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FILED
SUPREME COURT
STATE OF WASHINGTON
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No. 95441-1

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

The Associated Press;
Northwest News Network; KING-TV ("KING-5"); KIRO 7;
Allied Daily Newspapers of Washington; The Spokesman-Review;
Washington Newspapers Publishers Association; Sound Publishing, Inc.;
Tacoma News, Inc. ("The News Tribune"); & The Seattle Times,

Plaintiffs/Respondents/Cross-Appellants,

v.

The Washington State Legislature;
The Washington State Senate; The Washington State House of
Representatives; Washington State Agencies; Senate Majority Leader
Mark Schoesler; House Speaker Frank Chopp; Senate Minority Leader
Sharon Nelson; & House Minority Leader Dan Kristiansen,

Defendants/Appellants/Cross-Respondents.

**BRIEF OF AMICUS CURIAE THE FIRST AMENDMENT CENTER
OF THE FREEDOM FORUM INSTITUTE
IN SUPPORT OF
PLAINTIFFS/RESPONDENTS/CROSS-APPELLANTS**

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IDENTITY AND INTEREST OF AMICUS CURIAE

The First Amendment Center of the Freedom Forum Institute (“FAC”) is a nonpartisan, nonprofit organization that champions the First Amendment freedoms of religion, speech, press, assembly, and petition. In addition to scholarly and educational work, the FAC operates an amicus curiae program and has an interest in cases that impact First Amendment freedoms. The public’s right to information about their government is necessary for the operation of the freedoms of speech and press. Together, these freedoms empower citizens to keep their government in check. Denying the public access to records kept by their elected lawmakers undermines the purpose of a free press. “When the people do not know what their government is doing, those who govern are not accountable for their actions--and accountability is basic to the democratic system. By using devices of secrecy, the government attains the power to 'manage' the news and through it to manipulate public opinion.” *Gravel v. United States*, 408 U.S. 606, 640-41 (1972) (Douglas, J., dissenting) (quoting Samuel James Ervin, Jr., *Secrecy in a Free Society*, 213 *The Nation* 454, 456 (1971)).

STATEMENT OF THE CASE

The Public Records Act (“PRA”) was enacted so that the public would “remain[] informed so that they may maintain control over the instruments they have created.” RCW 42.56.030. This case arises out of PRA requests submitted by reporters to individual state legislators’ offices, as well as to the Washington State Senate and Washington House of Representatives (collectively, the “Legislature”) seeking lawmakers’ calendars, schedules, emails, and text messages related to their legislative duties, as well as documentation of staff complaints made against lawmakers and related legislative investigations. See Opening Br. of Associated Press et al. 2–4 (“Media Br.”). *Amicus* urges this Court to affirm the trial court’s determination that individual legislators are subject to the PRA, but reverse the trial court’s ruling that the PRA does not apply to the Legislature.

ISSUES ADDRESSED

This Court has been presented with two issues for review: (1) whether the Legislature, House of Representatives and Senate are not “agencies” as defined by the PRA, and are only subject to the Act in a limited capacity, and (2) whether each individual state legislator and his or her office is an “agency” as defined by the PRA and thus broadly subject to the act. *Amicus* files this brief in support of

Plaintiffs/Respondents/Cross-Appellants Media Plaintiffs (the “Media Parties”). This brief focuses on how the information sought in the PRA requests serves the purposes of the PRA and benefits the public, and how the outcome of this case may impact Washington’s public policy and the First Amendment right of access to information.

ARGUMENT

I. Public access to the legislative records requested by the Media Parties serves the purposes of the PRA and enhances trust in individual legislators and the Legislature as a whole

The PRA was adopted on the principle 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.” *Neighborhood All. of Spokane County v. Spokane County*, 172 Wn. 2d 702, 714-15, 261 P.3d 119, 125 (2011) (internal quotation marks omitted). To achieve this purpose, the Act must be “liberally construed and its exemptions narrowly construed” to ensure that the public’s interest is protected. *Worthington v. WestNET*, 182 Wn. 2d 500, 507, 341 P.3d 995, 999 (2015) (quoting RCW 42.56.030). While Washington’s Constitution provides for public access to certain legislative functions by requiring open door hearings, the publication of legislative journals, and the recording of votes for bills to become law, the PRA is intended to go beyond this by allowing the public to access records that

reveal more about what their elected representatives are doing on their behalf.

Records like those requested by the Media Parties--calendars, schedules, and emails--can shed light on the inner workings of the legislative process in ways that greatly benefit the public. Access to a lawmaker's emails can reveal the intent and motivation behind a piece of legislation with more candor than the justification stated in an open hearing or within the text of the bill. For example, the stated purpose of a 2010 Arizona bill requiring local police to enforce immigration laws was to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." Note following Ariz. Rev. Stat. Ann. §11-1051 (West 2012). But emails sent by the bill's sponsor, Arizona State Senator Russell Pearce, revealed the racial motivation behind the bill, containing statements such as, "we are much like the Titanic as we inbreed millions of Mexico's poor, the world's poor and we watch our country sink," as well as indicating that Pearce was preparing to introduce another bill to remove birthright citizenship in Arizona. See Alia Beard Rau, *ACLU: Pearce e-mails prove SB 1070 was racially motivated*, ARIZONA REPUBLIC, Jul. 19, 2012, <http://archive.azcentral.com/arizonarepublic/news/articles/2012/07/19/20120719sb-1070-pearce-aclu-emails.html>.

Legislators' calendars, schedules, and emails can also be instrumental in revealing the role of lobbyists and other special interest groups in certain pieces of legislation. Public records requests for thousands of pages of emails between prominent National Rifle Association lobbyist Marion Hammer and Florida state officials revealed the vast scope of Hammer's power over the legislative process--exemplified by an email exchange where Hammer reprimanded the then-policy chief of the House Criminal Justice Subcommittee, Katie Cunningham, for amending a firearms bill and Cunningham quickly apologized and reversed the changes. *See* Mike Spies, *The N.R.A. Lobbyist Behind Florida's Pro-Gun Policy*, NEW YORKER, Feb. 23, 2018, <https://www.newyorker.com/magazine/2018/03/05/the-nra-lobbyist-behind-floridas-pro-gun-policies>.

Similar requests for legislative records revealed that in Wisconsin, a state with notoriously strict rules against legislators receiving gifts, many state legislators attended meetings with corporate lobbyists at resorts and had their trips completely paid for by a group that received most of its funding from corporate donors. *See* Center for Media and Democracy, *Buying Influence: How the American Legislative Exchange Council Uses Corporate-Funded 'Scholarships' to Send Lawmakers on Trips with Corporate Lobbyists* (Oct. 26, 2012), WWW.ALECEXPOSED.ORG,

https://www.alecexposed.org/w/images/f/fa/BUYING_INFLUENCE_Main_Report.pdf.

Legislators' records can also be the key to exposing legislative wrongdoing, as was the case in Florida, where they showed that state legislative leaders worked with state Republican officials to manipulate redistricting efforts, in apparent defiance of a constitutional amendment that banned such coordination. See Nicholas Kusnetz, *Emails Show Florida GOP May Have Defied Constitutional Amendment* (May 19, 2014), CENTER FOR PUBLIC INTEGRITY, <https://publicintegrity.org/state-politics/emails-show-florida-gop-may-have-defied-constitutional-amendment/>.

This information is of great value and interest to the public, especially given the pervasive lack of public trust in government. A 2015 Pew Research survey found that roughly three-quarters of Americans (74%) thought their elected officials put their own interests ahead of their constituents, a belief that can only be exacerbated when elected officials conceal their activities. Pew Research Center, *Beyond Distrust: How Americans View Their Government* (Nov. 23, 2015), WWW.PEOPLE-PRESS.ORG, <https://www.people-press.org/2015/11/23/6-perceptions-of-elected-officials-and-the-role-of-money-in-politics/>.

The Media Parties in this case requested appointment calendars, schedules, texts and emails related to a matter of particular interest to the public--the funding of K-12 education and the passing of a new state budget. Despite the obvious importance of this subject to the people of Washington State, the legislature's work on it was not transparent, nor were all of Washington's legislators equally dedicated to accomplishing it. *The Seattle Times* reported that during a 30-day special session where the Governor called legislators back to Olympia to come up with a plan, "The Senate and the House rarely worked on the floor and few committee meetings were held. Many lawmakers spent their time back in their districts. But a group of eight legislators — four Democrats and four Republicans — continued to grind away in closed-door meetings to find a compromise on a McCleary funding plan." Joseph O'Sullivan, *No agreement yet: Washington Legislature goes into second special session*, SEATTLE TIMES, May 23, 2017, <https://www.seattletimes.com/seattle-news/politics/no-agreement-yet-washington-legislature-headed-toward-second-special-session/>.

Given the public's significant interest in its own state budget and the funding plan for its educational system, the legislative records requested by the Media Parties are necessary to fill in the gaps of this opaque process and shed light on issues such as which elected legislators

were absent from the state capitol during the special session, or what lobbyists or special interest groups met with the legislators that were present.

II. A ruling that the PRA does not apply to the Legislature or individual legislators would undermine the well-established public policy of this state and infringe upon the First Amendment right of access to information

- A. Exempting the legislature from the PRA would undermine Washington's public policy, which recognizes that transparency and access to information are essential for a democratic society to function

A consistent thread throughout American history is that all elements of government are responsible to the same ultimate authority: the people. Indeed, as James Madison said on introducing the Bill of Rights in Congress:

All power is originally vested in, and consequently derived from, the people. That government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty and the right of acquiring property, and generally of pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and indefeasible right to reform or change their government whenever it be found adverse or inadequate to the purpose of its institution.

H.R. 1st Congress, 1st Session (June 8, 1789).

A democratic society that is predicated on the ultimate authority of an informed and engaged electorate requires the highest degree of openness and transparency on the part of the officials elected or appointed

to administer the functions of government. The preservation and open access to the legislature's documents is necessary so that the electorate may know that their elected or appointed officials are operating in a fair and ethical manner. Openness is required for the public to assess individual operations, measure of performance of public officials relative to others in similar positions, and observe general trends in governance.

Indeed, even President Lyndon Johnson, a reluctant signer of the original federal Freedom of Information Act, remarked in a written statement that, "This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits. ..." Press Release, Office of the White House Press Secretary, Statement by the President Upon Signing S. 1160 (July 4, 1966).

The public's ability to monitor the actions of the government effectively is proportionate to the public's access to government records. A transparent government makes clear what is being done, how and why actions take place, who is involved, and by what standards decisions are made.

The PRA expressly embraces these fundamental principles of openness and transparency. It is a "strongly worded mandate" that "reflects the belief that the sound governance of a free society demands

that the public have full access to information concerning the workings of the government.” *Worthington*, 182 Wn. 2d at 506-07, 341 P.3d at 998-99 (quoting *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389, 392 (1997)). The Act guarantees the public access to government bodies at all levels in Washington, stating:

The people of the 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.

A ruling that the PRA does not apply to the legislative branch of Washington’s government would, in practical terms, deny the public access to information about the inner workings of its elected legislature. Washington does not have a separate statutory process for the public to seek access to records from its legislature. And while Washington’s Constitution does provide for public access to some legislative functions by requiring open door hearings, the publication of legislative journals, and the recording of votes for bills to become law, it does not provide the public access to types of records that would expose the inner workings of the legislative process. Wash. Const. Art. II, § 11, 21. A ruling that the PRA does not apply to the legislative branch would therefore ensure that

the only way the public could obtain such records is if their elected lawmakers chose to voluntarily disclose them. To exempt the legislative branch from the PRA would frustrate the purposes of the PRA and concede authority to individual legislators and the Legislature to “decide what is good for the people to know and what is not good for them to know.” RCW 42.56.030.

- B.** A ruling that the PRA does not apply to the Legislature or individual legislators would run counter to the public’s First Amendment right to receive information and ideas

Open records and freedom of information laws in general further one of the most important doctrines in all of First Amendment law – the public’s right to receive information and ideas. The right to receive information and ideas “is an inherent corollary of the rights of free speech and *press that are explicitly guaranteed by the Constitution.*” *Bd. of Educ. v. Pico*, 457 U.S. 853, 868 (1982).

The right to receive information and ideas is a concept of longstanding importance in First Amendment jurisprudence. The U.S. Supreme Court first recognized the right in the context of a Jehovah’s Witness woman punished for distributing religious handbills on a door-to-door basis in an Ohio town. *Martin v. City of Struthers*, 319 U.S. 141

(1943). The Court explained that the freedom to distribute religious-based literature “necessarily protects the right to receive it.” *Id.* at 142.

The Court has recognized this venerated right in a variety of other contexts, including the right to possess sexual materials in the privacy of one’s home, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”); the right to read books in a public school library, *Bd. of Educ. v. Pico*, 457 U.S. 853, 868 (1982) (“access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner.”); the right to receive prescription drug prices, *Virginia Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (“Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.”); the right of corporate speakers to disseminate information to the public, *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) (“the Court’s decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.”); and the right of the public to receive information free from

ensorship of the U.S. postmaster general, *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (“I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.”) *Id.* at 308 (J. Brennan, concurring).

More analogous to the instant case, the U.S. Supreme Court held that there was a First Amendment-based right for the press and the public to attend criminal trials in *Richmond Newspapers v. Va.*, 448 U.S. 555, 578 (1980) (the First Amendment right to information and ideas “means in the context of trials . . . that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.”). Although the Court recognized that the Constitution and the Bill of Rights, “do not contain any explicit provisions which guarantee the public a right to access,” it found that the right was implicit to the guarantees of the First Amendment:

[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government...Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), but also the antecedent

assumption that valuable public debate -- as well as other civic behavior -- must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.

448 U.S. at 587-88.

The Court found that the right to attend trials was a condition necessary for meaningful communication about the judicial process. *Id.* at 588. Similarly, there can be no meaningful communication about the legislative process when the public has no right to request information about key components of that process, such as whether their elected legislators were present at a crucial vote; whether they met with special interest groups prior to said vote; or whether they used their positions of power to take advantage of their subordinates.

The Supreme Court has repeatedly recognized that the First Amendment includes “a ‘right to gather information,’” because ““without some protection for seeking out the news, freedom of the press could be eviscerated.”” *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). These protections empower the press to fulfill its constitutionally recognized duty to inform citizens about matters of public concern. *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“The Constitution specifically selected the

press . . . to play an important role in the discussion of public affairs.”); *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (noting that an “untrammelled press” is “a vital source of public information” and “an informed public is the essence of working democracy”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (explaining that the media provides the public with information necessary to “assure unfettered interchange of ideas” which enable “political and social changes desired by the people”).

The Court in *Richmond Newspapers* cautioned that this argument for the right of access to information “must be invoked with discrimination and temperance,” and that, “an assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded.” 448 U.S. at 588. Certainly, within state and federal Freedom of Information acts, specific exemptions are provided – most often for medical records, individual personnel records, national security and various kinds of proprietary business data. However, even in holding that the federal FOIA privacy exceptions may prohibit the release of information about an individual, the U.S. Supreme Court distinguished “personal” information from records of government activity. *Nat’l Archives and Records Admin. v. Favish et al*, 541 U.S. 157, 166, 173 (2004).

Reading a blanket exemption for the legislative branch of the government into the PRA would cut against the principle that “an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.” *Richmond Newspapers*, 448 U.S. at 576 (J. Stevens, dissenting). Because the PRA applies to local lawmakers, excluding all state lawmakers from its reach would indeed be arbitrary. As Washington Senator Keith Wagoner said in explaining why he chose to oppose the bill that would have exempted the Legislature from the PRA, “setting a separate standard for the Legislature because it is ‘too onerous for us’ while local governments are subject to the full force of the [PRA] is self-serving. I cannot think of a good argument why, as a senator, there should be a different standard.” Douglas Buell, *Governor vetoes bill that would exempt lawmakers from Open Records Act*, MARYSVILLE GLOBE, Mar. 5, 2018, <http://www.marysvilleglobe.com/news/governor-vetoes-bill-that-would-exempt-lawmakers-from-open-records-act/>.

If this Court rules that the PRA applies to the Legislature, lawmakers will still be permitted to claim that certain records are exempt from the Act when privacy concerns outweigh the public interest. However, if the court rules that the PRA does not apply to the Legislature, the public will have no avenue for meaningful discovery of the inner

workings of the legislative process. Such an outcome would run counter to the implicit guarantees of the First Amendment.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to uphold the trial court's determination that individual legislators are agencies under the PRA and have violated the PRA, but reverse the trial court's conclusion that the Legislature is not an agency under the PRA or subject to the PRA.

Respectfully submitted this 26th day of April, 2019.

s/ Casey M. Bruner

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on April 26, 2019, the foregoing Brief of Amicus Curiae was filed with the Washington State Supreme Court using the Court's e-filing system, which will automatically provide notice to all required parties.

Executed this 26th day of April, 2019 in Spokane, WA.

s/ Casey M. Bruner

Casey M. Bruner

WITHERSPOON KELLEY

April 26, 2019 - 3:03 PM

Transmittal Information

Filed with Court: Supreme Court
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Appellate Court Case Title: The Associated Press, et al. v. The Washington State Legislature, et al.
Superior Court Case Number: 17-2-04986-4

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