

FILED  
Court of Appeals  
Division II  
State of Washington  
2/24/2020 4:16 PM  
NO. 53289-1-II

No. 98768-8

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

BRIAN GREEN, Respondent

v.

PIERCE COUNTY, a municipal corporation, Petitioner

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**PIERCE COUNTY'S ANSWER TO FIRST AMENDMENT CLINIC  
AT DUKE LAW SCHOOL'S AMICUS CURIAE BRIEF**

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## I. INTRODUCTION

Amicus “First Amendment Clinic at Duke Law” (hereinafter “Clinic”), filed an amicus curiae brief “in support of Respondent” that ignores most of the issues raised in the instant appeal<sup>1</sup> and *sua sponte* focuses instead on an issue that is *not* present. Thus, it spends much of its brief advocating: “The term ‘news media’ [under RCW 42.56.250(8) and RCW 5.68.010-(5)(a)] should be construed broadly to include new forms and mediums of news, including independent YouTube channels like Green’s.” Clinic Br. 1-2, 4-5, 10-17. However, Pierce County does not challenge Green’s status as “news media” because of the “form[] and medium” he uses to post his videos. Rather, the challenge raised is that neither *he* nor the *specific social media account at issue* satisfy the other *specific requirements* of the “news media” exception to RCW 42.56.250(8)’s protection of law enforcement worker photographs and birthdates. AB 3, 16-44; Reply 1-23.

Accordingly, the County’s Answer addresses only those assertions by

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<sup>1</sup> The Clinic does not contest: 1) Green’s PRA suit is independently barred *because at the time of the request no proper showing* was made that a “news media” entity or its employee, agent or contractor was making the request, AB 2, 7-10, 19-22 & 34-37; 2) only “Green made the Public Records Act request with *his* individual and proper name,” RB 44-45 (emphasis added); CP 6-7; 3) Green is the only plaintiff in this suit, CP 3 (complaint); 4) Green does not claim *he* is a “news media” entity under RCW 5.68.020(5)(a), AB 38-42, RB 34-37, Reply Br. 3-4, 14 n. 8, 21-23; 5) Green cannot sue claiming a non-party met the test of “news media,” AB 20-21, Reply Br. 13 (see cases cited therein); 6) the Clinic does not defend Green’s claim *he* was “news media” under RCW 5.69.010-(5)(b), *compare* Clinic Br. with AB 42-44, Reply Br. 21-23; and 7) if the law was somehow different, denial of discovery prejudiced the County and was an abuse of discretion. *See* AB 44-49, Reply Br. 23-25.

the Clinic that allegedly have relevance to matters raised by the parties – *i.e.* how RCW 42.56.250(8) is to be interpreted generally and the specific way RCW 5.68.010(5)(a) is alleged to somehow support “Green’s YouTube” *account* being deemed a “news media ... entity.” *See e.g. Cummins v. Lewis Cty.*, 156 Wn.2d 844, 851, 133 P.3d 458 (2006)(“Under case law from this court, we address only claims made by a petitioner, and not those made solely by amici.”)(*citing Mains Farm Homeowners Ass’n v. Worthington*, 121 Wn.2d 810, 826, 854 P.2d 1072 (1993)); *Washington State Republican Party v. Washington State Pub. Disclosure Comm’n*, 141 Wn.2d 245, 254, 4 P.3d 808, 814 (2000)(“claims raised only by amicus are not considered.”)(*Mains, supra.* at 827); *Ruff v. Cty. of King*, 125 Wn.2d 697, 704 n. 2, 887 P.2d 886 (1995)(since “neither Ruff nor King County argued” issue amicus raised, “this court need not consider this issue”)(*citing cases*); *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962)(“case must be made by the parties litigant, and its course and the issues involved cannot be changed or added to by friends of the court.”)

## II. ARGUMENT

### A. *Exception to RCW 42.56.250(8) Exemption is Strictly Construed*

The Clinic claims the RCW 42.56.250(8) *exemption* “must be narrowly construed” and its *exception* for “news media” entities “must be broadly construed” because RCW 42.56.030 states the PRA is to be “liberally

construed and its *exemptions* narrowly construed to promote this public policy and to assure that the public interest will be fully protected.” See Clinic Br. 7 (emphasis added). The Clinic’s application of this principle not only lacks any precedential support, Clinic Br. 8, but ignores the issues before the Court and how principles of construction apply to them.

First, regardless of whether the *exemption*’s protection is read broadly or narrowly, it was *undisputed* below and on appeal that the subject law enforcement worker photographs and birthdates *fall within the language* of the RCW 42.56.250(8) *exemption*. See RB 7-8, 41; *see also Wash. Pub. Employees Ass’n v. Wash. State Ctr. for Childhood Deafness & Hearing Loss*, 194 Wn.2d 484, 503, 450 P.3d 601 (2019) (“DSHS correctly regarded RCW 42.56.250[8] as applicable” to “employees” serving “high-risk youth who are committed to ... custody by county juvenile courts”). Instead, Respondent Green states “the outcome of this case *turns on* whether *Mr. Green* qualifies as ‘news media’ under [the] RCW 5.68.010-(5)” *exception* – not any claim the RCW 42.56.250(8) *exemption* would not otherwise apply. RB 8. Because a *PRA exemption* also reflects a PRA public policy, *see e.g.* AB 3-6, to assure that interest is protected the PRA does *not require disclosure* when a public record comes within an exemption. *Gendler v. Batiste*, 174 Wn.2d 244, 251, 274 P.3d 346 (2012). Thus: "An *exempt* record, like a nonexistent record, is *not available for inspec-*

tion, and an agency is *not obligated to produce it.*” *Gipson v. Snohomish Cty.*, 194 Wn.2d 365, 372, 449 P.3d 1055 (2019)(emphasis added).

Second, though the primary purpose of interpreting a statute is to give effect to the Legislature’s intent, *see e.g. Burns v. City of Seattle*, 161 Wn. 2d 129, 140, 164 P.3d 475 (2007); *State v. Sunich*, 76 Wn.App. 202, 206, 884 P.2d 1 (1994)(citing *State v. Kuhn*, 74 Wn App. 787, 790, 875 P.2d 1225 (1994)), *rev. denied*, 127 Wn.2d 1017 (1995)), the Clinic nowhere mentions the Legislature’s intent. Presumably, this most basic principle of statutory interpretation is ignored because the Legislature never intended a proposed “narrow” exemption and “broad” *exception* that would make its protections in RCW 42.56.250(8) meaningless and absurdly result in making the *exception* the *rule*. AB 1-8, 9 n. 7, 25-28, 33-34; Reply Br. 5-7.<sup>2</sup> Instead, "Courts will presume that the legislature did not engage in vain and useless acts and that some significant purpose or object is implicit in every legislative enactment." *See Oak Harbor Sch. Dist. v. Oak Harbor*

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<sup>2</sup> In a later unsourced footnote, the Clinic simply asserts: “Although billions of people have social media accounts, this does not make all of them news sources *in any significant way*” because it claims “[o]nly a small proportion of these accounts are in the ‘regular *business* of newsgathering,’ *like Green.*” Clinic Br. 14 n. 16 (emphasis added). This claim not only lacks any cited *factual* basis for its assertion or legal analysis, but also fails to explain how it determines when social media accounts are in the “*business* of *newsgathering*” or in it in a “significant way” enough to be “news media ...entity.” More importantly, the Clinic ignores its own later position that the social media account at issue is “news media” *even though* it – like “billions of people [who] have social media accounts” – also is *neither*, as is statutorily required: 1) in “*business* of *newsgathering*,” nor 2) an “entity” under the law. *Compare* Clinic Br. 3-6 *with* discussion *infra* at 6-15.

*Educ. Ass'n*, 86 Wn.2d 497, 500, 545 P.2d 1197 (1976)(citing *Kelleher v. Ephrata School Dist. No. 165*, 56 Wn.2d 866, 873, 355 P.2d 989 (1960)). This reading by the Clinic must fail because Courts "will not interpret a statute in a manner that leads to an absurd result." *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004). See also *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 221, 173 P.3d 885 (2007) (statutory "[c]onstructions that would yield 'unlikely' or 'absurd' results should be avoided"); *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001) (same); *Roy v. Everett*, 118 Wn.2d 353, 358, 951 P.2d 749 (1998) (Courts reject even "a literal interpretation [that] would yield absurd results") (citing *State v. Leech*, 114 Wn.2d 700, 708-09, 790 P.2d 160 (1990)).

Third, the Clinic concedes the definition of "news media" in RCW 5.68.010(5) "must be construed *in the context of the PRA*." Clinic Br. 7. Further, in the context of the RCW 42.56.250(8)'s general purpose of protecting law enforcement worker photographs and birthdates from PRA disclosure, the Clinic also agrees those who actually meet the "news media" requirement fall within the "exception" to the general purpose of protecting such records. Clinic Br. 8. However, the Clinic's reading disregards the rule of statutory construction that "*exceptions to the general terms of the statute to which they are appended ... should be strictly construed with any doubt to be resolved in favor of the general provisions*, rather than the

exceptions.” See *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974); see also *Wash. State Leg. v. Lowry*, 131 Wn.2d 309, 327, 931 P.2d 885 (1997). Otherwise, “such a reading would require us to construe the statute's limited proviso exception so broadly that it swallows the general rule entirely.” *Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 264, 413 P.3d 549 (2018) (“reading is absurd and renders the entire statute practically meaningless; we therefore avoid it.”)

Thus, the *exception* to RCW 42.56.250(8) must be *strictly construed*.

#### B. Social Media Account at Issue Does Not Satisfy RCW 5.68.010(5)(a)

##### 1. Incorporated Shield Law’s “News Media” Test is Narrowly Written

The Clinic next claims the “definition of ‘news media’ contained in the Media Shield Law is exceedingly broad” because it repeatedly uses the word “any.” Clinic Br. 3-4. However, in RCW 5.68.010(5)(a) the general term “any” simply modifies the list of entities that can be deemed a “news media ... entity” and has no meaning apart from the specific word it modifies. Where there are such “specific words following general ones,” the interpretive maxim *ejusdem generis* “restricts application of the general term to things that are *similar to those enumerated*.” 2A Singer & Singer, Statutes and Statutory Construction, § 47.17 at 362-70 (7th ed. 2007)(emphasis added). Thus, in such cases as is present here, courts hold the word “any” *cannot* “be understood in an unrestricted sense.” See *Burns*, 161

Wn.2d at 150 (statute listed “*any* other fee or charge of whatever nature or description” but also listed “franchise fee” and thus was limited); *see also In re Estate of Jones*, 152 Wn.2d 1, 11, 93 P.3d 147 (2004) (statute for removal of representative “for *any* other cause” applied “*only* if the conduct is *similar to the other grounds listed* in the statute”)(emphasis added); *Matter of Estate of Rathbone*, 190 Wn.2d 332, 343, 412 P.3d 1283 (2018) (“*any* other cause or reason which to the court appears necessary’ is not a catch-all clause giving the court carte blanche”)(emphasis added). *See also* Reply Br. 8-9. The word “any” does not make RCW 5.68.010(5)(a) broad.

Further, the Clinic fails to confront that the Shield Law’s language, the rules of statutory construction, and statutory history instead *confirm* the “news media” definition is to be *strictly construed* under *both* statutory schemes. It already has been noted that the Clinic ignores its “exceedingly broad” reading of the requirements for “news media” would make the protections of RCW 42.56.250(8) meaningless and absurdly result in making the “news media” *exception* instead the *rule* and thus violate the rules of construction when applied to that statute. *See supra*. 3-6. *See also* AB 1-8, 9 n. 7, 23, 25-28, 33-34; Reply Br. 5-7. So too, the Clinic ignores that the definition of “news media” incorporated from RCW 5.68.010(5)(a) also is strictly construed *under the Shield Law’s evidentiary privilege*.

This is so because “Legislative grants of testimonial privilege conflict

with the inherent power of the courts to compel the production of relevant evidence and are, therefore, *strictly construed*.” See *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 717, 985 P.2d 262 (1999), as amended (Sept. 8, 1999)(citing *State v. Latta*, 92 Wn.2d 812, 819, 601 P.2d 520 (1979) (emphasis added); *Phipps v. Sasser*, 74 Wn.2d 439, 444, 445 P.2d 624 (1968); *Cook v. King County*, 9 Wn. App. 50, 52, 510 P.2d 659 (1973)). Thus, “because *the journalist's privilege*, or any other privilege for that matter, limits the testimony that might be obtained in a court of law or similar proceedings, the privilege should be *narrowly interpreted*.” Jason A. Martin & Anthony L. Fargo, *Rebooting Shield Laws: Updating Journalist's Privilege to Reflect the Realities of Digital News-gathering*, 24 U. Fla. J.L. & Pub. Pol'y 47, 66 (2013) (emphasis added). Further, because this statutory definition of “news media” *as an evidentiary privilege* existed *before* it was incorporated into RCW 42.56.250(8), the Legislature is presumed to have known the rule of narrow interpretation of such evidentiary privileges would apply to the incorporating statute also. See e.g. *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 811, 123 P.3d 88 (2005) (“We presume that the legislature knows the existing state of the case law in the areas in which it legislates”)(citing *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994)). See also AB 23; Reply Br. 7.

Finally, the Legislative history shows the Legislature in drafting the

Shield Law recognized it needed a "*workable definition so you wouldn't provide a privilege to virtually anybody in the state who has a MySpace account,*" Columbia Journalism Review, "A New Shields Law in Washington State," 5/4/2007, [https://archives.cjr.org/behind\\_the\\_news/a\\_new\\_shield\\_law\\_in\\_washington.php](https://archives.cjr.org/behind_the_news/a_new_shield_law_in_washington.php) (emphasis added), and did not want "ordinary people in their pajamas to be able to claim journalistic" privileges. See Susan Walsh, "What Legal Protections Do Reporters Have?" [www.knkx.org/post/un-packing-government-what-legal-protections-do-reporters-have](http://www.knkx.org/post/un-packing-government-what-legal-protections-do-reporters-have) (2017). AB 31-32, 40-41; Reply Br. 16-17.

Thus RCW 5.68.010(5)(a)'s definition of "news media" was *narrowly* written and also is to be strictly construed under the Shield Law.

2. "Green's YouTube" Account Not Shown to be "News Media"

The Clinic next claims "*Green's YouTube" account* satisfies RCW 5.68.010(5)(a)'s requirement that "news media" must be an "*entity that is in the regular business of news gathering and disseminating news or information to the public*" because it is claimed without explanation that "*Green regularly gathers, comments on, and publishes news items over the Internet.*" Clinic Br. 3-4 (emphasis added). However, even *Green* does not claim on appeal *he* is a news media entity under RCW 5.68.010(5)(a)'s requirements, AB 38-42, RB 34-37, Reply Br. 3-4, 14 n. 8, 21-23 – and the Clinic nowhere defends his claim *he* is "news media" instead under RCW

5.68-.010(5)(b). *Compare* Clinic Br. with AB 42-44, Reply Br. 21-23. Instead, for the Clinic to claim “*Green’s YouTube*” account satisfies RCW 5.68.010(5)(a)’s requirement of being a “news media ... entity,” the Clinic must show that the *account* – not *Green* – meets RCW 5.68.010(5)(a)’s test for a “news media ... entity.”

Further, as to “*Green’s YouTube*” account itself being a “news media ... entity,” the Clinic overlooks: 1) the express requirement it be in the “*business of news gathering*,” and 2) that the *instant attempt* here to obtain the specific protected records for malicious use in retribution of *Green’s* private grievance is *not* “*news gathering and disseminating news*” as also is statutorily required. *See* AB 22-34, 38-42; Reply Br. 13-23. Though the Clinic does acknowledge the additional requirement that “news media” under RCW 5.68.010(5)(a) also must be an “entity,” it neither proposes a definition of “entity” nor explains how “*Green’s YouTube*” account meets it. Clinic Br. 4-6. Instead, the Clinic’s summary discussion of RCW 5.68-.010(5)(a)’s “entity” requirement attempts to read it out of the statute by changing the discussion to what it asserts such “entities” *do not need to be*. *See* Clinic Br. 4-6. Thus, in addition to failing because the Clinic ignores the requirements that an “entity” be in the “*business of news gathering*,” its analysis also fails because it gives the term “entity” *no* meaning at all.

In contrast to the Clinic’s analysis, a “legislative body is *presumed not*

to use nonessential words,” and Courts “are bound to give meaning, if possible, to every word contained in it.” See *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002)(citing *State v. Lundquist*, 60 Wn.2d 397, 403, 374 P.2d 246 (1962))(emphasis added). Thus, the term “entity” – like the words “in the regular *business of news gathering*” -- is not superfluous and must be given meaning. That the Clinic will not concede any meaning to “entity” or acknowledge the requirement it be in the “business of news gathering,” does not prevent the Court from exercising its duty to apply it in light of the statute’s language and the rules of statutory construction.

a. “Green’s YouTube” Account is Not an “Entity” of Any Kind

The Clinic asserts an “entity” under RCW 5.68.010(5)(a) need not be a “legal entit[y]” because such somehow would “modif[y] the statute’s language by inserting the word ‘legal’ before the word ‘entity.’” Clinic Br. 6. However, the Clinic fails to acknowledge – much less refute – that it has been shown the word “legal” is used as *part of the very definition* of the term “entity” and that the presence of a “legal entity” is essential for both RCW 42.56.250(8) and RCW 5.68.010(5)(b) to function. See AB 21-34.

Specifically, when a Court must give an undefined "term its plain and ordinary meaning ascertained from a standard dictionary" the Court will “turn to Black’s Law Dictionary.” *State v. Taylor*, 150 Wn.2d 599, 602, 80 P.3d 605 (2003). Black’s Law Dictionary defines "entity" as "[a]n

organization (such as a business or a governmental unit) that has a *legal identity apart from its members*." See Black's Law Dictionary, 553 (7th Ed. 1999) (emphasis added). See also *Price*, 125 Wn.2d at 463 ("an entity ... must be a *juridical being*") (emphasis added). On that ground alone, "Green's YouTube" account must be a "legal entity" *apart from Green*.

Further, under the PRA a requestor must be a "legal entity" that is capable of suing and being sued. This follows from the fact that the meaning of a statute can be determined by "viewing the words of a particular provision in the context of ... related statutory provisions, and the statutory scheme as a whole." See *Burns*, 161 W.2d at 140 (citing *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)). For an action to be brought to enforce a PRA request, a requestor must be capable of bringing suit. See RCW 42.56.550. Likewise, for law enforcement workers to protect their photographs and birthdates they must be able to bring a separate action under RCW 42.56.540 by serving notice on the requestor. See *Burt v. Washington State Dep't of Corr.*, 168 Wn.2d 828, 837, 231 P.3d 191 (2010) (inmate requestor "should have been joined as a party and given notice and an opportunity to respond in writing to the request for the injunction" by employees); WAC 44-14-04003(12). So too, to resist being compelled to produce a confidential source under RCW 5.68.010, a "news media ... entity" must be a "juridical being" capable of

both being compelled by the Court and asserting the privilege for itself.

Finally, failing to require “news media” to be at least a “legal entity” would, as shown above, absurdly result in repealing RCW 42.56.250(8) and creating a broad RCW 5.68.010(5)(a) Shield Law privilege that eviscerates Court power to compel disclosure. *See supra.* at 4-5; AB 1-8, 9 n. 7, 25-28, 33-34; Reply Br. 5-7. Because a “news media ... entity” must be a “legal entity,” and because “Green’s YouTube” account is *not* a legal entity, it cannot meet the “news media” exception to RCW 42.56.250(8).<sup>3</sup>

b. Account Also is Not the Type of “Entity” the Statutes Require

The Clinic not only fails to show “Green’s YouTube” account meets the test of being an “entity,” it fails to show the account is the *type* of entity the statutes require. Though the Clinic argues the meaning of “the word ‘entity’ does not necessarily refer to an incorporated business,”

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<sup>3</sup> Still ignoring these previously briefed principles, the Clinic also cites two irrelevant cases it claims supposedly show a “legal entity” is not required here. It first sites *Smelser v. Paul*, 188 Wn.2d 648, 398 P.3d 1086 (2017) and states it holds an “entity” for joint and several liability purposes under RCW 4.22.070(1) can be a “child or another person or entity.” *See* Clinic Br. 13. However, *Smelser* does nothing to show “Green’s YouTube” account is a “child or another person” much less an “entity” – especially since as a matter of law “an ‘entity’, as that term is used in RCW 4.22.070(1), *must be a juridical being capable of fault.*” *Price, supra.* at 461 (emphasis added). Next *Halme v. Walsh*, 192 Wn. App. 893, 904, 370 P.3d 42 (2016), is cited since it involved a homeowners statute RCW 64.38.010(11), that refers to an “unincorporated association, or other legal entity” – thus supposedly showing the Legislature would not have used “entity” here if it instead meant “legal entity.” Clinic Br. 6. However, *Halme* notes the Legislature used the phrase “unincorporated association, *or other legal entity*” only to clarify that RCW 64.38.010(11) requires “something more than a ‘typical’ unincorporated association” because they “generally are *not legal entities.*” *Id.* at 904 (citing *Newport Yacht Basin Ass’n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn.App. 56, 74, 277 P.3d 18 (2012))(emphasis added). Thus, *Halme* also fails to show that a “news media ... entity” need not be a “legal entity.”

Clinic Br. 6, it is undisputed the drafter of the legislation intended that one claiming to be an “entity” under RCW 5.68.010(5)(a) must "*incorporate yourself, then you're an entity.*" Columbia Journalism Review, "A New Shield Law in Washington State," 5/4/2007, [https://archives.cjr.org/behind\\_the\\_news/a\\_new\\_shield\\_law\\_in\\_washington.php](https://archives.cjr.org/behind_the_news/a_new_shield_law_in_washington.php) (emphasis added).

Further, the County has shown that under the maxim "*ejusdem generis*" the “general phrase ‘entity that is in the regular business of news gathering and disseminating news or information to the public by any means,’ is ‘modif[ied] and restrict[ed]’ by the *specific kinds of separate institutional news businesses* preceding it in the enumerated list” – and thus “the general term ‘entity’ can ‘embrace only objects *similar in nature* to those’ separate institutional news businesses.” See AB 28-30 (quoting *State v. Roadhs*, 71 Wn.2d 705, 708, 430 P.2d 586, 588 (1967); *In re Marriage of Tahat*, 182 Wn.App. 655, 671, 334 P.3d 1131 (2014)). Though the Clinic claims this analysis “erroneously argues that *ejusdem generis* limits the definition of ‘news media’” to “institutional news businesses,” it fails to provide any rational basis for ignoring that maxim or applying it differently. See Clinic Br. 4-5.<sup>4</sup>

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<sup>4</sup> Instead the Clinic oddly argues that because “the common definition of ‘newspaper’ is ‘a paper that is printed and distributed usually daily or weekly and that contains news, articles of opinion, features, and advertising,’ a “*publication* that fits this definition but is published by an unregistered sole proprietor is still a newspaper.” Clinic Br. 12-13 (emphasis added). However, RCW 42.56.250(8)’s exception and RCW 5.68.010(5)(a)’s evidentiary privilege do not create a right for “publications.” The statutes apply to “entities” which are in “the regular *business* of news gathering and disseminating news or information” – they do not empower the *medium* the entities use to *disseminate* that news.

### C. Federal and State Free Press Rights Not At Issue

Noting that Courts "construe statutes to avoid constitutional doubt," the Clinic asserts "a holding that *Green's YouTube channel* does not constitute news media would be in tension with both the First Amendment and Article I, § 5 of the Washington State Constitution." Clinic Br. 8 (citing *Utter v. Building Industry Ass'n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015)). However, Courts consider "the doctrine of constitutional avoidance ... *while also* taking the stated intent of the statutory scheme as a whole into account" and will reject that doctrine where the constitutional "argument does not have merit." See *Matter of Brown*, 198 Wn.App. 1041 (2017)(unpublished)(emphasis added). See also *Matter of Det. of Nelson*, 2 Wn.App.2d 621, 411 P.3d 412, *rev. denied* 190 Wn.2d 1029 (2018) (rejecting proposed statutory interpretation since it "is not warranted by statutory language and is not necessary to avoid a constitutional problem.")

Further, because statutes are presumed constitutional, *see e.g. Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000), a claim to the contrary "must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution." See *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998) (emphasis added). Here, the Clinic's constitutional argument fails to meet this "heavy burden," *Amalgamated*, 142 Wn.2d at 205, because

it's brief focuses only on the irrelevant issue of "*who* qualifies as 'press'" *under the Federal and State Constitutions*. The Clinic nowhere shows a constitutional "tension" exists because the non-entity "Green's YouTube" account cannot satisfy the statutory requirements of a PRA exception or evidentiary privilege. *See* Clinic Br. 10; *see also id.* at 8-20. Nevertheless, as shown below, no federal or state constitutional argument would have merit; and 2) a *non-entity* and non-person "*Green's YouTube*" account as a matter of law cannot have a *constitutional right* to be deemed a "news media ... entity" under either RCW 42.56.250(8) or RCW 5.68.010(5)(a).

As to any supposed Federal Constitution "tension," the Clinic fails to acknowledge that for even *actual* "news media ... entities" which legitimately come within the subject statutes, "the First Amendment *does not* guarantee the press a constitutional right of special access to information not available to the public generally" nor "a testimonial privilege that other citizens do not enjoy." *See Branzburg v. Hayes*, 408 U.S. 665, 684, 690 (1972)(emphasis added). *See e.g. also Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978)(media has no "First Amendment right to government information" because "[t]here is no constitutional right to have access to particular government information"); *Univ. of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 201 (1990)(no First Amendment privilege from producing subpoenaed records because it "does not invalidate every incidental burdening

of the press that may result from the enforcement of civil or criminal statutes of general applicability.”)(quoting *Branzburg, id.* at 682). Recognizing that Federal Courts reject any absolute First Amendment privilege for reporters, see *State v. Rinaldo*, 102 Wn.2d 749, 752, 689 P.2d 392 (1984), Washington Courts agree that under the Federal Constitution the “press is not guaranteed a right of special access to information that is not available to the public generally; rather, the press has the same right of access that the public has.” See *Tacoma News, Inc. v. Cayce*, 172 Wn.2d 58, 75, 256 P.3d 1179 (2011)(quoting *Branzburg, id.* at 684). See also *King Cty. Dep’t of Adult & Juvenile Det. v. Parmelee*, 162 Wn.App. 337, 358, 254 P.3d 927 (2011)(“no basis” to claim “the First Amendment compels .... governments—to supply information.”)(quoting *KQED, Inc., id.*).

As to any supposed “tension” with our State Constitution, Green neither raised nor briefed any state constitutional issue, see RB 20-23, and where “the parties have not raised any issues under the Washington State Constitution” our courts will not “decide [a] case on independent state constitutional grounds.” See *State v. Clarke*, 156 Wn.2d 880, 894, 134 P.3d 188 (2006). See also *Washington State Republican Party*, 141 Wn.2d at 254 (refusing to address amicus’ claim that Washington Constitution “provides greater protection ... than does the federal constitution,” because a party “did not brief the issue, and this court does not consider arguments

raised first and only by an amicus.”)(citing *Mains*, 121 Wn.2d at 827). Further, even where an actual party raises a state constitutional issue but fails to “show why the state provision should be interpreted differently,” our Courts “have repeatedly held that failure to do so will lead us to interpret the state constitutional clause coextensively with its parallel federal counterpart, and we will do so here.” *Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 523, 538, 936 P.2d 1123, *cert. denied* (1997).

Though the Clinic summarily discusses the required factors under *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), it does so only to note the state constitution is more protective than the First Amendment but *not* why Article 1, § 5’s language that “[e]very person may freely speak, write and publish on all subjects,” should be interpreted *differently* to give the *non-person* “Green’s YouTube” account access to protected law enforcement worker records but not to persons in the general public. Clinic Br. 17-20. Though the “language of Article 1, § 5 is significantly different from the First Amendment and often will support a broader protection for free speech in Washington,” our Courts hold it does “not afford broader protection” independent of the matter at issue. *See State v. Reece*, 110 Wn.2d 766, 781, 757 P.2d 947 (1988)(in the “area of obscene speech, article 1, § 5 *does not afford broader protection.*”)(emphasis added)

In any case, though the Clinic asserts Washington Courts have not

“definitively held that Article I, § 5 provides more protection for the freedom of the press than the First Amendment,” Clinic Br. 18, it overlooks pertinent Washington caselaw. Thus, the Clinic ignores that *State v. Rinaldo*, 102 Wn.2d at 753 recognizes: “While admittedly Const. art. 1, § 5 is worded differently than the First Amendment, ... *it does not support an absolute privilege for journalists.*” (emphasis added). Likewise, the Clinic ignores that *Parmelee*, 162 Wn.App. at 357-58, rejects an inmate’s claim that a PRA exemption is “a restriction on speech because it deters publication of government records and permits the agency to deny records based on the type of records requested,” and agreed “the PRA is not a prohibition on speech, but instead a disclosure **requirement**” and that such “requirements ... *do not prevent anyone from speaking.*” *Id.* (citing *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010))(emphasis in original).

Finally, the Clinic ignores the absence of any legal basis for claiming a non-“entity” and non-“person” such as “*Green’s You-Tube*” account can be a “*person* [who] may freely speak, write and publish” and that would be “*responsible* for the abuse of that right” under Article I, § 5. A social media account is not a “person” since it is not “a human being (i.e. natural person)” unless it were designated otherwise by statute. *See* Black’s Law Dictionary, 1028 (7th Ed. 1999). The Media Shield Law makes no such designation; rather it confirms that even an “entity” under RCW 5.68.010-

(5)(a) is *different* from a “person” who is subject to RCW 5.68.010(5)(b) instead. Likewise, the County has shown the account is not a “juridical being” and thus cannot be sued, Reply 13 n. 6, and therefore can have no alleged enforceable right since it cannot be held “*responsible* for the abuse of that right” as Article I, § 5 expressly requires.

Because the Clinic has failed to show any constitutional “tension” is at issue, it has not met the heavy burden of convincingly showing by argument and research that there is no reasonable doubt the PRA exception or evidentiary privilege statutes as interpreted by the County would violate the First Amendment or Article I, § 5 by somehow unconstitutionally restricting a supposed right to speak, write or publish by the non-“entity” and non-“person” “Green’s YouTube” *account*.

### III. CONCLUSION

The Court should not judicially repeal the protections of RCW 42.56-.250(8), nor unworkably expand the RCW 5.68.010(5) Media Shield Law as the Clinic requests. Instead the County respectfully requests the Court reverse the trial court and order this action be dismissed with prejudice.

DATED this 24th day of February, 2020.

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CERTIFICATE OF SERVICE

On February 24, 2020, I hereby certify that I electronically filed the foregoing PIERCE COUNTY'S ANSWER TO FIRST AMENDMENT CLINIC AT DUKE LAW SCHOOL'S AMICUS CURIAE BRIEF with the Clerk of the Court, with the Clerk of the Court, which will send notification of such filing to the following:

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