Supreme Court No. 93904-7
Court of Appeals No. 48601-6-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR WEST,

Respondent

v.

STEVE VERMILLION & CITY OF PUYALLUP,

Petitioners

PETITIONERS' JOINT RESPONSE TO WCOG AMICUS

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I. INTRODUCTION

Unlike Division II,[1] the Washington Coalition for Open Government (WCOG) does not question the U.S. Supreme Court holding that "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 First Amendment."[2] The right to privacy in political papers is older than the First Amendment itself and served as one of the inspirations for the American Revolution.[3]

Nor does WCOG try to defend Division II's claim[4] that that this Court resolved any First Amendment concerns in *Nissen v. Pierce County*.[5]

Finally, WCOG does not make any attempt to explain how the current definition of "public record" would provide an elected legislative official such as Petitioner Vermillion any guidance for distinguishing between "public records" and private, political correspondence. Instead, WCOG seems to agree with Division II that this is "impossible" when WCOG complains that Petitioners have offered "no real solution."[6]

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[1] *West v. Vermillion,* 196 Wn. App. 627, 639, 284 P.3d 634 (2016) (asserting that "even if' such a right exists, petitioners did not prove it was violated).
[2] *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 467, 97 S.Ct. 2777 (1977); *see also Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990); *Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004) (recognizing constituent communications are protected by First Amendment associational privacy).
[3] *See Stanford v. Texas*, 379 U.S. 476 (1965) (citing "Case of the Seized Papers"). The importance of "Case of the Seized Papers" is analyzed in Vermillion's opening brief at pages 13-15.
[4] *West,* 196 Wn. App.at 639 (asserting this Court addressed First Amendment rights based on the citation to *Nixon*).
[5] *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015).
[6] *West*, 196 Wn. App. at 640 ("It is impossible for us to determine if any of the e-mails are subject to First Amendment protections or are even public records.").

This gets to the crux of Petitioners' argument in this case. If the definition of "public record" requires Mr. Vermillion to produce all of his political correspondence, including those records protected by the First Amendment, it is unconstitutionally overbroad (and would violate Article 1, Section 7). If instead Mr. Vermillion is required to guess which records are protected and which qualify as "public records," then the definition of "public record" is unconstitutionally vague. Either result would have an unconstitutional chilling effect on Mr. Vermillion's First Amendment rights (along with the rights of his constituents and supporters), especially given the "strict compliance" standard imposed by the Public Records Act (PRA).

Instead of addressing the merits of the Petitioners' constitutional arguments, WCOG makes the frivolous claim that "Petitioners failed to raise any actual constitutional challenge below."[7] This argument confuses constitutional claims with the remedies to those claims, which are the exclusive prerogative of the courts, and cannot be "waived" by a party.[8] The Petitioners have asserted claims based on the First Amendment and Article 1, Section 7 consistently throughout this case. While the options for resolving those claims were narrowed by the *Nissen* decision, it has always been the duty of the Court to determine what remedy will apply, regardless of what remedy the parties may prefer.

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[7] WCOG Br. at 2. WCOG's attack on Mr. West's legal skills does not justify the violation of Mr. Vermillion's First Amendment rights. Moreover, they are baseless – one merely must glance through the advance sheets to see Mr. West has prevailed in more PRA appeals than likely any attorney in the state.

[8] *Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010) (parties' stipulated dismissal of facial challenge did not prevent Court for finding legislation facially unconstitutional).

II. ARGUMENT

A. Division II Misconstrued the *Nixon* Case

Nixon addressed two privacy challenges, one based on a Fourteenth Amendment personal-privacy right and one based on a First Amendment associational-privacy right. This Court cited to *Nixon*'s discussion of Fourteenth Amendment personal-privacy rights in *Nissen*. *Nissen*, 183 Wn.2d at 883 n.10 (referencing *Nixon*'s discussion of private papers that are "unrelated to any actions done by them in their public capacity"). Division II claimed that this citation to *Nixon* means this Court was also rejecting any possible First Amendment claim. *West*, 196 Wn. App. at 339. This Court typically does not "implicitly" reject First Amendment claims, especially not by citing to portions of a case that do not involve a First Amendment claim.

Division II also erroneously applied *Nixon* by merely reciting the result in *Nixon*, while ignoring analysis the U.S. Supreme Court applied to reach that result. The *Nixon* Court only ruled a very carefully controlled disclosure of private political correspondence was permitted because of the limited scope of disclosure and the public's strong interest in those communications. *Nixon*, 433 U.S. at 467-68. Yet Division II asserted that *Nixon* supported disclosure in the case at bar, especially because of the factual difference. But those differences – here the absence of provisions to limit the scope of disclosure and a greatly reduced public need – go to the heart of the *Nixon* Court's reasoning for allowing the infringement on

First Amendment rights in that case. *See NASA v. Nelson*, 562 U.S. 134, 145 (2011) (emphasizing how *Nixon* result was based on privacy protections in legislation and the compelling public need for disclosure). Despite this obvious problem with Division II's analysis, WCOG argues Division II properly applied the *Nixon* case.

B. Division II Misconstrued this Court's Decision in *Nissen*

In *Nissen*, this Court first adopted the "scope of employment" test, which was essential for protecting Mark Lindquist's privacy rights under Article 1, Section 7 because it allowed him to identify and produce any texts that were public records without also producing private protected records. But as Petitioners explained in their supplemental briefing to Division II after *Nissen*, the "scope of employment" test does not provide any meaningful guidance to elected legislative officials, who are not employees and whose official duties consist primarily of protected political activity. These differences are in fact the exact justification several federal circuit courts have used to find that the rules for First Amendment retaliation claims do not apply to elected officials.[9]

If Division II were following the *Nissen* decision, it would have adopted guidance that would allow Mr. Vermillion to sort out any public records comingled amongst his constitutionally protected political

[9] *See, e.g., Werkheiser v. Pocono Township*, 780 F.3d 172, 178 (3d Cir. 2015) ("if *Garcetti* [*v. Ceballos*, 547 U.S. 410 (2006)] applied to elected officials, speaking on political issues would appear to be part of an elected official's 'official duties,' and therefore unprotected. But protection of such speech is the 'manifest function' of the First Amendment."); *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 544-45 (9th Cir. 2010) (*Pickering* analysis does not apply to claims by elected school board member).

correspondence. But instead, based on a blatant misreading of *Walker v. Munro*,[10] Division II ruled that Mr. Vermillion had to disclose his private political correspondence before it would provide any guidance regarding what qualified as a public record. *West*, 196 Wn. App. at 639-40. In other words, Division II ruled that Vermillion must forfeit his First Amendment rights before a court would protect those rights. This is exactly what this Court sought to avoid in *Walker* when it ruled third parties could raise First Amendment claims. *Walker*, 124 Wn.2d at 416.

Despite these direct conflicts of *Nissen* and *Walker*, WCOG claims that Division II was properly applying *Nissen*. This Court should reject WCOG's argument and accept review.

C. WCOG's Waiver Argument Confuses Constitutional Remedies with Constitutional Claims

Once a party has properly presented a constitutional argument in a lawsuit, "parties are not limited to the precise arguments they made below" and are free to advocate for different remedies – even if the party formally abandoned a claim to remedy in an earlier stage of the case.[11] This is because courts, not parties, determine how constitutional violations should be remedied.[12]

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[10] *Walker v. Munro*, 124 Wn.2d 402, 418, 879 P.2d 920 (1994).
[11] *Citizens United*, 558 U.S. at 330-31 ("once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").
[12] *Citizens United*, 558 U.S. at 330-31 (finding statute facially unconstitutional even though plaintiff stipulated to dismissal of facial challenge).

Here, the Petitioners have consistently asserted claims based on the First Amendment and Article 1, Section 7 during every stage of this case. To remedy those claims, Petitioners originally asserted prior to the *Nissen* decision that this Court should avoid the constitutional claims by narrowly interpreting the definition of "public record," just like this Court did in *Nast v. Michaels.*[13] The Petitioners have subsequently acknowledged that a *Nast*-like resolution may be more complicated after *Nissen*, and its constitutional claims may require a hybrid facial/as applied type remedy.

WCOG's suggestion that constitutional challenges must either be facial or as applied is incorrect.[14] The U.S. Supreme Court's description of the constitutional challenge to the PRA in *Doe v. Reed*[15] illustrates that constitutional remedies can often have facial and as-applied aspects:

> The claim is "as applied" in the sense that it does not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim is "facial" in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions.[16]

Here, as in *Doe v. Reed*, the Petitioners are not claiming the PRA is unconstitutional in all its applications; rather the Petitioners only challenge

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[13] *Nast v. Michaels*, 107 Wn.2d 300, 730 P.2d 54 (1986) (records in possession of courts not public records). The Court, not the parties, determine what remedy to apply to resolve constitutional challenges. *See Citizens United*, 558 U.S. at 330-31.

[14] *See, e.g., Citizens United*, 558 U.S. at 331 ("the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge").

[15] *Doe v. Reed*, 561 U.S. 186 (2010).

[16] *Doe*, 561 U.S. at 194; *see also Wash. State Republic Party v. PDC*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000) (applying a similar hybrid type remedy when the Court refused to narrow its ruling and held it would apply to all similarly situated parties).

the application of the PRA to a class of records – those exclusively held by an elected legislative official in a protected private location. But the claim is not limited to just Vermillion's records, making it a hybrid claim.

It is important to note that there is one significant difference between Petitioners' First Amendment associational privacy claim here and the claim in *Doe v. Reed.* Doe's claim was a pure fact-of-association claim and did not involve any significant expressive conduct.[17] The Petitioners' claim, however, involves significant expressive conduct in the form of associational speech[18] and is based on overbreadth and/or vagueness. It is therefore a much stronger facial-type challenge, similar to those sustained in anonymous speech claims.[19]

Thus, the Petitioners have properly presented their constitutional challenges in the trial court, in the Court of Appeals and to this Court. WCOG's waiver argument should therefore be rejected.

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[17] In *Doe v. Reed*, five Justices agreed in concurring opinions that a more rigorous analysis should be applied to associational privacy claims that involve significant expressive conduct. *See Doe*, 561 U.S. at 212-13 (Sotomayor, J., concurring joined by Stevens, J., and Ginsburg, J.); *id.* at 207-08 (Alito, J., concurring); *id.* at 216 (Stevens, J., concurring, joined by Breyer, J.); *see also id.* at 231-32 (Thomas, J., dissenting) (arguing application of PRA in this case because the signing of an initiative petition qualified as expressive political activity).

[18] For a more detailed discussion of the differences between fact-of-association claims and "associational speech" clams, see Ashutoch Bhagwat, "Associational Speech," 120 Yale L.J. 978 (2011).

[19] *See, e.g., ACLU v. Heller*, 378 F.3d 979, 987-88 (9th Cir. 2004) (noting requirement that speakers disclose their identities on any written communication directly impacted their expressive conduct and was materially different for a requirement to disclose membership lists or other campaign finance information).

D. WCOG's Hypothetical Is a Straw Man Argument

WCOG next attempts to refute Petitioner's argument with a hypothetical argument based on a public official taking a file of public records to his home. But this hypothetical changes two crucial facts that highlight the exact constitutional quandary Mr. Vermillion faces after the Division II decision. First, the hypothetical assumes the files are "public records." Here, however, Mr. Vermillion has no method of determining what emails are public records and what emails are protected political records. Second, the hypothetical assumes the records are owned by the city. This means that the city could file an action to compel the file thief to return those files.[20] Here, however, the emails are owned by Mr. Vermillion and have never been possessed by the City. Thus, even if some emails were public records, the City has no legal basis to compel Mr. Vermillion to produce them.[21]

These key differences in WCOG's hypothetical suggest a misunderstanding of what the Petitioners are asserting and what they are not asserting. Petitioners are not arguing that the emails are constitutionally exempt from any disclosure requirement just because they are stored in a private place. Petitioners are not arguing that the First Amendment absolutely protects an elected official's emails in private accounts from

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[20] *See Kitsap County v. Smith*, 143 Wn. App. 893, 180 P.3d 834 (2008) (holding former employee could be compelled to return public records he took from the county).

[21] Mr. Vermillion owns the emails in his private email account. This ownership interest would not change even if some emails were public records, given that public ownership is not a mandatory element in the definition of "public record." RCW 42.56.010(3) (applying to certain records that are "prepared, owned, used, or retained" by an agency) (emphasis added).

compelled disclosure. And they are not arguing elected officials have any constitutional right to conduct any city business in secret. All Petitioners have argued from the very start of this case is that (1) some political correspondence are protected by the First Amendment; (2) the current definition of "public records" – even after *Nissen* – fails to provide bright-line guidance for sorting public records from protected political correspondence; and (3) it would be unconstitutional to compel Mr. Vermillion to waive his First Amendment privacy rights to allow for the City or a Court to determine where that line should be drawn.

In theory, this Court could resolve the case by providing such guidance, just as it provided guidance in *Nissen* by adopting the scope of employment test. But Division II found this task impossible without having the actual emails before it. If Division II is right on this point, then the only way to protect Mr. Vermillion is to find that all of the emails with constituents in Mr. Vermillion's exclusive possession are not subject to disclosure, either because they fall outside of the definition of "public record" (a *Nast*-type ruling) or because the definition of public record is unconstitutional as applied to the privately held records of elected legislative officials.

Either ruling will not create a permanent hole in the PRA because either ruling allows the Legislature to adopt a revised definition of public record that clearly delineates between "public records" and private political records. The Legislature is much better suited for this task than the courts

because the Legislature can take into account factual information from a wide variety of sources.

This solution also addresses another concern WCOG has raised – "the problem of recovering public records from a recalcitrant public official or employee." WCOG Br. at 7. This "problem" results from Article 1, Section 7 and is inherent in the Court's ruling in *Nissen* – not any ruling in this case. What is needed is a legislative fix, but so far, the Legislature has not acted. If, however, the Court ruled in favor of Petitioners in this case, it is almost certain the Legislature will respond, and that response will likely include a resolution to the "recalcitrant public official or employee" problem. Mr. Vermillion, in fact, has included a draft amendment that addresses both issues in the appendix to his reply brief.

III. CONCLUSION

The irony of WCOG's opposition to Petitioners' arguments is that the Division II opinion serves to increase government power at the expense of the people's elected representatives. These representatives are the only tool the people have to maintain control over the agencies they have created. Because of other protections, such as the Open Public Meetings Act and campaign finance laws, little is gained by forcing elected legislative officials to turn over their private political correspondence in response to PRA requests. A ruling in favor of Petitioners will protect the people's political power, while leaving the door open for the Legislature to provide for additional accountability without sacrificing First Amendment rights.

RESPECTFULLY SUBMITTED this 22nd day of February, 2017.

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