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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION, a Washington nonprofit corporation

Appellant,

v.

CHRISTINE O. GREGOIRE, in her official capacity as Governor of the

State of Washington

Respondent.

**BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON AND INSTITUTE FOR JUSTICE
WASHINGTON CHAPTER**

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including the right to access public records. The ACLU strongly supports adherence to the provisions of the Washington Public Records Act (PRA), RCW 42.56. It has participated in numerous public records cases, as amicus curiae, as counsel to parties, and as a party itself.

The Institute for Justice Washington Chapter (“IJ”) is a nonprofit, public interest legal center committed to defending and strengthening the free exchange of ideas, private property rights, and economic and educational liberty. As part of this effort, IJ’s national office in Arlington, Virginia, and its state chapters across the country and here in Washington rely heavily upon the ability to access public records to determine whether the government is violating fundamental constitutional rights and to hold it accountable when it does. To that end, IJ’s undersigned counsel is the author of the chapter on the attorney-client and other statutory exemptions in the Washington State Bar Association’s Deskbook on the Public Records Act. *See* William R. Maurer, *Attorney-Client Privilege and Other Discovery Exemptions*, in PUBLIC RECORDS DESKBOOK: WASHINGTON’S

PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS 10-1, 10-1
(Greg Overstreet, ed., 2006).

ISSUE TO BE ADDRESSED BY AMICI

Whether the Washington governor's claim of executive privilege should be allowed to shield public records from public disclosure, when the justifications for a narrow, limited executive privilege under federal law are not present with respect to the Washington governor under state law.

STATEMENT OF THE CASE

As discussed in the parties' briefs, the trial court upheld the governor's withholding of certain documents requested under the PRA, based on the governor's claim that executive privilege constituted an exemption to the PRA. The trial court relied on federal law regarding executive privilege (*United States v. Nixon, infra*) to support this conclusion. This Court granted direct review.

ARGUMENT

The governor asks this Court to recognize for the first time a form of executive privilege so that she may withhold government records otherwise disclosable under the Public Records Act ("PRA"). A federal presidential communications privilege derived from the United States Constitution does exist. *See U.S. v. Nixon (Nixon)*, 418 U.S. 683, 94 S. Ct.

3090, 41 L. Ed. 2d 1039 (1974); *Judicial Watch v. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997); and *Nixon v. Sirica (Sirica)*, 487 F.2d 700 (D.C. Cir. 1973).

Washington law, however, does not provide the governor with a similar executive privilege exemption to the PRA. Moreover, even under federal law, the presidential communications privilege is a very limited privilege that would not apply here.

The governor's executive privilege claim must be analyzed under the Washington Constitution, and the Washington Constitution reserves more power for the people, and requires greater government transparency and accountability than the federal Constitution. Likewise, the PRA clearly states that this state has a strong policy of open access to public records. Accordingly, this Court should decline the governor's invitation to recognize an executive privilege exemption derived from the Washington Constitution, and should remand the case to the trial court for resolution under the PRA.

I. The Federal Presidential Communications Privilege is Narrowly Limited.

Federal law does not control the authority of Washington's chief executive. Even if it did, the federal executive privilege would not allow the governor to withhold records in this case.

Under federal law, the term “executive privilege” actually encompasses several different privileges. *In re Sealed Case*, 121 F.3d at 737. In *In re Sealed Case*, the D.C. Circuit Court described the various types of executive privilege:

Courts ruled early that the executive had a right to withhold documents that might reveal military or state secrets. The courts have also granted the executive a right to withhold the identity of government informers in some circumstances, and a qualified right to withhold information related to pending investigations.

Id. at 736-37 (internal citations omitted). Under federal common law, a deliberative process privilege is also included in the executive privilege doctrine. *Id.* at 737.

The presidential communications privilege is one of the specific and narrowly defined forms of executive privilege derived from federal constitutional principles. *Id.* at 740. A careful reading of the federal case law demonstrates that the presidential communications privilege is actually based on two different constitutional rationales: the Court’s power to review the president’s claim of the privilege is derived from the separation of powers (*Nixon*, 418 U.S. at 705), and the privilege itself is rooted in the powers granted to the executive by the federal Constitution. *Id.* at 711. Neither rationale supports an analogous executive privilege exemption to the PRA in the case at bar.

A. The Separation of Powers Doctrine Does Not Preclude Judicial Review of a Claim of Executive Privilege.

The separation of powers doctrine only supports one element of the presidential communications privilege under federal law. The Supreme Court's analysis in *Nixon* began by addressing President Nixon's assertion that separation of powers creates an absolute executive privilege and that therefore the courts would violate the separation of powers by interfering with the president's assertion of that privilege. *Id.* at 706. Based on longstanding law recognizing that the Court retains the power of judicial review despite the separation of powers provisions of the federal Constitution, the *Nixon* Court ruled: "Since [the Supreme] Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers." *Id.* at 704.

While the separation of powers doctrine does not prevent judicial review, it remains significant in disputes between the legislative and executive branches of government. The courts recognize that disputes between the co-equal legislative and executive branches of government raise unique separation of powers issues because the constitutional functions of one branch are interfering with the constitutional functions of

another branch. *In re Sealed Case*, 121 F.3d at 753 (“Finally, we underscore our opinion should not be read as in any way affecting the scope of the privilege in the congressional-executive context... [t]he President’s ability to withhold information from Congress implicates different constitutional considerations than the President’s ability to withhold evidence in judicial proceedings.”)¹ However, separation of powers principles involving disputes between the legislative and executive branch should not be applied in the case at bar, because this case does not involve such a dispute.

B. The Form of Executive Privilege Upon Which the Governor Seeks to Rely is Actually the Narrow Presidential Communications Privilege That Derives From Enumerated Federal Article II Powers.

¹ See also *Nixon v. Adm’r of Gen. Services*, 433 U.S. 425, 443, 97 S. Ct. 2777, 2790, 53 L. Ed. 2d 867, 890 (1977) (In determining whether legislation disrupts the proper balance between the coordinate branches of government by infringing on powers of the executive branch, proper inquiry focuses on the extent to which it prevents the executive branch from accomplishing its constitutionally assigned function; only where the potential for disruption is present must the court determine whether the impact is justified by an overriding need to promote objectives within the constitutional authority of Congress); *U.S. v. House of Representatives of U.S.*, 556 F. Supp. 150, 152 (D.D.C. 1983) (“When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted.”); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (presuming of executive confidentiality can only be defeated by a strong showing that records sought by Congress are critical to the performance of its legislative functions); *Walker v. Cheney*, 230 F. Supp. 2d 51, 75 (D.D.C. 2002) (complaint dismissed because an agent of Congress cannot require the Article III courts to enter and resolve an inter-branch dispute in light of weighty separation of powers considerations); *U.S. v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 131–32 (D.C. Cir. 1977) (recognizing accommodation between the executive and legislative branches is contemplated by the Constitution and setting forth a procedure involving limited committee access and verification, and in camera resolution of disputes.) (internal citations omitted).

Once the *Nixon* Court had disposed of the separation of powers issue by upholding the courts' power to review the president's assertion of executive privilege, it proceeded to discuss the merits of the privilege under federal law. The Court explained why a presidential communications privilege originates from the president's enumerated constitutional powers in the federal Constitution. *Nixon*, 418 U.S. at 705-06, 711:

Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Article II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of the enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

Id. at 705-06 (emphasis added).

At the same time that the *Nixon* Court recognized the existence of the presidential communications privilege, it recognized that the privilege is not absolute and can be outweighed by competing interests. *Id.* at 707-08. "...[W]hen the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises." *Id.* at 706. *See also, Sirica*, 487 F.2d at 716-17.

The D.C. Circuit court has further limited the contours of the presidential communications privilege. In 1997 the D.C. Circuit court decided *In re Sealed Case*, which involved a claim of presidential communications privilege against a grand jury subpoena. Then in 2004 the D.C. Circuit decided *Judicial Watch* which involved a claim of presidential communications privilege against a Freedom of Information Act (FOIA) request. These cases recognize that the scope of the presidential communications privilege is restricted based on who is protected by the privilege, what subject matter is protected by the privilege, and what interests can overcome the privilege.

As to who is protected by the privilege, *Nixon* involved conversations directly between the president and his advisers, thus the Supreme Court did not have to decide whether the privilege protected communications outside those directly including the president. *In re Sealed Case*, 121 F.3d at 742. However, the *In re Sealed Case* court, out of concern for the privilege becoming too broad, carefully limited its holding to documents “authored or solicited and received by those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President...” *Id.* at 752.

In *Judicial Watch*, the court further limited the reach of the presidential communications privilege. In that case, the Department of Justice argued that documents created by the Office of the Pardon Attorney should be protected by the privilege because they were all created for the purpose of advising the president on his constitutional pardon power. 365 F.3d at 1114. However, the court was clear that the privilege should not extend any further than necessary to serve its purpose – protecting the president’s decision making process. *Id.* at 1116. To this end, the court endorsed the “solicited and received” language from *In re Sealed Case* and held that only documents that were actually submitted to the president or his White House staff would be protected by the presidential communications privilege. *Id.* at 1123. The courts have stressed the importance of a case-by-case analysis to prevent a conclusory application of the privilege and to ensure that the privilege was not being applied too broadly. *Id.* at 1118 (citing *In re Sealed Case*, 121 F.3d at 752.)

As to the subject matter protected by the presidential communications privilege, *Nixon* implied that this privilege was limited to decisions related specifically to the president’s Article II powers. *See Nixon*, 418 U.S. at 703-04, 705-06, 711. In *In re Sealed Case*, the D.C. Circuit court carefully limited the privilege to members of the president’s

staff and only communications related to a “quintessential and non-delegable Presidential power” which ultimately requires direct decision making by the president. *In re Sealed Case*, 121 F.3d at 752-53. Because *In re Sealed Case* involved the president’s enumerated appointment and removal power, the documents met this criteria. *Id.* at 752. However, the court recognized the privilege did not extend further: “In many instances, presidential powers and responsibilities, for example, the duty to take care that the laws are faithfully executed, can be exercised or performed without the President’s direct involvement...” *Id.*

Similarly, in *Judicial Watch*, the court rejected an overly broad scope of the privilege. The Office of the Attorney General argued that, based on *In re Sealed Case*, the court should adopt a functional approach for applying the presidential communications privilege – it claimed any communications related to the president’s enumerated Article II duties should be protected. *Id.* at 1115. However, the court rejected a functional approach because, “[w]hile a functional approach has the virtue of simplicity, it comes at too high a price . . . such an interpretation would sweep within the reach of the presidential privilege much of the functions of the executive branch, namely, to advise the President in the performance of his Article II duties.” *Id.* at 1121-22.

As to competing public interests that also limit the reach of the presidential communications privilege, the federal courts recognize that exactly the public interests in issue here – transparency and accountability of the executive branch – weigh against withholding documents from disclosure based on executive privilege. In *Judicial Watch*, the court addressed the presidential communications privilege in the context of a federal Freedom of Information Act (FOIA) request:

This FOIA case calls upon the court to strike a balance between the twin values of transparency and accountability of the executive branch on the one hand, and on the other hand, protection of the confidentiality of Presidential decisionmaking and the President’s ability to obtain candid, informed advice.

Id. at 1112. The court in *Judicial Watch* was faced with a unique problem because the Office of the President is not considered an agency subject to FOIA.² While any documents that were ultimately determined to be covered by the presidential communications privilege were protected from disclosure, the court acknowledged the presidential communications privilege must be interpreted and applied within FOIA’s policy favoring broad disclosure and narrowly construed exemptions. *Id.* at 1112-13, 1123-24. Accordingly, the court determined that the presidential

² There is a distinction between the Executive Office of the President, which is subject to FOIA, and the Office of the President, which is not subject to FOIA. The Office of the President is made up of only the president and his immediate advisers such as the White House Counsel and the Chief of Staff. *Id.* at 1110, n.1 (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156, 100 S. Ct. 960, 971, 63 L. Ed. 2d 267 (1980)).

communications privilege “should be construed as narrowly as is consistent with ensuring that the confidentiality of the President’s decisionmaking process is adequately protected.” *Id.* at 1116 (citing *In re Sealed Case*, 121 F.3d at 752.).

Likewise, as early as *Sirica*, the court noted that unless the presidential communications privilege was properly weighed against the general policy of accountable government, the president would be given the power to shroud his decisions in an unacceptable veil of secrecy:

If the claim of absolute privilege was recognized, its mere invocation by the President or his surrogates could deny access to all documents in all the Executive departments to all citizens and their representatives, including Congress, the courts as well as grand juries, state governments, state officials and all state subdivisions. The Freedom of Information Act could become nothing more than a legislative statement of unenforceable rights. Support for this kind of mischief simply cannot be spun from incantation of the doctrine of separation of powers.

Sirica, 487 F.2d at 715. *Judicial Watch* reaffirmed this principle when the court acknowledged it would be appropriate to weigh the general policy of FOIA against the president’s implied interest in confidentiality.

These limitations on the presidential communications privilege should be considered by this Court and lead it to reject an executive privilege exemption to the PRA in this case. State executive officers do not possess “the special prominence, singular[] unique constitutional status, and responsibilities of the President.” Matthew W. Warnock,

Stifling Gubernatorial Secrecy: Application of Executive Privilege to State Executive Officials, 35 Cap. U.L. Rev. 983, 1012 (2007). The case at bar does not involve the president's exercise of the enumerated powers of the federal Constitution, such as military or diplomatic secrets or the presidential pardon or appointment and removal powers. It does not involve a dispute between the legislative and executive branches of state government. Instead, it involves a request by individuals exercising their right to access public records. Thus, the public's interests in government transparency and accountability weigh against any public interest in confidentiality in the governor's decision making. Executive privilege in the form of the presidential communications privilege is limited and, if it applied here, those limitations would prevent the Governor from withholding the documents in issue.

II. State Law Provides Even Stronger Grounds for Rejecting An Executive Privilege Exemption to the PRA.

A. Washington Constitutional Law Limits the Powers of the Governor and Requires Accountability to the People.

Two significant principles of Washington constitutional law apply to this case. First, the Washington Constitution places significant limitations on the governor, more so than the federal Constitution or other state constitutions. Second, there is a strong underlying principle of

transparency in government in this state, even pre-dating the PRA and derived from the state Constitution. Thus, there is no reason for this Court to uphold the governor's executive privilege exemption from the PRA.

Under the Washington Constitution, ultimate sovereignty rests with the people, not the governor. Const. art. 1, § 1 (“All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.”) *See Love v. King County*, 181 Wash. 462, 467, 44 P.2d 175, 177 (1935). This provision that is contained in the very first section of the state Constitution reflects the populist roots of the Washington Constitution, and a belief that strict limits on the powers of government were necessary. Robert F. Utter & Hugh D. Spitzer, *THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE*, 12 (2002).

Under the state Constitution, the governor is not granted any powers that are outside the scope of the powers enumerated in the constitution. The Washington Supreme Court has “always insisted on finding an enumerated constitutional or statutory basis for the powers of executive officers.” *City of Seattle v. McKenna*, 172 Wn.2d 551, 557, 259 P.3d 1087, 1090 (2011); *accord* Utter and Spitzer, *supra*, at 80. It would be inconsistent with the state Constitution to engraft an unwritten,

unenumerated executive privilege on to the PRA, and the governor's arguments attempting to do so should be rejected.

B. The People's Ability to Monitor Government Decision-Making and Thus Hold Government Accountable is a Strong Value in Washington Predating the PRA and Clearly Continued and Embodied in the PRA.

Creating an executive privilege exemption to the PRA in this case would undermine the Washington Constitution in another way. The principle of popular oversight of government in order to hold it accountable pre-dates the PRA and traces its history to the Washington Constitution. As Washington courts have repeatedly noted, this state has a history of keeping our government open, and thus answerable, to the people. *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592, 597 (1994) ("The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions."). As discussed above, the sovereignty of the people and accountability of government officials are recognized in article 1, section 1 of the Washington Constitution, demonstrating that they significantly pre-date the adoption of the PRA. Upholding the Governor's claim of executive

privilege would conflict with the constitution and the “central tenets” that it is built on.

Moreover, the language of the PRA itself demonstrates Washington’s commitment to a strong presumption of openness in government decision-making. The Governor’s claim of executive privilege fails to meet her burden to overcome that presumption.

The Washington PRA provides: “Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550. It “is a strongly worded mandate for broad disclosure of public records” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246, 249 (1978), and its “disclosure provisions must be liberally construed, and its exemptions narrowly construed.” *Progressive Animal Welfare Soc.*, 125 Wn.2d at 251. The PRA “stands for the proposition that full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.” *Id.* 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. *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389, 392 (1997).

Washington's public records law has long recognized that "The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW 42.56.030. Thus, the PRA reflects Washington's agreement with the following comment by James Madison:

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103 (1910); *Progressive Animal Welfare Soc.*, 125 Wn.2d at 251 (quoting the first sentence with approval). As a recent law review article explains, Washington's passage of the PRA (seven years after FOIA was passed) reflected a trend among the states in the 1960s and 1970s in passing open records laws "to promote government transparency and ensure that government servants were properly serving the people that elected them." Karen Cullinane,

Protecting Anonymous Expression: The Internet's Role in Washington State's Disclosure Laws and the Direct Democracy Process, 44 U. Mich. J.L. Reform 947, 969 (2011).

In these strong affirmations of the people's sovereignty under state law, and their strong support for disclosure of public records under the state Constitution and statutes, there is no support for the governor's claim of an executive privilege exemption to the PRA.

CONCLUSION

For the foregoing reasons, amici respectfully request the Court reject the Governor's claim of executive privilege in this case.

Respectfully submitted this 20th day of August 2012.

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DECLARATION OF SERVICE

I, Madeline Roche, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Institute for Justice in Seattle, Washington. On August 20, 2012, I caused to be served a true copy of the foregoing Motion for Leave to File Amici Curiae upon the following:

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I declare under penalty of perjury that the foregoing is true and correct and
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s/ Madeline Roche
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