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

REPLY BRIEF

ALAN GURA
Counsel of Record
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W.
Suite 801
Washington, DC 20036
(202) 301-3300
agura@ifs.org

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY ARGUMENT SUMMARY 1

ARGUMENT 3

I. Green never waived his First Amendment argument—which was ruled on below 3

II. Pierce County's procedural arguments are untimely 6

III. The constitutional avoidance canon is irrelevant at this stage, because Washington's Supreme Court authoritatively construed state law 6

IV. "Officer safety" does not justify discrimination against individual citizen journalists 8

V. Reporting privileges traditionally protect individual reporters 10

VI. Washington's Supreme Court can select the remedy on remand 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Barr v. Am. Ass'n of Political Consultants, 140 S. Ct. 2335 (2020) 13

City & Cnty. of San Francisco v. Sheehan, 575 U.S. 600 (2015) 6

Clark v. Martinez, 543 U.S. 371 (2005).....7

Cortland v. Pierce County, 488 F. Supp. 3d 1027 (W.D. Wash. 2020).....10

Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).....7

Houchins v. KQED, Inc., 438 U.S. 1 (1978).....9

Jennings v. Rodriguez, 138 S. Ct. 830 (2018).....7

Los Angeles Police Dept. v. United Reporting Publishing Corp., 528 U.S. 32 (1999) 9, 10

New York v. Ferber, 458 U.S. 747 (1982).....7

Nielsen v. Preap, 139 S. Ct. 954 (2019) 7

Titan Sports, Inc. v. Turner Broad. Sys. (In re Madden), 151 F.3d 125 (3d Cir. 1998).....12

Virginia v. Hicks, 539 U.S. 113 (2003).....12

Von Bulow v. Von Bulow, 811 F.2d 136 (2d Cir. 1987) 11, 12

Warger v. Shauers, 574 U.S. 40 (2014)..... 7

Wilcox v. Basehore, 187 Wn.2d 772, 389 P.3d 531 (2017)..... 6

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I .....*passim*

STATUTES

Public Records Act 10

Wash. Rev. Code § 5.68.010(5) 7, 11

Wash. Rev. Code § 42.56.250(8) 11, 13

RULES

Sup. Ct. R. 14 12

Sup. Ct. R. 14.1(g)(i).....3

Sup. Ct. R. 24 12

OTHER AUTHORITIES

Argument video, *Green v. Pierce County*, https://tvw.org/video/washington-state-supreme-court-2020101153/?eventID=2020101153, at 26:29-26:41 (last visited Feb. 24, 2022) 4

S.B. Rep., E2SHB 1317 9

REPLY ARGUMENT SUMMARY

Had Brian Green formed a corporation through which he produced and uploaded his videos to YouTube, this dispute never would have arisen. Pierce County would have lacked any basis for denying him the public records to which "news media" are entitled under Washington law. But because Green publishes his reporting and commentary as a citizen journalist, without invoking the auspices of "something with a legal identity separate from the individual," App.13a, Washington's Supreme Court denied him the public records made available to corporate "news media."[1]

The backwards logic employed to achieve this result—the First Amendment is not implicated because Green doesn't meet the statutory definition of "news media," App.15a n.5—flies in the face of this Court's long-established understanding that the Press Clause protects people who act as press, not a special caste of officially sanctioned media. And the state court's opinion poses a direct threat to citizen journalists everywhere, against whom it will be cited by other censors eager to statutorily define them out of the First Amendment's protection.

Rather than address this holding and its implications, Pierce County offers a host of inapposite, even

---

[1] Pierce County dislikes the term "corporate," because technically, other organizational forms might be "entities." BIO 13 n.11. The semantic argument is irrelevant. What matters is that Green is a natural person, and not something (corporation, LLC, LP, LLP, etc.) that obtains its "separate" "legal identity" from the state, App.13a, such as the "listed *organizations*." BIO 13.

irrational defenses. It misrepresents Green's position and suggests that parties may not assert their constitutional rights other than through the pursuit of a declaratory judgment. It claims that "officer safety" somehow justifies providing public records to organized entities but not individuals, denies the availability of a remedy, and minimizes the split of authority that the holding below implicates. It celebrates the fact that the legislature intended to deny individual journalists the benefit of the state's shield law, whose narrow definition of "news media" the public records framework imports, and complains that remedying the First Amendment violation in the public records context threatens improving the state's shield law, which is not before this Court. Pierce County even raises an entirely new argument here, not passed on below, that Green did not technically comply with state procedural requirements in initiating his action—an argument that the County should have raised at some point below before eliciting a 7-2 substantive decision from the state's high court.

The opposition lacks merit. This petition should be granted.

ARGUMENT

I. Green never waived his First Amendment argument—which was ruled on below.

From day one, the federal question here has always been that presented in Green's certiorari petition: whether the First Amendment forbids the state from discriminating against citizen journalists in the provision of public records to the "news media." Pierce County refused to provide Green public records because it believed that the law does not authorize the provision of those records to individuals who are not acting on behalf of some organizational entity with a separate legal identity. Green sued to compel production.

Notwithstanding Green's extensive record quotations, citations and appendix materials "show[ing] that the federal question was timely and properly raised," Sup. Ct. R. 14.1(g)(i), Pierce County alleges that Green somehow disclaimed his arguments by failing to challenge the Public Record Act's constitutionality. It even goes so far as to argue that Green's First Amendment argument is "newly alleged." BIO 17. The argument is simply contrary to the record, App.15a n.5, 25a-26a, 63a-86a. It also misconstrues Green's position, and quotes his counsel out of context.

Of course Green did not facially "challeng[e] the [Act's] constitutional validity" or "ask[] that it be found unconstitutional," BIO 11—he sought the law's benefit; to wit, the provision of public records to the press, of which he is a member. And in doing so, he

consistently maintained that the First Amendment forbids Pierce County from excluding him from those benefits. Pierce County does not explain why Green had only the choice of foregoing access to the records by seeking a declaration that the statutory scheme is unconstitutional, or accepting any unconstitutional application of the Public Records Act without resort to this Court's review. After all, the trial court agreed with Green that he was entitled to the records, as did two Justices of his state's high court. His pursuit of that outcome did not nullify the Supremacy Clause.

Pierce County's assertion that Green somehow disclaimed or waived his constitutional arguments, BIO 16, are taken out of context. The County asserts that "[Green's] 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.'" BIO at 11 (citing argument at 26:25-28:37). But counsel was responding to a question of whether Green was challenging aspects of the law "that impose restrictions on who can request [information] or for what purpose, for example, we have a commercial use carve-out . . . are you constitutionally challenging those aspects of the PRA?" Argument video, *Green v. Pierce County*, https://tvw.org/video/washington-state-supreme-court-2020101153/?eventID=2020101153, at 26:29-26:41 (last visited Feb. 24, 2022). Counsel explained that Green saw no need to challenge those aspects of the Public Records Act because

Green did, in fact, qualify as media and faced no such restrictions. Green's disclaimer of challenging irrelevant aspects of Washington's regulatory regime did not waive the constitutional arguments he plainly, repeatedly asserted. Indeed, amici on both sides joined in the constitutional debate.

The essence of Pierce County's "waiver" theory is that state courts can apply state laws that violate the federal constitution, regardless of how strenuously the petitioner objects, and evade this Court's review so long as the action is not technically styled as one for declaratory judgment of facial invalidity. That is not the law.

To be sure, the Washington court's handling of Green's First Amendment argument was pithy and dismissive, even arguably unserious. But that is not to say that the court failed to reach it. Over a dissent, the majority found the First Amendment was not implicated because Green did not meet the statutory definition of "news media." App.15a n.5. The majority did not hold, as Pierce County now claims, that Green had not preserved or waived his argument. Nor did the majority otherwise find a way of resolving the case on some alternative ground that bypassed the First Amendment argument altogether. Less is more, and economy with words often makes for more powerful writing. But a constitutionally defective judgment, written sparingly, does not thereby avoid this Court's review.

II. Pierce County's procedural arguments are untimely.

While the record is replete with Green's First Amendment claims, it is unclear where the County ever mentioned its heavily italicized "independent and adequate state grounds" argument to the effect that Green did not comply with the Public Record Act's procedural requirements. BIO 23-26.

Without mentioning this theory, the trial court ruled in Green's favor, and the Washington Supreme Court issued a substantive decision on the merits of Green's request. Had Green not complied with state procedural requirements in bringing his action, obviously, neither of the state courts would have reached and expended so much effort on the merits. "The Court does not ordinarily decide questions that were not passed on below." *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 609 (2015). And neither does Washington's Supreme Court. *Wilcox v. Basehore*, 187 Wn.2d 772, 788, 389 P.3d 531, 540 (2017).

III. The constitutional avoidance canon is irrelevant at this stage, because Washington's Supreme Court authoritatively construed state law.

Pierce County argues at some length that this Court cannot consider Green's First Amendment arguments, because " 'the canon of constitutional avoidance in statutory interpretation' is 'not a method of adjudicating constitutional questions by other means.' " BIO

16 (quoting *Clark v. Martinez*, 543 U.S. 371, 381 (2005)).

"The trouble with this argument is that constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.'" *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018)). "In the absence of more than one plausible construction, the canon simply 'has no application.'" *Jennings*, 138 S. Ct. at 842 (quoting *Warger v. Shauers*, 574 U.S. 40, 50 (2014)) (internal quotation marks omitted).

Accordingly, the constitutional avoidance doctrine is, at this stage, irrelevant. Green is not here to argue about the meaning of Washington law. He does not ask to have this Court choose a better construction of state law or "rewrite a statute." BIO 17 (quoting *Jennings*, 138 S. Ct. at 843). The question is *not* whether the Washington Supreme Court's construction of Wash. Rev. Code § 5.68.010(5) is correct. Right or wrong, that construction is binding on this Court. *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982). Pierce County acknowledges this much. BIO 18.

Rather, for purposes of these proceedings, the question is whether the binding construction adopted by the state court can be applied, as state courts "must not give effect to state laws that conflict with federal law." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2262 (2020) (internal quotation marks

omitted). The majority below saw no such conflict, because it held that Green did not enjoy the benefits of the First Amendment's Press Clause, and had no First Amendment right to the records. That holding, however curt, is a holding subject to certiorari review. This is not a case where where certiorari is purportedly "based on a state court's application of constitutional avoidance." BIO 16. Certiorari is based on the Washington Supreme Court's application of state law in contradiction of the First Amendment's requirements.

IV. "Officer safety" does not justify discrimination against individual citizen journalists.

Pierce County helpfully explains that Washington's definition of "news media," first deployed in the state's shield law, was written with the intent to discriminate against individuals engaging in a press function. As the statute's "'primary author' explained: 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." BIO 5 (footnotes and internal quotation marks omitted).

Pierce County asserts that this discrimination against citizen journalists is properly extended into the public records context, because restricting access to these records is "all about officer safety." BIO 21

(quoting S.B. Rep., E2SHB 1317). Apparently, journalists who work for corporate entities can be entrusted with sensitive police records, but independent citizen journalists cannot.

This is irrational.

Green does not argue that the First Amendment requires the state to make these records public. *See* Pet. at 19. And contrary to the County's assertion, BIO 28-29, nowhere does Green argue that the state may not regulate who can access public records. If concerns about officer safety prompt the state to shield these documents from disclosure, it may be able to do that without running afoul of the First Amendment. But here, the state has indeed "opened its doors" to these records. *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring). And there is no reason to suppose that a journalist will be more respectful of or sensitive to officer safety concerns by dint of being employed by some entity that has a separate legal identity.

The County spills much ink decrying Green's lack of citation to *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), which rejected a facial challenge to a California law that restricted access to arrestee records to those who would use them for certain purposes, and barred their use for commercial purposes. But the case is irrelevant. *United Reporting* merely held that the statute was not facially overbroad, and on remand, left open the challengers' as-applied claim. *Id.* at 41 (alternative arguments "will remain open on remand"); *id.* at 41 (Scalia,

J., concurring). Green does not oppose the concept of restricting access to government records. He only argues that the "news media" restriction must meet constitutional scrutiny, which cannot be satisfied here.

Pierce County decries the lack of a "post *United Reporting* split over the constitutionality of uniformly applied and content neutral regulation of access to protected government records," BIO 33-34, but it is unclear how *United Reporting*'s rejection of a facial overbreadth challenge implicates the clear circuit split Green identified as to whether the First Amendment allows the government to discriminate among journalists in the provision of public information. Pet. at 19-23.

Also irrelevant is the district court's opinion in *Cortland v. Pierce County*, 488 F. Supp. 3d 1027 (W.D. Wash. 2020). *Cortland* rejected the claim that Green does not make, to the effect that the First Amendment creates a right to receive public records, in part based on an idiosyncratic "right to listen" argument, and a claim analogizing the Public Records Act to a park. "The County describe[d] [Cortland's] claim and argument as nonsensical layers of inapplicable analogies." *Id.* at 1033. What bearing a district court's resolution of such theories has here is unclear.

V. Reporting privileges traditionally protect individual reporters.

Because the problematic definition at issue comes from the state's shield law, Pierce County argues that Green's victory here "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.'" BIO 22 n.14. For good measure, the County stuffs its corporate media amici's state court brief into a supplemental appendix, that it quotes for the proposition that broadening the shield law to include individuals "would jeopardize [its] continued existence." BIO 22 n.14.[2]

There is a certain logic in the County's appeal to consistency—so long as the state violates the First Amendment rights of citizen journalists, it should do so thoroughly. But any potential impact that securing First Amendment rights with respect to public records might have on Washington's shield law would be a feature, not a bug. "Ordinary people," in pajamas or other clothes, with MySpace or, more likely, YouTube accounts, do act as journalists. They exercise First Amendment rights in gathering, reporting, and commenting on the news, often more effectively than their organizational brethren.

More to the point, journalistic privileges traditionally inhere in individuals who commit acts of journalism. "[A]n individual successfully may assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press." *Von Bulow*

---

[2] Green would have consented to the filing of the County's amici's brief had they sought it.

v. Von Bulow, 811 F.2d 136, 142 (2d Cir. 1987); *see also Titan Sports, Inc. v. Turner Broad. Sys. (In re Madden)*, 151 F.3d 125, 129-30 (3d Cir. 1998).

In any event, the legislature cannot immunize a constitutional defect from judicial review by giving it multiple applications. No case will ever arise implicating this problematic statute in all of its contexts. This Court might as well start here.

VI. Washington's Supreme Court can select the remedy on remand.

Pierce County complains that in failing to claim specific relief on the merits, the petition for certiorari does not satisfy the technical requirements of a merits brief under Rule 24. BIO at 1. Green pleads guilty to this charge—his petition is not a brief on the merits, so it follows Rule 14, and requests for now only that the petition be granted.

In any event, Pierce County argues that should this Court strike down the statute, as authoritatively construed by Washington's Supreme Court, "[t]he underlying question of severability of a state statute 'is of course a matter of state law.' " BIO 20 (quoting *Virginia v. Hicks*, 539 U.S. 113, 121 (2003)). The County should have stopped there, but it offers two additional pages of state-law argument as to how Washington's Supreme Court should address the issue.

This is irrelevant. The fact that the state court may have some additional work to do on remand would

not render this Court's opinion striking down the law an advisory opinion. As the County would have it, this Court is always "advising" state courts when it strikes down state laws that offend the federal constitution.

The statute can be construed so as to make these records publicly available, by severing the exemption of Wash. Rev. Code § 42.56.250(8). The legislature could also fashion a better, constitutional exemption before any such judgment would come into effect. But even if the end result is that nobody would be entitled to the records at issue, "a plaintiff who suffers unequal treatment has standing to seek withdrawal of benefits from the favored class." *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2355 (2020) (plurality opinion) (internal quotation marks omitted). Green suspects that Washington's legislature could find an appropriate solution to this problem. But in the meantime, he should not be discriminated against for lack of an organizational identity, and this Court is empowered to end that discrimination.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN GURA
Counsel of Record
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W.
Suite 801
Washington, DC 20036
(202) 301-3300
agura@ifs.org

Counsel for Petitioner

FEBRUARY 25, 2022