

NO. 90875-3

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GLEND A NISSEN,

Appellant

v.

PIERCE COUNTY ET AL.,

Respondent

[PROPOSED] BRIEF OF AMICUS SUBMITTED ON BEHALF OF
THE WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS IN SUPPORT OF PIERCE COUNTY AND THE PIERCE
COUNTY PROSECUTOR MARK LINDQUIST

AMENDED MAY 4, 2015

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I. INTRODUCTION

Assume¹ Prosecutor Mark Lindquist used his personal cell phone to send the following text to the sheriff guilds' attorney:

leanne mark here did det nissen push guild vote not endorse my camp call me this number

- Does this text message “contain information relating to the conduct of government”?
- Would this text message be a “public record”?

There is likely disagreement regarding the answer to the first question. But the law is absolutely clear that the answer to the second question is no – by law that text is not a public record. Why?

First, the text would not be a public record because it is political in nature and as demonstrated in this brief, Lindquist has a First Amendment right to associate with others to pursue his political goals in private.

Second, it would not be a public record because the text relates to Lindquist's campaign, and he is prohibited by law – which was adopted as part of the same Initiative that contained the public records provision – from using public resources to support any election campaign.²

¹ No text was sent but according to Detective Nissen, Lindquist did make a phone call to ask the guild attorney this question, which was the catalyst for this lawsuit. See Nissen's Brief of the Appellant at page 2.

² See Initiative 276 (“I-276”), Laws of 1973, Ch. 1, §13 (prohibiting use of public resources to support a political campaign) (now codified at RCW 42.17A.555); *see also Herbert v. PDC*, 136 Wn. App. 249, 256, 148 P.3d 1102 (2006) (no de minimis exception to RCW 42.17A.555). It would be absurd to say that the same law that prohibits Lindquist from using resources to promote a campaign would require the county to distribute that same document to anyone who asked for it.

This does not mean Lindquist did anything wrong in posing the question about Nissen's political support –as long as Lindquist used his private phone. As a citizen and an elected official, Lindquist has a First Amendment right to engage in political activity and associate with others to further common political goals.³

Lindquist also has a First Amendment right to keep his political communications private: “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.”⁴ “[I]nvolvement in partisan politics is closely protected by the First Amendment, and ... compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by First Amendment.”⁵

For city councilmembers and other officials elected to legislative bodies, their First Amendment right to communicate with their constituents is particularly import because their job is to adopt policies that reflect the wishes of the voters. “Essential to the success of modern representation is the maintenance of an on-going dialogue between legislators and their constituents throughout the term of office.”⁶ “[E]x

³ See *Chandler v. Miller*, 520 U.S. 305 (1997); *Baggett v. Bullitt*, 377 U.S. 360, 371-74 (1964); see generally *Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990) (recognizing associational privacy protection).

⁴ *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2009).

⁵ *Nixon v. Administrator*, 433 U.S. 425, 467 (1977) (citation omitted).

⁶ *Gordon v. Griffith*, 88 F. Supp. 2d 38, 47 (E.D.N.Y. 2000); see also *Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004) (holding correspondence between elected officials and constituents were protected by First Amendment associational privacy).

parte contacts between the legislator and his constituents advocating specific legislation ... is an integral part of representative government at every level.”⁷ The elect official’s right to communicate with constituents must be protected because “the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.”⁸ The back and forth between constituent and elected official “embody a central feature of democracy – that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.”⁹

While an elected official has a First Amendment right to engage in private political correspondence with constituents and supporters, it is not at all clear that an elected official’s political correspondence does not “relate to the conduct of government.” The term “political” is defined as “of or relating to ... the conduct of government.”¹⁰

This is where the First Amendment problem arises if the PRA is applied to an elected official’s personal email account. If a city councilmember were required to produce all emails from the councilmember’s personal email account that “contain information relating to the conduct of government,” the councilmember would be left to guess whether any particular exchange with a constituent was or was

⁷ *Westside Hilltop Survival Com. v. King Cty.*, 96 Wn.2d 171, 179, 634 P.2d 862 (1981).

⁸ *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

⁹ *McCutcheon v. F.E.C.*, -- U.S. --, 134 S. Ct. 1434, 1441 (2014).

¹⁰ Merriam-Webster Dictionary on line, definition 1(a) of “political.” (Available at <http://www.merriam-webster.com/dictionary/political>) (last visited April 25, 2015).

not a “public record.” Moreover, because of the mandatory attorney fee provision, the absence to any good faith exception and the lack of any general privacy exemption, the councilmember would likely err on the side of disclosure to minimize the risk of an adverse PRA judgment.

The inevitable result of this compelled production would be an unconstitutional chilling effect on the official’s willingness to correspond with constituents about private political issues. As this Court recently recognized, “[p]rotecting the privacy of personal communications is essential for freedom of association and expression” because the “[a]wareness that the Government may be watching chills associational and expressive freedoms.”¹¹

Because the PRA would infringe on First Amendment rights, it would only be constitutional if the disclosure obligation was narrowly tailored to serve an important governmental interest without being vague or overbroad. The PRA’s mandate for broad disclosure is not narrowly tailored and thus, if the Court finds that the PRA applied to records maintained by elected officials in private accounts or on private devices, it would inevitably violate the constitutional rights of elected officials and their constituents.

This Court can avoid these constitutional problems entirely by using the rules of statutory interpretation, including the doctrine of

¹¹ *State v. Hinton*, 179 Wn.2d 862, 877, 319 P.3d 9 (2014) (quotations omitted). The Court protects the drug user’s rights to avoid any erosion of our freedoms, but the protections of the First Amendment are strongest in the political area.

constitutional avoidance, just as the Court used these tools to avoid the separation of powers problems that would have arisen if the Court had ruled that the records maintained by courts were public records.¹² Individual elected officials, like courts, are not agencies, and therefore the Court should rule records maintained by elected officials in private locations are not “public records.” By making this ruling, the Court need not make any ruling on the constitutional issues,¹³ and it leaves the legislature with the maximum leeway to address any unintended consequences from this ruling.¹⁴

II. SUMMARY OF INTERESTS AND IDENTITY OF AMICUS¹⁵

The members of the Washington State Association of Municipal Attorneys (WSAMA) are the attorneys who represent most of the cities and towns in this state and help their clients with PRA compliance.

¹² *Nast v. Michaels*, 107 Wn.2d 300, 730 P.2d 54 (1986); *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346, 348 n.2, 217 P.3d 1172 (2009) (“*Federal Way*”).

¹³ *Clark v Martinez*, 543 U.S. 371, 380 (2005) (“one of the [constitutional avoidance] canon’s chief justifications is that it allows courts to avoid the decision of constitutional questions.”).

¹⁴ See *McConnell v. FEC*, 540 U.S. 93, 190 (2003) (when court applied constitutional avoidance in earlier case, holding was only “an endpoint of statutory interpretation, not a first principle of constitutional law” so later legislation drawing a different line was not per se unconstitutional). This would be similar to how the Court has addressed the ruling in *Federal Way v. Koenig*, in adopting General Rule 30.1. This brief does not argue the constitution prohibits an agency from accessing an elected official’s personal email account; only that it would be unconstitutional to use the PRA as currently drafted for that access.

¹⁵ Additional details about Amicus, its interest in this case, why the Court should hear from Amicus and the familiarity of the applicant with the issues in this case are described in the Motion to File Brief of Amicus.

III. SPECIFIC ISSUE ADDRESSED

The amicus brief addresses the issue of whether the PRA's definition of "public records" applies to emails maintained by elected officials in private locations such as personal cell phones and private email accounts. Specifically, this brief addresses the First Amendment issues that would arise if the PRA were interpreted to apply to those records and argues that the Court should avoid those issues by ruling that the PRA, as currently drafted, does not apply to records exclusively held in the private accounts of elected officials because elected officials are not "agencies."

The plaintiff has asserted that the Court should not consider any First Amendment issues, claiming that these issues were not raised by the parties below. While defendants have adequately raised the First Amendment issue, even if they had not, the Court should still avoid interpreting the PRA in a manner that will violate the First Amendment rights of elected officials. Moreover, the First Amendment issue is fully addressed in another case currently pending before the Court that also involves emails maintained in an elected official's private email account, *West v. Vermillion*, Supreme Court No. 90912-1. The term "public record" can only have one meaning. Thus, if the Court does not address the First Amendment issues in the *Nissen* case, the Court should wait to rule on the issue until the Court has also considered *West v. Vermillion*. WSAMA submits that a unified ruling on the issue of privately-held electronic records would be of greatest benefit to its members and the public.

IV. STATEMENT OF THE CASE

The PRA request at issue seeks records stored on or associated with the private cell phone of Mark Lindquist, the elected Pierce County Prosecutor. To resolve this case, however, the Court will need to interpret the term “public record.” Statutory terms are not “chameleons [whose] meaning are subject to change depending on the presence or absence of constitutional concerns in each individual case,”¹⁶ however, so the Court should consider how its ruling will affect records maintained by any elected official in any constitutionally protected location.¹⁷

V. ARGUMENT

Elected officials have a First Amendment right to use private accounts to engage in private political correspondence and privately associate with others to pursue political goals. The disclosure obligations of the PRA, if applied to records exclusively maintained in private accounts of elected officials, would infringe on those rights, and would likely be unconstitutional because the obligations of the PRA could not withstand an “exacting scrutiny” analysis.

¹⁶ *Clark*, 543 U.S. at 382.

¹⁷ This case only involves records that have been exclusively maintained in the elected official’s control. Thus, nothing in this brief should be read to suggest that an elected official could transfer a public record held by an agency into private control to avoid the PRA. In that situation, the Court’s decision in *Concern Ratepayers v. PUD No. 1*, 138 Wn.2d 950, 983 P.2d 635 (1999) would likely control. *See Concerned Ratepayers*, 138 Wn.2d at 954 (noting agency had control of record at the time of the request and only lost control after the request). *Concerned Ratepayers* did not involve a situation where an agency had never had control over the record, however, and thus it does govern when the records have always been out of the agency’s control, as in the case at bar.

The Court should assume the people and the Legislature did not intend the PRA to violate the First Amendment rights of elected officials. The Court should therefore avoid the constitutional issues in this case and interpret the PRA's definition to "public record" so that it does not apply to emails maintained exclusively in the private accounts.

A. Elected Officials Have a First Amendment Right to Engage in Political Correspondence in Private

As demonstrated in the introduction of this brief, elected officials have the First Amendment right to privately associate with their constituents and supporters and cannot be forced to forfeit these rights as a condition of holding office. As long as campaign donations are disclosed, there is no public accountability interest in the disclosure of these communications.¹⁸

The drafters of I-276 encouraged elected officials to keep the political correspondence private by including an absolute prohibition on using public resources to communicate with constituents in support of a political campaign. Because of the strict enforcement of this provision, elected officials are encouraged to err on the side of using private accounts for any activities that might be considered campaign-related:

The consequences of a violation of RCW 42.17A.555 can be severe; there is the potential for a civil penalty of up to \$10,000 and, if it can be shown that the violation probably affected an election's outcome, the election can be voided. ... Thus, prudence would suggest that, if the legal authority

¹⁸ *Westside Hilltop*, 96 Wn.2d at 179 (holding that campaign disclosure requirements and the political process allow the public to hold elected officials accountable).

to use a public facility is not clear, the decision be in favor of nonuse.¹⁹

This prohibition suggests the drafters of I-276 understood the First Amendment implications mandating the disclosure of political correspondence and did not intend to include such correspondence within the definition of “public record.” *See also, e.g., Young Am. for Freedom v. Gorton*, 83 Wn.2d 728, 522 P.2d 189 (1974) (adopting a narrower interpretation of I-276 disclosure obligation to avoid violation associational privacy).²⁰

B. Serious Constitutional Doubts Arise if the PRA as Currently Drafted Were Applied to Records Exclusively Held in the Private Accounts of Elected Officials

Disclosure laws such as the PRA infringe on First Amendment rights when they mandate the disclosure of political beliefs and associations because “[t]he compelled disclosure of political associations can have ... a chilling effect.”²¹ As Justice Gonzalez noted in *State v.*

¹⁹ See *Getting into Office: Being Elected or Appointed into Office in Washington Counties, Cities, Towns, and Special Districts* at 19 (MRSC 2013), available at: <http://mrsc.org/getmedia/865D9DE0-1EE5-45AC-8F82-0B4B773D0A79/gio13.aspx> (Last visited April 26, 2015). The Attorney General’s office gives state employees, who are governed by a parallel prohibition in RCW 42.52.180, similar advice, suggesting employees not try to “bump up against the ‘line’ that divides lawful from unlawful conduct” when using public resources. See James Pharris, Deputy Solicitor General, *Memorandum re 2009 Election-Restrictions on Use of Public Funds and Property to Support or Oppose Candidates or Ballot Measures* at 10 (Oct. 30, 2009). This memo is featured at the Executive Ethic’s Board’s website and can be accessed at <http://www.ethics.wa.gov/RESOURCES/public%20fund%20memo%202009.pdf>. (Last visited April 26, 2015).

²⁰ I-276 provides for subpoena power to obtain information from elected officials to enforce financial disclosures obligations but not the public records provisions of I-276. *See Seeber v. Public Disclosure Commission*, 96 Wn.2d 135, 142, 634 P.2d 303 (1981) (noting limits on subpoena powers).

²¹ *Perry*, 591 F.3d at 1160; *see also Doe v. Reed*, 561 U.S. 186, 194-95 (2010) (holding that the PRA infringed on First Amendment rights by mandating the disclosure of

Hinton, the “[a]wareness that the Government may be watching chills associational and expressive freedoms.”²²

1. Disclosure Provisions Must Be Narrowly Tailored to Serve a Substantial Governmental Interest

A disclosure provision that infringes on First Amendment rights will only be constitution if it can withstand “exacting scrutiny.” This requires the provision to be narrowly tailored so that there is “a substantial relation between the disclosure requirement and a sufficiently important governmental interest.” *Doe v. Reed*, 561 U.S. at 196. It must also “employ[] means closely drawn to avoid unnecessary abridgement of associational freedoms.” *McCutcheon*, 134 S.Ct. at 1444.

This requires the Court to “assess the fit between the stated governmental objective and the means selected to achieve that objective.” *McCutcheon*, 134 S.Ct. at 1445. “In the First Amendment context, fit matters.” *McCutcheon*, 134 S.Ct. at 1446. Under this level of scrutiny, the “fit” need not be “perfect,” but it must still be “narrowly tailored to achieve the desired objective.” *McCutcheon*, 134 S.Ct. at 1447. The disclosure obligation also cannot be overbroad or vague. *PDC v. Rains*, 87 Wn.2d 626, 630-31, 555 P.2d 1386 (1976) A law that “does not avoid

signatures on initiative petitions). Note, the potential intrusion is much greater in this case than in *Doe v. Reed*, which only involved the disclosure of a name on a petition.

²² *Hinton*, 179 Wn.2d at 877.

unnecessary abridgement of First Amendment rights ... cannot survive” exacting scrutiny. *McCutcheon*, 134 S. Ct. at 1446.²³

2. The PRA’s Broad Disclosure Obligation Is Not Narrowly Tailored to Serve Public Accountability.

“The purpose of the PRA is to ensure the sovereignty of the people and the accountability of the governmental agencies that serve them by providing full access to information concerning the conduct of government.” *Kitsap County Pros. Att’y Guild v. Kitsap County*, 156 Wn. App. 110, 118, 231 P.3d 219 (2010). In other words, it is a “fundamental and necessary” tool to protect our “free society.” I-276 §1(11).

While this is unquestionably an important governmental purpose, the actual disclosure provisions of the PRA are not in any way tailored to serve this accountability interest. First, a significant volume of records will “relate” to the conduct of government but will further the PRA’s goals of accountability. Second, the requestor need not show a record is needed for accountability to obtain the record using the PRA. Instead, “[a]ny member of the public can demand any public record from any public agency at any time for any reason[.]”²⁴ A requestor “shall not be required to provide information as to the purpose of the request” and any “intended

²³ See, e.g., *Buckley v. Am. Constitutional Law Found.*, 515 U.S. 182, 202 (1999) (requirement that signature gatherers disclose amounts paid unconstitutional because it was not tailored to public’s legitimate informational interest).

²⁴ *Soter v. Cowles Pub. Co.*, 131 Wn. App. 882, 900, 130 P.3d 840, 848 (2006) *aff’d*, 162 Wn. 2d 716, 174 P.3d 60 (2007). Moreover, a requestor does not need to show that a request will benefit any “legitimate public concern” before a requested record will be subject to disclosure. See *Bellevue John Does v. Bellevue Sch. Dist.*, 164 Wn.2d 199, 224, 189 P.3d 139 (2008).

use of the information cannot be a basis for denying disclosure.”²⁵ Finally, there also is no generally privacy exemption. Thus, the PRA’s mandate for broad disclosure is not narrowly tailored because it is significantly broader than what would be needed to serve accountability. Thus it could not withstand exacting scrutiny if it applied to emails in elected officials’ private accounts or to text messages on Lindquist’s personal cell phone.

3. Other Transparency Laws Allow the Public to Hold Elected Officials Accountable.

Moreover, in light of the numerous other transparency laws that apply to elected officials, there is no need to apply the PRA to private accounts to further accountability. This is particularly true for elected officials serving on multi-member bodies, who make up the bulk of elected officials in this state. The Open Public Meetings Act prohibits these elected officials from taking any action on their own, and an elected official who tries can be subject to recall.²⁶ Moreover, an email exchange between a quorum of a governing body will violate the OPMA, which mandates that a government body cannot even discuss agency issues outside of an open public meeting.²⁷ Thus, a person who suspects elected

²⁵ RCW 42.56.080; *King County v. Sheehan*, 114 Wn. App. 325, 341, 57 P.3d 307 (2002) (PRA contains no “need to know” requirement).

²⁶ *In re Recall of Davis*, 164 Wn. 2d 361, 369, 193 P.3d 98 (2008) (holding allegation that single commissioner agreed to large severance package was sufficient to support a recall petition).

²⁷ *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 27 P.3d 1208 (2001) (review emails of newly elected school board members sent both before and after members were sworn in to determine if email exchanges violated the OPMA).

officials are conducting secret meetings using personal email accounts could bring an OPMA claim and use discovery to reach into private accounts.²⁸

4. The PRA's Definition of "Public Record" Would Either Be Unconstitutionally Overbroad or Unconstitutionally Vague If Applied to Records Maintained by Elected Officials.

In addition to the lack of any "fit" between PRA's purpose of accountability and its disclosure obligation, the current definition of public record would be unconstitutional if applied to emails held in an elected official's personal email account because the phrase "relating to the conduct of government" is either unconstitutionally overbroad or unconstitutionally vague. A statute is overbroad if it would intrude on a substantial amount of First Amendment activity. *State v. Johnson*, 156 Wn.2d at 355, 363, 127 P.3d 707 (2006). A statute is unconstitutionally vague when it fails to provide sufficient guidance to allow a person of ordinary intelligence to determine when the regulation applies. *Rains*, 87 Wn.2d at 630-31 (regulation unconstitutional if person must guess when it applies).

If the phrase "relating to the conduct of government" were interpreted literally, it would encompass all of an elected official's email to constituents soliciting campaign donations and all other private political

²⁸ See, e.g., *Eugster v. City of Spokane*, 110 Wn. App. 212, 226–27, 39 P.3d 380 (2002) (remanding for discovery in OPMA case to determine if illegal meeting occurred). Here, Nissen admits she could have used discovery in her whistleblower lawsuit. See Nissen's Reply Brief of Appellant at 15

correspondence (not to mention purely personal correspondence that references the agency). This would be unconstitutionally overbroad.

While courts will often avoid an overbroad challenge by adopting a limiting construction, that will not save the statute if the limiting construction itself makes the statute unconstitutionally vague. *See Baggett*, 377 U.S. at 371-74. The construction must also be at least arguably inferable based on the statute's plain language because the Court cannot re-write a statute to avoid an overbreadth challenge.²⁹

To avoid a vagueness challenge, a regulation infringing on First Amendment rights must be “sharply drawn” with a “great[] degree of specificity and clarity[.]” *WSRP*, 141 Wn.2d at 266. Restrictions on First Amendment rights that involve “the drawing of fine distinctions” and require “substantial litigation over an extended time” to set those lines create a “serious risk of chilling” First Amendment rights and therefore should be rejected. *Citizens United v. FEC*, 558 U.S. 310, 326-27 (2010). Absent sufficient clarity, such regulations will have an unconstitutional chilling effect on the exercise of First Amendment rights. *Voters Educ. Committee v. PDC*, 161 Wn.2d 470, 482, 166 P.3d 1174 (2007).

Case law suggests that rather than interpret the phrase “relating to the conduct of government” literally, courts should look at “the role the document played in the system” to determine if the record is a public

²⁹ *Wash. State Republic Party v. PDC*, 141 Wn.2d 245, 4 P.3d 808 (2000) (*WSRP*) (“a court may not strain to interpret the statute as constitutional: a plain reading must make the interpretation reasonable”).

record.³⁰ But because political emails will often play a role in the system, this narrower interpretation of “relating to the conduct of government” is still unconstitutionally vague when applied to an elected official’s private email account.

In the end, the problem is not limited just to the imprecise phrase “relating to the conduct of government”; it is also rooted in the general presumptions in the PRA itself that serve to urge agencies to err on the side of disclosure. This presumption directly conflicts with the court rulings that regulations on First Amendment restrictions must give wide latitude to avoid chilling those rights.

This is one of the reasons why a “constitutional exemption” like that recognized in *Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 310 P.3d 1252 (2013), will not work to protect First Amendment rights. “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*, 558 U.S. at 325. “First Amendment freedoms need breathing space to survive” and any regulation that “requires intricate case-by-case determinations to verify” whether it applies will have the opposite result, creating a chilling effect from uncertainty. *Citizens United*, 558 U.S. at 329 (citations omitted). Moreover, this Court has already recognized that *in camera* review, by itself, can have a chilling effect on associational privacy and

³⁰ See, e.g., *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989); *Dragonslayer v. State*, 139 Wn. App. 433, 161 P.3d 428 (2007).

thus cautioned that “*in camera* review of associational materials is not a course to be routinely undertaken in a First Amendment [.]”³¹ At the very least, any First Amendment “exemption” would require a requestor to make a showing of “need” before an elected official could be required to submit records to a court for review.³² The mandatory attorney fee provision would also have to be eliminated to provide elected officials with sufficiently “breathing space.”

Nissen’s reliance on *Nixon v. Administrator* in support of her claim that *in camera* review is sufficient to protect Lindquist’s First Amendment rights is misplaced. First and foremost, the records at issue were already in the Government’s possession, which allowed the Court to distinguish its First Amendment records seizure decision cases.³³ Second, the review process put in place to protect Nixon’s privacy was significantly more elaborate than a simple *in camera* review process.³⁴ Third, if some type of review process was not used, the public would have

³¹ *Snedigar*, 114 Wn.2d at 167. Nissen has suggested the Court’s analysis in *Snedigar* is inopposite because the PRA does not require a requestor to demonstrate any “need” for a record. But that is the problem – because there is no “need” requirement, the PRA would allow requestors to violate an elected official’s associational privacy for any reason or no reason at all.

³² See *Right-Price Recreation v. Connells Prairie Community Council*, 105 Wn. App. 813, 822, 21 P.3d 1157 (2001) (reversing order for *in camera* review made before requestor demonstrated need), *aff’d on other grounds*, 146 Wn.2d 370, 46 P.3d 789 (2002).

³³ See *Nixon v. Administrator*, 433 U.S. at 462 (distinguishing seizure of records in *Stanford v. Texas*, because “the search in *Stanford* was an intrusion into an individual’s home to search and seize personal papers” while the government already possessed President Nixon’s papers).

³⁴ See *Nixon v. Freeman*, 670 F.2d 346, 351-353 (D.C. Cir. 1982) (describing elaborate screening process needed to protect President Nixon’s privacy rights).

lost access to over 42 million pages of records, because the private records, which only made up a fraction of 1% of the records at issue, were intermixed with those 42 million pages of records.

In the case of emails in an elected official's private email account, such records are by definition not within the agency's control. No elaborate review process exists and with over 10,000 elected officials in this state, such a process would be too expensive to put in place. Third, for the vast majority of elected officials who are subject to the OPMA, emails in the elected official's personal account will not reflect any agency actions.

In summary, if the PRA applied to records held by elected officials in private accounts, it would likely have an unconstitutional chilling effect on the willingness of elected officials to engage in political activities.³⁵

C. The Court Should Apply the Doctrine of Constitutional Avoidance to Resolve this Case

The Court need not address any of these constitutional issues, however, if it used the doctrine of constitutional avoidance and interprets the term "public record" so that it does not include records maintained by elected officials in private locations. The doctrine of constitutional

³⁵ While this brief has focused on the issue of political emails, another even more troubling result of applying the PRA to records exclusively held in private accounts of public employees in general is that it would discourage whistleblowing by public employees. "It is important to good government that public employees be free to expose misdeeds and illegality in their departments. Protecting such employees from unhappy government officials lies ... at the core of the First Amendment." *Myers v. Hasara*, 226 F.3d 821, 826 (7th Cir. 2000). If the PRA applied to these private accounts, a vindictive agency would be able to rummage through the personal computer of any employee it suspects of having reported misconduct to the media or outside agency.

avoidance “is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that [the legislature] did not intend the alternative which raises serious constitutional doubts.” *Clark*, 543 U.S. at 381. Under this doctrine, “[w]here a statute is susceptible of several interpretations, some of which may render it unconstitutional, the court, without doing violence to the legislative purpose, will adopt a construction which will sustain its constitutionality if at all possible to do so.” *State ex rel. Morgan v. Kinnear*, 80 Wn.2d 400, 402, 494 P.2d 1362 (1972).

As demonstrated above, if the PRA as currently written were to apply to emails maintained in private accounts of elected officials, it would raise serious constitutional doubts. The Court can avoid these doubts, however, by using the same reasoning the Court used in *Nast* and *Federal Way* and rule that because elected officials are not “agencies,” the records they maintain are not agency records, and therefore not “public records.”

In *Federal Way* and *Nast*, rather than attempt to parse the second element of the definition of public record – “containing information related to the conduct of government” – the Court focused on the third prong, whether the records were maintained by an “agency.” “Either the entity maintaining a record is an agency under the PRA or it is not.”³⁶ The

³⁶ *Federal Way*, 167 Wn.2d at 346. The Court went on to conclude that “[u]nder *Nast*, the courts are not included in the definition of agency, and thus, the PRA does not apply to the judiciary. As a result, the court records requested by Koenig are not subject to disclosure under the PRA.”

Court ruled that courts were not agencies because courts were not expressly listed in the definition of “agency.”³⁷

Elected officials, like courts, are not agencies. While the PRA is silent on the issue of whether courts are agencies,³⁸ the PRA expressly and repeatedly distinguished between an agency on one hand and individuals, including elect officials and employees on the other.³⁹ Thus, the Court should use the same reasoning it applied on *Nast* and *Federal Way* and rule that records maintained by elected officials in personal private locations are not public records because they are not maintained by an agency.

The doctrine has at least two distinct benefits. First, when applying the doctrine, the Court does not have to rule on any constitutional challenge – “one of the canon’s chief justifications is that it allows courts to avoid the decision of constitutional questions.” *Clark*, 543 U.S. at 380. Second, it allows the legislative body broad discretion to revise the law without any constitutional ruling constraining its options. *See, e.g., McConnell*, 540 U.S. at 190. Not surprisingly, this Court repeatedly

³⁷ *Nast*, 106 Wn.2d at 305; *Federal Way*, 167 Wn.2d at 348 n.2.

³⁸ The courts in *Nast* and *Federal Way* were in fact departments within King County and the City of Federal Way respectively, both of which are agencies.

³⁹ *See, e.g.*, RCW 42.56.060 (“No public agency, public official, public employee, or custodian shall be liable ...); RCW 42.56.550(3) (“Judicial review of all agency actions ... even though such examination may cause inconvenience or embarrassment to public officials[.]”).

applied the doctrine of constitutional avoidance to avoid several of the numerous constitutional challenges to the PDA.⁴⁰

The Court should apply that doctrine again in this case and allow the legislature to develop a statutory method to access any records needed for accountability, while still providing elected officials wide latitude to engage in political correspondence privately without fear that their agency will later demand these records because someone has requested them.

VI. CONCLUSION

Disclosure is not the purpose of the PRA; rather it is a tool designed to allow the public to hold government accountable and protect our free society. When the PRA's "strongly worded mandate for broad disclosure of public records"⁴¹ is shined on records maintained by an agency, it furthers accountability by limiting secrecy, which is a privilege the people grudgingly granted government and must limit to maintain control over government. But if its full might were turned on the records maintained by elected officials on private devices or personal email accounts (or the home), the exposure would threaten privacy, which is the most important right in a free society. The primary purpose of the constitution itself was to "confer[], as against the Government, their right

⁴⁰ See *Young Am.*, 83 Wn.2d 728; *State v. The (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 546 P.2d 75 (1976); *Seeber*, 96 Wn.2d at 142-43; *State Republican Campaign Comm. v. Public Disclosure Comm'n*, 133 Wn.2d 229, 943 P.2d 1358 (1997); *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 157 P.3d 831 (2007).

⁴¹ *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978).

to be left alone – the most comprehensive of rights and the right most valued by civilized man.”⁴²

The interpretation of the PRA advocated by Nissen would turn everything on its head by granting government the power to reach into private computers and cell phones of elected officials, chilling those officials ability to engage in private political activity. Ironically, this could even threaten the ability of the people to maintain control over government because once reformers got a foothold by electing a like-minded reformer, those in control of government could neutralize that official by monitoring the official’s political correspondence.

The drafters of I-276 cautioned courts to be “mindful of the rights of individuals to privacy.” I-276 §1(11). The Court should heed this advice and interpret the PRA in a manner that does not threaten the privacy rights of elected officials and their constituents and political supporters by ruling that records maintained by elected officials in private locations are not “public records.”

⁴² *Rhinehart v. Seattle Times*, 98 Wn.2d 226, 240, 654 P.2d 673 (1982) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandies, J., dissenting)), *affirmed*, 467 U.S. 20 (1984).

RESPECTFULLY SUBMITTED this 4th day of May, 2015.

A handwritten signature in black ink, appearing to read 'Ry Ram', written in a cursive style.

By: _____
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CERTIFICATE OF SERVICE

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Nissen v. Pierce County, No. 90875-3

Attached for filing are the following documents

1. Motion To File Corrected Brief of Amicus WSAMA
2. Proposed Corrected Amicus Brief

Note, WSAMA filed a Motion to File Amicus on 4/27/15, which included a proposed amicus brief. This motion supplements that motion by asking to have Proposed Corrected Amicus Brief attached with this filing admitted instead.

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NOTE, because I can only have one "official" email address, my city of Everett email address is listed with the Bar.

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