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STATE OF WASHINGTON

NO. 78637-2

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BY C.J. HERBERT

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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WASHINGTON STATE FARM BUREAU FEDERATION,  
WASHINGTON STATE GRANGE, NATIONAL FEDERATION OF  
INDEPENDENT BUSINESS, BUILDING INDUSTRY ASSOCIATION  
OF WASHINGTON, EVERGREEN FREEDOM FOUNDATION,  
WASHINGTON ASSOCIATION OF REALTORS, and STEVE  
NEIGHBORS,

Respondents/Cross-Appellants,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington; STATE  
EXPENDITURE LIMIT COMMITTEE; an agency of the State of  
Washington; and STATE OF WASHINGTON,

Appellants/Cross-Respondents.

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**AMICUS CURIAE BRIEF OF NATIONAL GOVERNORS  
ASSOCIATION**

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## I. NGA'S INTEREST AS AMICUS CURIAE

The National Governors Association ("NGA") is a bipartisan organization of the governors of all 50 states and five territories. The NGA represents governors in Congress, before federal agencies, and in state and federal appellate courts. The NGA presents the governors' collective voice on issues critical to the successful functioning of the independent executive branch of state governments.

This case presents one such issue. Essential to the successful decision- and policy-making by the head of the executive branch is the ability to solicit candid views from advisors and executive personnel without fear of compelled disclosure. The trial court correctly recognized that this need to think out loud is protected by executive privilege under Washington law. "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). It is equally firmly rooted in the common law and recognized "nearly unanimous[ly]" by state courts. *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 783 (Del. Super. Ct. 1995).

This Court should join the majority of state courts in recognizing that a governor bears the same relation to a state as does the President to

the United States and therefore “is entitled to the same executive privileges and exemptions in the discharge of his duties as is the President.” *Guy*, 659 A.2d at 783. Like the President, the governor cannot be “forced to operate in a fishbowl,” *EPA v. Mink*, 410 U.S. 73, 87, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973) (citation omitted), and “needs . . . protected channels for the kind of plain talk that is essential to the quality of [the government’s] functioning.” *Nixon*, 418 U.S. at 708 n.17 (citation omitted).

The trial court has correctly so held and should be affirmed.

## II. DISCUSSION

“Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision-making process.” *Nixon*, 418 U.S. at 705-706, 94 S. Ct. at 3106. Executive privilege safeguards the decision-making process of the chief executive by fostering candid recommendations and advice that is protected from public disclosure. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975) (“The point is . . . that the frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public; and that the decisions and policies formulated would be poorer as a

result.”) (citations omitted); *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969) (“there are enough incentives as it is for playing it safe and listing with the wind”).

The executive privilege was invoked by President Washington as early as 1792, when an investigative committee of the House of Representatives requested papers concerning the details of a failed military expedition. See LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 10 (2004). Two years later, when the Senate sought details about a treaty with France, Washington withheld some documents concerning “those particulars which, in [his] judgment, for public consideration, ought not to be communicated.” ABRAHAM D. SOFAER, *EXECUTIVE POWER AND THE CONTROL OF INFORMATION: PRACTICE UNDER THE FRAMERS*, 1977 DUKE L. J. 1, 7 (1977).

The executive privilege “made [another] early appearance” in *Marbury v. Madison*, where Chief Justice Marshall suggested that “for a court to intrude ‘into the secrets of the cabinet’ would give the appearance of ‘intermeddling with the prerogatives of the executive.’” *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997) (citing *Marbury*, 5 U.S. (1 Cranch) 137, 170, 2 L. Ed. 60 (1803)). Four years later, in Aaron Burr’s

trial for treason, Marshall concluded that President Jefferson could withhold a letter from General Wilkinson, one of Burr's accusers:

The president . . . may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production. . . . [I]n such a case, much reliance must be placed on the declaration of the president; and I do think that a privilege does exist to withhold . . . letters of a certain description. The reason is this: letters to the president . . . are often written to him in consequence of his public character, and may relate to public concerns. Such a letter . . . partake[s] of the character of an official paper, and to be such as ought not on light ground to be forced into public view.

*Hamilton v. Verdow*, 287 Md. 544, 414 A.2d 914, 922 (Md. 1980) (citing *United States v. Burr*, 25 F. Cas. 30, 37-38 (C.C.D. Va. 1807) (No. 14,692D)).<sup>1</sup>

When the executive privilege resurfaced in federal and state courts much later, its dual constitutional and common-law bases were more fully developed. The Constitution “diffuses power the better to secure liberty.”

*Youngstown Sheet & Tube Co., v. Sawyer*, 343 U.S. 579, 635, 72 S. Ct.

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<sup>1</sup> Early state cases also recognized the executive privilege. See *Gray v. Pentland*, 2 Serg. & Rawle 23 (Pa. 1815) (the governor could not be compelled to disclose a document in his possession by the issuance of a subpoena); *Thompson v. German Valley Railroad Co.*, 22 N.J. Eq. 111 (1871) (the governor was entitled to withhold any papers or documents if, in his opinion, his official duty required him to do so); *Appeal of Hartranft*, 85 Pa. 433 (1871) (quashing a grand jury subpoena and holding that the governor could refuse to disclose information in any case where he concluded that disclosure would be contrary to the public interest).

863, 96 L. Ed. 1153 (1952) (Jackson, J., concurring). It is “the supremacy of each branch within its own assigned area of constitutional duties” that serves as the constitutional basis for the executive privilege. *Nixon*, 418 U.S. at 708. *See also Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325-25 (D.D.C. 1966), *aff’d*, 384 F.2d 979 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 952 (1967) (“The judiciary . . . is not authorized ‘to probe the mental processes’ of an executive or administrative officer. This salutary rule forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others . . .”); *Atty. General v. First Judicial Dist. of New Mexico*, 96 N.M. 254, 629 P.2d 330, 334 (N.M. 1981) (“Executive privilege is a recognition by one branch of government, the judiciary, that another co-equal branch of government, the executive, has the right not to be unduly subjected to scrutiny in a judicial proceeding where information in its possession is being sought by a litigant.”).

The chief executive stands in a unique position under the separation of powers. The federal and state constitutions vest the executive power directly in the President or governor as “the chief constitutional officer of the executive branch . . . entrusted with supervisory and policy responsibilities of the utmost discretion and

sensitivity.” *Nixon v. Fitzgerald*, 457 U.S. 731, 750, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982). These “unique powers and profound responsibilities” warrant enhanced protection under the executive privilege. *See In re Sealed Case*, 121 F.3d at 749. *See also id.* at 751 (because “the President does not represent simply one level of executive branch, but rather the ultimate level of decisionmaking in the executive branch . . . intrusion into presidential deliberations is therefore more serious.”).

In addition to the separation of powers, the executive privilege also arises from the common law of evidence:

the privilege arises from the common sense-common law principle that not all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires.

*Guy*, 659 A.2d at 782 (citations omitted). *See also In re Sealed Case*, 121 F.3d at 750 (“*Nixon* . . . make[s] absolutely clear that the privilege . . . is rooted in the need for confidentiality to ensure that presidential decisionmaking is of the highest caliber, informed by honest advice and full knowledge.”).

The state courts are nearly unanimous in recognizing the executive privilege on both the constitutional and common-law grounds. This protection extends to materials prepared by or for the governors in the official discharge of their duties. *Guy*, 659 A.2d at 783. *See also Colorado Springs v. White*, 967 P.2d 1042, 1047 (Colo. 1998); *Ostoin v. Waterford Tp. Police Dept.*, 189 Mich. App. 334, 471 N.W.2d 666, 668 (1991); *Killington, Ltd. v. Lash*, 153 Vt. 628, 572 A.2d 1368, 1374 (1990) (deliberative material in the possession of the governor); *Dorchester Master Ltd. P'ship v. Cabot Pipeline Corp.*, 521 N.Y.S.2d 209, 210-11 (N.Y. Sup. Ct. 1987); *Doe v. Alaska Superior Ct.*, 721 P.2d 617, 622-23 (Alaska 1986) (governor's file concerning a candidate for appointment to state office); *First Judicial Dist. Of New Mexico*, 629 P.2d at 333-34; *Hamilton*, 414 A.2d at 922 (investigative report about a state mental hospital prepared for the governor); *Nero v. Hyland*, 76 N.J. 213, 386 A.2d 846, 853 (1978) (investigative report prepared at the governor's request).

The same constitutional and common-law grounds support the recognition of executive privilege under Washington law. *See Senear v. Daily Journal-American*, 97 Wn.2d 148, 151-52, 154, 641 P.2d 1180 (1982) ("A qualified privilege may be based on the constitution, a statute

or on common law.”) (recognizing a journalist’s common-law privilege to withhold confidential sources of information).<sup>2</sup>

Under the Washington Constitution, “[t]he supreme executive power of this state [is] vested in [the] governor.” Const. art. III, § 2. In the exercise of her duties, the governor “may require information in writing from the officers of the state upon any subject relating to the duties of their respective offices, and shall see that the laws are faithfully executed.” Const. art. III, § 5. The executive privilege is therefore constitutionally based to the extent it relates to the governor’s discharge of her duties as the chief constitutional officer of the independent executive branch. *See State v. Int. Typographical Union*, 57 Wn.2d 151, 159-60, 356 P.2d 6 (1960) (“We have held that courts cannot control the action of an executive or administrative body in the exercise of their discretionary powers.”) (citation omitted).

The common-law basis for the executive privilege is equally firm. To be effective in her duties, the governor must rely on “candid, objective, and even blunt or harsh” opinions of her advisers and staff and have the

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<sup>2</sup> Importantly, in *Senear* this Court rejected the contention (similar to the Respondent’s contention in this case) that “any privilege is a matter for the legislature, not the courts.” 97 Wn.2d at 151. To agree with Respondent would cause the Court to abdicate “the province and duty of the judiciary branch to say what the law is.” *Overton v. Washington State Econ. Assistance Authority*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981).

benefit of their comprehensive exploration of all policy alternatives. A fear of disclosure may dissuade the governor's advisers from expressing "unpopular but correct opinions" to the detriment of the governor's decision-making. *In re Sealed Case*, 121 F.3d at 750. *See also id.* ("If the [governor's] advisers must assume they will be held to account publicly for all approaches that were advanced, considered but ultimately rejected, they will almost inevitably be inclined to avoid serious or novel or controversial approaches to . . . problems.").

To be meaningful, the protection of the executive privilege must be broad enough to "provide sufficient elbow room for advisers to obtain information from all knowledgeable sources" and apply to "communications these advisers solicited and received from others as well as those they authored themselves." *Id.* at 752. Under the "operational proximity" test, the privilege must extend to communications authored or received in response to a solicitation by members of the governor's staff. *Id.* (citing *Ass'n of Am. Physicians and Surgeons v. Clinton*, 997 F.2d 898, 910 (D.C. Cir. 1993) ("*AAPS*").

Finally, the executive privilege cannot be limited only to opinions. "[T]he most valuable advisers will investigate the factual context of a problem in detail, obtain input from all others with significant expertise in

the area, and perform detailed analyses of several different policy options before coming to closure on a recommendation for the Chief Executive.” *In re Sealed Case*, 121 F.3d at 750. Because fact-based recommendations are as revealing of the adviser’s thinking on policy issues as opinions, the governor’s access to such advice would be limited without the protection of the executive privilege.

For similar reasons, dissemination of the factual portions of the communications to and from the governor jeopardizes the confidentiality of the governor’s own deliberations. “[I]f you know what information people seek, you can usually determine why they seek it.” *Id.* at 551 (citing *AAPS*, 997 F.2d at 910). *See also Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 813 P.3d 240, 251 (1991) (“the seemingly straightforward distinction between fact and opinion blurs when the facts themselves reflect on the deliberative process”); *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974) (“to probe the summaries of record evidence . . . would be the same as probing the decisionmaking process itself”).

The NGA does not suggest that the executive privilege is absolute. The trial court correctly held that the constitutional and common-law protections it affords must be balanced against the showing of need. In

*Nixon*, the United States Supreme Court addressed only the balancing of the executive privilege and the competing need for evidence in a criminal case. *See Nixon*, 418 U.S. at 712 n.17 (“We are not here concerned with the balance between the President’s generalized interest in confidentiality and the need for relevant evidence in civil litigation . . .”). Under *Nixon*, the executive privilege can be outweighed by the showing that the evidence is “demonstrably relevant in a criminal trial.” *Id.* at 712.

But the structure of the balancing test established in *Nixon* is nonetheless relevant:

The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged. However, the privilege is qualified, not absolute, and can be overcome by an adequate showing of need. If a court believes that an adequate showing of need has been demonstrated, it should then proceed to review the documents *in camera* to excise non-relevant material.

*In re Sealed Case*, 121 F.3d at 744-45. *See also Nixon*, 418 U.S. at 708 (“It is well established that when a formal, specific claim of executive privilege is asserted, a presumptive privilege attaches.”).

In a civil case such as this, the party challenging the chief executive’s assertion of executive privilege must be prepared to make a

heightened showing of need. Where the competing interest is not the constitutional right to life or liberty but one as diffuse as a citizen's interest in public disclosure, the party seeking production must demonstrate a manifest need to override the public's interest in ensuring that the governor can make decisions in a frank, open, and candid environment.

### III. CONCLUSION

For these reasons the trial court's application of the executive privilege should be affirmed under Washington law.

DATED this 27<sup>th</sup> day of October 2006.

Respectfully submitted,



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