for Upfront Guidance**

Contrary to Mr. West’s suggestion, *in camera* review cannot be used as a substitute for a court addressing the nuanced issue presented in this case. As explained, the *in camera* review process itself infringes on First Amendment rights<sup>33</sup> and presumes the initiation of costly litigation.<sup>34</sup> Thus, the *Nissen* Court rejected its use. *Nissen*, 183 Wn.2d at 885. Given the imperative to protect First Amendment rights, *in camera* review cannot substitute for a clear interpretation of “public record” that does not infringe upon individual liberties.

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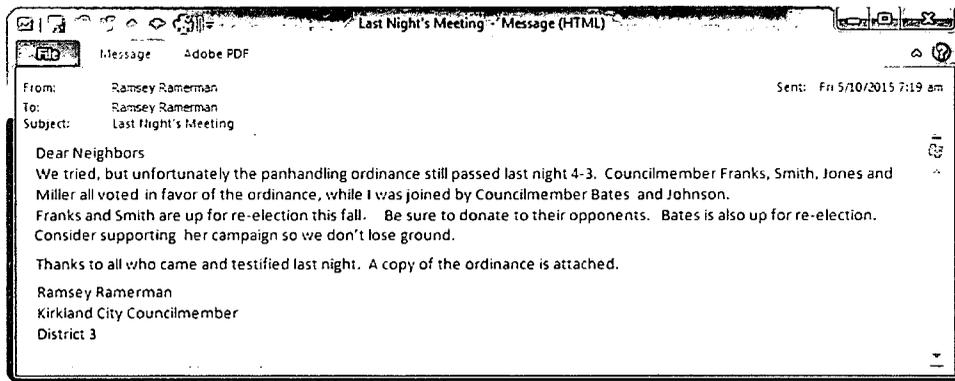
<sup>32</sup> See *Perry*, 2016 WL 738237 at \*20 (noting that interests in prevent conduct already prohibited by other statutes does not qualify as an interest that can justify infringements on First Amendment rights); *In re Grand Jury Subpoena*, 782 F. Supp. 1518, 1526 (N.D. Ala 1992) (First Amendment associational privacy rights trumped by public interest in bribery investigation); Vermillion’s Br. at §VI.C.3.

<sup>33</sup> *Supra*, note 7; see e.g., Vermillion Op. Br. at 18; Vermillion Reply Br. at 21 & n.43.

<sup>34</sup> “The First Amendment does not permit laws that force speakers to retain a campaign finance attorney ... or seek declaratory rulings before” exercising their First Amendment rights. *Citizens United v. FEC*, 558 U.S. 310, 325 (2010).

**2. Without upfront guidance, a multitude of constitutionally-protected communications will remain in a sea of unconstitutional uncertainty.**

As noted, elected legislators routinely correspond with their constituents; such communication is a cornerstone of their duties. Without additional clarity, it will be impossible for elected officials to discern under the *Nissen* standard which of their emails are “public records,” while still preserving their own and their constituents’ constitutional rights. In Mr. Vermillion’s reply brief, he used a fictional email adapted from an email in another case currently before this Court<sup>35</sup> to illustrate the ambiguities that would arise if the prohibition on the use of public resources were used to define political emails that fall outside of the definition of “public record.” That email reproduced below also illustrates why the “within the scope of employment” test does not address the issue presented:



Was this email sent within the scope of a councilmember’s “employment”? Informing constituents about a newly enacted ordinance

<sup>35</sup> Vermillion Reply Br. at 19-20. The fictitious email is modeled after an email at the center of the dispute in *Esch v. Skamania County PUD No. 1*, CoA No. 47831-5-II, and can be found at the Clerk’s Papers in that case at page 15-16.

is certainly part of a city councilmember's duties and furthers the city's interests. Yet, if this email is determined to be a public record, strong First Amendment protections will be grievously undermined.

The Petitioners urge the Court to follow the *Nissen* Court's lead and interpret the definition of "public record" to add the needed nuance regarding the political correspondence of elected officials.<sup>36</sup> As outlined in the Petitioners' prior briefs,<sup>37</sup> the Petitioners submit that such an interpretation could be narrowly conceived so as not to unduly hamper the public's right to information about their government.

#### **F. West Is Not Entitled to Attorney Fees or Penalties**

In *Nissen*, the Court ruled that the defendants could not be required to pay penalties or attorney fees<sup>38</sup> incurred prior to the Court's ruling because their position was taken in good faith without the benefit of the new rules. *Nissen*, 183 Wn.2d at 888. Here, the Appellants took the same good faith position. Therefore, the Court should deny West's request for attorney fees and rule that even if the City ends up disclosure more records

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<sup>36</sup> On at least two other occasions, courts have interpreted the PRA to create exemptions necessary to protect constitutional rights. *See Freedom Foundation*, 178 Wn.2d at 700 (adopting exemption and procedure based on separation of powers doctrine); *Roe v. Anderson*, 2015 WL 4724739 (W.D. Wash. Aug. 10, 2015) (recognizing First Amendment exemption for personal information provided on erotic dancing license); *see also State v. Homan*, \_\_\_ Wn. App. \_\_\_, 264 P.3d 839, 848-49 (2015) (noting obligation to construe law in constitutional manner, even when it means "interpreting" statute to finding "implied" elements); Vermillion Op. Br. at 11-12 & n.13.

<sup>37</sup> *See, e.g.* Vermillion Op. Br. at 44-46; Vermillion Reply Br. Appendix.

<sup>38</sup> Although the body of the *Nissen* opinion did not address attorney fees, the Supreme Court subsequently ruled that *Nissen* was not the prevailing party and therefore not entitled to attorney fees. *See Nissen v. Pierce County* Nov. 6, 2015 Letter Ruling Denying Award of Attorney Fees (attached as Exhibit A to this brief).

based on the Court's additional guidance, no penalties should be incurred prior to the Court's ruling.

### III. CONCLUSION

The PRA is a tool to allow the people to maintain control over government by mandating transparency of government actions. But the people best control government through the elected representatives they install in office. If the Court adopts Mr. West's interpretation, it would take the PRA spotlight off *agency* conduct and turn it onto *the people's* conduct. This would allow citizen factions, groups, and even disgruntled individuals to use the PRA to undermine the power and effectiveness of rival factions.<sup>39</sup> Political warfare would be conducted under the veil of transparency, without guaranteeing the people any relevant information about the conduct of *the public agencies* that are the subjects of the PRA.

By protecting First Amendment rights, therefore, the Court will be furthering the fundamental purpose of the PRA: the preservation of our right to a "free society" while still following the people's dictate to be "mindful of the rights of individuals to privacy."<sup>40</sup>

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<sup>39</sup> The recent Wisconsin Supreme Court decision in *State v. Two Unnamed Petitions*, 866 N.W.2d 165 (Wisc. 2015), particularly the opinion of Justice Prosser starting on page 213, provides but one example of how government power can be used to violate associational privacy rights in an effort to undermine the public's vote. For an older Washington state example, see *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 166, 157 P.3d 831 (2007) (Johnson, J.J., concurring).

<sup>40</sup> *Nissen*, 183 Wn.2d at 887 (quoting Laws of 1973, ch. 1, §1(11), now codified at RCW 42.17A.001(11)).

RESPECTFULLY SUBMITTED this 4th day of March, 2016.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that I sent the foregoing Supplement Brief via email on March 4, 2016, with the parties' agreement to accept email service:

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*Cynthia Nelson*

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