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WA AUGUST 2008

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Nearly two years ago the authors prepared a report[1] that reviewed recent cases by the Washington Supreme Court in order to help people answer for themselves the question: "[h]as the court recognized the proper role of the judiciary in interpreting and applying the laws enacted and enforced by other branches of government, or has the court over-extended itself, usurping powers belong to the other branches or infringing rights reserved to the people themselves?"[2]

When that report went to press, media news coverage focused on the unprecedented spending on contested races for seats on the Washington Supreme Court. While many commentators zeroed in on campaign spending and the tenor of campaign advertising, many missed the most important issue: why had judicial races suddenly generated a willingness to spend large amounts of money to retain or unseat a member of the Washington Supreme Court? What had the court done to arouse such interest?

Some court watchers and judicial candidates suggested an answer: the court had lost its bearings. According to these critics the court's recent decisions simply did not reflect due respect for the court's proper role in a democratic society. Instead, the court had misinterpreted or misconstrued statutes, ignored separation of powers limits on its authority, and failed to protect individual liberties—especially property rights. In order to address this controversy, the authors identified and analyzed some of the court's more notable and controversial opinions.[3] Many of those cases dealt with property rights, Washington's felony murder statute, and open records issues. The report also provided a brief preview of several cases pending before the court—all of which have now been decided.

Nearly two years later, it is time to provide additional data to help Washingtonians revisit the question we asked in 2006: how faithful has the court been to its constitutionally defined role? As we did in 2006, the authors have selected the more notable and controversial opinions issued by the court since our last report.[4] The cases fall under six headings:

(1) The Initiative/Referendum process;

(2) Statutory interpretation;

(3) The public's right to know through the public disclosure/open records laws;

(4) Freedom of political speech;

(5) Private property rights; and

(6) The right to earn a living.

I. The Initiative/ Referendum Process

The success of limited government relies upon the maintenance of a system of checks and balances that restrain the tendency of the other branches toward unlimited power. One important safeguard built into our state constitution is the provision for initiatives and referenda, which give the people a means to redress perceived failures in the other branches of government. Although the opening lines of the Washington Constitution vest legislative authority in the legislature,[5] in 1912 the constitution was amended to reserve to the people the power to propose, enact, and reject laws through the initiative and referendum processes:[6]

> The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws,

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> and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.[7]

While the people's lawmaking rights are coextensive with the legislature, legislation enacted through the initiative or referendum process must comport with the constitution's substantive and procedural requirements.[8] Thus, even if an initiative or referendum is approved by the people at the ballot box, it will not become law if the courts determine that there is a constitutional infirmity.

In just the last two years alone, the Washington Supreme Court issued four decisions determining whether initiatives passed constitutional muster or complied with procedural requirements. The court has often overturned initiatives and referenda. For example, the court ruled that the people didn't know what they were voting for when they passed an initiative limiting property taxes. In another high-profile case, the United States Supreme Court unanimously reversed the Washington Supreme Court's decision striking down an initiative requiring unions to obtain "affirmative authorization" from non-union members before using their fees for political purposes.

Below is a discussion of the four prominent cases issued by the Washington Supreme Court involving initiatives and referenda. In addition, a fifth case provides revealing views of how different members of the court understand the role of Initiative and Referendum in the political process.

A. Wash. ex. Rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n, 156 Wn.2d 543 (2006) (reversed by Davenport v. Wash. Educ. Ass'n., 127 S.Ct. 2372 (2007))

Wash. ex. Rel Washington State Public Disclosure Commission v. Wash. Education Association dealt with the constitutionality of an initiative passed by the people requiring unions to obtain affirmative authorization from non-union members prior to using their fees for political purposes. In a 6-3 decision, the Washington Supreme Court ruled that the State's "opt-in" provision violated unions' First Amendment rights.[9] The United States Supreme Court granted the petition for writ of certiorari review and in a 9-0 decision reversed the Washington Supreme Court.

Washington is one of a number of states that authorizes union security agreements. These agreements force both union and non-union members to contribute dues for costs related to collective bargaining. The non-union members' dues are referred to as "agency shop fees," but are functionally equivalent to union dues.[10] A portion of all the member and nonmember dues are used to support political and ideological causes. Nonmembers opposed to these causes can receive a rebate after going through a lengthy process. In 1992, Washington voters passed Initiative 134 which, among other things, required unions to seek "affirmative authorization" from non-union members prior to using their money for political purposes. The law provides that labor organizations "may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual." Instead of requiring non-union members to first object, or opt-out, the statute places the burden on the unions to seek authorization before using the fees for political purposes.

After the initiative's passage, the Washington Education Association (the union) continued to send out packets to each non-union member which included a letter explaining the nonmember's right to object to fees being used for political purposes. The packets are known as "*Hudson* packets" (named after the United States Supreme Court decision outlining the minimum procedures unions must follow when notifying nonmembers of their right to withhold agency shop fees for political purposes). The *Hudson* packet provides nonmembers three options: 1) pay the full amount of agency shop fees without a rebate; 2) object to paying the full amount and receive a rebate for fees used for political purposes; or 3) object to paying the full amount and challenge the union's calculation of the rebate.[11]

In 2000, the Washington Evergreen Freedom Foundation (EFF), a public policy research organization focused on limited government, filed a complaint with the Washington Public Disclosure Commission arguing that the union violated the initiative. EFF

argued that the union failed to seek the affirmative authorization of all nonmembers before using their fees for political purposes. Based on EFF's complaint, the State of Washington (State) filed suit against the union alleging that it violated the initiative. The trial court ruled in favor of the State declaring the initiative's opt-in requirement constitutional. On appeal, the court of appeals reversed the trial court, finding the initiative's opt-in requirement unconstitutional. The court of appeals ruled that an "affirmative authorization" requirement "unduly burdens unions," and thus violated the union's First Amendment right to free speech.[12] The case was appealed to the Washington Supreme Court and consolidated with another case[13] brought by a number of non-union educational employees seeking a refund of their agency fees that were used for political purposes. In a 6-3 decision, the Washington Supreme Court upheld the appellate court ruling that the initiative's opt-in requirement was unconstitutional. The decision was authored by Justice Pro Tempore Faith Ireland, and joined by Justices Charles Johnson, Barbara Madsen, Bobbe Bridge, Tom Chambers, and Susan Owens.

The majority held that because the initiative forced unions to seek affirmative authorization from nonmembers, it unconstitutionally violated the union's First Amendment right to free speech. According to the court, the initiative's built-in presumption that nonmembers automatically dissent unless they affirmatively authorize the use of their fees for political purposes violates the U.S. Constitution. In addition, the court ruled that the presumption of dissent not only violated the union's First Amendment rights, but also the right of those nonmembers who do not object.

In a strongly worded dissent, Justice Richard Sanders, joined by Chief Justice Gerry Alexander and Justice Mary Fairhurst, criticized the majority's ruling. Justice Sanders argued that the majority's decision "turn[ed] the First Amendment on its head."[14] The dissent embraced Thomas Jefferson's maxim: "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."[15] Justice Sanders observed that because the unions have only a statutory right to require employers to withhold membership dues from members and nonmembers, the unions have no constitutional right for such withholding for political purposes:

> Given that the legislature could constitutionally repeal the whole statutory scheme allowing withholding in the first place, I find it nearly beyond comprehension to claim that the legislature, or the people acting through their sovereign right of initiative, could not qualify these statutes to ensure their constitutional application.[16]

Reversal by the U.S. Supreme Court

The U.S. Supreme Court unanimously reversed the Washington Supreme Court. In an opinion authored by Justice Scalia, the Court commented that "[t]he notion that this modest limitation upon an extraordinary benefit violates the First Amendment is, to say the least, counterintuitive."[17] According to the Court, the "unions have no constitutional entitlement to the fees of nonmember-employees."[18] The Court dismissed the Washington Supreme Court's decision that the initiative could lead to content-based discrimination, citing a previous opinion where the Court said that "content based regulation is permissible so long as 'there is no realistic possibility that official suppression of ideas is afoot.'"[19] The Court reasoned that the initiative passed constitutional muster because it acted as a reasonable check on the expenditure of funds which were not constitutionally guaranteed to the union. The Court vacated and remanded because "the Supreme Court of Washington's decision rested entirely on flawed interpretations of this Court's agency-fee cases."[20]

B. Washington Citizens Action of Washington v. State, 162 Wn.2d 142 (2007)

In a highly controversial decision, a divided Washington Supreme Court ruled 5-4 that the voters misunderstood Initiative 747 (I-747), which amended existing law by limiting property tax increases to 1% per year.[21] Prior to I-747's passage, Washington voters passed a similar initiative (I-722) in 2000 which reset the property tax limit from 6% to 2%. After I-722's passage, a number of local jurisdictions challenged the measure as unconstitutional. On November 20, 2001, the trial court entered a preliminary injunction against implementation or enforcement of I-722.[22] As a result of the trial court's decision, supporters of I-722 filed I-747 with the Secretary of State's Office. Seven

months later in July 2001, I-747 supporters turned in the requisite number of signatures, placing the initiative on the 2001 November general election ballot. I-747's official ballot title stated:

> Initiative Measure No. 747 concerns limiting property tax increases. This measure would require state and local governments to limit property tax levy increases to 1% per year, unless an increase greater than this limit is approved by the voters at an election. Should this measure be enacted into law?[23]

On September 20, 2001 the Washington Supreme Court ruled[24] I-722 violated the single-subject rule of the Washington Constitution.[25] Because I-722 was struck down by the Washington Supreme Court, the previous 6% property tax limit was reinstated. On November 6, 2001, Washington voters overwhelmingly passed I-747 (59 to 41 percent) which set the property tax increase limit at 1%.

Writing for the majority, Justice Bobbe Bridge[26] upheld the trial court's ruling that I-747 violated art. II, section 37 of the Washington Constitution. Concurring in the decision were Justices Susan Owens, Barbara Madsen, Stephen Brown (Pro Tem), and Teresa Kulik (Pro Tem).[27] The court ruled that I-747 violated the Washington Constitution because the "text of the initiative claimed to reduce the general property tax limit from two percent to one percent, but in reality it reduced the limit from six percent to one percent."[28] Article II, section 37 provides that "[n]o act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." According to the court, when I-747 was enacted, the text of the initiative "did not accurately set forth the law that the initiative sought to amend."[29] The court ruled that I-747's text led voters to believe the initiative would generally reduce the property tax increase limit from 2% to 1% when in reality—because I-722 was declared unconstitutional—I-747 was actually reducing the property tax increase limit from 6% to 1%.[30]

The court dismissed the State's argument that article II, section 37's purpose was, in fact, satisfied because the official Voters' Pamphlet made it clear that there was an ongoing challenge to I-722, and if that law was struck down, I-747 would reduce the property tax increase limit from 6% to 1%.[31] In addition, the court disagreed that the "Argument For" section and Washington Attorney General explanatory statement set forth in the Voters' Pamphlet cured any defect:

> While complete review of the attorney general's explanatory statement in the Voters' Pamphlet might have explained the relationship between pre-I-722 law and the changes proposed by I-747, article II, section 37 does not simply require that notice of an amendatory initiative's impact on existing law be somehow available to voters. "[T]he act revised or the section amended" must be "set forth at full length." Nothing in the plain language of article II, section 37 or in the case law interpreting it suggests that information in the Voters' Pamphlet can cure the type of textual violation of article II, section 37 that occurred here, where the initiative's inaccuracy strikes at the substance of the amendment's impact.[32]

The majority further noted that the court "previously acknowledged that many voters do not read the Voters' Pamphlet when evaluating an initiative or referendum." Thus, according to the court, a voter would have thought the initiative was reducing the property tax limit from 2% to 1%, if he or she had simply read the text of I-747.[33] In sum, the court ruled that at the time of the popular vote, the text of I-747 misled the voters because the initiative did not accurately set forth the act being revised or the section being amended.

Justice Charles Johnson—joined by Chief Justice Gerry Alexander and Justices Tom Chambers and Richard Sanders—chided the majority for suggesting that "the voters are unable to think or read for themselves[.]"[34] According to the dissent, article II, section 37 of the Washington Constitution has two primary purposes: 1) "to avoid confusion, ambiguity, and uncertainty in statutory law, essentially to disclose the effect of the new legislation"; and 2) "to ensure that legislators and voters are aware of the impact that an amendatory law will have on existing law."[35] The dissent argued that there was no confusion, ambiguity, or uncertainty to I-747's text. The dissenting justices further noted that the "ballot title and the text clearly disclose[d] the effect of the new legislation to reduce taxes."[36] Moreover, the dissent opined that the voters were informed there was a previous higher property tax limit of 6% and that I-747 reduced the maximum

tax to 1%.[37] According to the dissent, "[w]hether the former tax cap was six percent or two percent, the voters understood the effect of this law was to reduce the tax, and this is what they voted to approve."[38]

The dissent further explained that the former 6% property tax limit was specifically referenced in the Voters' Pamphlet's "Policies and Purposes" section, the "Argument For" section, and the Washington Attorney General's explanation section.[39] Thus, the voters who wished to read only the official ballot title were apprised of the initiative's effect, to reduce taxes to a maximum of 1% increase per year.[40] Voters who further decided to read the Voters' Pamphlet were fully apprised of both the status of I-722 and the former 6% property tax cap.[41] The dissent concluded that the voters "were aware the existing law was higher taxes and the impact of [I-747] was to reduce taxes[.]"[42] As a result of the public outcry sparked by the Washington Supreme Court's decision, Governor Christine Gregoire (D) convened the state legislature for a rare one-day special session to reinstate the 1% property tax limit.[43] Both houses overwhelmingly voted to overturn the Washington Supreme Court's decision and to reinstate the 1% property tax cap; the bill was signed into law the same day by Governor Gregoire.[44]

C. 1000 Friends of Washington v. McFarland, 159 Wn.2d 165 (2006)

McFarland represents another situation where the voters passed a ballot measure and the Washington Supreme Court ruled that it was unlawful.[45] The referendum sought to repeal a number of ordinances enacted under Washington's Growth Management Act ("GMA"). The GMA is a state law addressing how local governments are to plan for future growth. The law requires local governments to review and revise their comprehensive plans and development regulations at least every seven years. King County, the largest county which encompasses Seattle, adopted three ordinances addressing the designation and protection of critical areas and storm water runoff management. The most controversial aspect of the ordinances called for requiring rural property owners to set aside 65 percent of their property as open space.

Rodney McFarland, a rural property owner, initiated the process to hold referenda on the newly enacted ordinances. 1000 Friends of Washington (1000 Friends), an environmental advocacy group, joined King County in filing a declaratory judgment action contending that the ordinances were not subject to local referenda. 1000 Friends and King County prevailed via summary judgment at the trial court, and the supreme court granted direct review.

In a 7-2 decision authored by Justice Tom Chambers, joined by Chief Justice Gerry Alexander, and Justices Barbara Madsen, Susan Owens, Mary Fairhurst, Charles Johnson, and Bobbe Bridge, the court held that because the ordinances were enacted in response to the GMA, which is a statewide statute, they were not subject to local referenda. The majority reasoned that the ordinances were part of a state legislative action which would trump any contrary county level action. The court reasoned that "localities have considerable power to conduct their purely local affairs... so long as they abide by the provisions of the constitution and do not run counter to considerations of public policy of broad concern ."

Justice Jim Johnson, joined by Justice Sanders, filed a dissenting opinion maintaining that the GMA "does not require such ordinances nor does [the] act prohibit these or any referenda." The dissent argued that the majority overlooked the court's historical presumption in favor of the right to referendum and in so doing undermined "an important check on legislative power." The dissenters further cautioned the court from limiting "powers that have been constitutionally reserved to the people." The dissent quoted the *The Federalist No. 49* and argued that "the people are the only legitimate fountain of power, and it seems strictly consonant to the republican theory, to recur to the same original authority... whenever any one of the departments may commit encroachments on the chartered authority of the others."

D. Super Valu, Inc. v. Dep't of Labor and Industries of the State of Washington, 158 Wn.2d 422 (2008)

In 2003 voters adopted Initiative 841, repealing ergonomics regulations enacted by the Department of Labor and Industries (L&I) in 2000.[46] I-841 declared those regulations "an expensive, unproven rule." The initiative prohibited the L&I's director from adopting new or amended ergonomic standards "until and to the

extent required by congress or the federal occupational safety and health administration."[47] I-841 was aimed at promoting job creation by relaxing workplace regulations to a level comparable to other states.

After I-841 was enacted, L&I received a complaint about working conditions from an employee at a SuperValu distribution center. L&I obtained a subpoena to get all of the information regarding SuperValu's ergonomic program. SuperValu filed for an injunction, which the trial court granted. L&I argued that despite I-841, it still possessed the power to address ergonomic workplace hazards pursuit to its "general duty" clause in Washington's Industrial Safety and Health Act ("WISHA"), RCW 49.17.060(1). The court refused to enforce L&I's subpoena, holding L&I no longer had the authority to perform health and safety inspections for any ergonomics-related hazards.

The Washington Supreme Court vacated the trial court's ruling in an opinion by Justice Tom Chambers. The majority opinion was joined by Chief Justice Alexander and Justice Charles Johnson, Justice Owens, Madsen, Fairhurst, Bridge and Justice Pro-Tem Quinn-Brintnall. (Justice James Johnson recused himself.) The majority framed the issue as whether voters intended to repeal only specific ergonomics regulations adopted in 2000 or both the regulations and L&I's ability to enforce its "general duty clause" under WISHA with respect to ergonomics. While noting that collective intent of the voters controls the meaning of voter initiatives, the majority stated that if the language is plain and unambiguous it is not subject to judicial interpretation. The majority concluded that the initiative was very specific in naming the regulations which it was intended to repeal, listing citations and date of enactment.[48] I-841 denied L&I's director the authority to adopt any new or amended standards, but the majority highlighted the absence of any mention of the "general duty clause." That absence was interpreted by the majority to mean the voters only intended the initiative to address the regulations specifically mentioned and did not mean to strip L&I of all power to investigate matters involving ergonomic hazards. The majority asserted that part of I-841's significance is L&I's higher burden to meet in establishing a violation under the "general duty clause" compared to the repealed regulations. Repealed regulations identified specific risk factors and required employers to identify them and means by which they were remedied. The "general duty clause," by contrast, requires L&I to demonstrate a recognized hazard likely to cause death or serious injury, as well as specific steps the employer should have made to address the hazard.

Lone dissenter Justice Richard Sanders argued that L&I lacked the authority to implement as "recognized" ergonomics standards those that voters previously declared "unproven" in I-841. The proper standard for interpretation of initiatives such as I-841, asserted Sanders, requires the court to construe it liberally and to determine intent from the language "as the average informed voter voting on the initiative would read it."[49] Voters, according to Justice Sanders, would have understood their deeming ergonomics regulations "unproven" to remove L&I's authority to regulate in that area under its "general duty clause" in WISHA. In his view, the majority subjected I-841 to a hyper-technical and narrow construction whereby voters are said to have only intended to place a higher legal burden on L&I in enforcing ergonomics standards. Justice Sanders also noted that L&I directed its staff to look to the ergonomics rules repealed by I-841 as a guide to post-initiative workplace hazards enforcement. Moreover, the dissent noted that L&I's new definition of "ergonomics" in the litigation included "psychological" hazards, making it even broader than under the repealed regulations.

E. Washington State Farm Bureau Federation v. Gregoire, 162 Wn.2d 284 (2007)

Washington voters passed I-601, the Taxpayer Protection Act ("TPA"), in 1993. The TPA specified a procedure for the legislature to increase taxes, which included a requirement of voter approval if the tax exceeded a certain threshold. In 2005 the Washington Legislature approved a budget which would have resulted in the triggering of a voter approval process, and in July 2005 the Washington State Farm Bureau Federation ("WSFBF") sued to enforce the TPA. The trial court granted partial relief to WSFBF, and both parties appealed. The Washington Supreme Court took direct review of the case. On appeal the state argued that the initiative process cannot bind future

legislatures, and that in adopting a budget that in effect rejected the limitations set by TPA, the legislature was simply amending a previous statute; thus, according to the state's position, any conflict between the TPA and later legislation had to be resolved in favor of the later legislation.

The Washington Supreme Court unanimously rejected the WSFBF's position,[50] but for sharply different reasons. The majority (Justices Fairhurst, Charles Johnson, Madsen, Bridge, and Owens) based the decision on the plenary power of the legislature to enact statutes so long as they do not conflict with the state or federal constitution: "[i]t is a fundamental principle of our system of government that the legislature has plenary power to enact laws, except as limited by our state and federal constitutions."[51] The fact that the original statute was passed by initiative, and the later one by the legislature, was immaterial: "[a] law passed by initiative is no less a law than one enacted by the legislature. Nor is it more."[52]

An additional argument was that the legislature's adoption of the budget had the effect of imposing retroactive taxes, since it rejected the procedure previously adopted by the people through the initiative process. The majority disagreed. So long as there was no vested right that was affected, a statute may have retroactive effect, particularly where it has a curative effect. Since there was controversy concerning the fiscal year 2006 expenditures, the legislature's enactment had the effect of clarifying an ambiguous statute.

In addition to the four justices who joined Justice Fairhurst's majority opinion, four justices wrote separate concurring opinions. Chief Justice Alexander would have reached the question of whether the TPA "is an unconstitutional intrusion into the legislature's plenary power to pass laws." He would have said that it was. Justice Sanders (with Justice Jim Johnson concurring in the opinion) agreed with the majority's resolution of the legal issues, but could not agree with their claim that the legislature has plenary power to pass statutes so long as they do not contravene express constitutional prohibitions. He takes it as an axiomatic principle of limited government that there must first be a grant of authority to the legislature to pass legislation, and that when the state exercises any power it is incumbent upon the state to establish that the people have delegated such power to the state, rather than indulging the opposite presumption. "Our majority also appears to be oblivious to the basic tenet of the American Revolution, which forcefully rejected the European model of unlimited government."[53] Justice Chambers, like Chief Justice Alexander, would have addressed the constitutionality of the TPA, and described this issue as "an elephant in the courthouse."[54] He would have found the TPA's requirement of voter approval was an unconstitutional intrusion into the legislature's plenary power to pass laws.[55]

Finally, Justice Jim Johnson (with whom Justice Sanders concurred) agreed with the majority's disposition, but joined in the reservations expressed by Justice Sanders, noted above. In addition, he wanted to rebut the claims made by Justice Chambers. While the majority claimed that laws passed by initiative are no more nor less than a statute passed by the legislature, Justice Chambers viewed the initiative process as a derogation from the rightful place of the legislature as the representatives of the people. Instead, in Justice Johnson's view, the initiative process reflected the fundamental reality of republican government, that the state derives its powers from the people, and that the initiative and referendum processes are important safeguards against usurpation by the state.

(At the time this report was prepared, the court had scheduled oral argument in *Brown v. Owens*, which included a direct attack on the constitutionality of the TPA. The resolution of that question will likely be a feature in the next Report.)

II. Statutory Interpretation

In its role of interpreting statutes, a court should strive to implement the policy choices of the legislative body, not to substitute its own policy preferences. In the guise of statutory "interpretation," a court may read into a statute an intent that is foreign both to the language of the statute and to the clearly expressed policy choices of the legislature. In the past two years the court decided many controversial cases that required interpretation and application of statutes. Below is a discussion of several illustrative cases.

F. Ball-Foster Glass Container Co. v. Giovanelli, 163 Wn.2d 133 (2008)

Giovanelli involved a workers' compensation claim by an out-of-state employee.[56] Alfred Giovanelli, a mason from Pennsylvania, was severely injured after being hit by a car while he and a fellow employee decided to spend a Sunday afternoon—their day off—attending a concert in a nearby park. Giovanelli sustained serious injuries as a result of the accident.

In a 5-4 decision penned by Justice Charles Johnson, joined by Justices Mary Fairhurst, Susan Owens, Barbara Madsen and Tom Chambers, the Court ruled that Giovanelli was entitled to Washington's workers' compensation benefits even though he was not a Washington resident. In reaching its decision, the majority adopted a new doctrine, known as the "the traveling employee doctrine." According to this doctrine, a traveling employee is considered to be in the course of employment during the entire trip, and thus entitled to that state's workers' compensation benefits. The exception to this newly adopted doctrine is when an employee departs on a personal errand. The majority ruled that despite the fact that it was Giovanelli's day off and he was on his way to attend a concert, Giovanelli was still a "traveling employee" in the course of his employment. In reaching its decision the court found that Giovanelli's acts—walking to a park to watch a concert on his day off—did not constitute departing on a "personal errand." Justice Jim Johnson, joined by Chief Justice Gerry Alexander, and Justices Richard Sanders and Bobbe Bridge, criticized the majority for rewriting Washington's workers' compensation statutes. Admonishing the majority, the dissenting justices explained that the "legislature is the appropriate forum to amend perceived deficiencies in Washington's workers' compensation laws," not the courts.

The dissent cited to Washington's statutes which state that an employee is entitled to workers' compensation benefits when the worker is "acting at his or her employer's direction or in the furtherance of his or her employer's business." Since Giovanelli was not directed by his employer to attend the concert, nor was his walking to the concert on his day off in furtherance of his employer's business, the dissent concluded he was not entitled to benefits.

G. Woo v. Firemen's Fund Insurance Co., 161 Wn.2d 43 (2007)

In *Woo*, the court issued a 5-4 decision in favor of a dentist who brought suit against his insurance company for failure to defend him in action brought by one of his former employees.[57] *Woo* involved a bizarre set of facts. As part of an attempt at a practical joke, Dr. Woo temporarily inserted a set of fake boar tusks into his assistant's mouth while performing a dental procedure. While his assistant was under anesthesia, Dr. Woo inserted the boar tusks in her mouth, pried open her eyes, and took a number of disturbing photographs. The assistant learned of Dr. Woo's strange antics when co-workers showed her the photographs. The assistant quit shortly thereafter and brought suit against Dr. Woo, alleging several negligent and intentional torts. Dr. Woo requested that his insurance carrier defend him, but his request was denied. After settling the case against him, Dr. Woo sued the insurer for breach of duty.

Writing for the majority, Justice Mary Fairhurst, joined by Justices Tom Chambers, Susan Owens, Richard Sanders, and Bobbe Bridge, held that the insurer had a duty to defend Dr. Woo because the facts alleged against him, when construed liberally, fell within the scope of his professional and general liability coverage. The court held that "the duty to defend is triggered if the insurance policy conceivably covers the allegations in the complaint" and said "[b]ecause RCW 18.32.020 defines the practice of dentistry so broadly, the fact that his acts occurred during the operation of a dental practice conceivably brought his actions within the professional liability provision of his insurance policy."[58] The court granted Dr. Woo relief in the form of $750,000 as compensation for his earlier settlement as well as the emotional distress that he had suffered as a result of Fireman's failure to defend. Dr. Woo was also awarded attorney's fees and costs of appeal.

In his dissent, Justice Jim Johnson, joined by Chief Justice Gerry Alexander, argued that "the proper inquiry is whether a reasonable person would find the insertion of faux boar tusks into the mouth of an unconscious patient to be covered as the practice of dentistry."[59] The dissent argued that, "[n]o reasonable person could believe that a dentist would diagnose or treat a dental problem by placing boar tusks in the mouth while the patient was under anesthesia in order to take pictures

with which to ridicule the patient."[60] Justices Charles Johnson and Barbara Madsen, in a separate dissenting opinion, argued that "[e]ven under the most liberal construction, the complaint's allegations are not conceivably covered."[61]

H. C. Stevens v. Brink's Home Security, Inc., 162 Wn.2d 42 (2007)

In *Stevens v. Brink's Home Security, Inc.*, the supreme court handed down a 7-2 decision affirming a trial court ruling that under Washington's Minimum Wage Act,[62] technicians were entitled to compensation for time spent driving company trucks from the employees' home to the first jobsite, and back home from the last jobsite.[63]

The case involved a class action suit brought by installation and service technicians against their employer, Brink's Home Security ("Brink's"). The plaintiffs argued that Brink's violated the Washington Minimum Wage Act because the company did not pay their employees for time spent driving company trucks from the employee's home to the first jobsite, and back home from the last jobsite.[64] Because the legislature has not defined hours worked or addressed the compensability of employee drive time, the court looked to regulations defining "hours worked." Washington regulations define "hours worked" as all hours during which the employee is authorized or required "to be on duty on the employer's premises or at a prescribed work place."[65] Justice Owens, writing for the majority, ruled that employees are "on duty" and at a "prescribed work place" when they are driving a company vehicle to work and/or back home from the last jobsite. Joining Justice Owens were Chief Justice Gerry Alexander, and Justices Charles Johnson, Tom Chambers, Mary Fairhurst, Barbara Madsen, and Bobbe Bridge.

Justices Richard Sanders and Jim Johnson dissented. The dissent argued that the plain meaning of the regulations did not support the proposition that a truck is a workplace, particularly because the employees don't perform their work while commuting. Looking at the plain meaning of the definition of "premises," which is "a specified piece of tract of land with structures on it," Justice Sanders argued that vehicles used for commuting to a jobsite cannot constitute an "employer's premises." The dissent further argued that a vehicle used by an employee to commute cannot be a "prescribed workplace." According to the dissent, a "workplace" is "simply a setting in which an employee performs his principal work at the behest of an employer."

III. The Public's Right to Know Through the Public Disclosure/ Open Records Laws

"A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both."[66]

Washington's Public Records Act ("PRA") was adopted by the people via initiative in 1972 with overwhelming support.[67] The PRA leaves no doubt that public records should be made available for public inspection and copying. For example, the PRA provides in relevant part:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.[68]

Nonetheless, the Washington Supreme Court has issued a number of controversial decisions limiting the right of the people to obtain public records.[69] The most controversial was a case discussed in our previous publication, *Hangartner v. City of Seattle*.[70] There, the court created two new exemptions to the PRA: an "attorney-client privilege" exemption and an exemption for "overbroad" public record requests. Since *Hangartner*, a divided Washington Supreme Court has decided three significant cases relating to the PRA.

A. Lindeman v. Kelso School District No. 458, 162 Wn.2d 196 (2007)

At issue in *Lindeman v. Kelso School District No. 458* was the scope and application of the "student file exemption" to public disclosure requests under the PDA.[71] That provision of law exempts from disclosure "[p]ersonal information in any files maintained for students in public schools, patients or clients of public institutions or public health agencies, or

welfare recipients."[72] After school district officials initially showed parents Lindeman a school bus video surveillance tape of their child engaged in an altercation with another student, the parents' public disclosure request for access to the tape was denied by the school district. Officials claimed the video tape fell under the "student file exemption" contained in the PDA. The trial court agreed that the video tape was exempt under that exception, and the Court of Appeals affirmed that ruling.

The Washington Supreme Court reversed and held the district must disclose the videotape. An opinion for the court by Justice Susan Owens examined the meaning of the terms "personal information" and "in any files maintained for students." Chief Justice Alexander and Justices Charles Johnson, Bobbe Bridge, and James Johnson joined the opinion of the court. "We construe the student file exemption narrowly, in accordance with the directive of the PDA," wrote Justice Owens, "by exempting information only when it is both 'personal' and 'maintained for students.'"[73] The majority concluded that a surveillance tape made for safety on buses is significantly different from the types of records schools typically maintain in students' personal files. The majority held the School District never met its burden in showing otherwise. The statute's phrase "files maintained for students in public schools," held the majority, contemplates material in a student's "permanent file," including grades, test results, psychological or physical evaluations, or personal identification information.

According to the majority, mere placement of the tape in a student's file doesn't transform it into a record maintained for students: "[t]he District cannot change the inherent character of the record by simply placing the videotape in a student's file or by using the videotape as an evidentiary basis for disciplining the student."[74] Also considered significant by the majority was the fact that the District previously permitted the parents to view the tape.

In a brief concurrence, Justice Richard Sanders—joined by Justices James Johnson and Tom Chambers—voiced agreement with the court's opinion for the most part. But the concurrence disagreed with the majority's conclusion that the surveillance videotape of students fighting in a crowded school bus was "personal information" under the statute. "Rather this conduct was 'public or general'... and thus does not meet the majority's own definition."[75] Although the concurrence was only one short paragraph in length, the concurrence's construal of the statutory language is hardly insignificant. The concurrence's construal of the "student file exemption" is arguable more in keeping with the PDA's mandate that exemptions are to be construed "narrowly."

An opinion dissenting in part from the majority was issued by Justice Mary Fairhurst and joined by Justice Barbara Madsen. The dissent disagreed with the majority's granting of the public record request to the parents on remand to the lower court. Rather, the dissent argued it would have returned the case to the trial court to make a specific factual determination of whether the surveillance videotape was exempt from disclosure requirements. "A public school bus surveillance videotape capturing an altercation between students could be "[p]ersonal information in any files maintained for students in public schools," insisted the dissent.[76] The dissent asserted that under the PDA the videotape's character is defined by the information it contains, and not the source of its origination. It noted that the "student file exemption" applied to "any files maintained for students," and argued the tape was analogous writings documenting student altercations that are kept by schools. Thus, the dissent offered a construal of the exemption broader than the majority and concurrence. The dissent's insistence that the trial court should ascertain whether the school kept such analogous records and whether it kept the tape in any files maintained for students appears squarely at odds with the majority's conclusion that moving a public record into a student file doesn't automatically trigger the exemption.

B. Soter v. Cowles Publishing Co., 162 Wn.2d 716 (2007)

Nathan Walters, a nine-year-old student in the Spokane School District ("District"), died after suffering a severe allergic reaction to the food provided for him on a school field trip. Walters' parents and the District entered into mediation and settled the wrongful death suit against the district. Prior to the settlement a local newspaper reporter requested "copies of all material related to the investigation and possible settlement"

under the state Public Records Act ("PRA"). The District disclosed a number of documents but refused to release 75 documents, including the settlement agreement itself as well as interviews and notes taken by a private investigator that had been hired by the district in preparation for the wrongful death suit. The District and the Walters' jointly filed a petition for a declaratory judgment arguing that the documents in question were exempt from disclosure under the PRA because they were "records that are relevant to a controversy to which an agency is a party." The trial court ruled that all of the documents—except for the settlement agreement itself and an incident report from the school—were exempt from disclosure under the attorney-client privilege and/or the work product doctrine. The court of appeals affirmed.[77]

In a 5-4 decision, the divided supreme court affirmed the lower court holding that the documents were exempt from disclosure because they were relevant to a controversy in which the school was involved. The majority held that the same rule governing pre-trial discovery in civil cases governed the controversy exception to the PRA. The court ruled that the documents were protected under attorney-client privilege or as work product. In addition, the court held that the language of RCW 42.56.540 allowed state agencies to seek declaratory judgments regarding whether they had to disclose public records under the PRA. This essentially gives a local government the authority to sue a public records requestor if it feels the public records are exempt from disclosure under the PRA. According to the court, the plain language of the statute allows agencies to bring an action in superior court if releasing the records would "substantially and irreparably damage any person, or... vital government functions."

In his dissent, Justice Charles Johnson, joined by Justices Jim Johnson, Richard Sanders and Tom Chambers, argued that the majority's ruling essentially created a public "non-disclosure act" by expanding what was meant to be a narrowly tailored exception. The dissent also argued that the majority had contradicted their holding in *Limstrom v. Ladenburg*[78] by interpreting the work product exemption to cover all written materials "obtained by counsel with an eye toward litigation." This meant that attorneys could now use "work product" to withhold material facts as well as documents containing their personal impressions and strategies. The court's decision is also notable in that it allows a governmental agency to sue a requestor as a way to challenge the public records request.

C. Livingston v. Cedeno, ___ Wn.2d ___, 186 P.3d 1055 (2008)

A recent PDA case to come before the Washington Supreme Court presented the unique issue of whether the Department of Corrections could legally withhold public records from an inmate held in a correctional institution.[79] Plaintiff Livingston filed a public disclosure request while incarcerated, seeking the training records of a corrections officer. The Department confirmed receipt of the request, and provided the officer the opportunity to file a privacy injunction. When the officer did not object, the Department copied and mailed the record to Livingston. But officials at Livingston's new place of incarceration withheld those records under department policy Directive No. DOC 450.100. That directive authorizes the Department to inspect all incoming mail to keep offenders from obtaining material threatening to the facility's security. Livingston challenged the denial of delivery, but the trial court ruled against him. The Court of Appeals affirmed the trial court, ruling the PDA "does not require agencies to guarantee disclosure or guarantee that mailed documents will be physically received by the person making the request."[80]

By a 5-4 vote, a majority of the Washington Supreme Court upheld the lower court rulings. In an opinion by Justice Barbara Madsen, joined by Chief Justice Gerry Alexander and Justices Charles Johnson, Mary Fairhurst and Bobbe Bridge, the majority held although "the Department may not deny a public records request based on a requester's status as an inmate," it may permissibly deny an inmates possession of such records pursuant to a mail policy designed for safety reasons.[81] The majority acknowledged that the statute authorizing the Department's mail policy (RCW 72.09.530) provided no exemption to disclosure under the PDA. While contending the PDA requires the Department to release public records, "the Department has broad discretion to deny entry of any materials it determines may threaten legitimate penological interests,

without exception for public records."[82] Insisting that courts must read statutes in harmony when possible, the majority concluded no conflict existed between the PDA and the statute authorizing the prison mail policy. Whereas the PDA was designed to ensure broad access to public records in order to ensure government accountability, the majority observed that the statutory directive for screening mail going through prisons is designed to interdict "contraband" to protect penal security concerns. According to the majority, while the "contraband" statute doesn't relieve the Department from public records disclosure obligations, that statute "does authorize the Department to decide whether those records will be permitted inside the institution."[83] The majority disagreed with one appeals court judge's insistence that it was unlikely an officer's training records could undermine prison security. Training vulnerabilities of corrections officers could be revealed by such records, it concluded.

Justice James Johnson penned the dissenting opinion, joined by Justices Sanders, Owens, and Chambers. Reading the PDA by its terms, the dissent asserted that "[t]he effect of the statute is that the public and each member of the public own the public records, even though a record may be in the custody of an agency. This law is clear."[84] The dissent insisted that the duty of the Department under the PDA is not to "release," but to "make available." Wrote Justice James Johnson: "If the law said 'release,' the majority would be more persuasive since 'release' could mean place in the mail. But the law requires agencies to make records available, and I cannot agree than an agency makes a record available by mailing the record to itself and then withholding the record from the person who requested it."[85] The PDA's express mandate that it be construed liberally and exemptions construed narrowly, argued the dissent, precluded the majority's narrow interpretation of "make available." The dissent proceeded to argue that there was a clear conflict between the PDA and the "contraband" law. While acknowledging the desire to avoid conflicts where possible, the dissent insisted it "cannot disregard a broad law (especially an initiative of the people) like the public records act to make it subservient to a narrow law."[86] Significant to the dissenters was a key provision of the PDA: "In the event of conflict between the provisions of this act and any other act, the provisions of this act shall govern."[87] In sum, the dissent faulted the majority for narrowly construing terms of the PDA to avoid disclosure obligations and for avoiding the liberal construction and conflict provisions of the PDA to deny delivery of public records.

IV. Freedom of Political Speech

The court over the last two years was asked to decide whether a Washington statute granting the Washington's Public Disclosure Commission authority to impose fines for untruthful statements about his or her political opponent was unconstitutional. The deeply divided court ruled that the law was an unlawful infringement upon the First Amendment's free speech clause. The court also was asked to decide whether talk radio hosts could be restricted from speaking in favor of an initiative while on the air. The court unanimously ruled that the hosts' on-air comments supporting the initiative were not subjected to speech restrictions under the Washington's Fair Campaign Practices Act.

A. Rickert v. State, Public Disclosure Com'n, 161 Wn.2d. 843 (2007)

As part of her campaign for the state senate in 2002, Marilou Rickert issued a brochure comparing her position on certain issues to those of the incumbent, Senator Tim Sheldon. In the brochure it stated that Mr. Sheldon had "voted to close a facility for the developmentally challenged in his district."[88] In response, Mr. Sheldon filed a complaint with the Public Disclosure Commission ("PDC") under RCW 42.17.530(1) which makes it illegal for a person to sponsor political advertisements which contain false statements of material fact about a candidate for office. The statute said that the person making the false statements must do so with "with knowledge of falsity or with reckless disregard as to the truth."[89]

At a hearing in 2003, the PDC found that, contrary to Ms. Rickert's brochure, Mr. Sheldon had not voted to close the facility and that it was not a facility for the mentally challenged.[90] The PDC subsequently imposed a $1,000 on Ms. Rickert. The fine was affirmed in superior court, but was reversed by the court of appeals which ruled that RCW 42.17.530(1)(a) violated the First Amendment.

In a 5-4 decision the supreme court affirmed the court of appeals' holding that the statute was unconstitutional on its face. The court said that "the first amendment has its fullest and most urgent application to speech uttered during a campaign for political office," and that "any statute that purports to regulate such speech based on its content is subject to strict scrutiny." Citing the landmark decision by the U.S. Supreme Court in *New York Times v. Sullivan*,[91] the court reasoned that the statute did not withstand such scrutiny for two reasons. The court first held that the protection of political candidates is not a compelling interest which would warrant such a law. The court went on to say that even if the protection of political candidates was a compelling interest, the statute would still fail because it did not require the complaining party to prove that the false statements were defamatory. The statute was therefore overly broad and potentially created liability for speech that was protected under the First Amendment. Justice Madsen, in her dissent, characterized the ruling as a blanket prohibition on government regulation of political speech.

B. San Juan County v. No New Gas Tax, 160 Wn.2d 141 (2007)

No New Gas Tax did not involve the issue of whether an initiative passed constitutional muster, but instead centered on whether talk radio hosts' can be restricted from commenting on an initiative's campaign during their shows.[92] In a unanimous 9-0 decision, the supreme court ruled that KVI radio hosts John Carlson's and Kirby Wilbur's on-air support for the anti-gas tax initiative did not run afoul of campaign finance laws.

Carlson and Wilbur began speaking out in favor of the initiative (I-912) that would have repealed a controversial 9.5-cents-a-gallon gas tax enacted by the Legislature. Wilbur and Carlson, two popular conservative talk-show hosts, opposed the new tax on their radio programs. Carlson and Wilbur spent considerable time during their morning and evening radio shows encouraging listeners to contribute to the campaign. They also urged their listeners to sign and circulate the initiative so that it qualified for the ballot. Although supporters of the initiative garnered enough signatures to qualify it for the fall election, I-912 was eventually defeated by the voters.

During the beginning stages of the I-912 campaign, the cities of Seattle, Kent, Auburn, and San Juan Island County filed a complaint against the No New Gas Tax ("NNGT") campaign. The local governments alleged that the NNGT campaign violated public disclosure provisions under Washington's Fair Campaign Practices Act ("FCPA").[93] Specifically, the municipalities alleged that the NNGT campaign failed to report in-kind contributions from Fisher Communications, the corporation that owns the radio station. According to the local governments, the NNGT campaign received free advertising from Carlson's and Wilbur's radio shows. Therefore, the municipalities sought an injunction to prevent the campaign from receiving further in-kind contributions until it reported the contributions to the Public Disclosure Commission—the state commission that oversees elections. The trial court granted the municipalities' preliminary injunction, ruling that the NNGT campaign received contributions of free air time for political advertising in support of I-912.[94] The trial court further ruled that the campaign was required to disclose the value of Carlson's and Wilbur's on-air contributions to the Public Disclosure Commission.

The NNGT campaign appealed the ruling and filed an emergency stay, arguing that the injunction would limit the radio hosts' ability to speak about the initiative. According to Fisher Communications' vice-president, since Washington law limits in-kind contributions to $5,000 three weeks prior to the election, the practical effect of the ruling was that the hosts would no longer be able to speak about the initiative on the air. The radio feared that allowing the hosts to continue to speak about the I-912 campaign would subject the radio station to prosecution for violating campaign finance laws.

The NNGT campaign proceeded to file 14 counterclaims against the prosecutors, alleging violations of the campaign officials' civil rights. The trial court dismissed the counterclaims. In its ruling, the trial court found: that Carlson and Wilbur were principals of the NNGT campaign; that the hosts intentionally promoted the campaign on the air; and that the on-air discussion of I-912 had value to the NNGT campaign similar to advertising that could be purchased off the air. According to the trial court, forcing the radio show hosts to report the value of their discussions would not "in any way" restrict their on-air speech.

In a unanimous decision, the Washington Supreme Court reversed the trial court. The court ruled that Wilbur's and Carlson's on-air discussion of I-912 was protected speech. In a concurring opinion, Justice Jim Johnson—joined by Justice Richard Sanders—rebuked the local governments for bringing the lawsuit. The concurring justices noted that "[t]oday we are confronted with an example of abusive prosecution by several local governments."[95] The concurring opinion further argued that the real purpose of the lawsuit was to "restrict[] or silenc[e] political opponents."[96] The justices further explained that the injunction granted by the trial court was a "chilling of speech" because of the substantial risk that the radio hosts' continued commentary would lead to excessive financial sanctions and potential prosecution. The justices ended their analysis by pointedly admonishing the prosecutors for bringing the lawsuit. According to the justices, the lawsuit appeared as a calculated way to "muzzle media support of the NNGT initiative" and "was offensive to the notion of free and open debate." [97] Thus, according to the justices, the NNGT campaign was entitled to attorneys' fees on remand.

C. Voters Education Committee v. Public Disclosure Commission, 161 Wn.2d 470 (2007)

At issue in *Voters Education Committee v. Public Disclosure Commission* was constitutionality of political speech requirements and an enforcement action brought against an organization for failing to register as a political action committee and disclose information about contributors and expenditures.[98] The U.S. Chamber of Commerce funded television ads by the Voters Education Committee (VEC) critical of then-Attorney General candidate Deborah Senn for actions she made while serving as State Insurance Commissioner. The ads repeated prior newspaper stories and did not ask or recommend viewers vote for either Senn or her opponent. On freedom of speech grounds, the VEC challenged the Public Disclosure Commission's (PDC) ruling that the VEC failed to properly register and disclose required information.

In a 7-2 majority opinion written by Justice Mary Fairhurst and joined by Chief Justice Gerry Alexander and Justices Charles Johnson, Barbara Madsen, Bobbe Bridge, Tom Chambers, and Susan Owens, the court upheld the challenged provisions of the Fair Campaign Practices Act ("FCPA")[99] and the PDC's enforcement of them. The majority affirmed that the VEC met the statute's definition of a "political committee," thereby triggering the registration and reporting requirements of the FCPA. The majority concluded that the FCPA's definition of a "political committee" as "any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot provision"[100] was *not* unconstitutionally vague. According to the majority, the wording was precise enough for a person of ordinary intelligence to have a reasonable opportunity to understand. Significantly, the majority asserted that "[a]rticle I, section 5 of the Washington Constitution does not provide greater protection against disclosure requirements than the first amendment to the United States Constitution."[101] The majority observed the Washington Constitution's categorical prohibition of prior restraints, but concluded that the FCPA does not rise to the level of prior restraint. Moreover, the majority asserted that VEC failed to show how the disclosure requirements prohibited its own speech.

A dissenting opinion was filed by Justice James Johnson, joined by Justice Richard Sanders. The dissent argued that "[e]ven disclosure requirements, if applied to political speech, must utilize a bright line test that can be clearly understood and may not be subjectively interpreted by state enforcers."[102] According to the dissent, the FCPA provision at issue was unconstitutionally vague because its "support or oppose" language was not "sharply drawn" as required under a 2000 decision of the Washington Supreme Court.[103] In the dissent's view, a bright-line test distinguishing express advocacy from issue advocacy is constitutionally required. It asserted that the discretionary power given to the PDC to enforce that provision of the FCPA through post-speech agency decisions has a chilling effect on protected political speech. The dissent declared that the Washington State Constitution provides more protection to political speech than the federal constitution. Although acknowledging that disclosure requirements are the least

restrictive alternative to limiting such speech, the dissent concluded the discretion given to an agency under the statute rendered it unconstitutional under article I, section 5. The dissent argued that anonymous political speech is sometimes necessary and that the majority's decision will hamper the voicing of unpopular political opinions.

V. Private Property Rights

A. Public Utility Dist. No. 2 of Grant Co. v. North American Foreign Trade Zone Indus., LLC, 159 Wn.2d 555 (2007)

In this case the Washington Supreme Court issued its most recent decision concerning government exercise of eminent domain power.[104] The Public Utility District No. 2 of Grant County ("PUD") condemned a private company's land upon which it operated twenty diesel generators after failing to negotiate a purchase of the property. A week prior to the PUD's meeting, an agenda posted and sent to media did not specify the specific parcel of land considered for condemnation, nor identify its owners. No notice was sent to the property owners. The property owners later alleged that the PUD failed to provide proper statutory notice, and that such notice was a jurisdictional requirement. While the property owner's motion to dismiss was pending, the PUD adopted a new and more detailed resolution, ratifying the earlier resolution. Actual notice about the new resolution to be considered at a PUD meeting was given to the property owners. The trial court ultimately held the PUD's subsequent resolution retroactively cured the defective notice. It also found the PUD had a reasonable basis for declaring a public use and necessity to condemn the property

Justice Mary Fairhurst wrote the opinion for the court's 5-4 majority, which also included Justices Charles Johnson, Susan Owens, Barbara Madsen, and Bobbe Bridge. The majority concluded that the PUD fulfilled its statutory requirements to initiate the condemnation, and that substantial evidence supported the trial court's public use and necessity determination. The burden of proof that the notice of a public hearing to authorize a condemnation was defective rests with the challenger and not the condemning agency, asserted the majority. The majority also insisted that because the notice for the public hearing was to the public, the statutes did not require the parcel of land considered for condemnation be identified or that the property owner be identified. It cited to the court's most recent condemnation notice case as authority for its position.[105] Also, the majority thought it sufficient that the earlier resolution identified the property and its owners, even if the agenda did not. Moreover, the majority argued that because a condemnation may or may not go forward after a resolution is adopted and because landowner rights are protected in the judicial hearing in which the condemnation occurs, there is no constitutional right to individual notice for the public hearing.

The majority also affirmed the trial court's public use and public necessity determinations in support of the condemnation action. It cited case law supporting the proposition that condemnation of private property by public utilities to generate power is a public use. Moreover, the majority cited its previous eminent domain case on public necessity determinations for the proposition that "[a] determination of necessity is a legislative question."[106] Such determinations, held the majority, need only be supported if reasonably necessary under the circumstances and are therefore conclusive absent fraud or constructive fraud. While noting the PUD's decision to install the generators was at least partially motivated to maximize profits in energy sales, it asserted that the record also suggested the generators were purchased in light of a real energy crisis with intent to protect its customers. The majority concluded that the findings of the trial court were supported by substantial evidence in the light most favorable to the property owners.

Three separate dissents were filed. Chief Justice Gerry Alexander's dissent insisted that the PUD's resolution finding a "public necessity" to condemn the property "directly and adversely" affected the owner's interest in the property, thereby triggering constitutional due process requirements. The Chief Justice analyzed the PUD's actions under the circumstances using a balancing test weighing the interests of the State and the owner's interest sought to be protected by the Fourteenth Amendment's due process clause. The

Chief Justice observed that the initial notice given by the PUD as "minimal," that "the notice was not sent to the affected property owners,"[107] and that the notice was posted, transmitted to local media and given to any interested party who requested it. Concluding that the PUD's method of notice was not "reasonably calculated" to inform the property owners, the Chief Justice argued that its actions violated constitutional due process.

Justice Tom Chambers' dissent focused solely upon statutory notice requirements, insisting no constitutional questions were raised or argued by the parties. Because the agenda neither identified the property owners nor the property to be condemned, Justice Chambers concluded the notice did not fairly apprise those who might be affected so that they could prepare to meaningfully debate the proposed ordinance in a public forum. Adequate notice, argued Justice Chambers, is particularly important where such a legislative action is likely to be deemed conclusive concerning public necessity.

Justice James Johnson, joined by Justice Richard Sanders, filed the lengthiest dissent. Reiterating the position he staked out in an earlier eminent domain case involving public notice,[108] Justice Johnson argued that because eminent domain power derogates from the people's rights, condemning agencies have the burden of proving that they complied with notice requirements. Justice Johnson insisted that agencies must comply with internal procedures adopted pursuant to statutory requirements. Because eminent domain affect constitutional property rights, Justice Johnson argued that effective notice requires the agenda "'fairly apprise a reasonable person of the actual land under consideration for condemnation.'"[109] Moreover, Justice Johnson rejected the PUD's claim that a subsequent resolution retroactively ratified the earlier, notice-deficient resolution declaring a "public necessity" for the condemnation.

Justice Johnson went further than the other two dissents by rejecting the majority's conclusion that the PUD condemned the property at issue with a public purpose. Rather, Justice Johnson insisted Washington Constitution Article I, Section 3's protections against taking of property without due process "requires genuine public notice, which identifies the particular parcels of property to be considered for condemnation. Due process also prohibits retroactive ratification of a defective notice."[110] In addition, article I, section 16's declaration that private property only be taken for "public use" (and that "public use" shall be a judicial question without resort to the legislature's judgment) is not satisfied by the majority's proffered standard that agency determinations are conclusive in the absence of actual fraud or (arbitrary and capricious conduct amounting to) constructive fraud. Reiterating a position he argued in a dissenting opinion from another prior eminent domain case, Justice Johnson insisted that "public necessity" decisions are also part of the "public use" inquiry. According to Justice Johnson, the court should likewise review "public necessity" determinations made by condemning agencies with same level of scrutiny that they examine "public use" determinations.

Justice Johnson argued that mere economic benefit to the PUD was not a sufficient public purpose justifying condemnation under article I, section 16. Additionally, Justice Johnson concluded that the "PUD's dilemma was a direct, bargained-for consequence of its short-term lease agreement with [the North American Foreign Trade Zone Industry, LLC]."[111] Significantly, Justice Johnson referenced the "harshly criticized" U.S. Supreme Court holding in *Kelo v. City of New London*,[112] which held that mere "economic development" could be a "public use" under the federal constitution. Justice Johnson asserted that "Washington Article I, Section 16 offers stronger protections of private property rights and more stringent procedural restrictions on the exercise of eminent domain power."[113] Finally, Justice Johnson also insisted that due process requirements of article I, section 3 demand clear written findings be entered by a trial court. The entering of such findings, concluded Justice Johnson, generates a record for meaningful judicial review to protect individuals' rights to keep and own property.

B. City of Pasco v. Shaw, 161 Wn.2d 450 (2007)

In *City of Pasco v. Shaw*, a 7-2 majority of the Washington Supreme Court upheld a city ordinance requiring landlords to submit certification every two years to city officials, ensuring that their units met applicable health, safety, and building code

requirements.[114] Justice Bobbe Bridge wrote the opinion for the majority, joined by Justices Charles Johnson, Barbara Madsen, Susan Owens and Mary Fairhurst. The landlords and tenants argued that the warrantless inspections required by the ordinance were forbidden by the Washington Constitution's Article I, Section 7's requirement that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law," and by the Fourth Amendment to the federal constitution. But the court's majority rejected those challenges, as well as a void-for-vagueness challenge.

Although acknowledging that "[a]rticle I, section 7 bestows upon Washington citizens protections that are 'qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment,'"[115] the majority declined to find any such extra protections of the Washington Constitution applicable to the case. The reasoning of the majority opinion rested on the standard that "[i]t is the party asserting the unconstitutionality of an action that bears the burden of establishing that state action is involved."[116]

The majority maintained that because the ordinance gave landlords the option to obtain inspection by private inspectors, no state action was involved to trigger article I, section 7 or Fourth Amendment protections. Wrote Justice Bridge, "under the Pasco ordinance a landlord can engage *private* inspectors in order to further the *private* objection of obtaining a certification needed to maintain a business license."[117] "If a private inspector finds code violations," continued Justice Bridge, "the ordinance does not require the inspector to turn his or her findings over to the city."[118] The majority pointed to the Residential Landlord-Tenant Act of 1973 ("RLTA"), and its provisions barring tenants from unreasonably withholding consent to the landlord to enter into the rental unit in order to inspect the premises and to allow some third parties to accompany the landlord upon entrance. She contended that the ordinance at issue does not exceed what is already allowed by RLTA. Reiterating the presumption "that ordinances are constitutional and the party challenging the ordinance must prove vagueness beyond a reasonable doubt,"[119] the majority also sustained the ordinance against a void-for-vagueness challenge.

In a concurring opinion, Justice Tom Chambers—joined by Chief Justice Gerry Alexander—expressed agreement with the majority's result but issued a few notes of caution. Justice Chambers observed that the ordinance potentially invades the privacy interests of landlords and tenants. However, he maintained that "[h]ousing is a heavily regulated industry,"[120] and that in such heavily regulated industries "our state may create a reduced expectation of privacy."[121] Justice Chambers concluded that the ordinance in question was written with recent Washington case law in mind, but warned that "if and when inspections go beyond reasonable expectations for housing code violations, the complexion of this controversy will change."[122]

Justice Richard Sanders dissented, joined by Justice James Johnson. The dissent asserted that the warrantless searches were triggered by state action, and thereby violated article I, section 7 of the Washington Constitution. Citing prior case law, the dissent insisted that state action existed if the City either "'instigated, encouraged, counseled, directed, or controlled' private conduct."[123] State action existed under the ordinance because the City "instigates and encourages the searches, dictates their scope, and examines their fruits," "rigidly lays out who can perform the inspections and the specific scope of the inspection," and also "requires a landlord to select an inspector that is either directly employed or specifically approved by the city."[124]

Contrary to the majority, the dissent argued there was no "private" objective of the landlord in carrying out the inspection to obtain a business license because the licensing requirement was government-mandated. Rather, the inspections furthered the city's ends in obtaining compliance with health and safety codes. Finally, the dissent found significant the possibility that evidence seen in plain sight suggesting a criminal violation by the tenant could be used to support issuance of a criminal search warrant and future prosecution.

C. State v. Vander Houwen, 163 Wn.2d 25 (2008)

In *State v. Vander Houwen*, the Washington Supreme Court reaffirmed that a person may reasonably protect their property against damage from wildlife, reversing an orchard owner's conviction on two counts of second-degree unlawful hunting of elk that damaged his orchards.[125] Justice James Johnson wrote the opinion for the majority, which included Chief Justice Gerry

Alexander, and Justices Susan Owens, Charles Johnson, Richard Sanders, and Bobbe Bridge.

Elk repeatedly caused damage to Vander Houwen's orchard between 1998 and 2000, sustaining losses over $250,000. Elk repeatedly came through inadequate fences constructed by the Department of Fish and Wildlife ("F&W") to his orchard. Vander Houwen personally rebuilt F&W's fences, and used feeding hay to try to deter the elk. Despite receiving several requests for help and warnings he would shoot elk to protect his property, F&W did nothing to address the problem. F&W later discovered ten dead elk on Vander Houwen's orchard. Vander Houwen admitted shooting at the elk, and was charged with ten counts of waste of wildlife and ten counts of killing game out of season.

Defense counsel asked the trial court to give the jury instructions based on a 1921 case, *State v. Burk*.[126] Burk held that "[it] may be justly said that one who kills an elk in defense of himself or his property, if such a killing was reasonably necessary for such purpose, is not guilty of violating the law."[127] But the trial court rejected defense counsel's proposed jury instructions in favor of a "necessity" instruction that requires a defendant prove by a preponderance of the evidence that the act of self defense was necessary. Vander Houwen was only convicted on two counts of killing game out of season. He appealed his conviction, however, on the ground that he had a right to defend his property under the Washington Constitution's Article I, Section 3 due process clause.

The majority noted that while *Burk*'s "reasonably necessary" standard for protection of property remains a constitutional right, what may constitute "reasonably necessary" may include considerations not apparent when *Burk* was decided. The Fish and Wildlife Code of Washington, chapter 77.36 RCW, acknowledged the majority, includes various provisions seeking to address conflicts between humans and wildlife. But the majority concluded that the Wildlife Code "does not abrogate a property owner's constitutional right to protect his property from destructive game."[128] The majority noted that a 1937 case, *Cook v. State*,[129] recognized the "reasonably necessary" standard for protection of property was not merely a common-law right, but a constitutional due process right. According to the majority, "[a] property owner need not demonstrate exhaustion of every remedy, but a fact finder may take into consideration the measures provided by the wildlife code and the Department when determining what is 'reasonably necessary.'"[130] The majority concluded that the facts of the case "render[ed] it likely that it was 'reasonably necessary' for Vander Houwen to exercise his constitutional right to defend his property."[131] Moreover, the majority insisted that landowners such as Vander Houwen should not be compelled to forego their right to defend their property by a state-run, capped compensatory scheme for wildlife damage that not provide adequate relief. The majority held that the "necessity" instruction used by the trial court did not adequately protect Vander Houwen's constitutional right. While noting that turn-of-the-century due process rules put the burden of persuasion on the defendant, modern due process rules require the prosecution shoulder the burden. Once a charged property owner "presents evidence to support a justification instruction for protection of property, the burden of persuasion to prove beyond a reasonable doubt the absence of this justification shifts to the State."[132]

A concurring opinion was authored by Justice Tom Chambers and joined by Justices Mary Fairhurst and Barbara Madsen. The concurrence agreed that landowners have a right to defend their property against wild game. Contrary to the majority, however, the concurrence argued that "[t]he burden is properly on the property owner to demonstrate that the killing of an animal was necessary."[133] The concurrence took exception to the majority's assumption that the defense of property from wild animals is similar to self-defense against murder. According to the concurrence, defenses such as self-defense against murder negate the intent element of the crime. The necessity defense, it argued, does not negate any element of unlawful hunting or waste of wildlife under statute. The concurrence concluded that Vander Houwen's jury should have been instructed that animals may be killed if necessary to protect property, but that such instruction should not shift the burden to the prosecution.

VI. The Right to Earn a Living

The Washington Supreme Court has recently decided cases concerning an individual's right to earn a

living. The two cases below address the right of a person to pursue a lawful calling and the extent to which that right is protected.[134]

A. Amunrud v. Board of Appeals, 158 Wn.2d 208 (2006)

At issue in *Amunrud v. Board of Appeals* was an administrative agency's suspension of a taxi driver's commercial driver's license under a Washington law for non-payment of child support.[135] In order to receive a federal block grant and federal money for certain family social services, the Legislature enacted RCW 74.20A.320. The statute allows the Department of Social and Health Services ("DSHS") to establish a program for suspending certain licenses where the responsible parent is six months or more in arrears on child support payments. Amunrud, a taxi cab driver behind on his child support payments, challenged an administrative Board of Appeals' suspension of his commercial driver's license on the due process grounds. He argued that the process of suspension denied him a meaningful opportunity to be heard, and that revocation for non-payment of child support obligations was not logically related to road safety—thereby infringing his right to earn a living.

In an 6-3 majority opinion written by Justice Barbara Madsen—joined by Chief Justice Gerry Alexander and Justices Charles Johnson, Bobbe Bridge, Susan Owens, and Mary Fairhurst—the Washington Supreme Court rejected Amunrud's claims. Addressing Amunrud's procedural due process claims, the majority asserted that the statute at issue provides a person with opportunity for an administrative hearing to challenge the license suspension, and that it likewise provides the right to appeal the suspension. The majority dismissed Amunrud's claim that he was denied a "meaningful" hearing because the Board of Appeals did not consider his unusual financial circumstances in suspending his license. According to the majority, Amunrud failed to challenge a (pre-suspension) superior court decision that increased his child support obligations, and could always file a motion to modify that decision with the court.

The majority also examined the right to earn a living (or pursue an occupation) under federal and state constitutional law. According to the majority, the right to earn a living is *not* a fundamental right, since "courts have repeatedly held that the right to employment is a protected interest subject to rational basis review."[136] As the majority observed, "[t]he rational basis test is the most relaxed of judicial scrutiny."[137] It therefore concluded that to sustain the suspension, the government need only show that such suspension bears a rational relationship to the State's enforcement of child support orders. The majority held that it was reasonable for the legislature to believe its license suspension scheme provides incentive to parents to make their payments. It also held:

> the legislature could reasonably conclude that if an individual wishes to continue to receive the financial benefit that flows from possessing a professional or occupational license granted by the State, that individual must not be permitted to burden the State by shifting the financial obligation to support his or her children to the taxpayers.[138]

The majority rejected the dissent's argument that rational basis scrutiny in this case required the court to also determine whether the license suspension program is "unduly oppressive on individuals."[139] In addition, the majority dismissed as mistaken the dissent's claims that the right to earn a living is a fundamental right deserving a higher standard of protection. It argued that the dissent's approach "would require us to overturn nearly 100 years of case law in Washington,"[140] and that a return to turn-of-the-century economic jurisprudence would "strip individuals of the many rights and protections that have been achieved through the political process."[141]

Justice Richard Sanders wrote the dissenting opinion, joined by Justices James Johnson and Tom Chambers. Citing a string of prior Washington Supreme court rulings, the dissent insisted that laws or regulations that satisfy due process must be (1) aimed at a legitimate public purpose, (2) use means reasonably necessary to achieve that purpose, and (3) not be unduly oppressive on individuals.[142] The dissent insisted that the legitimate end of licensing drivers to promote road safety doesn't justify the means of suspending licenses to deter delinquency in child support. According to the dissent, without a necessary connection between the ground for suspension and the purpose of the license, "the State could simply license

every human endeavor (shoeshine boys?) simply to deter anyone from undesirable conduct of any nature through the threat of license revocation."[143]

The dissent insisted that there is a fundament right to pursue an occupation free from unreasonable governmental interference, and that Washington law recognizes a fundamental right to "carry on business."[144] Laws or regulations burdening that right must therefore be subject to strict scrutiny, being supported by a compelling interest and narrowly tailored to serve that interest. According to the dissent, this standard was not met by the government. In particular, the dissent noted that other historic methods of collecting child support—i.e., garnishment, civil liability, execution, property liens, contempt of court, prosecution under federal laws—offered less intrusive but more effective ways to meet the state's goals. The dissent also noted the irony that burdening a person's ability to earn a living terminates his ability to pay child support.

B. Ventenbergs v. City of Seattle, 163 Wn.2d 92 (2008)

In *Ventenbergs v. City of Seattle*, the court heard a constitutional challenge to a City of Seattle ordinance making it unlawful for all companies, except two large corporations, to collect and haul construction, demolition and land-clearing waste (CDL waste).[145] Josef Ventenbergs—a small business owner of a CDL waste-removal company—sued Seattle arguing that the ordinance violated the Washington Constitution's "privileges and immunities clause." Art. I, section 12 states that "no law shall be passed granting to any citizen, class of citizens, or corporation . . . privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Ventenbergs argued that by allowing only two large corporations—Rabanco and Waste Management—the right to haul CDL waste, Seattle was granting those corporations privileges unavailable to all other corporations.

Justice Bobbe Bridge authored the majority 6-3 opinion. Justices Mary Fairhurst, Charles Johnson, Susan Owens, Barbara Madsen, and Tom Chambers joined the decision. According to the majority, Seattle had authority under its police powers to contract with only two corporations and therefore did not infringe upon the constitutional rights of small business owners who were not conferred the same rights. Justice Richard Sanders, joined by Chief Justice Gerry Alexander and Jim Johnson, wrote a lengthy dissent discussing the history behind the framer's insertion of article I, section 12 into the constitution. According to the dissent, the constitution "on its face" provides an absolute guaranty of protection from the government conferring a privilege to one class of citizens while denying others the same privilege.

The dissent further noted that the framers inserted the clause to prevent "economic favoritism" in the granting of privileges to favored corporations by the government. The dissent argued that Seattle's ordinance did just that—it handed out favors to Rabanco and Waste Management while denying those same fundamental rights to other companies. According to the dissent, evidence of such favoritism occurred when Rabanco contacted Seattle officials to complain that its profits were being reduced by approximately 40 percent due to other "unlicensed" haulers. In response, Seattle enacted an ordinance making it unlawful for any other companies, besides Rabanco and Waste Management, to haul CDL waste.

Endnotes

1 David K. DeWolf, Andrew C. Cook, & Seth L. Cooper, *The Washington Supreme Court: A Special Issue Report*, The Fed. Soc. for Law & Pub. Pol. Studies (September, 2006).

2 *Id*. at 1.

3 *Id*.

4 In fairness, it must be recognized that the court has issued many other opinions that addressed issues more technical in nature, and consequently this report focuses on a narrow band of cases that address the more controversial and contested items on the court's docket. Because this Report focuses on the extent to which the court has remained faithful to its constitutional responsibilities, the selection of cases is necessarily limited.

5 *See also* Jeffrey T. Even, *Direct Democracy: Initiative and Referendum*, 32 Gonz. L. Rev. 247 (1996-97).

6 Wash. Const. art. II, § 1(a) & (b).

7 Wash. Const. art. II, § 1.

8 Kristen L. Fraser, *Method, Procedure, Means, and Manner: Washington's Law of Law-Making*, 39 Gonz. L. Rev. 447 (2003-04).

9 Wash. ex. rel. Wash. State Pub. Disclosure Com'n v. Wash. Educ. Ass'n, 156 Wn.2d 543, 130 P.3d 352 (2006).

10 RCW 41.59.100.

11 156 Wn.2d at 550.

12 State ex rel. Wash. State Pub. Disclosure Com'n v. Wash. Educ. Ass'n, 117 Wn.App. 244 (2003).

13 Davenport v. Wash. Educ. Ass'n, 156 Wn.2d 543, 130 P.3d 352 (2006).

14 *Id*. at 571 (Sanders, J., dissenting).

15 *Id.*

16 *Id*. at 573.

17 Davenport v. Wash. Educ. Ass'n., __ U.S. __, 127 S.Ct. 2372, 2378 (2007).

18 *Id*. at 2379.

19 *Id.* at 2381 (*quoting* R.A.V. v. St. Paul, 505 U.S. 377, 390, 112 S.Ct. 377 (1992)).

20 127 S.Ct. at 2383 (Breyer, J. concurring).

21 Wash. Citizens Action of Wash. v. State, 162 Wn.2d 142, 171 P.3d 486 (2007). In some taxing districts, I-747 would have limited property tax collections at the lesser of 1% or the rate of inflation.

22 162 Wn.2d at 149.

23 Voters' Pamphlet, *supra* note 3, at 4.

24 City of Burien v. Kiga, 144 Wn.2d 819, 31 P.3d 659 (2001).

25 Wash. Const. art. II, § 19 ("No bill shall embrace more than one subject, and that shall be expressed in the title").

26 Justice Bridge retired in December, one year before her six-year term ended. Bridge was replaced by Debra Stephens, who was appointed by Governor Christine Gregoire.

27 Justices Mary Fairhurst and Jim Johnson recused themselves. Justice Jim Johnson, prior to being elected to the court, represented the proponents of I-747 and drafted the initiative's text.

28 162 Wn.2d at 145.

29 *Id*.

30 *Id*.

31 *Id*.

32 *Id*. at 155 (citations omitted).

33 *Id*.

34 *Id*. at 163 (C. Johnson, J., dissenting).

35 *Id*. (*citing* Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 245, 11 P.3d 762 (2000) *and* Citizens for Responsible Wildlife Mgmt. v. State, 149 Wn.2d 622, 642, 71 P.3d 644 (2003)).

36 Wash. Citizens Action of Wash. v. State, 162 Wn.2d at 163.

37 *Id*. at 163-64.

38 *Id*. at 164.

39 *Id*.

40 *Id*.

41 *Id*.

42 *Id*.

43 Ralph Thomas & Andrew Garber, *Shouting, Name-Calling as Lawmakers Cap Property Taxes*, The Seattle Times, Nov. 30, 2007, *available at* http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=session30m&date=20071130&query=Initiative+747.

44 *Id*. (The House of Representatives voted 86-8 voted in favor of reinstating the 1% property tax limit; the Senate voted 39-9.)

45 1000 Friends of Washington v. McFarland, 159 Wn.2d 165, 149 P.3d 616 (2006)

46 Super Valu, Inc. v. Dep't of Labor and Industries of the State of Wash., 158 Wn.2d 422, 144 P.3d 1160 (2008).

47 RCW 49.17.360.

48 WAC 296-62-05101 through -05176, adopted May 26, 2000.

49 Amalgamated Trasnit Union Local 587 v. State, 142 Wn.2d 183, 205, 11 P.3d 762, 780 (2001).

50 Wash. State Farm Bureau Federation v. Gregoire, 162 Wn.2d 284, 174 P.3d 1142 (2007)

51 162 Wn.2d at 290, 174 P.3d at 1145. "[T]he legislature's power to enact a statute is unrestrained except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions." State ex rel. Citizens v. Murphy, 151 Wn.2d 226, 248, 88 P.3d 375, 386 (2004).

52 162 Wn.2d at 291, 174 P.3d at 1145.

53 *Id.* at 309 (Sanders, J., concurring).

54 *Id.* at 314 (Chambers, J., concurring).

55 *Id.* at 320 (Chambers, J., concurring).

56 Ball-Foster Glass Container Co. v. Giovanelli, 163 Wn.2d 133, 177 P.3d 692 (2008).

57 Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 164 P.3d 454 (2007).

58 161 Wn.2d at 57.

59 161 Wn.2d at 76.

60 *Id*. at 77.

61 *Id*. at 72.

62 RCW 49.46.

63 Stevens v. Brink's Home Security, Inc., 162 Wn.2d 42, 169 P.3d 473 (2007).

64 Brink's did, however, implement program that paid employees if the drive time to the first jobsite from home or the last jobsite to home exceeded 45 minutes. Brink's also allowed its employees to drive their own vehicles to the company's headquarters to pick up the company's vans, and be paid for the drive to the jobsite and back to the company's headquarters.

65 Wash. Admin. Code § 296-126-002(8).

66 James Madison, Letter to William Taylor Berry (Aug. 4, 1822), in 9 The Writings of James Madison 103 (Gaillard Hunt ed., 1910).

67 Initiative 276 passed with 72 percent voting in favor of the initiative.

68 RCW 42.56.030.

69 At the time this paper went to press, the Washington Supreme Court issued another controversial decision limiting the right of the public to obtain public records. The court ruled in *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, __ Wn.2d __, 2008 WL 2929683 (2008) that school districts are not required to disclose public records containing the names of teachers who had unsubstantiated allegations of sexual misconduct against them. In a 6-3 decision, Justice Mary Fairhurst, joined by Chief Justice Gerry Alexander and Justices Tom Chambers, Susan Owens, Jim Johnson, and Bobbe Bridge ruled that releasing teachers' names would violate the Public Records Act's privacy exemption. Justice Barbara Madsen wrote a dissent, joined by Justices Richard Sanders and Charles Johnson arguing that the records did not fall under the privacy exclusion.

70 Hangartner v. City of Seattle 151 Wn.2d 439, 90 P.3d 26 (2004).

71 Lindeman v. Kelso School District No. 458, 162 Wn.2d 196, 172 P.3d 329 (2007).

72 Former RCW 42.17.310(1)(a), *amended and recodified as* RCW 42.56.230(1).

73 162 Wn.2d at 202.

74 *Id*. at 203.

75 *Id*. at 204-205 (Sanders, J., concurring) (*citing* Dawson v. Daly, 120 Wn.2d 782, 796-799, 845 P.2d 995 (1993)).

76 *Id.* at 207 (Fairhurst, J., dissenting in part).

77 Soter v. Cowles Publishing Co., 131 Wn.App. 882, 130 P.3d 840 (2006).

78 Limstrom v. Ladenburg 136 Wn.2d 595, 963 P.3d 869 (1998).

79 Livingston v. Cedeno, ___ Wn.2d ___, 186 P.3d 1055 (2008).

80 Livingston v. Cedeno 135 Wn.App. 976, 980, 146 P.3d 1220 (2006).

81 ___ Wn.2d ___, 2008 WL 2612028 at, *5.

82 *Id*. at *2.

83 *Id*. at *3.

84 *Id*. at *5 (J.M. Johnson, J, dissenting).

85 *Id.* at *6 (J.M. Johnson, J., dissenting).

86 *Id*. at *6 (J.M. Johnson, J., dissenting).

87 *Id*. at *6, (J.M. Johnson, J., dissenting (quoting RCW 42.17.920)).

88 Rickert v. State, Pub. Disclosure Com'n, 161 Wn.2d. 843, 846, 168 P.3d 826 (2007)

89 RCW 42.17.020(1).

90 161 Wn.2d at 847.

91 376 U.S. 254, 84 S.Ct. 710 (1964).

92 San Juan County v. No New Gas Tax, 160 Wn.2d 141, 157 P.3d 831 (2007).

93 RCW 42.17.

94 160 Wn.2d at 141.

95 *Id*. at 166.

96 *Id*.

97 *Id*. at 172.

98 Voters Educ. Comm. v. Pub. Disclosure Comm'n 161 Wn.2d 470, 166 P.3d 1174 (2007).

99 The FCPA was enacted pursuant to the citizens of Washington passing Initiative 276 in 1992.

100 *Former* RCW 42.17.020(33), *amended by* Laws of 2005, ch. 445 § 6 (*codified in* RCW 42.17.020).

101 161 Wn.2d at 475, 166 P.3d at 1177.

102 *Id*. at 498 (J.M. Johnson, J., dissenting).

103 *See* Wash. State Republican Party v. Wash. State Pub. Disclosure Com'n, 141 Wn.2d 245, 266 (2000).

104 Public Utility Dist. No. 2 of Grant Co. v. North American Foreign Trade Zone Indus., *LLC*, 159 Wn.2d 555, 151 P.3d 176 (2007). While announcement of its decision in the case was pending, in December of 2006 the court declined to revisit its eminent domain jurisprudence by denying review of an unpublished court of appeals ruling that implicated constitutional public purpose requirements. *See* City of Burien v. Strobel Family Investments, 2006 WL 1587655, *review denied*, 149 P.3d 378 (2006).

105 *See* Central Puget Sound Regional Transit Auth. v. Miller, 156 Wn.2d 403, 416, 128 P.3d 588 (2006).

106 161 Wn.2d at 575 (*citing* In re Petition of Seattle Popular Monorail Auth, 155 Wn.2d 612, 629, 121 P.3d 1166 (2005)).

107 *Id*. at 589 (Alexander, C.J., dissenting).

108 156 Wn.2d at 426 (2006) (J.M. Johnson, J., dissenting).

109 159 Wn.2d at 600 (J.M. Johnson, J., dissenting) (*quoting* 156 Wn.2d at 434 (J.M. Johnson, J., dissenting)).

110 *Id*. at 596 (J.M. Johnson, J., dissenting).

111 *Id*. at 605 (J.M. Johnson, J., dissenting).

112 545 U.S. 469, 125 S.Ct. 2655 (2005).

113 159 Wn.2d at 605 (J.M. Johnson, J., dissenting).

114 City of Pasco v. Shaw, 161 Wn.2d 450, 166 P.3d 1157 (2007).

115 161 Wn.2d 450, 458 (*quoting* City of Seattle v. McCready, 123 Wn.2d 260, 267, 868 P.2d 134 (1994)).

116 *Id*. at 460 (cites omitted).

117 *Id*. at 460 (emphasis in original).

118 *Id*. at 460.

119 *Id*. at 462 (*citing* City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988).

120 *Id*. at 464 (Chambers, J., concurring).

121 *Id*. at 465 (Chambers, J., concurring).

122 *Id*. at 466 (Chambers, J., concurring).

123 *Id*. at 468 (Sanders, J., dissenting) (*quoting* State v. Wolken, 103 Wn.2d 823, 830, 700 P.2d 319 (1985)(internal cite omitted)).

124 *Id*. at 468 (Sanders, J., dissenting).

125 State v. Vander Houwen, 163 Wn.2d 25, 177 P.3d 93 (2008).

126 114 Wash. 370, 195 P. 16 (1921).

127 114 Wash. at 376.

128 163 Wn.2d at 29.

129 192 Wn. 602, 74 P.2d 199 (1937).

130 163 Wn.2d at 35.

131 *Id*.

132 *Id*.

133 *Id*. at 40 (Chambers, J., concurring).

134 For a related occupational licensing case not discussed here, *see* Ongom v. State, Dept. of Health, Office of Professional Standards, 159 Wn.2d 132, 148 P.3d 1029 (2006), *cert. denied,* 127 S.Ct. 2115 (2007).

135 Amunrud v. Board of Appeals, 158 Wn.2d 208, 143 P.3d 571 (2006).

136 158 Wn.2d at 220. Court decisions from Washington State cited by the majority, 158 Wn.2d at 221, include *Meyers v. Newpoert Consol. Joint Sch. Dist. No. 56-415*, 31 Wn.App. 145, 639 P.2d 853 (1982), and *In re Kindschi*, 52 Wn.2d 8, 319 P.2d 824 (1958).

137 158 Wn.2d at 223 (*citing* State v. Shawn P., 122 Wn.2d 553, 859 P.2d 1220 (1993)).

138 *Id*. at 227.

139 *Id*. at 226.

140 *Id*. at 227.

141 *Id*. at 230.

142 *Id.* at 231 (Sanders, J., dissenting) (cites omitted).

143 *Id.* at 232 (Sanders, J., dissenting).

144 *Id.* at 235 (Sanders, J., dissenting) (*citing* State v. Vance, 29 Wash. 435, 458, 70 P. 34 (1902); Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 813, 83 P.3d 419 (2004)).

145 Ventenbergs v. City of Seattle, 163 Wn.2d 92, 178 P.3d 960 (2008).

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