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No. 53289-1-II

**COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON**

BRIAN GREEN,

Plaintiff/ Respondent

v.

PIERCE COUNTY,

Defendant/ Appellant

BRIEF OF *AMICUS CURIAE* FIRST AMENDMENT CLINIC AT DUKE LAW SCHOOL IN SUPPORT OF RESPONDENT

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I. INTRODUCTION

The question before the Court is whether Plaintiff Brian Green is a member of the "news media" under the Public Records Act (the "PRA"), RCW 42.56.001, et seq., as the term is defined within Washington's "Media Shield Law," RCW 5.68.010.

When construing a statute, the starting point is "the statute's plain language and ordinary meaning." *Jewels v. City of Bellingham*, 183 Wn.2d 388, 394 (2015). The PRA provides in relevant part:

> The following employment and licensing information is exempt from public inspection under this chapter: Photographs and month and year of birth in the personnel files of employees and workers of criminal justice agencies as defined in RCW 10.97.030. The news media, as defined in RCW 5.68.010(5), shall have access to the photographs and full date of birth.

RCW 42.56.250(9) (2018).[1] The Media Shield Law defines "news media" as:

> Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, ***or any entity that is in the regular business of news gathering and disseminating news or information to the public by any means***, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution.

RCW 5.68.010(5)(a) (emphasis added).

The term "news media" in both acts should be construed broadly to

[1] In July 2019, RCW 42.56.250(9) was renumbered to subsection (8) by HB 2020, 2019 ch. 349, § 2. The language was not changed.

include new forms and mediums of news, including independent YouTube channels like Green's. First, the Media Shield Law should be broadly construed because it is broadly written. Second, the PRA must be broadly construed because the act itself mandates such a construction. Third, a broad interpretation of "news media" is necessary to avoid potential conflict with the United States and Washington State Constitutions.

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The First Amendment Clinic at Duke Law (the "Clinic") has a public mission to protect and advance the freedoms of speech, press, assembly, and petition.[2] The Clinic represents clients with First Amendment claims and provides public commentary and legal analysis on freedom of expression issues. The Clinic has an interest in ensuring that the First Amendment protections guaranteed to all Americans are not unduly abridged by state statute. This Brief will demonstrate that the Respondent should be considered a member of the "news media" under Washington state law.

III. STATEMENT OF THE CASE

On December 14, 2017, Plaintiff Brian Green made a request under the Public Records Act seeking information about certain correctional officers at the Pierce County Jail. In his initial email, Green identified himself as an

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[2] All parties received notice of the Clinics' intention to file this brief prior to its due date. This brief is filed with the consent of all parties. No counsel for a party authored this brief in whole or in part, and no one other than *amicus*, its members, or its counsel made any monetary contribution to the brief's preparation or submission.

"Investigative Journalist." The State provided eleven pages of responsive records, but it withheld certain information after concluding that Green did not qualify as a member of the "news media" under the Media Shield Law, which provides the definition for the Public Records Act. Green explained that he was "working on a story," and that he was "a journalist that primarily covers local court cases on [his] Youtube channel."[3] But the State ultimately closed Green's request without producing additional documents. Green subsequently filed this action in the Superior Court of Thurston County, which found that he and his YouTube channel fell within the statutory definition of "news media." On July 3, 2019, this Court granted discretionary review of that order.

IV. ARGUMENT

A. The definition of "news media" contained in the Media Shield Law should be broadly construed because it is broadly written.

The definition of "news media" contained in the Media Shield Law is exceedingly broad. The first word that appears in the definition of "news media" is "any," followed by a list of various information sources: "[a]ny newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company." 5.68.010(5)(a). The list ends with a catch-all phrase: "or *any* entity that is in the regular business of

[3] Green's YouTube channel, "Libertys Champion," is available at: https://www.youtube.com/channel/UCTjBAvhF0o9561-i7XKo6rA.

news gathering and disseminating news or information to the public by *any* means." *Id.* (emphasis added).

The Media Shield Law also describes the means of dissemination broadly. The definition continues, "by *any* means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution." *Id.* (emphasis added). Again, the word "any" creates an open list, and the language "including, but not limited to" "plainly establishes [the listed terms] as illustrative examples rather than an exhaustive list." *State v. Larson*, 184 Wn.2d 843, 849 (2015).

Nothing in this open-ended language supports the State's position that "news media" is limited to the formats and practices of traditional media, or "institutional news businesses." Appellant's Opening Br. 30. The Media Shield Law's protection is not limited to certain types of media, but broadly covers "*any* entity" that regularly distributes news and information "by *any* means." Green's YouTube channel clearly fits into the expansive category of news media entities contemplated by the Media Shield Law's broadly worded definition: Green regularly gathers, comments on, and publishes news items over the Internet.

The State erroneously argues that *ejusdem generis* limits the definition of "news media" to "legal business entities." Appellant's Opening Br. 29–30. *Ejusdem generis* "requires that general terms appearing in a statute in connection

with specific terms are to be given meaning and effect only to the extent that the general terms suggest items *similar* to those designated by the specific terms." *City of Seattle v. State*, 136 Wn.2d 693, 699 (Wash. 1998) (emphasis added). Here, the similarity is explained within the provision itself: each item in the list is "in the regular business of news gathering and disseminating news or information to the public." RCW 5.68.010(5)(a). While news publishers may find it expedient to incorporate, nothing in the list of examples requires them to do so.

For example, the common definition of "newspaper" is "a paper that is printed and distributed usually daily or weekly and that contains news, articles of opinion, features, and advertising."[4] A publication that fits this definition but is published by an unregistered sole proprietor is still a newspaper. Similarly, a "magazine" is defined as "a print periodical containing miscellaneous pieces (such as articles, stories, poems) and often illustrated."[5] A publication that fits this definition but is published by an unincorporated entity is still a magazine. Indeed, "zines" are independent magazines that gather and publish news and information to the public, but they are characterized by their underground, non-corporate status.[6] Zines have thrived

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[4] "Newspaper" The Merriam-Webster.com Online Dictionary, https://www.merriam-webster.com/dictionary/newspaper (last visited Jan. 30, 2020).
[5] "Magazine" The Merriam-Webster.com Online Dictionary, https://www.merriam-webster.com/dictionary/magazine (last visited Jan. 30, 2020).
[6] What is a Zine, University of Texas Libraries, https://guides.lib.utexas.edu/c.php?g=576544&p=3977232 (last visited Jan. 9, 2020).

in the State of Washington, and Seattle is home to the Zine Archiving and Publishing Project, which is housed at the Seattle Public Library.[7]

In effect, the State's *ejusdem generis* argument modifies the statute's language by inserting the word "legal" before the word "entity." But courts "will 'not add words where the legislature has chosen not to include them.'" *Jespersen v. Clark Cty.*, 199 Wash. App. 568, 578 (2017) (Division 2) (quoting *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526 (2010)). The word "entity" does not necessarily refer to an incorporated business. *See Smelser v. Paul*, 188 Wn.2d 648, 658 (2017) (construing statute referring to "entity" and "entities" to refer to a "child or another person or entity"). The State Legislature could have included language limiting the definition to legal entities, but it did not. *Cf. Halme v. Walsh*, 192 Wash. App. 893, 904 (2016) (interpreting statute referring to an "unincorporated association, or other legal entity"). This Court should not read in that language now.

B. The Public Records Act's codified construction provision mandates that its definition of "news media" be broadly construed to further public access and governmental transparency.

While the Media Shield Law supplies the definition at issue, Green made his request under the Public Records Act. The PRA provides that "news media . . . shall have access to the photographs and full date of birth" of public

[7] ZAPP Zine Collection, Seattle Public Library, https://www.spl.org/books-and-media/digital-magazines-and-newspapers/zapp-zine-collection (last visited Jan. 30, 2020).

employees, incorporating the definition of "news media" from the Media Shield Law. RCW 42.56.250(9). When a statute references another statute for a definition, that definition "must be examined in the context . . . into which it is incorporated." *State v. Foster*, 91 Wn.2d 466, 474 (1979). Because the Public Records Act references the Media Shield Law for the definition of "news media," RCW 42.56.250(8), that definition must be construed in the context of the PRA.

In no uncertain terms, the PRA strongly favors disclosure. *See City of Federal Way v. Koenig*, 167 Wn.2d 341, 344–45 (2009) ("The PRA 'is a strongly-worded mandate for open government' that provides the public with access to public records." (citation omitted)); *Wade's Eastside Gun Shop, Inc. v. Department of Labor and Industries*, 185 Wn.2d 270, 277 (2016) ("The language of the PRA must be interpreted" to further the "goal of ensuring that the public remains informed so that it may maintain control over its government"). The PRA expressly dictates that its terms be construed to favor disclosure:

> This chapter shall be ***liberally construed and its exemptions narrowly construed*** to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030 (emphasis added). Thus, "[t]he PRA 'begins with a mandate of full disclosure of public records; that mandate is then limited only by the precise, specific, and limited exemptions which the Act provides.'" *Lyft, Inc. v.*

City of Seattle, 190 Wn.2d 769, 778 (2018) (citation omitted).

Here, the PRA provides an exemption for "[p]hotographs and month and year of birth in the personnel files of employees and workers of criminal justice agencies." RCW 42.56.250(9). This exemption must be narrowly construed. RCW 42.56.030. The PRA also provides an exception to this exemption: "The news media . . . shall have access to the photographs and full date of birth." RCW 42.56.250(9). This provision must be broadly construed. RCW 42.56.030. As it is contained within this exception, the definition of "news media" as incorporated by the PRA should also be broadly construed in favor of disclosure. To satisfy this mandate for broad construction, the term "news media" should be construed to reach Green's YouTube channel.

C. If any ambiguity remains, this Court should broadly define "news media" to avoid constitutional doubt.

Washington courts "construe statutes to avoid constitutional doubt." *Utter v. Building Industry Ass'n of Washington*, 182 Wn.2d 398, 434 (2015). Here, a holding that Green's YouTube channel does not constitute news media would be in tension with both the First Amendment and Article I, § 5 of the Washington State Constitution.

1. The First Amendment strongly protects freedom of the press, and this freedom applies to both mainstream media outlets and to independent news gatherers like Green.

The First Amendment prohibits laws "abridging the freedom of speech, and of the press." U.S. Const. amend. I. This command provides

sweeping protection to the press. *See, e.g.*, *Bridges v. California*, 314 U.S. 252, 265 (1941) ("[T]he unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."). The Washington Supreme Court recently reiterated that the First Amendment's protection of "[f]ree speech is revered as the Constitution's most majestic guarantee, central to the preservation of all other rights." *State v. Arlene's Flowers, Inc.*, 193 Wn.2d 469, 511 (2019) (citation omitted).

The First Amendment's protection of press freedom is particularly strong because of the vital function that the press serves in our democracy. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring) (recognizing language of First Amendment is "an acknowledgment of the critical role played by the press in American society"). The press provides information necessary for citizens to be civically engaged. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (Brennan, J., concurring) (noting that First Amendment protections are predicated on the assumption "that valuable public debate—as well as other civic behavior—must be informed." (citation omitted)); *Herron v. KING Broadcasting Co.*, 109 Wn.2d 514, 527 (1987) (Dolliver, J., concurring specially) ("A free press is certainly an essential and crucial ingredient of a democratic society."). So, "the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our

democracy." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

The Supreme Court has not limited these freedoms to an established class of mainstream journalistic entities. Drawing a line around *who* qualifies as "press" would be "a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972). "[T]he First Amendment does not 'belong' to any definable class of persons or entities: It belongs to all who exercise its freedoms." *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring). Likewise, "the purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it." *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring). Indeed, discrimination based on the identity of a speaker or publisher is generally impermissible. *See, e.g.*, *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 301 (1984) ("the First Amendment does not permit any state legislature to" single out "favored speaker[s]") (Stevens, J., dissenting).

Rather than define a class of protected *people*, the First Amendment protects anyone engaged in the essential *function* of the press: gathering and disseminating news and information. *See, e.g.*, *Leathers v. Medlock*, 499 U.S. 439,

444 (1991) (because cable television "provides to its subscribers news, information, and entertainment" it is "in much of its operation, part of the 'press'"); *Citizens United v. FEC*, 558 U.S. 310, 390 (2010) (Roberts, C.J., concurring) ("The freedom of 'the press' was widely understood to protect the publishing activities of individual editors and printers" and not just publications as such). "The liberty of the press is not confined to newspapers and periodicals . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

The State's argument that "news media" should be interpreted narrowly to exclude independent or non-traditional journalists such as Green conflicts with First Amendment principles and draws a dubious identity-based distinction. Imagine two small newspapers or blogs doing exactly the same work: running down leads, interviewing sources, and publishing stories. One is incorporated as a limited liability company, while the other is not. Under the State's interpretation, the statutes would recognize only one of these organizations as a "news media" "entity" under the Media Shield Law and the PRA, even though both serve exactly the same function. This result is a constitutional absurdity, and it highlights the illogicality of the State's position.

Some definition of "news media" is necessary to administer the Washington Media Shield Law's careful balance between privacy concerns and

the legislature's recognition that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg*, 408 U.S. at 681. But the constitutional avoidance canon counsels that this definition should be as broad as possible. The definition should focus on the function of newsgathering and reporting rather than arbitrary distinctions between incorporated and unincorporated news sources. The public has a right to publish freely and that right comprehends the ability to gather information on newsworthy topics. *Id.* The mainstream press should not have a monopoly on the information needed to keep the public informed. "Freedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing." *State v. Buchanan*, 436 P.2d 729, 731 (Or. 1968).

2. Green shares key similarities with historical examples of independent publishers, and his speech must be protected as the media landscape continues to adapt to emerging technologies.

Finding that Green's channel qualifies as news media is consistent with long-standing precedent. While YouTube is a relatively young platform, its content creators share many similarities with the "lonely pamphleteer who uses carbon paper or a mimeograph." *Branzburg,* 408 U.S. at 704. Like these pamphleteers, Green is an individual broadcasting his research and opinions to be consumed by the public at large. *See Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (drawing parallels between purposes of peaceful

pamphleteers and newspapers). *Branzburg* expressly recognizes the value of this sort of speaker, concluding that they enjoyed "liberty of the press . . . just as much as [a] large metropolitan publisher." 408 U.S. at 704. That he publishes content on the Internet instead of printing it on paper does not make Green undeserving of First Amendment protection.

Independent journalism has always been a part of the United States' journalistic landscape. Unlike the large corporate-owned newspapers of today, early American papers only published to an audience of a few thousand subscribers.[8] Technology limited circulation, as a printer could produce only about 2,000 copies of a page in a ten-hour day.[9] Some of the most prolific members of the colonial "news media" were pamphleteers like Thomas Paine, who fueled the American Revolution with his publication of *Common Sense*.[10] And, in reference to these pamphleteers, the Supreme Court has opined that, "liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty." *Lovell*, 303 U.S. at 452. Today, pamphlets and leaflets have largely ceded their place to spiritual successors like blogs, YouTube videos, and tweets; but independent publishing, in whatever

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[8] *See* Eric Burns, Infamous Scribblers: The Founding Fathers and the Rowdy Beginnings of American Journalism 118–19 (2006) (discussing the early history of American journalism).
[9] U.S. Congress, Office of Technology Assessment, Science, Technology, and the First Amendment 5 (1988), https://ota.fas.org/reports/8835.pdf.
[10] Burns, supra, at 205–09.

medium, remains essential to democracy.

The growth of the Internet has made it increasingly important to protect independent publishers like Green, as individuals are more frequently consuming news online. As early as 1988, it was clear that technological "advances . . . may change the concept of 'the press' from one in which one organization publishes for many to one in which many share information amongst themselves."[11] This observation has proved prophetic. A significant and growing proportion of Americans get their news primarily online through sources like blogs, social media, and YouTube.[12] Sixty-nine percent of Americans used Facebook as of February 2019.[13] YouTube was registered in February 2005 and by the summer of 2006 served more than 100,000,000 video views per day.[14] Almost seventy-five percent of Americans now use YouTube in some capacity.[15] As these platforms have grown, they have taken on a larger role delivering news.[16] In 2019, the Pew Research Center found that fifty-three percent of Americans get news on social media sites "often" or

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[11] U.S. Congress, Office of Technology Assessment, Science, Technology, and the First Amendment 2 (1988), https://ota.fas.org/reports/8835.pdf.
[12] *See* Elisha Shearer & Elizabeth Grieco, Americans are Wary of the Role Social Media Plays in Delivering the News, Pew Research Center (Oct. 2, 2019), https://www.journalism.org/2019/10/02/americans-are-wary-of-the-role-social-media-sites-play-in-delivering-the-news/.
[13] Social Media Fact Sheet, Pew Research Center (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/social-media/.
[14] William L. Hosch, *YouTube* in Encyclopedia Britannica (Feb. 7, 2019), https://www.britannica.com/topic/YouTube.
[15] Social Media Fact Sheet, supra.
[16] Although billions of people have social media accounts, this does not make all of them news sources in any significant way. Only a small proportion of these accounts are in the "regular business of newsgathering," like Green.

"sometimes."[17]

As social media and online news sources expand rapidly, traditional sources of news have faded. Between 2004 and 2018, America lost 1,779 newspapers—roughly one out of every five.[18] In those newsrooms that remain, fewer journalists are expending diminishing resources to publish for a declining readership.[19] The audience for local TV news has also declined over the last decade, including a fourteen percent drop in audience for the late-night news from 2017 to 2018.[20] These traditional sources of news no longer serve the needs of many communities, especially in rural areas, which are at risk of becoming news deserts.[21]

A narrow construction of "news media" would ignore these developments. Independent news organizations, most of which use digital platforms, are stepping in to fill the void left by declining traditional news sources. Seattle alone has ninety hyperlocal blogs.[22] The development of these local news sources in the Seattle area was spurred by the closure of one traditional newspaper, the *King County Journal*, and the decision by another, the

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[17] Shearer & Grieco, supra note 12.
[18] Penelope Muse Abernathy, The Expanding News Desert 12 (2018), available at https://www.usnewsdeserts.com/reports/expanding-news-desert/download-a-pdf-of-the-report/.
[19] *Id.* at 14, 24.
[20] Michael Barthel, 5 Facts About the News Media in 2018, Pew Research Center (July 23, 2019), https://www.pewresearch.org/fact-tank/2019/07/23/key-takeaways-state-of-the-news-media-2018/.
[21] Abernathy, supra note 18, at 20.
[22] Michael R. Fancher, Seattle: A New Media Case Study, Pew Research Center (Mar. 19, 2011), https://www.journalism.org/2011/03/19/seattle-a-new-media-case-study/.

Seattle Post-Intelligencer, to publish entirely online.[23] The local blogs have stepped into the void by providing public service journalism and publishing residents' insights. Phinneywood.com, a blog dedicated to covering a specific neighborhood in Seattle, won a national award from the Society of Professional Journalists for its coverage of arson in the community.[24]

In fact, the mainstream press itself often disseminates stories broken by independent speakers who are highly engaged with their local communities. For example, a Steubenville, Ohio newspaper reported on the arrests of two teens for sexual assault several years ago.[25] This caught the attention of crime blogger Alexandria Goddard. Through her own investigation, Goddard pieced together unreported details surrounding the assault and the community's reaction to the case.[26] After she published her findings, the story was picked up by national news networks.[27] Facts that would have been swept under the rug helped ignite a national conversation about sexual assault. Goddard is not a professional reporter—she's a blogger—but her contribution was invaluable.

Independent news gathers like Goddard and Green provide clear

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[23] *Id.*
[24] *Id.*
[25] WTOV NEWS 9, BREAKING: Two juveniles arrested following alleged sex assault, Facebook (Aug. 22, 2012), https://www.facebook.com/WTOV9/posts/10150961218021887.
[26] Alexandria Goddard, Big Red Players Accused of Rape & Kidnapping, Prinniefied.com (Aug. 23, 2012), https://prinniefied.com/wp/ 2012/08/23/steubenville-high-school-gang-rape-case-firs/.
[27] *See, e.g.*, Juliet Macur & Nate Schweber, Rape Case Unfolds on Web and Splits City, N.Y. Times, Dec. 16, 2012, https://www.nytimes.com/2012/12/17/sports/high-school-football-rape-case-unfolds-online-and-divides-steubenville-ohio.html.

public value in a rapidly shifting media landscape, and the protection of all news gathers, large and small, is a core value of this country. It is vital for these independent news gatherers to be considered "news media" under the law.

3. The Washington State Constitution's protection of freedom of speech and press would be frustrated by a narrow definition of "news media."

Green's journalistic activity would be protected by the First Amendment no matter in which state it occurred. But in Washington, he is afforded another, stronger layer of protection by the state Constitution: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Const. art. I, § 5. This is an affirmative recognition of the right of all citizens to publish freely. The broad and unqualified nature of this right suggests that it is even more expansive than the federal protection, and a narrow definition of "news media" would thus be at odds with this strong protection.

The Washington Supreme Court laid out the factors for determining whether the state constitution is more protective than its federal counterpart in *State v. Gunwall.* 106 Wn.2d 54 (Wash. 1986). Those factors are (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. *Id.* at 58. Applying this analysis, Washington courts have held that the Washington State Constitution provides more expansive protection than the

First Amendment for individual expression. *See O'Day v. King Cty.*, 109 Wn.2d 796, 802 (Wash. 1988) ("[A]rticle 1, section 5 provides greater protection of speech than the first and fourteenth amendments to the United States Constitution."). While the Washington Supreme Court has not yet definitively held that Article I, § 5 provides more protection for the freedom of the *press* than the First Amendment,[28] *Gunwall* supports Green's claim to be part of the news media. The first three *Gunwall* factors are most applicable.

First, the text of Article I, § 5 is broader than the First Amendment's, encompassing the right of all people to publish on any topic they see fit. In *Collier v. City of Tacoma*, the Washington Supreme Court found that this "broad" language, as compared to the First Amendment, compelled a stricter test regarding time, place, and manner restrictions on speech. 121 Wn.2d 737, 747–48 (Wash. 1993). A similar conclusion follows here.

Second, there are "[s]ignificant differences" between the texts that "warrant reliance on the state constitution." *Gunwall*, 106 Wn.2d at 61. Though the First Amendment and Article I, § 5 both provide broad protection for expression in an informed democracy, they operate differently. Instead of restricting government action, like the First Amendment does, Washington

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[28] In *Nelson v. McClatchy Newspapers*, the Supreme Court of Washington was asked to resolve this question, but it declined to do so because the plaintiff had failed to conduct a *Gunwall* analysis in its briefing. 131 Wn.2d 523, 538 (Wash. 1997); *State v. Lee*, 135 Wash. 2d 369, 387 (1998) ("*When asked to do so*, this Court will consider whether Washington's constitution provides greater protection than parallel federal provisions, *but only if* the argument adequately addresses the principles announced in *State v. Gunwall*.") (emphases added).

provides an express grant of a right.[29] As the affirmative grant is designed to offer the most fulsome freedom of expression possible, the state Constitution should be considered more extensive under *Gunwall*'s second factor.

Third, "[t]he history of the adoption of [Article I, § 5] reveal[s] an intention" by the drafters to provide greater protection than the U.S. Constitution. *Gunwall*, 106 Wn.2d 61. Records show "that the free speech and press clause of [Washington's] constitution became progressively more liberal during the course of convention consideration." *State v. Rinaldo*, 36 Wn. App. 86, 92–93 (Wash. App. 1983), 102 Wn.2d 749 (Wash. 1984). In the end, "[t]hose hardy frontier lawyers, newspaper people and their colleagues at the 1889 constitutional convention said it as clearly as they possibly could—the right to free speech and press in the State of Washington is a privilege guaranteed to all." *Id.* at 93–94.

For these reasons, the Washington State Constitution is properly construed as offering even more expansive protection for the right to publish than the First Amendment. Restricting Green's access to government records would interfere with this right to publish.

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[29] "The [federal constitution] is a grant of enumerated powers to the federal government, and the [state constitution] serves to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence the explicit affirmation of fundamental rights in our state constitution may be seen as a guarantee of those rights rather than as a restriction on them." *Gunwall*, 106 Wn.2d at 62. Rather than acting as a limit on legislative power, Article I, § 5 explicitly ensures the citizens of Washington State an unqualified right to publish freely.

* * *

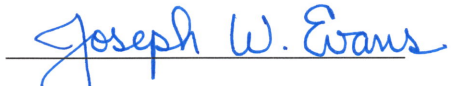
Given the severe tension between the State's interpretation of the statutes at issue and protections of the First Amendment and Article I, § 5, this Court should apply the constitutional avoidance canon and construe "news media" in the PRA and Media Shield Law broadly. If accepted, the State's interpretation of these statutes would create significant constitutional scrutiny.

V. CONCLUSION

For the foregoing reasons, this Court should construe "news media" broadly to include any person, organization, association, or other entity that regularly gathers and disseminates news, and affirm the judgment below.

Dated this 3rd day of February, 2020.

Respectfully submitted,



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The undersigned hereby swears under penalty of perjury and under the laws of the State of Washington, that the following is true and correct; that I am a citizen of the United States and of the State of Washington; over the age of 18 years of age; not a party of interest in this case. That on February 3rd, 2020, I caused to be served a true and correct copy of ***BRIEF OF AMICUS CURIAE FIRST AMENDMENT CLINIC AT DUKE LAW SCHOOL IN SUPPORT OF RESPONDENT*** to Counsel, as noted below:

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