No. 21-614

In The Supreme Court of the United States

BRIAN GREEN,

Petitioner,

v.

PIERCE COUNTY WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioner brought suit in state court under a state public records act ("PRA") seeking statutorily protected photographs and birthdates of criminal justice employees "inten[ding] to . . . convey[ ]" their personal information on YouTube "to a broad segment of the public." He claimed his social media activity entitled him to a statutory "news media" exception from the protection. Petitioner repeatedly insisted he was "using the First Amendment to construe" the statutory privilege in general, but denied "making a Constitutional challenge" to its validity. As a result, in dismissing his PRA suit the Washington Supreme Court did not address the constitutionality of the statutory media privilege but interpreted its requirements and found Petitioner had not met them.

The question presented is: Where a Petitioner brings a state PRA action alleging entitlement to a statutory "news media" privilege to access otherwise protected photographs and birthdates of criminal justice employees but disavows making a "constitutional challenge" to the validity of the statutory privilege, and the state's highest court dismisses the PRA action because Petitioner does not meet the statute's requirements, should this Court grant certiorari because Petitioner now claims the First Amendment dictates he be treated as privileged "news media" due to his use of social media?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

STATUTES

RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

Petitioner Brian Green seeks certiorari by mischaracterizing his state action as "relying in large part on his First Amendment claims." *See* Pet. 10. Instead, he brought a single unsuccessful state PRA suit wherein he only briefly raised the First Amendment for purposes of constitutional avoidance to support his misreading of the applicable statute. *See* Pet. App. 71a-73a; Resp. App. 20, 23, 26-28. Thus, in this Court he can neither now make a constitutional challenge nor obtain a different statutory interpretation. Further, had he challenged the constitutionality of the statute and succeeded, striking down the part of the statute at issue would not have prevented dismissal of his complaint's only cause of action – *i.e.* a PRA suit to obtain protected personal records of officers. This lack of a remedy in this Court is confirmed by Petitioner's failure to identify any material relief he could obtain other than an advisory opinion on a constitutional challenge he never previously made. *Compare* Pet. 29-30 *with* Rule 24(1)(j).

Finally, Green's proposed advisory opinion would require reversal of this Court's long settled precedent – about which Petitioner makes no mention and shows no Circuit Court split – as well as undermine state shield statutes and create a constitutional public record duty that this Court has consistently rejected.

STATEMENT OF THE CASE

STATUTORY HISTORY

Officer Birthdates and Photographs Protected After Mass Murder of Police

In 2009, four police officers were targeted and gunned down at a Pierce County coffee shop. Resp. App. 36. It was reported that the murderer's family and friends helped him evade capture and that during the manhunt the police department was barraged with information requests on officers and their families – including from the murderer's family. S.B. Rep., Engrossed Second Substitute 1317, 61st Leg., Reg. Sess. (Wash. 2010).

On recommendation of the Governor's task force, the Legislature took testimony and further found: "The public disclosure process, specifically background information and photographs, in the hands of an inmate is used as a weapon to get back" at correctional staff. *Id*. Accordingly, "staff is very concerned about their personal information being given to inmates, and this tension then affects the overall environment in correctional facilities." *Id.*[1] Legislation was deemed

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[1] Another Washington appellate court noted: "Such disclosure to the public would not be voluntary or within the employees' control" and once in "the public domain, these employees would potentially be subject to an ongoing risk of identity theft and other harms from the disclosure of this personal information, such as their . . . personal telephone numbers." *Washington Pub. Employees Ass'n v. Washington State Ctr. for Childhood Deafness & Hearing Loss*, 1 Wash. App. 2d 225, 404

necessary because "[i]nmates and other parties use [requests] to target and endanger individuals and families." *Id.* The Washington Supreme Court later agreed "there are legitimate concerns about the misappropriation of birth dates" because "disclosing birth dates with corresponding employee names may allow PRA requesters or others to obtain residential addresses and to potentially access financial information, retirement accounts, health care records or other employee records." *Washington Pub. Employees Ass'n v. Washington State Ctr. for Childhood Deafness & Hearing Loss*, 194 Wash.2d 484, 493, 499, 450 P.3d 601 (2019).[2]

Accordingly, Washington Revised Code § 42.56.250 was amended to protect both "[p]hotographs and month and year of birth in the personnel files of employees and workers of criminal justice agencies."[3]

P.3d 111 (2017), *overruled on other grounds*, 194 Wash.2d 484 (2019).

[2] A similar risk exists from release of officer photographs. Levit and Rosch, THE CYBERSLEUTH'S GUIDE TO THE INTERNET: INTERNET FOR LAWYERS, 407-08 (2017) (Google's "Search by Images" allows use of a person's photograph alone to "practically create[ ] a dossier of [the subject], using images instead of text.")

[3] Before the decision below, the Legislature extended § 42.56.250(8)'s protections to "employees or volunteers of a public agency." *See* 2020 c 106, § 1. Testimony before that body showed disclosure of birthdates and photographs put state employees "in danger of being retaliated against" and "at risk of identity theft and harassment . . . due to modern cybersecurity concerns." H.B. Rep., HB 1888, 66th Leg., Reg. Sess. (Wash. 2020); S.B. Rep., Second Substitute H.B. 1888, 66th Leg., Reg. Sess. (Wash. 2020). The Legislature recognized "no other employer would send out all

Having been enacted in response to the murders of police, its purpose "is all about officer safety." S.B. Rep., *supra*. However, legislators recognized "the name and date-of-birth" also were "two necessary identifiers" permitting newspapers to "match[] up the employees of criminal justice agencies with the database of criminal convictions, and arrests" to report "how criminal justice employees were treated in these cases." H.B. Rep., Engrossed Second Substitute 1317, 61st Leg., Reg. Sess. (Wash. 2010). Thus, the amended statute provides an exception for "news media, *as defined in RCW 5.68.010(5)*, [to] have access to the photographs and full date of birth." *See id.*; § 42.56.250(8) (emphasis added).

The "news media" definition incorporated into the PRA statute is from the state's evidentiary "shield law" governing when "compulsory process may compel the news media to testify, produce, or otherwise disclose" certain information. *See* Wash. Rev. Code § 5.68.010(5). This narrow definition[4] was used

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this information" and extending the protection was necessary for "the safety and privacy of one in ten Washingtonians." *Id*.

[4] Washington evidentiary privileges "are narrowly construed to serve their purposes so as to exclude the least amount of relevant evidence." *Lowy v. PeaceHealth*, 174 Wash.2d 769, 787, 280 P.3d 1078 (2012) (quoting *State v. Burden*, 120 Wash.2d 371, 376, 841 P.2d 758 (1992)). *See also* Jason A. Martin & Anthony L. Fargo, *Rebooting Shield Laws: Updating Journalist's Privilege to Reflect the Realities of Digital Newsgathering*, 24 U. Fla. J.L. & Pub. Pol'y 47, 66 (2013) ("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.") Similarly, "exceptions to the

because, as its "primary author" explained:[5] the Legislature needed a "workable definition so you wouldn't provide a privilege to virtually anybody in the state who has a MySpace account," and no legislator wanted "ordinary people in their pajamas to be able to claim journalistic" evidentiary privileges unavailable to the public.[6] *See* Bree Nordenson, Columbia Journalism

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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." *State v. Wright*, 84 Wash.2d 645, 652, 529 P.2d 453 (1974); *see also Wash. State Leg. v. Lowry*, 131 Wash.2d 309, 327, 931 P.2d 885 (1997). The Legislature is presumed to have known these "narrow construction" rules would apply when it incorporated the reporter's shield statute into § 42.56.250(8). *See Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wash.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 Wash.2d 456, 463, 886 P.2d 556 (1994)).

[5] The "remarks of [an author], a prime sponsor and drafter of the bill, are appropriately considered to determine the purpose of revisions to the language of the proposed act." *In re Marriage of Kovacs*, 121 Wash.2d 795, 807-08, 854 P.2d 629 (1993). *See also Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) ("statement of one of the legislation's sponsors . . . deserves to be accorded substantial weight in interpreting the statute") (citing *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 640 (1967); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951)).

[6] Petitioner is among the 82% of Americans (i.e. 223 million) who as of 2020 had at least one such account, and among the 4.2 billion social media users worldwide as of January 2021. *See* "Percentage of U.S. population who currently use any social media from 2008 to 2021." https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/. YouTube had "2.3 billion" users. *See id.*

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; Simone Alicea, "What Legal Protections Do Reporters Have?," https://www.knkx.org/politics/2017-03-13/unpacking-government-what-legal-protections-do-reporters-have (2017).

FACTUAL BACKGROUND

Green Targets His Officers With PRA Request

Green was arrested for obstructing a sheriff's deputy and incarcerated at the Pierce County jail for approximately 24 hours from November 26 through 27, 2014. Resp. App. 39.[7] Over three years after his release, he made a PRA request to the Sheriff's Department targeting correctional staff and deputies working at the time of *his* incarceration. *Id.* at 39.

Green sought: "Any and all records of official *photos* and/or *birth date* and/or rank and/or position and/or badge number and/or hired and/or ID Badge for all detention center and/or jail personnel and/or deputies on duty November 26 & 27 2014." Pet. App. 3a (emphasis added). Though his request's signature line gave himself the title "Investigative Journalist," he also stated "[n]one of the following request(s) for documents will be used for commercial purposes." Resp. App. 9. Green's request came from the email

[7] Criminal charges were filed, but later dismissed without prejudice. *Id.* n. 6.

address for his musical band, briangreenband@tds.net, and gave no indication of any association with a news media entity or that the title "Investigative Journalist" had significance to the request involving his own incarceration. *Id.*

In responding, the Department provided 11 pages of records with a letter notifying Green: "The records do not include the dates of birth or the official photos of our Corrections Staff. Per RCW 42.56.250[], *photographs and dates of birth in personnel files of employees and workers of criminal justice agencies* are exempt." *Id*. 8-9 (emphasis in original). The letter advised it was the final definitive response and that his request was closed. *Id.*[8]

PROCEDURAL HISTORY

Trial Court: PRA Suit Filed so Green Could "Convey" Officers' Birthdates and Photographs to a "Broad Segment of the Public"

Almost a year later, Petitioner filed a "Complaint for Disclosure under the Public Records Act." *Id.* at 1. Green was the only plaintiff and his complaint sought relief exclusively under § 42.56.550 of the state PRA

[8] Only after the request was closed did Green allege he was a journalist who "covers local court cases on my YouTube," causing the PRA officer to conduct an independent review of the account – named "Libertys Champion" – and a Google search to find any information showing Petitioner was a "journalist," but found nothing supporting such status. Resp. App. 41-43.

while making no mention of the First Amendment. *Id*.[9] Indeed, he did not provide the state attorney general the mandatory notice that would have been required if he was making a constitutional challenge to the statute. *See, e.g.*, *Jackson v. Quality Loan Serv. Corp.*, 186 Wash. App. 838, 846, 347 P.3d 487 (2015) ("RCW 7.24.110 requires notification to the state attorney general when there is a Constitutional challenge to state legislation.")

In response to County discovery requests, Green did not claim he would use the protected information to investigate as the Legislature intended but admitted if he obtained the protected photographs and birthdates of the officers he "intend[s] to . . . convey[ ]" them "to a broad segment of the public. . . ." Resp. App. 33. The County thereby confirmed Green was an ex-inmate seeking to widely disseminate protected personal information about officers that would cause

[9] His failure to make a constitutional claim makes sense: "Legislative classifications . . . are presumed to be constitutional, and the burden of showing a statute to be unconstitutional is on the challenging party, *not* on the party defending the statute: 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 17 (1988) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). Understandably, Green never pursued this "considerable" burden. *See id.* (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)).

the very kind of harm the statute was enacted to prevent.[10]

After the parties filed dispositive briefing, the trial court ruled – without mention of the First Amendment – that under its broad interpretation of the statute Green satisfied the statutory definition of "news media" and held the County liable under the PRA for withholding its employee's personal records – the only issue before it. *See* Resp. App. 44-62. However, it also certified the case to the Court of Appeals because its "order involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation." *Id.* at 61a-62a.

Appellate Argument: Green Argues First Amendment Only as Aid to Statutory Construction and Denies Making "Constitutional Challenge"

In responding to Green's opposition to appellate review, *id.* at 39a, 67a-60a, the County observed "a constitutional challenge would not be a basis to oppose discretionary review," Green had "pled no constitutional challenge in his Complaint to RCW 5.68.010 [i.e.

[10] Confirming this, Green during this litigation made a PRA request to the Pierce County Prosecutor's Office – again calling himself an "Investigative Journalist" but targeting the Deputy Prosecutor defending the County against this lawsuit and seeking the attorney's protected birthdate and photograph. Pet. App. at 48a-49a; Pet. App. 46a n. 13.

definition of "news media"], and his cause of action is under RCW 42.56.550" [i.e. the PRA]. Resp. App. 27. In response, Green moved to personally sanction County counsel for somehow "mischaracteriz[ing] [Green's] First Amendment argument as a *constitutional challenge to the statute*," because instead his "argument is the statute must be construed in a constitutional manner." *See id*. 26-28; *see also id*. 23 (emphasis added). Indeed, he also filed a declaration swearing the County "incorrectly states that I am making a constitutional challenge to RCW 5.68.010(5)" when he in fact only was "using the First Amendment to construe RCW 5.68.010(5) in a way that would not infringe upon the First Amendment's protections. . . ." *Id*. at 20.

The Court of Appeals granted the County's discretionary review motion (without mention of the First Amendment), Pet. App. 33a-41a, and later certified the appeal for transfer to the Washington Supreme Court for direct review (again without mentioning the Constitution). Pet. App. 42a. The only appellate issues listed were civil discovery and whether Green "could obtain through a public disclosure request, photographs and birthdates of law enforcement personnel, which are usually exempt from public disclosure under RCW 42.56.250(8), because his YouTube channel makes him 'news media' under RCW 5.68.010(8) [sic] to whom the exemption does not apply." *Id.*

In the Washington Supreme Court, Green devoted less than three pages of his 50 page appellate brief to arguing the First Amendment as a general

consideration for interpreting the statutory definition of "news media," but neither argued it as a ground for challenging the constitutional validity of § 5.68.010's definition nor asked that it be found unconstitutional. Resp. App. 71-73. In opposing the amicus brief of Allied Daily Newspapers of Washington that supported reversal, Green reiterated his use of the First Amendment for constitutional avoidance was so he could obtain a broad definition of the statute's requirement that a privilege holder must be "in the regular business of gathering and disseminating news." Pet. App. 75a-82a. He attributed no constitutional significance to the additional statutory requirement that a "person" asserting the privilege also must be "an employee, agent, or independent contractor of any *entity* listed in (a) of this subsection. . . ." *Compare id*. *with* § 5.68.010(5)(b) (emphasis added). In oral argument later, his counsel responded to the Court's pointed questioning about "constitutional avoidance" by repeatedly reaffirming: "And this is just a basic statutory construction argument. . . . This isn't a First Amendment challenge to the statute, we're not saying that the statute is unconstitutional." *See* https://deprecated.tvw.org/watch/?eventID=2020101153, at 26:25 sec to 28:37.

Washington Supreme Court: Decision and Dissent Agree Only Issue is Statutory Meaning of "Entity," Not Violation of Constitution

In rejecting Green's arguments and instructing the trial court to dismiss his PRA complaint, the seven justice majority of the Washington Supreme Court – as well as the two justices in dissent – made clear the only appellate issue was the statutory definition of "news media" under § 5.68.010(5) and *not* its validity under the First Amendment. The Court therefore instead recognized its "fundamental objective is to ascertain and carry out the Legislature's intent." *Id.* at 7a (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 9-10, 43 P.3d 4 (2002); *see also id*. at 14a ("the legislature, not the court, is responsible for enacting statutes, and this court is bound by the statute's unambiguous language.") As a result, the decision simply held "Green has not proved that he or the Libertys Champion YouTube channel meets the statutory definition of 'news media,' and, thus, he is not entitled to the exempt records." Pet. App. 1a-2a. Specifically, the decision held "[o]nly (a) and (b)" of § 5.68.010(5)'s definition of news media "are at issue in this case," *id*. at 11a – and even more specifically its "entity" requirement.

As to Green's YouTube account, the decision found "[u]nder the plain meaning of the statute," subsection (a) required – among other things – a party seeking the privilege must "fall under one of the listed traditional news outlets *or* the general term, '*entity*.'" *Id.*; *see also*

id. at 13a (emphasis added). The social media account however was found neither among those "listed *organizations*" *nor* a legal "entity."[11] The decision further noted the statute was not "concerned with the medium" and therefore rejected any claim "a YouTube channel cannot be a news media entity."[12] Pet. App. 15a (citing § 5.68.010(5)(a) (defining news media as an entity that gathers and disseminates news "by any means")). Instead, the decision recognized that "owning and operating a YouTube channel *alone* does not create a news media entity" for purposes of the statutory privilege. *Id.* (emphasis added). As to Green, the decision held "[u]nder the plain meaning of the statute" subsection (b) (which expressly addresses "person[s]"), he could not "satisfy the first part of this test because the Libertys Champion YouTube channel is not a news media *entity* under (a)." *Id*. at 17a-18a (emphasis added). Thus, the decision did "not reach the issue of whether [the YouTube account] is 'in the regular business of news gathering and disseminating news or information to the public'" as subsection (a) also requires, *id.* at 16a, or whether Green as a "person . . . was 'engaged in bona fide news gathering' or

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[11] The decision holds that under the statute "[a]n 'entity' must be something with a legal identity separate from the individual," and here "Green has stated that 'Libertys Champion does not exist without Mr. Green.'" *Id*. at 13a, 16a. The decision does not hold, as Petitioner misstates 22 times, that incorporation is required. *See, e.g.*, Pet. i. Neither the decision nor statute make such a statement nor do either accompany the term "entity" with the term "corporate." Pet. App. 1a-31a.

[12] Thus Petitioner is mistaken in claiming the decision somehow "may imperil entire mediums of publication." Pet. 28.

obtained the news or information 'on behalf of a news media entity'" as subsection (b) additionally required. *Id*. at 17a-19a.

As to Green's generalized and short "argu[ment] that the definition of 'news media' must be construed broadly so as to not infringe on the First Amendment's freedom of the press," the decision considered this interpretive canon of constitutional avoidance and rejected its application. Pet. App. 15a n. 5. It did so by noting this Court holds the "First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally." *Id.* (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring)).

The two dissenting justices agreed "this case does not directly concern the First Amendment" but only was "instructive" as a statutory interpretive tool. Pet. App. 26a. They simply "part[ed] ways with the majority . . . on its holding" regarding the interpretation of the statute's "entity" requirement. *Id.* at 23a. As the dissent's author correctly explained *that same day* when authoring a majority decision in a different case, the court cannot "use the doctrine of Constitutional avoidance" when a statute "clearly commands the result we reach," and the alternative of "strik[ing] down that statute" is not available when "that argument . . . is not before the court." *State v. Jenks*, 197 Wash.2d 708, 727, 487 P.3d 482 (2021) (citing *State v. Chester*, 133 Wash.2d 15, 21, 940 P.2d 1374 (1997) ("a

statute will be construed so as to avoid Constitutional problems, *if possible*") (emphasis in original); *In re Parentage of C.A.M.A.*, 154 Wash.2d 52, 69, 109 P.3d 405 (2005) (the Court does not rewrite statutes to avoid Constitutional problems)).

ARGUMENT

A. This Case is an Extraordinarily Poor Vehicle for Addressing the Question Presented Concerning "News Media's" Supposed First Amendment Privilege to Public Records

1. By Expressly Denying He was Making a First Amendment Challenge in State Court, Green is Precluded From Making it Now

Green's petition attacks the Washington Supreme Court's alleged "refusal to consider the First Amendment's application" to the statutory privilege. Pet. 29. *See also* Pet. i (asserting "question presented" is whether the state court's interpretation of state statute "violates the First Amendment freedoms of speech and press"). First, the state's highest court *did* consider constitutional avoidance and found it inapplicable. *See* Pet. App. 15a n. 5. Second, Petitioner's argument ignores the court below did not consider a First Amendment *challenge* to the statute because he expressly and repeatedly told the court "this is just a basic statutory construction argument" and not "a First Amendment challenge to the statute, we're not

saying that the statute is unconstitutional." *See* discussion *supra* at 10-11.

As a matter of law, "the canon of constitutional avoidance in statutory interpretation" is "not a method of adjudicating constitutional questions by other means." *See Clark v. Martinez*, 543 U.S. 371, 381-82 (2005) (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (refusing to engage in extended analysis in the process of applying the avoidance canon "as we would were we considering the Constitutional issue"); *Vermeule, Saving Constructions*, 85 Geo. L.J. 1945, 1960-1961 (1997) (providing examples of cases where the Court construed a statute narrowly to avoid a constitutional question ultimately resolved in favor of the broader reading)). Green's assumption that certiorari can be based on a state court's application of constitutional avoidance simply "misconceives – and fundamentally so – the role played by the canon of constitutional avoidance in statutory interpretation." *Clark*, 543 U.S. at 381 (citing *Catholic Bishop of Chicago*, *id.*).

Where – as here – the court below "never reached [Petitioner's] Constitutional arguments," this Court will "decline to do so in the first instance" regardless of constitutional avoidance arguments. *See United States v. Apel*, 571 U.S. 359, 372-73 (2014) (whether statute was unconstitutional "is a question we need not address" despite Petitioner's "attempts to repackage his First Amendment objections as a statutory interpretation argument based on constitutional avoidance" because constitutional avoidance "is not a method of

adjudicating constitutional questions by other means") (quoting *Clark*, 543 U.S. at 381)). *See also, e.g.*, *Pierce Cty., Wash. v. Guillen*, 537 U.S. 129, 148 n. 10 (2003) (declining in PRA action to address constitutional amendment that plaintiff raised "in passing" and which "court below did not address," because "[w]e ordinarily do not decide in the first instance issues not resolved below and decline to do so here.") (citing *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999)); *Adams v. Robertson*, 520 U.S. 83 (1997) (though plaintiffs cited relevant case in brief before state supreme court, they cited it for entirely different argument).[13]

Likewise, a petitioner's "[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases" but only to "choos[e] between competing plausible interpretations of a statutory text." *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (quoting *Clark*, 543 U.S., at 381). Petitioner's newly alleged "First Amendment claims" turn on the Washington Supreme Court's interpretation of its state's statutory "news media" privilege based on what

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[13] Citing *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2262-63 (2020), Green argues "Washington's Supreme Court may be free to interpret state law, but it cannot apply that law, as it did here, in contravention of the First Amendment." Pet. 1. Here, however, Petitioner *expressly denied* making a "First Amendment challenge," while the *Espinoza* plaintiffs *expressly* "challenged Rule 1 in District Court, arguing *it violated* the free exercise clauses of the Montana *and U.S. Constitution*" *See Espinoza v. Montana Dep't of Revenue*, 393 Mont. 446, 435 P.3d 603, 608 (2018) (emphasis added).

it held was "the plain meaning of the statute." *See* Pet. App. 11a, 13a, 17a-18a. This Court has long held state supreme courts "are the ultimate expositors of state law," and it is "bound by their constructions except in extreme circumstances not present here." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (citing, *e.g.*, *Murdock v. City of Memphis*, 87 U.S. 590 (1875)). *See also Bellotti v. Baird*, 443 U.S. 622, 644-45 n. 24 (1979) ("the interpretation of a state statute by the State's highest court "is as though written into the ordinance itself") (citing *Poulos v. New Hampshire*, 345 U.S. 395, 402 (1953)). Accordingly, when addressing an actual First Amendment challenge to a state statute, this Court held the state court's statutory interpretation was "authoritative" and its "construction *fixes the meaning of the statute for this case*." *Winters v. New York*, 333 U.S. 507, 514 (1948) (emphasis added). As a result, the "views of the State's highest court with respect to state law are binding on the federal courts." *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (citing *Brown v. Ohio*, 432 U.S. 161,167 (1977)). Because the record confirms no federal question was raised and decided by the state court, this Court lacks jurisdiction. *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213 (1983), *rehearing denied* 463 U.S. 1237 (1983) (If both requirements that a federal question has been raised and decided in the state court do not appear on the record, appellate jurisdiction of the Supreme Court fails); *Webb v. Webb*, 451 U.S. 493 (1981) (where plaintiff did not raise federal question below and state supreme court did not rule on any federal issue, this Court was without jurisdiction on petition for certiorari).

2. Striking Down "News Media" Exception as Unconstitutional Would Still Require Affirming Dismissal Since Officer Birth Dates and Photos Would Then be Protected From *All* Requesters

One explanation for Petitioner's repeated denials of making "a constitutional challenge to RCW 5.68.010(5)," *see, e.g.*, Resp. App. 20, 23, 26-28, is that striking down the statutory definition of "news media" as unconstitutional would *remove* the incorporated "news media" *exception* from § 42.56.250(8) while *retaining* the latter's statutory *protections*. Without the statutory exception, Green – and anyone else claiming to be "news media" – would share the same position as the "public generally" and be equally excluded from obtaining protected officer birthdates and photographs under the PRA. *See Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) ("First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally") (citing *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965)); *see, e.g.*, *also Houchins*, 438 U.S. at 14 (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*, 408 U.S. at 682).

This Court has long recognized that should a state statute "be in part constitutional and in part unconstitutional, . . . if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (holding invalidation of state statute would be "improvident") (quoting *Allen v. Louisiana*, 103 U.S. 80, 83-84 (1881) quoted with approval in *Field v. Clark*, 143 U.S. 649, 695-696 (1892)). "Nor does the First Amendment involvement in this case render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)). Thus, where a prior statute is "incorporated in a subsequent one in terms or by relation," it is equally well settled "the repeal of the former leaves the latter in force, unless also repealed expressly or by necessary implication." *In re Heath*, 144 U.S. 92, 93 (1892); *see also* 2B Sutherland Statutory Construction § 51:8 (7th ed.) ("Repeal of a referred statute has no effect on the reference statute unless the reference statute is repealed by implication with the referred statute").

The underlying question of severability of a state statute "is of course a matter of state law." *Virginia v. Hicks*, 539 U.S. 113, 121 (2003) (citing *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (*per curiam*)). In Washington: "An act of the legislature is not unconstitutional in its entirety because one or more of its provisions is unconstitutional unless the invalid provisions are

unseverable . . . or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes." *State v. Williams*, 144 Wash.2d 197, 212, 26 P.3d 890 (2001) (refusing to strike down statute in entirety for restricting "constitutionally protected speech" because severing an objectionable term "cures the constitutional infirmity") (quoting *State v. Anderson*, 81 Wash.2d 234, 236, 501 P.2d 184 (1972)). A "severability clause is not necessary in order to meet the severability test." *United States v. Hoffman*, 154 Wash.2d 730, 748-49, 116 P.3d 999 (2005), as amended (Aug. 25, 2005) (citing *Guard v. Jackson*, 83 Wash. App. 325, 921 P.2d 544 (1996), *aff'd*, 132 Wash.2d 660, 940 P.2d 642 (1997). Instead, severability concerns "examin[ing] the challenged statute as a whole to determine whether the legislature could have intended to enact the valid sections alone and whether those valid sections alone work to achieve the legislature's goals." *See Ass'n of Washington Bus. v. Washington State Dep't of Ecology*, 195 Wash.2d 1, 18, 455 P.3d 1126 (2020) (severing objectionable definition from rest of statute); *see also McGowan v. State*, 148 Wash.2d 278, 60 P.3d 67 (2002) (definition was severable from balance of initiative).

After the murders of four police officers the legislative purpose of amending § 42.56.250 was "all about officer safety." S.B. Rep., E2SHB 1317. Incorporation into that statute of § 5.68.010(5)'s "news media" definition, *see* § 42.56.250(8), provided a "workable definition" for an exception for access by those needing the information as a tool to "engage[] in bona fide

news gathering" rather than as "a privilege to virtually anybody in the state who has a MySpace account." *See discussion supra* at 5; § 5.68.010(5). In light of the protection's origin in the gunning down of four police officers, there is no basis to believe the Legislature would have preferred continuing to risk officer safety rather than severing the news media exception. Retaining those protections *without an exception* for everyone claiming to be news media would still fulfill the Legislature's goal.[14]

Finally, where it was argued a statutory "exemption . . . renders the act unconstitutional because" of its "classification of persons," Washington Supreme Court precedent holds even if "appellant should prevail in this contention, it would still avail him nothing, for if that particular section of the statute were declared invalid, it would merely result in subjecting" him "to the general operation of the act." *See Unemployment Comp. Dep't v. Hunt*, 17 Wash.2d 228, 239, 135 P.2d 89 (1943) (holding exemption to statute "severable and could be eliminated without affecting the remainder of

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[14] Petitioner's broad application would defeat the Legislature's goals by making both § 42.56.250(8)'s protection and § 5.68.010(5)'s shield law privilege *meaningless* by transforming billions of social media accounts into privileged "news media." Under his reading everyone with a social media account – i.e. 82% of Americans, *see* n. 6 *supra* 5 – could compel disclosure of "protected" personal records of officers. Likewise, as amicus Allied Daily Newspapers of Washington argued below, Green's expansive interpretation creates "a danger of stretching the definition" of "news media" entity under § 5.68.010(5) "so far as to jeopardize the [evidentiary press shield] law's continued existence." Resp. App. 70.

the act" and Court did "not believe that if the legislature had thought that this one provision would be declared unconstitutional, it would have hesitated for an instant to pass the remainder of the act.") Because Green's PRA claim likewise still would be dismissed, it is thus similarly "unnecessary to determine whether this provision of the statute is valid or invalid, for in either event the result is the same so far as the appellant is concerned." *Id.*; As this Court recognizes: "our power is to correct wrong *judgments*, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (emphasis added).

3. Existence of Other Independent and Adequate State Grounds

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Id.* at 125 (citing, *e.g.*, *Murdock*, 87 U.S. 590). Such state grounds exist here because Green did not satisfy his burden to timely comply with the state PRA's procedural requirements.

As the Washington Supreme Court recognized in this case, in "order to access otherwise exempt records under the PRA, the requester bears the burden to prove an exception to the exemption applies." Pet. App.

19a. *See also id*. at 10a (citing § 42.56.210(2); *Oliver v. Harborview Med. Ctr*., 94 Wash.2d 559, 567-68, 618 P.2d 76 (1980)). Applying its' state's statutory law, the state's high court held:

> When the question is whether the requester can claim news media status and qualify for an exception, the requester is in the better position to prove they are news media. . . . Pierce County has satisfied its burden, *and the burden shifts to Green, as the party asserting the news media exception to the PRA exemption*.

Pet. App. 10a (emphasis added). This burden included making a *timely* showing the exception applied. *See also Republic of Kazakhstan v. Does 1-100*, 192 Wash. App. 773, 781, 368 P.3d 524 (2016) ("'[t]he burden of showing that [the news media] privilege applies in any given situation rests entirely upon the entity asserting the privilege.'") (quoting *Guillen v. Pierce County*, 144 Wash.2d 696, 716, 31 P.3d 628 (2001), *reversed in part on other grounds*, 537 U.S. 129 (2003)).

At issue here is the PRA's requirement that: "With any request, the *receiving* agency determines any applicable exemptions *at the time* the request is received." *Gipson v. Snohomish Cty.*, 194 Wash.2d 365, 372, 449 P.3d 1055 (2019) (emphasis in original). Thus, *at the time of this request*, Green must have shown an exception applied. *See* § 42.56.080(2) (persons requesting records may be required to provide information "to establish whether inspection and copying would violate . . . other statute which exempts or prohibits

disclosure of specific information or records to certain persons."); *Thomas v. Pierce Cty. Prosecuting Attorney's Office*, 190 Wash. App. 1036, at *9 (2015) ("Plaintiffs never told the PCPAO *at the time they requested the documents* that they had a substantial need" so as to overcome the attorney work-product protection) (emphasis added); *Koenig v. Pierce Cty*., 151 Wash. App. 221, 233, 211 P.3d 423 (2009), as amended (July 20, 2009), as amended on denial of reconsideration (Oct. 26, 2009) (where the PRA "exemption is applicable, the office invoking it need not take steps to provide the documents unless the requester makes an affirmative showing" of the exception). Without information *at the time of the request* establishing Green was "news media" as defined in § 5.68.010(5), it would have violated § 42.56.250(8) to release to an ex-inmate the statutorily protected photographs and birthdates of officers just because he used the unsubstantiated title of "Investigative Journalist" – a term not included in the shield statute's definition. Thus, an agency's response that a PRA request is protected by statute does not become retroactively invalid when facts justifying an exception to the protection are not disclosed until later.

Prior to bringing this action, Petitioner never claimed *he personally* qualified as "news media" under § 5.68.010(5)(a). Resp. App. 19.[15] Indeed, *at the time he*

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[15] Though *after his request's closure and before bringing suit* Green alleged his *YouTube account* met "the definition of RCW 5.68.010(5)," Resp. App. 10-11, he neither at that time produced evidence of such nor could sue based on a *non-party's* meeting an

made the PRA request, he made no claim – much less the required "affirmative showing" – that a statutory exception to the protection even applied to his request. Instead, the facts *then available to the County* indicated the opposite: 1) the request was made through an email address for Green's musical band; 2) it targeted an ex-inmate's officers' protected photographs and birthdates; 3) disclosing such information could endanger those officers and their families; and 4) § 42.56.250(8) was enacted to prevent precisely such disclosures to just such requestors. It was only when Green filed suit that he first claimed *he personally* met the statutory "media" exception.[16] *Id.* at 3-4.

B. No First Amendment Right to Access Protected Records Just Because Requester Uses Social Media and Claims to Be "News Media"

1. State Decision Follows this Court's Precedent While Petitioner Ignores and Mischaracterizes it

Overlooking his failure to raise a constitutional challenge below, Petitioner asserts: "It is irrelevant

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exception to § 42.56.250(8)'s protection. *See, e.g.*, *Haberman v. Washington Pub. Power Supply Sys*., 109 Wash.2d 107, 138, 744 P.2d 1032 (1987), amended, 109 Wash.2d 107 (1988) ("doctrine of standing prohibits a litigant from raising another's legal rights") (citing *Allen v. Wright*, 468 U.S. 737, 750-51 (1984)); *Jevne v. Pass, LLC*, 3 Wash. App. 2d 561, 567-68, 416 P.3d 1257 (2018) (no standing to assert rights of third party unincorporated association).

[16] *See supra* 7 at n. 8.

that the First and Fourteenth Amendments do not guarantee 'a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally.' " Pet. 19. (quoting App. 15a n. 5 (quoting *Houchins*, 438 U.S. at 16) (Stewart, J., concurring)); *see also Branzburg*, 408 U.S. at 684 ("First Amendment does not guarantee the press a Constitutional right of special access to information not available to the public generally.") He attempts to support this surprising assertion by quoting *Houchins*: "The Constitution does no more than assure the public and the press equal access *once government has opened its doors*." *Houchins*, 438 U.S. at 16 (Stewart, J., concurring) (emphasis added). First, § 5.68.010(5) expressly *closed* general public access to officers' birthdates and photographs, not "opened its doors." Second, Green's argument conflates a *state statutory privilege* with a *federal constitutional right* and inverts this Court's precedent to somehow transform a holding concerning the *absence* of a constitutional right into one *supporting* its supposed *presence*. He does not explain this legal alchemy, much less cite a decision of this Court holding a *statutory provision* of access to records for *qualified* press creates a *federal Constitutional right* for all. *Compare* Pet. 14-19 *with McBurney v. Young*, 569 U.S. 221, 232 (2013) ("This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws") (quoting *Houchins*, 438 U.S. at 14 ("The Constitution itself is [not] a Freedom of Information Act")).

Third, though he claims the decision below "directly conflicts" with this Court's precedent and that the Washington Supreme Court "should have read" the sentence he quotes from *Houchins*, Pet. 14, 19, he ignores the holdings of *Houchins* and its progeny. Unmentioned is that *Houchins* involved a news stations' request for access to a jail to conduct interviews and its claim to a First Amendment right to that access. This Court *rejected* the claim and explained that though the press has a First Amendment right to gather information, "[t]his Court has never intimated a First Amendment guarantee of a *right of access* to all sources of information within government control," and that "[t]here is *no discernible basis for a constitutional duty to disclose*, or for standards governing disclosure of or access to information." 438 U.S. at 9, 14 (emphasis added).

Similarly, Green omits mention entirely of this Court's application of *Houchins* in *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 34 (1999), which rejected the First Amendment argument he asserts here. In *United Reporting*, petitioner challenged as unconstitutional a state statute restricting public access to arrest records only to those who attested they "will not be used directly or indirectly to sell a product or service." *Id.* This Court rejected the First Amendment claim and agreed with the police department the statute was "not an abridgment of anyone's *right to engage in speech*, be it commercial or otherwise, but simply a law regulating access to information in the hands of the police

department." *Id.* at 40 (emphasis added). The Court explained:

> This is not a case in which the *government is prohibiting a speaker from conveying information that the speaker already possesses*. . . . The California statute in question merely requires that if respondent wishes to obtain the addresses of arrestees it must qualify under the statute to do so. . . . [W]hat we have before us is nothing more than a governmental denial of access to information in its possession. California could decide *not to give out arrestee information at all without violating the First Amendment*.

Id. (citing *Houchins*, 438 U.S. at 14) (emphasis added). For over two decades this Court's precedent holds no right to speech is violated by regulating those seeking access to public information. *See, e.g.*, *Boardman v. Inslee*, 354 F. Supp. 3d 1232, 1244 (W.D. Wash. 2019), *aff'd*, 978 F.3d 1092 (9th Cir. 2020) (rejecting challenge to Washington's PRA because *United Reporting* "and related cases declare firmly that legislative policy decisions on public records disclosure do not generally implicate fundamental rights under the First Amendment," and thus holding "Plaintiffs have failed to establish infringement of fundamental First Amendment rights.")

Ignoring this Court's precedent, Petitioner contorts various inapplicable quotations from *Citizens United v. FEC*, 558 U.S. 310, 320 (2010) to cobble together an alternative legal reality. *See* Pet. 14-19.

Hence, he quotes the sentence from *Citizens* that: "We have consistently rejected the proposition that the institutional press has any *constitutional privilege* beyond that of other speakers." (emphasis added). *See id*. 15-16 (quoting 558 U.S. at 352). However, it is Green that seeks a *constitutional* privilege beyond that held by the public generally. Second, *Citizens* did not involve regulating *access to government records* or claiming a constitutional right was created by a *state statutory privilege*. Rather, *Citizens* overturned a federal statute that *barred* independent corporate expenditures for electioneering communications – yet *upheld* that statute's other requirements that "may burden the ability to speak, but they . . . 'do not *prevent* anyone from speaking.'" 558 U.S. 366 (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201 (2003)).

Petitioner next quotes from *Citizens United*: "Government *may* commit a Constitutional wrong when by law it identifies certain preferred *speakers*" so as to take "*the right to speak* from some and giving it to others. . . ." Pet. 18 (quoting 558 U.S. at 340) (emphasis added). Again, *Citizens* nowhere holds a state statute providing press special access to records somehow takes away a constitutional "*right*" – much less overturns *United Reporting*'s express holding that *no such right exists* and that regulation of it is no violation. Despite this precedent, Petitioner's argument consistently assumes a constitutional right and argues the fallacy that giving specifically defined press special access to government records somehow *takes away from others* a previously rejected "right to speak."

Such circular arguments cannot establish a rejected right's existence.

Like *Houchins*, and *United Reporting*, this case is not one in which "the government is *prohibiting a speaker* from conveying information that the speaker already possesses," but concerns "nothing more than a governmental denial of access to information in its possession" and thus it is "not an abridgment of anyone's right to engage in *speech*." The constitutional question Petitioner seeks to resurrect was answered by this Court decades ago.

2. Statutory Definition of "News Media" Does not Discriminate Based on Content

Petitioner lastly quotes *Citizens*: "'[*R*]*estrictions* distinguishing among different speakers, *allowing speech* by some *but not others*,' are 'interrelated' to content-based discrimination." Pet. 17 (citing 558 U.S. at 340) (emphasis added). Again, this argument fails to acknowledge *United Reporting* holds no right to *speech* is involved by a state statute simply regulating *who* can *access government information*. So too, he ignores federal precedent *specifically holding the statute at issue*, § 5.68.010(5), is *not* "content-based discrimination."

Cortland v. Pierce Cty., 488 F. Supp. 3d 1027, 1029 (W.D. Wash. 2020), reconsideration denied, C20-5155RJB, 2020 WL 5909808 (W.D. Wash. Oct. 6, 2020), was a First Amendment challenge to § 5.68.010(5) that – unlike this case – actually litigated whether it was a

"content-based restriction on speech" and specifically requested the court to "invalidate it as unconstitutional." As to the claim "the PRA permits the media to access records that he cannot" and thus "is unconstitutional" because "it differentiates the result of the request based on the content of the speech," the Court first noted that even "[a]ssuming a PRA request is speech," the PRA protection instead distinguishes between two types of speakers, even where the *content of the speech* – 'please provide a copy of Cornelius's ID photo' – is identical." *Id.* at 1030 n. 2 (emphasis in original).[17] Like Petitioner here, plaintiff's filings there did "not clearly articulate what content he claims is being suppressed by a rule that certain employee photographs are exempt from the PRA, when requested by a non-media member of the public." *Id.* at 1033. Second, the District Court found *Houchins* and *United Reporting* had resolved that restrictions on access to government records otherwise allowed to others *did not* prohibit "speech." *Id.*

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[17] Plaintiff in *Cortland*, like Petitioner now, Court, Pet. 18, cited *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2347 (2020) (plurality) which noted "laws favoring some speakers over others demand strict scrutiny *when* the legislature's speaker preference *reflects a content preference*." *Id*. (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994)) (emphasis added). However, the District Court found *Barr* inapplicable to § 42.56.250(8) because that case involved "a statute permitting 'robocalls' seeking to collect a debt to the government, while *prohibiting* robocalls calls seeking to collect a campaign donation" – which this Court noted "is 'about as content-based as it gets.'" *Rodriguez v. Barr*, 488 F. Supp. 3d 29, 1033 (2020) (emphasis added).

Cortland accordingly held "RCW 42.56.250(8) is facially neutral; it does not regulate the content of anyone's speech" and "the Supreme Court has firmly established that the public does not have a First Amendment right to obtain information from the government, and that *restrictions on access* do not implicate the First Amendment, at all" so this "should end the inquiry." *Id*. (emphasis added). It thus held § 42.56.250(8)'s protection from disclosure "does not implicate the First Amendment, and the carve-out allowing the media to access that information is not facially unconstitutional as a matter of law." *Id*. Petitioner cites no authority of this Court, or of any other after *United Reporting*, that holds to the contrary.[18]

3. Petitioner Identifies no Relevant Circuit Court Split

Green alleges the "D.C., First, Second, and Seventh Circuits hold that the First Amendment requires the government to justify any discrimination in providing press access to information." Pet. 19-22. However, his case citations reflect no post *United*

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[18] Consistent with its precedent, this Court gives access that is not available to the public generally by providing offices, after hours non-public facilities and courtroom seats exclusively for *credentialed* media who are "*full-time professional journalists* employed by *media organizations* that have *records of substantial and original news coverage of the Court* and a *demonstrated need for regular access* to the Court's press facilities." *See* https://www.supremecourt.gov/publicinfo/press/media_requirements_and_procedures_revised_070717.pdf. (emphasis added).

Reporting split over the constitutionality of uniformly applied and content neutral regulation of access to protected government records. *See* Pet. 19-22 (citing *Karem v. Trump*, 960 F.3d 656, 659, 665 (D.C. Cir. 2020) (observing only that suspension of press pass from a public forum "*implicate*[*s*]" "important first amendment rights," but enjoining suspension instead because reporter "is likely to succeed on his [Fifth Amendment] *due process claim* because . . . he lacked fair notice that the White House might *punish his purportedly unprofessional conduct*") (emphasis added); *Anderson v. Cryovac, Inc*., 805 F.2d 1, 9 (1st Cir. 1986) (decision predating *United Reporting* held court erred by granting one media entity exclusive access to court records); *Am. Broad. Cos., Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (pre-*United Reporting* decision that did not involve protected records but which found *barring* a particular news station from candidate campaign facilities under "threat of arrest is unconstitutional and should be the subject of a federal injunction."); *John K. MacIver Inst. for Pub. Policy, Inc. v. Evers*, 994 F.3d 602, 615 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 711 (2021) (affirming *dismissal* of reporters' First Amendment claim for denial of access to press event because, though it "*look*[*s*] carefully at any claim that a government entity is disallowing access to the media or a particular subset thereof," it *held* such "does not mean . . . members of the press have special access to newsgathering and must be exempt from laws and rules of general application" nor "that we must disallow a government's set of viewpoint-neutral criteria" and held the state there "has created neutral

laws of general application and [reporter] has not shown any evidence that it was excluded based on its viewpoint")).

4. Protections Against Doxing[19] Pose no Threat to Citizen Journalism or to Accessing News and Commentary

Petitioner ends his argument by listing several modern day "lone pamphleteers" and equates them to his endangering officers and their families by "convey[ing]" their protected photographs and birthdates directly to "a broad segment of the public." Pet. 23-29. However, none of the cited examples relied on PRA requests or made them for revenge doxing of public servants. *Id.* Neither PRA protections of officer birthdays and photographs nor a "news media" exception would have prevented the cited stories from "see[ing] the light of day" as somehow alleged. *Id.* at 24. Comparing Green to Thomas Paine defies common sense.

Petitioner then asserts "videos that Brian Green might publish if he knew the identities of the officers who assaulted and jailed him would doubtless annoy Pierce County." Pet. 28. This misstates the facts and trivializes the danger to officers and their families. Green was immediately provided those identities in

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[19] Defined by Merriam-Webster as "to publicly identify or publish private information about (someone) especially as a form of punishment or revenge." *See* https://www.merriam-webster.com/dictionary/dox.

the County's PRA response, Resp. App. 8, and his complaint seeks only the withheld private information of numerous officers – just two of whom had anything to do with his obstruction arrest. Pet. 7. More importantly, the danger at issue is not supposed County "annoyance," but Petitioner's admitted "inten[t] to . . . convey[]" its officers' protected photographs and birthdates directly to "a broad segment of the public." Resp. App. 33.

Such use as "a weapon to get back" at Petitioner's officers "targets and endangers individuals and families," as well as risks "misappropriat[ing] . . . birth dates" that allow "requesters or others to obtain residential addresses and to potentially access financial information, retirement accounts, health care records or other employee records" as well as commit "identify theft and harassment." *See Washington Pub. Employees Ass'n*, 194 Wash.2d at 493; S.B. Rep., ESSHB 1317; H.B. Rep., HB 1888; S.B Rep., 2SHB 1888 (2020). These dangers should not be belittled: they are why birth years are redacted from federal court filings, *see* FRCP 5.2(a), and why doxing public servants is increasingly being recognized as a tort and crime. *See, e.g.*, Ky. Rev. Stat. Ann. § 525.085 (2021); Nev. Rev. Stat. Ann. § 41.1347 (2021); Okla. Stat. Ann. tit. 21, § 1176 (2021); Or. Rev. Stat. Ann. § Ch. 300, § 1 (2021).

CONCLUSION

Because the statute at issue "is all about officer safety," because the state court decision interpreting it decided no federal issue, and because the petition raises no federal question and seeks reversal of this Court's long-standing precedent without providing Petitioner an actual remedy, Respondent Pierce County respectfully requests certiorari be denied.

DATED: February 14, 2022

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