STATE OF WISCONSIN	CIRCUIT COURT BRANCH 1	GRANT COUNTY

THE JOHN K. MACIVER INSTITUTE
FOR PUBLIC POLICY, INC. and
BRIAN FRALEY,

Plaintiffs,

v.

Case No. 12 CV 063
Case Code: 30703

JON ERPENBACH,

Defendant.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

INTRODUCTION 1

FACTS 4

I. ACT 10 CAUSED UNPRECEDENTED PUBLIC REACTION, POLITICAL UNREST AND DEMONSTRATIONS. 4

II. IT IS A SENATE RULE OF PROCEEDING THAT EACH SENATOR SHOULD DECIDE WHETHER TO DISCLOSE CONSTITUENT PERSONAL INFORMATION. 6

III. DISCLOSURE OF CONSTITUENT PERSONAL INFORMATION WITH THE CONTENT OF THEIR COMMUNICATION WILL HAVE A CHILLING EFFECT ON CONSTITUENTS' CONSTITUTIONAL RIGHTS OF FREE SPEECH AND TO PETITION THEIR GOVERNMENT AND THEIR RIGHT OF PRIVACY. 8

ARGUMENT 11

I. SUMMARY JUDGMENT STANDARD. 11

II. THE CUSTOM AND PRACTICE OF THE SENATE OF ALLOWING SENATORS TO DECIDE WHETHER TO DISCLOSE CONSTITUENT PERSONAL INFORMATION WITH THE CONTENT OF THE COMMUNICATION IS A RULE OF PROCEEDING THAT TAKES PRECEDENCE OVER THE WPRL, MAKING THE ISSUES IN THIS CASE NON-JUSTICIABLE. 12

III. CONSTITUENT PERSONAL INFORMATION IS NOT A RECORD FOR PURPOSES OF THE WPRL. 18

IV. SENATOR ERPENBACH'S WIS. CONST. ART. IV § 16 SPEECH AND DEBATE PRIVILEGE CREATES AN EXCEPTION TO THE WPRL FOR CONSTITUENT PERSONAL INFORMATION. 22

V. THE PUBLIC POLICY IN FAVOR OF NONDISCLOSURE OF CONSTITUENT PERSONAL INFORMATION WITH THE CONTENT OF THE COMMUNICATION OUTWEIGHS THE WPRL'S POLICY OF DISCLOSURE. 25

A. General Legal Standards. 25

B. Application Of The Balancing Test Here Tips Decidedly In Favor Of Nondisclosure. 26

1. Protection Of Constituents' State And Federal Constitutional Rights To Free Speech And To Petition The Government Was Appropriately Considered By Senator Erpenbach In Performing The WPRL Balancing Test. 26

2. Protection Of Constituents' Right To Privacy In The Context Of The Time Was Appropriately Considered By Senator Erpenbach In Performing The WPRL Balancing Test. 29

3. The Constitutional And Privacy Rights Policies Favoring Nondisclosure Of Constituent Personal Information Outweigh The WPRL'S Policy Supporting Disclosure. 31

C. Deference To Senator Erpenbach's Application Of The Balancing Test And Decision To Redact Constituent Personal Information Is Warranted. 38

CONCLUSION 39

INTRODUCTION

"This case is an offshoot of the turbulent political times" that consumed Wisconsin in early 2011. *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶18, 334 Wis. 2d 70, 798 N.W.2d 436 (concurring opinion of Justice David T. Prosser). In early 2011, Wisconsin politics was the center of international news. At issue was a proposed budget repair bill "requiring additional public employee contributions for health care and pensions, [and] curtailing collective bargaining rights for most state and local public employees." *Id.* at ¶ 21 (concurring opinion). "Governor Walker's proposed legislation created controversy and division. In the weeks following introduction of the two identical 'budget repair bills,' the Wisconsin State Capitol was the center of demonstrations against the governor. The building was taken over by protesters." *Id.* at ¶ 27 (concurring opinion).

Democratic Senators, including Defendant Senator Jon Erpenbach, opposed stripping public employees of their collective bargaining rights. Affidavit of Senator Jon Erpenbach in Support of Motion for Summary Judgment ("Erpenbach Aff."), ¶ 14. On March 9, 2011, the Republican controlled Senate adopted a conference committee report, which the Assembly passed on March 10, 2011, and Governor Walker signed on March 11, 2011. *Fitzgerald*, 2011 WI at ¶ 29 (concurring opinion). The bill became 2011 Wis. Act 10 ("Act 10"). Lawsuits challenging the validity of Act 10 immediately followed, including a challenge to keep Act 10 from being published, which resulted in a Wisconsin Supreme Court decision on June 14, 2011. *Id.* at ¶¶ 1-6.

Senator Erpenbach's office was flooded with e-mail, telephone calls and other contacts—some supporting and some criticizing his opposition to Act 10 and its predecessor bills. Affidavit of Julie Laundrie in Support of Motion for Summary Judgment ("Laundrie Aff."), ¶¶ 7-8. Several of the contacts included threats of violence against Senator Erpenbach and his family.

Erpenbach Aff., ¶ 15, Exh. J and Laundrie Aff., ¶ 8, Exh. I. In fact, as many as 90 threats of violence against public officials were made between February 16 and March 25, 2011. *Id.* On March 24, 2011, less than two weeks after Governor Walker signed the bill that became Act 10, while lawsuits were pending concerning the validity of Act 10, and in the midst of investigations into the many threats of violence made against Senator Erpenbach, Plaintiffs Brian Fraley and The John K. MacIver Institute for Public Policy (collectively the "MacIver Institute") submitted the Wisconsin Public Records Law ("WPRL") request that is the subject of this lawsuit (the "Request"). Erpenbach Aff., ¶ 10 and Exh. G; Laundrie Aff., ¶ 2 and Exh. B.

The Request sought "[c]opies of all correspondence [Senator Erpenbach] received or sent, (including, but not limited to, letters, e-mails, voice mails, records of phone calls, and logs of in-person meetings) regarding the subject of changes to Wisconsin's collective bargaining laws for public employees" for the time period January 1 – March 23, 2011, including "communications specifically pertaining to 2011 SSSB11, 2011 SSAB11, and 2011 Wis. Act 10" (hereinafter referred to as "Constituent Communications"). Erpenbach Aff., ¶ 10 and Exh. G. On April 18, 2011, Senator Erpenbach produced 18,208 pages of Constituent Communications, and on November 13, 2011, Senator Erpenbach produced an additional 4,717 pages of Constituent Communications. Erpenbach Aff., ¶ 11 and Exh. H; Laundrie Aff., ¶¶ 5-7 and Exh. E, G.[1] While Senator Erpenbach produced the substance of the requested Constituent Communications, he redacted the last name, e-mail address, home or work address, telephone number, or other personally identifiable information ("Constituent Personal Information") and

[1] Pages often contained multiple "records" in the form of e-mails, records of office visits and telephone logs. Laundrie Aff., ¶¶ 5 and 7. In total approximately 25,000 records were produced. Laundrie Aff., ¶ 7.

detailed his rationale for doing so in written responses to the Request. Erpenbach Aff., ¶¶ 11-14 and Exh. I; Laundrie Aff., ¶¶ 2-8 and Exh. B-I.

The MacIver Institute, however, is not satisfied with receipt of the substance of the Constituent Communications. It has demanded disclosure of Constituent Personal Information. As set forth fully below, the MacIver Institute is not entitled to receive Constituent Personal Information under the WPRL. First, the Senate has a rule of proceeding, based on custom and practice, giving Senators discretion as to whether constituent contacts will be disclosed. Erpenbach Aff., ¶ 9. Because the Senate has a rule of proceeding governing the disclosure of the Constituent Personal Information at issue in this case, the issue is a nonjusticiable political question. *In re Doe*, 2004 WI 65, ¶ 25, 272 Wis. 2d 208, 680 N.W.2d 792. To comply with separation of powers, the Court must dismiss the case. *Id.*

Even if the issue presented by this case were justiciable, as a matter of law, Constituent Personal Information is not a "record" for purposes of the WPRL because Constituent Personal Information has no connection to the affairs or official acts of government. *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 22, 327 Wis. 2d 572, 786 N.W.2d 177. Even if Constituent Personal Information were records, redaction was appropriate under the WPRL for two reasons: 1) Senator Erpenbach's constitutional immunity derived from the Speech and Debate clause, Wis. Const. art. IV § 16, creates an exception to the WPRL under the facts of this case because the Constituent Communications were central to the legislative process; and 2) Senator Erpenbach properly concluded under the WPRL's balancing test that constituents' rights of free speech, to petition the government and privacy and be free from the risk of threats, harassment and reprisals outweigh the WPRL's general policy of disclosure.

FACTS

I. ACT 10 CAUSED UNPRECEDENTED PUBLIC REACTION, POLITICAL UNREST AND DEMONSTRATIONS.

Act 10 caused a major political divide between those supporting Act 10 (mostly Republicans) and those opposing it (mostly Democrats). Erpenbach Aff., ¶ 15. It was the most divisive and contentious piece of legislation ever proposed in Senator Erpenbach's long tenure in the Wisconsin legislature. *Id.* Feelings were running very strongly on both sides. *Id.* The nature of the Constituent Communications Senator Erpenbach received were from expressions of heartfelt desperation to ugly threats of what might happen to Senator Erpenbach and his family and staff if he continued to oppose Act 10. *Id.;* Laundrie Aff., ¶ 8 and Exhs. H-I. Senator Erpenbach received written and anonymous telephone calls containing personal threats aimed at both himself and his family. Erpenbach Aff., ¶ 15 and Exh. J. As many as 90 threats of violence against public officials, including Senator Erpenbach, were made between February 16 and March 25, 2011. *Id.*

It is difficult to convey the level of unrest caused by Act 10 to people who were not present in Madison at the time. Erpenbach Aff., ¶ 16 and Exh. K (pictures of the protests). Protesters and supporters circled the Capitol for many weeks and numbered in the tens of thousands of people. *Id.* Law enforcement personnel had a conspicuous presence both on foot and on horseback during this volatile time. *Id.* Doors to the Capitol were locked and persons were required to access at one security position and were made subject to search for weapons. *Id.* Public areas of the Capitol were closed to protestors. *Id.* Hundreds of police officers, state patrol and game wardens from all over the state were in the Capitol on a daily basis for crowd control. *Id.* The atmosphere inside the Capitol was emotional and volatile for an extended period of time. *Id.* This was the environment at the time Senator Erpenbach received the

Request on March 24, 2011. *Id.* On April 4, 2011, Senator Erpenbach replied to the Request seeking clarification as to its breadth. Laundrie Aff., ¶ 3 and Exh. C. On April 12, 2011, the MacIver Institute responded to Senator Erpenbach's clarification request by refusing to narrow the breadth of the Request and "restat[ing] our original request for the information, including constituent communications." Laundrie Aff., ¶ 4 and Exh. D.

On April 18, 2011, Senator Erpenbach forwarded his response to the Request. His response included the following:

> Please note that the vast majority of the records deal with correspondence to and from specific private citizens. You will see that, rather than deny you access to entire records that contain such information, I have chosen to provide you with the content of the record, redacting only the last name, personal contact information or other personally identifiable information of the citizen (the "personal citizen information"). Also, I have disclosed personal citizen information if there is a clear intention by the citizen to have their information shared publicly. In addition, I have not redacted official contact information related to public officials or lobbyists.

Laundrie Aff., ¶ 5 and Exh. E. A first wave of production of 18,208 pages was produced with the April 18, 2011 letter. *Id.*

On August 15, 2011, the MacIver Institute's counsel sent Senator Erpenbach a letter requesting that he provide the information that had been redacted from the documents produced with the April 18, 2011 letter and seemingly narrowing the request. Laundrie Aff., 6 and Exh. F. On October 3, 2011, Senator Erpenbach's staff sent the MacIver Institute's attorney an e-mail asking whether the MacIver Institute had now narrowed its request to the "redaction of the e-mail addresses of state employees...." *Id.* The MacIver Institute's counsel responded on October 4, 2011 by indicating that the MacIver Institute wanted the information redacted from "e-mails sent from state government e-mail accounts [and] from those of any unit of local government including school districts and technical colleges [and] any UW accounts." *Id.*

On November 13, 2011, Senator Erpenbach sent his final response to the narrowed request for the redacted information to The MacIver Institute's counsel. Laundrie Aff., ¶ 7 and Exh. G. Along with the November 13, 2011 letter, Senator Erpenbach produced 4,717 additional pages that had been assembled since the last partial production. *Id.* The MacIver Institute never picked up those additional 4,717 documents. *Id.*[2] In all, approximately 25,000 records were produced. *Id.*

II. IT IS A SENATE RULE OF PROCEEDING THAT EACH SENATOR SHOULD DECIDE WHETHER TO DISCLOSE CONSTITUENT PERSONAL INFORMATION.

Article IV, Section 8 of the Wisconsin Constitution reads: "Each house may determine the rules of its own proceedings ...." The Wisconsin Senate Rules of Proceeding is the set of written and unwritten rules governing the decision-making process of the Senate. Erpenbach Aff., ¶ 3. Mason's Manual of Legislative Procedure 2010 Edition ("Mason's") is the parliamentary manual for the Senate, which means it is the manual used by the Senate to interpret adopted Senate Rules of Proceeding and as a source of Rules of Proceeding where no adopted rule exists. *Id.* Newly elected Senate leadership are provided with a copy of Mason's to assist them in their duties. *Id.*

As set forth in Mason's, sources of Senate parliamentary Rules of Proceeding are as follows:

(a) Constitutional provisions and judicial decisions thereon;

(b) Adopted rules;

(c) Custom, usage and precedent;

(d) Statutory provisions;

[2] Additional facts considered by Senator Erpenbach in performing the WPRL balancing test are set forth in the Argument, Part V.B.3., *infra*.

(e) Adopted parliamentary authority; and

(f) Parliamentary law.

Erpenbach Aff., ¶ 4 and Exh. A (Mason's sec. 4, pp. 14-16). As directed by Mason's, whenever there is a conflict between rules from the above sources, the rule from the source listed earliest prevails over the sources listed later. *Id.* For instance, whenever the WPRL and judicial decisions interpreting the WPRL are in conflict with a Wisconsin Senate "custom, usage or precedent," the Senate custom, usage or precedent takes precedent under the Wisconsin Senate Rules of Proceeding. *Id.*

That Mason's is used by the Senate to interpret points of adopted Rules of Proceeding and as a source of Rules of Proceeding where no adopted rule exists is evident from published rulings of the Senate Chair. Erpenbach Aff., ¶¶ 5 - 7 and Exhs. C-E. The current Joint Rules of the Wisconsin Legislature adopted Section 4 of Mason's as Joint Rule 99 (75):

> RULES OF PROCEEDINGS: The rules that govern the operations of the legislature and the conduct of legislative business. Rules of proceedings are found in the state constitution: the joint rules, senate rules, and assembly rules; custom, usage, and precedent in each house; the statutes; and parliamentary law.

Erpenbach Aff., ¶ 8 and Exh F. They are listed in the same order as in Mason's, Section 4 and are applied in the same manner with the earlier listed category controlling over any subsequent listed category that conflicts with the earlier listed category. *Id.*

It has long been a custom and precedent of the Wisconsin Senate, and thus one of its Rules of Proceeding, to leave it up to each individual Senator whether to disclose personally identifiable information regarding constituents who contact the Senator. Erpenbach Aff., ¶ 9. Senators are told that they are the custodian of the records in their offices and the Senate as a body delegates to each individual Senator the authority to decide whether personally identifiable information regarding constituents should be produced in response to a request for documents

made under the WPRL. *Id.* If there is any inconsistency between a Rule of Proceeding and the WPRL as to whether personally identifiable information of a constituent should be produced in response to a request under the WPRL, then the Senate Rule of Proceeding allowing each individual Senator to decide whether personally identifiable constituent information should be disclosed controls under Article IV, Section 8 of the Wisconsin State Constitution as a Senate Rule of Proceeding as set forth in Joint Rule 99 (75) and Mason's, Section 4. *Id.*

III. DISCLOSURE OF CONSTITUENT PERSONAL INFORMATION WITH THE CONTENT OF THEIR COMMUNICATION WILL HAVE A CHILLING EFFECT ON CONSTITUENTS' CONSTITUTIONAL RIGHTS OF FREE SPEECH AND TO PETITION THEIR GOVERNMENT AND THEIR RIGHT OF PRIVACY.

Because Senator Erpenbach has been elected by voters in the 27th District, he owes a duty of loyalty to represent those voters while at the same time maintaining concern for the common good of Wisconsin citizens. Erpenbach Aff., ¶ 12. Senator Erpenbach serves to guarantee that constituents have their voices heard in the legislative process. *Id.* To do his job, Senator Erpenbach needs to be able to receive honest and personal communications from constituents. *Id.*

Every legislative assembly reflects the desires of the Founding Fathers to represent diverse interests and guarantee that constituents have their voices heard in the legislative process. Affidavit of Professor David Canon in Support of Defendant's Motion for Summary Judgment ("Canon Aff."), ¶ 7. Geographic representation is central to understanding the nature of legislative representation. Because members are elected from specific geographic constituencies, they have loyalties to those voters, while also maintaining concern for the common good. *Id.*

The Founders endorsed the importance of local constituencies. *Id.* In *Federalist 56*, for example, James Madison said that "it is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents," and the two-year

House term was specifically intended to tie legislators to public sentiment. *Id. Federalist 52* elaborates: "As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people." *Id.*

Thomas Jefferson expanded on the sanctity of the constituent-representative relationship in a letter to the Virginia House of Delegates in 1797.

> [T]hat in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive, and that their communications with their constituents should, of right as of duty also, be free, full, and unawed by any.

Canon Aff., ¶ 8. Jefferson expanded on this idea that representative-constituent communication must not be regulated:

> [T]hat, for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them ... is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be, that the same interchange of sentiment be lawful between him and them as would be lawful among themselves were they in the personal transaction of their own business....

Canon Aff., ¶ 9.

The same rationale is true for the Wisconsin Legislature. Just like the 1st Amendment to the U.S. Constitution, Article I, Section 4 of the Wisconsin Constitution guarantees to constituents the right to petition the government. Canon Aff., ¶ 11. Because members are elected from specific geographic constituencies, they have loyalties to those voters, while also

maintaining concern for the common good. *Id.* Representatives and constituents must have unrestricted ability to communicate between each other if the legislative representative process is to function properly: representatives need to be able to seek out the views of their constituents and constituents need to be able to freely express their views without limitation or constraint. *Id.* Constituent participation in the legislative process, therefore, is at the core of Wisconsin's representative process. *Id.* Without meaningful and unimpaired constituent input in the legislative process, the fundamental bases of the Wisconsin representative process would be undermined. *Id.*

When constituents contact their representatives there is an expectation of privacy, whether the contact is in person or by mail, e-mail, or telephone. Canon Aff., ¶ 12. Given the intense political atmosphere in Wisconsin in 2011, and particularly in Madison, constituents who knew that their identity would be made public with the content of their communications would have been much less likely to contact their representative. *Id.* Fear of reprisals from an employer, concerns for personal safety or simply unwanted attention from colleagues or family would be sufficient reason to deter communication if the privacy of that communication is violated. *Id.*

Making public the Constituent Personal Information of persons who contacted Senator Erpenbach with the Constituent Communication would have a chilling effect on political participation. Canon Aff., ¶ 30.[3] Whether the context is voting, membership in an organization,

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[3] As detailed in Professor Canon's affidavit, there are several areas that support the conclusion that disclosing personally identifiable information about constituents along with the content of their communications to their elected representative will deter such communication. Canon Aff., ¶ 13. These examples are drawn from areas of First Amendment participation and speech and the political process:

1) the secret ballot versus participation in public caucuses, Canon Aff., ¶¶ 14-22;

(footnote continued)

or drafting legislation, people, in general, are less likely to participate if they believe their activity and their identity will be made public. *Id.* The State of Wisconsin has a strong public policy interest in ensuring that citizens of the state can exercise their constitutionally protected right to petition their government without fear of having their identities revealed with the content of their communications with their representative. *Id.* Requiring disclosure of Constituent Personal Information with his or her communication with an elected representative will have a substantial adverse impact on that public policy by deterring public participation in the legislative process. *Id.*

ARGUMENT

I. SUMMARY JUDGMENT STANDARD.

Summary judgment is governed by Wis. Stat. § 802.08, which provides that summary judgment:

> shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

> 2) the privacy expectation in the legislative process for drafting bills, Canon Aff., ¶¶ 23-25;
>
> 3) disclosure of names on petitions or of membership in an organization, Canon Aff., ¶¶ 26-28; and
>
> 4) lawsuits aimed at restricting political participation, Canon Aff., ¶29.

See also Argument, Part V.B.3., *infra* (detailed analysis of the chilling effect documented in the secret ballot, bill drafts, organization membership and strategic lawsuits contexts).

Wis. Stat. § 802.08(2). As the Wisconsin Supreme Court has explained, the purpose of summary judgment is "to avoid trials where there is nothing to try." *Rollins Burdick Hunter of Wis., Inc. v. Hamilton*, 101 Wis. 2d 460, 470, 304 N.W.2d 752 (1981).

When deciding a motion for summary judgment, a court employs the following methodology:

> First, the pleadings are examined to determine whether they state a claim for relief. If they do, and if the responsive pleadings join issue, the court must then examine the evidentiary record to determine whether there is a "genuine issue as to any material fact," and, if not, whether a party is thereby entitled to "judgment as a matter of law."

Transp. Ins. Co., Inc. v. Hunzinger Constr. Co., 179 Wis. 2d 281, 289, 507 N.W.2d 136 (Ct. App. 1993) (citation omitted). Applying these standards here demonstrates that there are no material facts in dispute and that Senator Erpenbach is entitled to summary judgment as a matter of law.

II. THE CUSTOM AND PRACTICE OF THE SENATE OF ALLOWING SENATORS TO DECIDE WHETHER TO DISCLOSE CONSTITUENT PERSONAL INFORMATION WITH THE CONTENT OF THE COMMUNICATION IS A RULE OF PROCEEDING THAT TAKES PRECEDENCE OVER THE WPRL, MAKING THE ISSUES IN THIS CASE NON-JUSTICIABLE.

By constitutional mandate, legislative power is vested solely in the Legislature. Wis. Const. art. IV, § 1. The Wisconsin Constitution also confers upon both houses of the Legislature the exclusive authority to determine their own rules of proceeding:

> **Rules; contempts; expulsion.** SECTION 8. Each house may *determine the rules of its own proceedings*, punish for contempt and disorderly behavior, and with the concurrence of two-thirds of all the members elected, expel a member; but no member shall be expelled a second time for the same cause.

Wis. Const. art. IV, § 8 (italics added).

"Separation of powers is a foundational principle of our tri-partite system of government, wherein each branch has equal power and a region of independent authority." *In re Doe*, 2004 WI at ¶ 25. "'Each branch has a core zone of exclusive authority into which the other branches may not intrude.' In these core areas, 'any exercise of authority by another branch of government is unconstitutional.'" *State v. Jensen*, 2004 WI App 89, ¶ 42, 272 Wis. 2d 707, 681 N.W.2d 230 (citation omitted). "Where an issue exclusively committed to the legislative branch is brought before the courts, it is often described as a 'political question' that is non-justiciable." *In re Doe*, 2004 WI at ¶ 25 (citations omitted). "Under our system of government" where the "constitution leaves [a decision] to the legislature alone to make" courts will not interfere with the decision because it "is none of [their] business." *State ex rel. Elfers v. Olson*, 26 Wis. 2d 422, 431, 132 N.W.2d 526 (1965).

The "'judicial department has no jurisdiction or right to interfere with the legislative process. That is something committed by the constitution entirely to the legislature itself.'" *Fitzgerald*, 2011 WI at ¶ 8 (quoting *Goodland v. Zimmerman*, 243 Wis. 459, 467, 10 N.W.2d 180 (1943)). The Senate "makes its own rules, prescribes its own procedure, subject only to the provisions of the constitution...." *Goodland*, 243 Wis. at 467. A court's authority is limited to determining whether a particular provision constitutes a "rule of proceeding" that is not prohibited by the constitution. *Id.* Once that determination has been made, courts may not question the wisdom, or pass on the validity, of the rule of proceeding. *See State ex rel. La Follette v. Stitt,* 114 Wis. 2d 358, 367, 338 N.W.2d 684 (1983). Moreover, courts "'will not determine whether internal operating rules or procedural statutes have been complied with....'" *Fitzgerald*, 2011 WI at ¶ 13 (quoting *Stitt,* 114 Wis. 2d at 364). Short of a constitutional

deprivation, "recourse against legislative errors, nonfeasance, or questionable procedure is by political action only." *Outagamie Cnty. v. Smith*, 38 Wis. 2d 24, 41, 155 N.W.2d 639 (1968).[4]

A Senate rule of proceeding, whether adopted by custom and practice or formally adopted as a rule or statute, may even conflict with a state statute. Erpenbach Aff., ¶¶ 4-9 and Exhs. B-F. This is because one legislature's rules of proceeding have "no implications of control over the final deliberations or actions of future legislatures." *Wis. Solid Waste Recycling Auth. v. Earl*, 70 Wis. 2d 464, 487, 235 N.W. 648 (1975). "[T]he legislature by statute or joint resolution cannot bind or restrict itself or its successors as to the procedure to be followed in the passage of legislation...." *Stitt*, 114 Wis. 2d at 365 (citation and internal quotation omitted); *see also Hughes*, 876 A.2d at 744 ("[E]ach branch of each successive Legislature may proceed to make rules without seeking concurrence or approval of the other branch, or of the executive, and without being bound by action taken by an earlier Legislature.... The Legislature, alone, has

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[4] *See also Hughes v. Speaker of the N.H. House of Representatives*, 876 A.2d 736, 743-46 (N.H. 2005) (holding whether members violated the Right to Know statute was a non-justiciable political question); *Town of Brilliant v. City of Winfield*, 752 So. 2d 1192, 1197 (Ala. 1999) (courts "cannot look to the wisdom or folly, the advantages or disadvantages, of the rules which a legislative body adopts to govern its own proceedings") (citation omitted); *Abood v. League of Women Voters of Ala.*, 743 P.2d 333, 338-40 (Alaska 1987) (holding whether the legislature violated the open meetings law was a non-justiciable political question because the open meetings law constituted a rule of proceeding that, even if violated by the legislature, was not reviewable); *Howard Cnty. v. Rotenberry*, 688 S.W.2d 937, 939 (Ark. 1985) (except prohibited by the constitution, the legislature has the power to adopt any rules it thinks desirable); *Moffitt v. Willis*, 459 So. 2d 1018, 1022 (Fla. 1984) ("It is a legislative prerogative to make, interpret and enforce its own procedural rules and the judiciary cannot compel the legislature to exercise a purely legislative prerogative."); *Coggin v. Davey*, 211 S.E.2d 708, 710-11 (Ga. 1975) (the legislature has the power to adopt and enforce rules for its own internal operations that are inconsistent with a statute formerly enacted); *Paisner v. Attorney Gen.*, 458 N.E.2d 734, 739 (Mass. 1983) ("Legislative rule-making authority is a continuous power absolute and beyond the challenge of any other tribunal."); *Tuck v. Blackmon*, 798 So. 2d 402, 407 (Miss. 2001) (rules regulating the internal operations of the legislature should be left to the legislature to apply and interpret, without review by the judiciary); *In re Gilmore*, 774 A.2d 576, 581 (N.J. 2001) (court may not substitute its judgment for that of "the Senate with respect to the rules it has adopted or the procedure followed in giving effect to the rules."); *State v. Cumberland Club*, 188 S.W. 583, 585 (Tenn. 1916) (a court's role with respect to review of a rule of proceeding is to ascertain whether the constitution has been violated).

complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure." (citations and internal quotations omitted)).

There has been no published Wisconsin case considering whether the Senate's custom and practice of allowing Senators to decide whether to disclose Constituent Personal Information is a rule of proceeding. However, the Iowa Supreme Court considered a similar issue in *Des Moines Register and Tribune Company v. Dwyer*, 542 N.W.2d 491, 495-496 (Iowa 1996). In *Des Moines Register,* the Iowa Supreme Court addressed whether the Iowa Senate's policy regarding release of certain long distance phone records falls within its constitutionally granted power to determine its own affairs. *Id.* at 493. In that case, a reporter from the Des Moines Register requested from General Services, an executive agency providing telephone service to all state agencies and the senate, "all bills, records, summaries, or other documents relating to the use of any incoming or outgoing '800-Watts' telephone line paid for by the Iowa Senate or General Assembly during the calendar years 1990 through 1993." *Id.* General Services provided copies of "recap" telephone billing summary reports, which showed the total long distance charges for each senate telephone. *Id.* at 494. The General Services refused to produce the "call detail" information about long distance calls because "production would violate the constitutional rights of the parties to the conversations and would improperly differentiate between those individuals who communicated with the senate via long distance telephone calls and those who were able to communicate with senate members by other means." *Id.* The Senate Rules and Administration Committee subsequently adopted a policy regarding public access to telephone records along these lines. *Id.*

The Des Moines Register filed suit against the secretary of the Iowa Senate and the administrator for the Department of General Services seeking a declaration that, as legal

custodians of the "call detail" information, the open records law required release of the information. *Id.* The court reasoned that "[t]he determinative issue in the case at bar is whether the senate's policy on release of detailed phone records constitutes a senate rule of proceeding." *Id.* at 497. The plaintiffs argued that the constitutional grant only applies to the "body" of the senate, and the defendants claimed that "[i]nasmuch as privileged communication with constituents is an integral part of the senate's lawmaking process," the senate's policy regarding confidentiality of phone records constitutes a rule of proceeding beyond judicial intervention. *Id.* at 497-498. The *Des Moines Register* court agreed with the defendants and held that the Iowa Senate's decision to keep the records in question confidential falls within the constitutionally-granted power of the Senate to determine its rules of proceedings. *Id.* at 503.

As a matter of law, the authority to adopt and interpret rules of proceeding is "exclusively committed" to the Senate by the Wisconsin Constitution. *See* Wis. Const. art. IV, § 8; *In re Doe*, 2004 WI at ¶ 25. Therefore, the Court may not rule on a challenge that is covered by a Senate rule of proceeding. *Goodland*, 243 Wis. at 467; *Stitt,* 114 Wis. 2d at 367. This Court's jurisdiction is limited to determining whether the Senate's custom and practice to allow Senators to decide whether to disclose Constituent Personal Information constitutes a "rule of proceeding" that is not prohibited by the constitution. *Id.* The question is not whether the WPRL applies to the Legislature or whether Senator Erpenbach violated the WPRL. The question is whether this specific WPRL mandamus action is justiciable. *See Hughes*, 876 A.2d at 746 ("We emphasize that the question before us is not whether the Right-to-Know Law applies to the legislature.... The question before us is whether the legislature's alleged violation of the Right-to-Know Law is justiciable."); *Abood,* 743 P.2d at 339. ("The question before us, however, is not whether the

Open Meetings Act applies to the legislature, but rather whether the legislature's alleged violation of the Act or Uniform Rule is justiciable.")

It is the custom and practice of the Senate to allow Senators to decide whether to disclose Constituent Personal Information when they disclose the substance of a constituent's communication.[5] Erpenbach Aff., ¶ 9. Constituent communication is the bedrock of Wisconsin's legislative process because, as a representative government, legislators must listen to constituent concerns when deciding whether to propose, support, oppose or enact a law. Erpenbach Aff., ¶ 12; Canon Aff., ¶¶ 7-11. "Public communication with senators is an integral part of the senate's performance of its constitutionally granted authority to enact laws." *Des Moines Register*, 542 N.W.2d at 499 ("communications with their constituents should of right, as of duty also, be free, full, and unawed by any," quoting 8 Works of Thomas Jefferson 322-23 (Ford ed. 1904)).

As in the *Des Moines Register* case, because the Senate has a Rule of Proceeding, based on custom and practice, allowing Senators to keep Constituent Personal Information confidential, the Court may not inquire into the wisdom or question the validity of the rule. *See Des Moines Register*, 542 N.W.2d at 495-496; *Goodland*, 243 Wis. at 467; *Stitt*, 114 Wis. 2d at 367. Even if the rule conflicts with the WPRL, the issue is a non-justiciable political question because it implicates the exclusive constitutional right of the Senate to control the process by which it formulates and passes laws. *See* Wis. Const. art. IV, §§ 1 and 8; Erpenbach Aff., ¶¶ 9 and 13.

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[5] In addition to the constitutional right to adopt its own rules of proceeding, the Senate has the constitutional authority to determine that the public welfare requires that certain of its proceedings be confidential: "Each house shall keep a journal of its proceedings and publish the same, except such parts as require secrecy. The doors of each house shall be kept open except when the public welfare shall require secrecy. Neither house shall, without consent of the other, adjourn for more than three days." Wis. Const. art. IV, § 10. As such, the Legislature's decision to allow Senators to decide whether to keep Constituent Personal Information confidential is further authorized by Wis. Const. art. IV, § 10.

Even if the Legislature that passed the WPRL intended to change the manner in which the Legislature treated Constituent Personal Information, that Legislature could not bind subsequent Legislatures to the extent the WPRL implicates Senate rules of proceeding. *See Earl*, 70 Wis. 2d at 487; *Stitt*, 114 Wis. 2d at 365; *Hughes*, 876 A.2d at 744. This Senate's Joint Rule of Proceeding 99 (75) in reliance on Mason's, expressly provides that Senate custom and practice takes precedence over any allegedly contrary provision in any state statute, including the WPRL. *See* Erpenbach Aff., ¶¶ 3-9 and Exhs. B-F. Accordingly, Senator Erpenbach's compliance with the Senate custom and practice of deciding to keep Constituent Personal Information confidential, even if that were inconsistent with the WPRL, is a non-justiciable political issue. *See In re Doe*, 2004 WI at ¶ 28; Erpenbach Aff., ¶¶ 9-13. For that reason alone, Senator Erpenbach's motion for summary judgment must be granted.

III. CONSTITUENT PERSONAL INFORMATION IS NOT A RECORD FOR PURPOSES OF THE WPRL.

Except as otherwise provided by constitutional or statutory law or as restricted by common law, any person has the right to inspect any record:

> *Except as otherwise provided by law*, any requester has a right to inspect any record. *Substantive common law* principles construing the right to inspect, copy or receive copies of records shall remain in effect....

Wis. Stat. § 19.35(1)(a) (emphasis added). Record is defined in Wis. Stat. § 19.32(2). Wisconsin law not only authorizes, but obligates, a records custodian to redact information that is not subject to disclosure from a record:

> If a record contains information that is subject to disclosure under s. 19.35 (1) (a) or (am) and information that is not subject to such disclosure, the authority having custody of the record shall provide the information that is subject to disclosure and delete the information that is not subject to disclosure from the record before release.

Wis. Stat. § 19.36(6). Further, "[s]tatutes should be construed to avoid constitutional questions." *State v. Hall*, 207 Wis. 2d 54, 83, 557 N.W.2d 778 (1997) (citation and internal quotations omitted).

"In determining whether a document is a record under Wis. Stat. § 19.32(2), the focus is on the content of the document. To be a record under § 19.32(2), the content of the document must have a connection to a government function." *Schill*, 2010 WI at ¶ 22. In *Schill*, the Supreme Court addressed whether purely personal e-mail of teachers were "records" for purposes of the WPRL. The Court concluded that "personal e-mails are ... not always records within the meaning of Wis. Stat. §19.32(2) simply because they are sent and received on government e-mail and computer systems." *Id.* at ¶ 9. The Court rejected the contention of the requester—the same contention being made by the MacIver Institute here—that disclosure of personal e-mail was necessary to the oversight of public employees' use of public resources: "Disclosure of the contents of the Teachers' personal e-mails does not keep the electorate informed about the government and sheds no light on 'official acts' or 'the affairs of government.'" *Id.* at ¶ 81.

The Supreme Court went on to conclude that occasional personal use of e-mail by public employees is not a misuse of public resources but an acceptable workplace practice:

> It is consistent with the conduct of governmental business to allow public employees occasional personal use of government computers and e-mail accounts consistent with their work duties. Flexible, common-sense workplace policies that allow occasional personal use of e-mail are in line with the mainstream of professional practice. In this case, the School District's Internet Use Policy and Guidelines required that "[a]ccess to e-mail on [the network] will be through the district provided account only. Other commercial e-mail services will not be allowed."
>
> Occasional personal use of District e-mail accounts thus enables public employees to take care of family and personal necessities in the office, without requiring greater interruption to the workday.

> E-mail often provides the quickest and simplest way to facilitate brief communications and enables employees to be more productive.
>
> Forbidding employees from using work e-mail accounts for any personal communications, or making such communications automatically subject to public review, would create a perverse incentive for employees to use more time-consuming means of personal communication during the workday. Stripping a public employee of his or her privacy in the contents of personal e-mails simply because he or she works for the government might hamper productivity, negatively impact employee morale, and undermine recruiting and retention of government employees.

Id. at ¶¶ 83-85.

The Constituent Personal Information does not relate to the "official acts" of the individual sending the communication, even if the individual is a government employee and even if a government e-mail account or computer were utilized to send the communications, because individuals had no authority or ability to "officially act" with respect to the enactment of Act 10 or any of the predecessor bills. However, because Senator Erpenbach is responsible for considering and acting on legislation, the *substance* of the Constituent Communications do relate to Senator Erpenbach's "official acts" in connection with the passage of legislation, undoubtedly a "government function." *Schill*, 2010 WI at ¶ 22; Erpenbach Aff., ¶¶ 13-14. As a result, Senator Erpenbach disclosed the substance of the Constituent Communications to the MacIver Institute. Erpenbach Aff., ¶¶ 13-14.

The Constituent Personal Information—last names, e-mail addresses, home addresses and telephone numbers—however, have no connection to Senator Erpenbach's "official acts," nor does such information pertain to his "government function." *Schill*, 2010 WI at ¶ 81; Erpenbach Aff., ¶¶ 13-14. It is the substance of the communication from a constituent that influences Senator Erpenbach's government function of voting for what he believes is good public policy, not the name and personal information of the constituent who contacted him. Erpenbach Aff.,

¶ 13. Therefore, the Constituent Personal Information is not a "record" for purposes of WPRL. *Id.* Indeed, in *Schill*, the Supreme Court considered the burden imposed on records custodians in having to review e-mail and redact personally identifiable information from the portions of the document that related to a government function or official act and therefore constituted a "record." 2010 WI at ¶¶ 133-34.

> Here, the School District has already acknowledged, and the circuit court order has required, that confidential information including pupil records, banking and medical information, **and other personally identifiable information must be redacted from any released e-mails**. Under the present statutes, the custodian must examine the contents of each e-mail to decide what material is publicly accessible while withholding protected or exempt information. Wis. Stat. § 19.36(6).
>
> * * *
>
> If the content of the e-mail is solely personal, it is not a record under the Public Records Law and the e-mail cannot be released. **If the content of the e-mail is personal in part and has a connection with the government function in part, then the custodian may need to redact the personal content and release the portion connected to the government function....**

Id. at ¶¶ 134 and 137 (emphasis added). *See also id.* at ¶ 32 ("The circuit court ordered that sensitive information, including pupil records, medical information, social security numbers, bank account information, **home addresses, and telephone numbers** be redacted upon disclosure." (emphasis added)).

Similarly, in *C.L. v. Edson*, 140 Wis. 2d 168, 173-74, 409 N.W.2d 417 (Ct. App. 1987), a local Eau Claire newspaper sought access to a settlement agreement resulting from a lawsuit involving minors allegedly abused by a psychiatrist. The circuit court concluded that the settlement agreement, which had originally been placed under seal, would be disclosed under the WPRL but only " after the deletion of any identifying references to the plaintiffs." *Id.* at 174. The Court of Appeals upheld the circuit court's decision holding: "An edited version of the

settlements will have at most a marginal effect on these parties because it respects their privacy." *Id.* at 185. The record, *i.e.*, the settlement agreement, was disclosed, but personal identifying information was redacted. *See also State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 516, 558 N.W.2d 670 (Ct. App. 1996) (holding, redaction of home addresses from records appropriate because police officers have "a right to keep their home addresses private").[6]

Here the "records" are the Constituent Communications, which have been provided to the MacIver Institute. Erpenbach Aff., ¶¶ 13-14. The Constituent Personal Information in each e-mail is not a "record" for purposes of Wisconsin law. Erpenbach Aff., ¶¶ 13-14. Senator Erpenbach was required to, and did, redact the Constituent Personal Information. *See* Wis. Stat. § 19.36(6); *Schill*, 2010 WI at ¶ 137 (custodian must redact portion of e-mail not connected to the government function); *Edson*, 140 Wis. 2d at 173-74; *Arreola*, 207 Wis. 2d at 516. Because the Constituent Personal Information is not a record, the MacIver Institute's challenge to the redaction under the WPRL fails as a matter of law.

IV. SENATOR ERPENBACH'S WIS. CONST. ART. IV § 16 SPEECH AND DEBATE PRIVILEGE CREATES AN EXCEPTION TO THE WPRL FOR CONSTITUENT PERSONAL INFORMATION.

"[T]he public's right to inspect documents is not absolute." *Hathaway v. Joint Sch. Dist. No. 1*, 116 Wis. 2d 388, 396, 342 N.W.2d 682 (1984). The WPRL expressly provides that disclosure is appropriate "[e]xcept as otherwise provided by law." Exceptions may be found in the constitution or statutes. *See State ex. rel. Bergmann v. Faust*, 226 Wis. 2d 273, 281-282, 595 N.W.2d 75 (Ct. App. 1999) (*citing to Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis.

[6] *See also The Denver Publ'g Co. v. Bd. Of Cnty. Comm'rs Of the Cnty. Of Arapahoe*, 121 P.3d 190, (Co. 2005) (holding e-mail containing information unrelated to performance of public functions should be redacted from the balance of the e-mail related to performance of public functions).

2d 142, 156, 469 N.W.2d 638 (1991)); *see also Village of Butler v. Cohen*, 163 Wis. 2d 819, 825, 472 N.W.2d 579 (Ct. App. 1991) (*citing to Hathaway*, 116 Wis. 2d at 397).

Pursuant to Wis. Const. art IV § 16, "[n]o member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate." "The framers' objectives in adopting section 16 were to ensure the independence of the legislature and the integrity of the legislative process by precluding the possibility of intimidation or harassment of members of the legislature." *State v. Beno*, 116 Wis. 2d 122, 141, 341 N.W.2d 668 (1984). The reach of the privilege extends beyond that debate floor to all matters within the regular course of the legislative process:

> Nevertheless, considering the purposes of section 16, we do not read section 16 as limited to words spoken on the floor of the Assembly or Senate in debate. We read section 16 to reach matters that are an integral part of the processes by which members of the legislature participate with respect to the consideration of proposed legislation or with respect to other matters which are within the regular course of the legislative process. In the landmark case *Coffin v. Coffin*, 4 Mass. 1, 27 (1808), interpreting constitutional language which was substantially similar to the original draft of section 16, the court concluded that the constitutional protection extended beyond debate. The court said:
>
> > "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office...."

Id. at 143-44. *See also Gravel v. United States*, 408 U.S. 606, 625 (1972) (holding federal speech and debate clause reaches matters that are an "integral part of the deliberative and

communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation"); *Melvin v. Doe*, 2000 WL 33252882, * 575 (Pa. Comm. Pl. May 23, 2000) (holding the Pennsylvania Speech and Debate Clause protected a legislator from being subpoenaed for a deposition: "Thus, the Pennsylvania Supreme Court does not become involved in the legislative process, including the manner in which individual legislators conduct themselves in any manner in which they appear to be functioning as legislators....").

The Request sought communications regarding "changes to Wisconsin's collective bargaining laws for public employees" including "communications specifically pertaining to" Act 10. Senator Erpenbach is not suggesting that every communication with every constituent will relate to "the legislative process" and therefore implicate the speech and debate privilege. *Id.* Here, however, the Request sought *only* communications that unquestionably relate to Senator Erpenbach's consideration of Act 10 and the predecessor bills. Constituent input on pending legislation is fundamental to the legislative process. Erpenbach Aff., ¶¶ 12-14; Cannon Aff., ¶¶ 7-11. Furthermore, Senator Erpenbach disclosed the substance of the Constituent Communication to the MacIver Institute. He merely redacted Constituent Personal Information to protect "the integrity of the legislative process" and protect against the chilling effect from public disclosure of Constituent Personal Information. *See* Facts, Part III, *supra*; Argument Part V.B.3., *infra*. Under these limited facts, the Speech and Debate Clause Art. IV § 16 creates an exception to the WPRL for the Constituent Personal Information and immunizes Senator Erpenbach from this lawsuit. *See* Wis. Stat. § 19.35(1)(a).

V. THE PUBLIC POLICY IN FAVOR OF NONDISCLOSURE OF CONSTITUENT PERSONAL INFORMATION WITH THE CONTENT OF THE COMMUNICATION OUTWEIGHS THE WPRL'S POLICY OF DISCLOSURE.

A. General Legal Standards.

When faced with a request for inspection of public records, the records custodian "must balance the public's right of inspection under the law against the public interest in nondisclosure." *Munroe v. Braatz*, 201 Wis. 2d 442, 446, 549 N.W.2d 451 (Ct. App. 1996). "[I]t is the duty of the custodian of public records, prior to their release, to consider all the relevant factors in balancing the public interest and the private interests." *Woznicki v. Erickson*, 202 Wis. 2d 178, 191, 549 N.W.2d 699 (1996). "[A] custodian is not expected to examine a request ... in a vacuum. Rather, the statute contemplates an examination of all the relevant factors, considered in the *context of the particular circumstances*." *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 31, 305 Wis. 2d 582, 740 N.W.2d 177 (emphasis added). Thus, "each request entails a fact-intensive inquiry such that 'the legislature entrusted [custodians] with substantial discretion' in performing a disclosure analysis." *Id.* (citing, *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 62, 284 Wis. 2d 162, 699 N.W.2d 551).

In reviewing a custodian's denial, the circuit court determines whether the custodian's stated policy reasons against disclosure outweigh the presumption of disclosure in the WPRL. *Munroe*, 201 Wis. 2d at 446 (*citing to Vill. of Butler*, 163 Wis. 2d at 826). The denial of access to public records will be upheld if the court is satisfied that the presumption favoring disclosure is outweighed by a more important policy consideration that necessitates either nondisclosure or limited access. *Id.* (*citing to In re Estates of Zimmer*, 151 Wis. 2d 122, 132, 442 N.W.2d 578, (Ct. App. 1989)); *Hempel*, 2005 WI at ¶ 4.

B. Application Of The Balancing Test Here Tips Decidedly In Favor Of Nondisclosure.

1. Protection Of Constituents' State And Federal Constitutional Rights To Free Speech And To Petition The Government Was Appropriately Considered By Senator Erpenbach In Performing The WPRL Balancing Test.

"The United States and Wisconsin Constitutions protect the rights of individuals to speak and to petition their federal and state governments." *Madison Joint Sch. Dist. No. 8 v. WERC*, 69 Wis. 2d 200, 210, 231 N.W.2d 206 (1975), overruled on other grounds by 429 U.S. 167, 175 (1976) ("teachers may not be 'compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work.'") (citation omitted); *see also* U.S. Const. Amend. I ("Congress shall make no law ... abridging the freedom of speech, or ... of the people ... to petition the Government for a redress of grievances."; Wis. Const. art I § 3 ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press."); Wis. Const. art. I § 4 ("The right of the people ... to petition the government, or any department thereof, shall never be abridged.") "The Wisconsin Constitution guarantees the same freedom of speech rights as the first amendment to the United States Constitution." *State v. Bagley*, 164 Wis. 2d 255, n.1, 474 N.W.2d 761(Ct. App. 1991). "The purpose of the Constitution and Bill of Rights ... was to take government off the backs of people. The First Amendment's ban against Congress 'abridging' freedom of speech, the right peaceably to assemble and to petition, and the 'associational freedom' that goes with those rights create a preserve where the views of the individual are made inviolate." *Schneider v. Smith*, 390 U.S. 17, 25 (1968). The mere fact of being a public employee does not diminish the constitutional protection afforded those individuals to speak freely or petition the government. *See, e.g.,*

Hutchins v. Clarke, 661 F.3d 947, 955 (7th Cir. 2011) ("It is well established that a public employee retains First Amendment rights to free speech.").

With respect to the constitutional right of free speech, there is a "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.'" *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (citation omitted). Anonymity "is an aspect of the freedom of speech protected by the First Amendment." *Id.* at 342. *See also Lassa v. Rongstad,* 2006 WI 105, ¶ 43, 294 Wis.2d 187, 718 N.W.2d 673("the decision to remain anonymous is an aspect of the freedom of speech protected by the First Amendment" (quoting *McIntyre, supra*)). This is because "'[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.'" *McIntyre*, 514 U.S. at 342 (citation omitted). "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *Id.* at 341-42.

With respect to the constitutional right to petition the government, "[w]e start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press. 'All these, though not identical, are inseparable.'" *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967). "[L]aws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an

evil." *Id.* Like the right to free speech, "[t]he right to petition one's government ordinarily includes the right to make communications in confidence…." *Melvin*, 2000 WL 33252882 at *576.

The Constituent Communications were both speech and petitions to the government concerning a matter of great public importance, the stripping of public employee collective bargaining rights. Thus, the individuals who made the Constituent Communications are entitled to the constitutional protections afforded the rights of free speech and to petition the government. There can be no reasonable argument that sending an e-mail to an elected representative concerning pending legislation that would impact every tax paying citizen of the State does not implicate the "most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers*, 389 U.S. at 222. The right to anonymity or confidence in speech and in a petition to the government is well-established. *Lassa,* 2006 WI at ¶ 43; *Melvin*, 2000 WL 33252882 at *576; *McIntyre*, 514 U.S. at 342.

Even if this were a justiciable issue for the Court's consideration, *see* Part II, *supra*, Senator Erpenbach properly considered constituents' constitutional rights of free speech and to petition the government in conducting the WPRL balancing test. Erpenbach Aff., ¶¶ 11-13. As detailed in Part V.B.3., *infra*, given the facts and circumstances surrounding Act 10, including the reasonable probability that disclosure would lead to threats, harassment, or reprisals and chill future constituent communications, the public policies in support of nondisclosure of the Constituent Personal Information far outweigh the WPRL's general policy favoring disclosure since the Constituent Communications were disclosed.

2. *Protection Of Constituents' Right To Privacy In The Context Of The Time Was Appropriately Considered By Senator Erpenbach In Performing The WPRL Balancing Test.*

"In order for the government to act efficiently, it must have certain information about its citizens. The government, however, should also protect each individual's privacy interests." *Woznicki*, 202 Wis. 2d at 198, n.1 (concurring opinion) (quoting, Francis S. Chlapowski, *The Constitutional Protection of Informational Privacy*, Note, 71 B.U. L. Rev. 133, 133-34 (1991)).[7] In the WPRL context, "the public interest in protecting individuals' privacy and reputation arises from the public effects of the failure to honor the individual's privacy interests, and not the individual's concern about embarrassment." *Linzmeyer v. Forcey,* 2002 WI 84, ¶ 31, 254 Wis. 2d 306, 646 N.W.2d 811. The public effects of the failure to honor individual privacy interests may include a chilling effect on future conduct if people know that "their names and comments will become public record." *Hempel*, 2005 WI at ¶ 72.

Wisconsin is not alone in acknowledging that in appropriate circumstances, individual privacy interests and the potential chilling effect on public business that results from failing to protect individual privacy interests outweighs the general policy supporting disclosure. For example, in *North Jersey Newspaper Co. v. Passaic County Board of Chosen Freeholders*, 584 A.2d 275, 276-77 (Super. Ct. N.J. 1990), a "right to know" law request sought the long distance

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[7] The identities of the individuals who made threatening statements to Senator Erpenbach but whose threats were found to not warrant prosecution are afforded anonymity under the Wisconsin Statewide Information Center Privacy Policy. *See* WSIC Privacy Policy, Ver. 2.0 (April 2010), avail. at http://www.nfcausa.org/(S(ijfccy45fzgkit45jmu3fa45))/documentdownload.aspx?documentid=72&getdocnum=1. Personally identifiable information of those individuals has been removed from the publicly available summaries of the investigations. *See* Erpenbach Aff., ¶ 15 and Exh. J. It would be an absurd and unreasonable result if individuals who made threats resulting in law enforcement investigations were afforded greater privacy protection under the WPRL than concerned constituents who exercised their constitutional rights of free speech and to petition the government. *See Adams v. State Livestock Facilities Siting Review Bd.,* 2012 WI 85, ¶ 35, 342 Wis. 2d 444, 820 N.W.2d 404 (statute should be interpreted to avoid unreasonable or absurd results).

telephone billing records of the elected county legislators called "freeholders." Concluding that the long distance telephone billing records should not be disclosed, the court found the privacy interests of constituent communications with the elected officials and the potential chilling effect on future constituent communications outweighed the public policy in favor of disclosure:

> We assume, for example, that part of a freeholder's proper task is to talk to constituents in order to learn their views, their problems, their concerns, and their complaints.... We assume that much of this dialogue is conducted by telephone and that the recipient of the call, as well as the freeholder, has a reasonable expectation of the privacy of the conversation.
>
> We do not think it advances the public interest for a person who has spoken to a freeholder on the telephone to be susceptible to inquiries, from the press or otherwise, regarding the nature and substance of the conversation. We do not think a recipient of a telephone call from a freeholder should be subject to any indiscriminate embarrassment or harassment. We can think of little else which would have a more chilling effect on the free and open communication on which elected officials should be able to rely. And we do not think that free and open communication should be relegated to the official's home telephone or walks in the park....

Id. at 279.

In *Taylor v. Worrell Enterprises, Inc.*, 409 S.E.2d 136, 137 (S. Ct. Va. 1991), the Virginia Supreme Court was asked to decide whether the Virginia Freedom of Information Act extended to the Governor's telephone call logs. Concluding that the Act violated the separation of powers doctrine, the court found that public dissemination of the call log could result in a chilling of open communication with the Governor's office:

> The potential chilling effect would operate not only on the Chief Executive but could also extend to individuals he might wish to consult via this communication medium. As noted by the United States Supreme Court,
>
> > [h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with

> a concern for appearances and for their own interests to the detriment of the decision making process.
>
> *United States v. Nixon*, 418 U.S. 683, 705, 94 S.Ct. 3090, 3106, 41 L.Ed.2d 1039 (1974).

Id. at 138-39.

Senator Erpenbach considered the privacy interests of constituents in performing the WPRL balancing test. Erpenbach Aff., ¶¶ 12-14. As set forth in Part V.B.3., *infra*, given the facts and circumstances surrounding the Request and the potential chilling effect of disclosure on future constituent communications, Senator Erpenbach's conclusion that the public policy of protecting constituent privacy interests, together with the public policies surrounding constituent rights of free speech and to petition the government, outweighed the public interest in disclosure of Constituent Personal Information was reasonable and entitled to deference.

3. The Constitutional And Privacy Rights Policies Favoring Nondisclosure Of Constituent Personal Information Outweigh The WPRL'S Policy Supporting Disclosure.

In weighing competing public policy factors, the Court must consider to what extent the public disclosure of the requested information will further the purpose of the WPRL, which is to inform the electorate of the official acts of the government. *See* Wis. Stat. § 19.32; *State ex. rel. Morke v. Records Custodian, Dep't of Health & Soc. Servs.,* 159 Wis.2d 722, 465 N.W.2d 235 (Ct. App. 1990). In *State ex. rel. Morke*, a prisoner sought a list of names, home addresses and home telephone numbers of all prison employees. *Id.* at 724. The records custodian's decision to deny the request after weighing the competing public policy factors was upheld. *Id.* at 726-27. The Court of Appeals concluded that disclosure of the personal information did not further the purposes of the WPRL: "Granting Morke's request would in no way further the purpose of the open records law; the information he seeks neither 'informs the electorate,' promoting better self-governance, nor concerns 'official acts' of government employees. There is very little, if

any, general public interest in allowing access to personal information about prison employees that bears no apparent relation to their public duties." *Id.*

Disclosure of the substance of the Constituent Communications, which Senator Erpenbach disclosed, furthers the purposes of the WPRL. The Constituent Communications themselves could educate the electorate as to the myriad of personal and public concerns implicated by Act 10 and were part of what shaped Senator Erpenbach's "official acts" and aided the performance of his "government function" in connection with his opposition to Act 10. Erpenbach Aff., ¶¶ 12-14. An individual's name, address, e-mail address, or telephone number, however, does not inform the electorate or have any connection to an official act of a government employee or elected official. *Id.* Moreover, the MacIver Institute's alleged public policy purpose of policing personal use of government employee e-mail was rejected in *Schill.* In *Schill*, the requester sought all e-mail communications of each teacher, which *may* have identified individuals who excessively sent or received an excessive number of personal e-mail but was still rejected by the Supreme Court as a reason to justify disclosure. *Schill*, 2010 WI at ¶¶ 83-85. Here, Senator Erpenbach disclosed approximately 25,000 Constituent Communications from *different* constituents. Laundrie Aff., ¶¶ 5 and 7-8, Exhs. E and G-I. No pattern of abuse for any individual employee could be ascertained, and occasional personal use of e-mail, even to contact an elected representative, is consistent with commonsense workplace policies. *Schill*, 2010 WI at ¶¶ 83-85.[8]

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[8] The MacIver Institute's assertion that its Request furthers a public policy of discovering public employees who use public computers for a private purpose is flawed. Act 10 eliminated collective bargaining rights for public employees. It directly affected their status as public employees. Contacting Senator Erpenbach about a law that affected their employment status while at their place of employment is not a misuse of their employment position. In any event, even assuming that such a public policy exists, despite the *Schill* Court's statement to the contrary, it is far outweighed by the public policies supporting non-disclosure. *See* Part V. B. 1-3.

Access to government is embodied in the individual rights of free speech and to petition the government. Canon Aff., ¶¶ 7-11. Here, nondisclosure of Constituent Personal Information while disclosing the Constituent Communication furthers both the public policy of disclosure under the WPRL and advances the overarching public policy in favor of access to government. Nondisclosure prevents the chilling effect that would follow from constituents believing that an e-mail contact to their elected representative could be released publicly together with all Constituent Personal Information. Erpenbach Aff., ¶¶ 12-15; Cannon Aff., ¶¶ 14-29.

Disclosure of Constituent Personal Information inhibits candid communication between an elected representative and his or her constituents, particularly with respect to highly controversial and politically charged issues such as Act 10 when constituent input is most crucial. *Hempel*, 2005 WI at ¶ 72. Concluding that a chilling effect on future constituent communications would result from disclosure of Constituent Personal Information has been documented in substantially similar circumstances. A first example is found in the context of the secret ballot. Canon Aff., ¶¶ 14-22. The confidentiality of the vote is critical for the integrity of the voting process and has been a part of our political process for more than one hundred years. Canon Aff., ¶ 14. There are several excellent cutting-edge studies that have examined the impact of the secret ballot on participation in recent elections. Canon Aff., ¶ 15. One such study found that even ***perceived violations of the anonymity*** of voting have a significant chilling effect on voting. Canon Aff., ¶¶ 15-16. Another study, conducted in the 2008 Iowa presidential caucus, found that a 21.9% reduction in turnout occurred by telling voters that they would have to reveal their voting preferences in front of their neighbors. Canon Aff., ¶¶ 17-18. Like the secret ballot

studies, if constituents knew that their personal information would be revealed with their e-mails, that revelation would likely deter many from sending that e-mail. Canon Aff., ¶¶ 18-22.[9]

A second example of the chilling effect is found in the context of bill drafting. Canon Aff., ¶¶ 23-25. Confidentiality in the drafting of legislation is crucial for the free exchange of ideas in the legislative process. Canon Aff., ¶ 25. Subjecting the early stages of the legislative drafting process to public scrutiny would have a chilling effect on constituents' constitutional right to petition their government. Canon Aff., ¶ 24. For example, the Milwaukee Journal Sentinel reported: "Senate Democratic Leader Judy Robson of Beloit said that sometimes the best ideas come from constituents. Robson said two of her bills passed by the Senate this fall were generated by talks with people in her district." *Id.* If the subject matter was sensitive (*e.g.*, parental consent on abortion or whistle-blowing on an employer), constituents will likely be less willing to consult with their representatives if these early contacts could be subject to public disclosure. *Id.*

A third example is found in the context of disclosure of membership affiliation bill. Canon Aff., ¶¶ 26-28. Disclosing the names of members in organizations also has a chilling effect on participation. Canon Aff., ¶ 26. For example, the United States Supreme Court has reasoned:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute ... a restraint on freedom of association.... This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.... Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in

[9] Although they were not voting directly via their communication with Senator Erpenbach, constituents were telling him how they wanted him to vote on Act 10, which is voting via their elected representative. Thus, the comparison is apt. Canon Aff., ¶ 22.

> many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

NAACP v. State of Ala. ex. rel. Patterson, 357 U.S. 449, 462 (1958); Canon Aff., ¶ 26. The majority (although not all) of Senator Erpenbach's constituents who contacted him presumably supported his stance, and thus chose to "associate" with him. Canon Aff., ¶¶ 27-28. As the Patterson Court held, if that association were revealed through the forced disclosure of the Constituent Personal Information with the content of their communication, their "association" with him by petitioning him as their elected representative would be deterred. *Id.*

Yet another example is found in the context of Strategic Lawsuits Against Political Participation (SLAPP). Canon Aff., ¶ 29. These lawsuits are aimed at preventing groups from expressing views that are opposed by the party bringing the suit. *Id.*

> The apparent goal of SLAPPs is to stop citizens from exercising their political rights or to punish them for having done so. SLAPPs send a clear message: that there is a "price" for speaking out politically.... Filers of SLAPPs seldom win a final victory in court, yet seem to achieve their political purposes. Targets seldom lose legally, yet frequently are devastated and depoliticized – "chilled" in first amendment vernacular.

Id.[10]

The Constituent Communications contain personal reflections of desperation, frustration, depression and fear, information regarding family members and employment struggles, and other deeply personal matters. Erpenbach Aff., ¶ 15; Laundrie Aff., ¶ 8 and Exhs. H-I. "[T]he invasion of privacy becomes significant when the personal information is linked to particular" individuals. *Dep't of State v. Ray*, 502 U.S. 164, 176 (1991) (holding redaction of personally

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[10] This WPRL action is a SLAPP. While the constituents are not defendants, it is aimed at them by an action against Senator Erpenbach to reveal their Constituent Personal Information, which will have a chilling effect on future contacts they may have had if their personal confidential information were not disclosed.

identifiable information appropriate under Federal Freedom of Information Act). "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process." *United States v. Nixon*, 418 U.S. 683, 705 (1974). Constituents who sent written communications should be afforded the same right of privacy and anonymity as a person who had an in-person conversation with Senator Erpenbach about Act 10. *See N. Jersey Newspaper,* 584 A.2d at 279.

In addition to the chilling effect on open and free communication between elected representatives and their constituents, there is a reasonable probability that individuals whose personal information is disclosed would be targeted for threats, harassment or reprisals. As set forth in the Facts, Part I, *supra*, thousands of protestors invaded the Capitol, heightened security measures were in place, and strong, divisive feelings were being expressed. Erpenbach Aff., ¶¶ 15-17 and Exhs. J-K. Senator Erpenbach received numerous e-mail and calls of a threatening and harassing nature including threats of harm to himself and his family, as did other legislators, many of which were investigated. *Id.* For the first time, doors to the Capitol were locked and persons were required to access at one security entrance where they were searched. *Id.* Hundreds of police officers, state patrol and game wardens from all over the state were in the Capitol on a daily basis for crowd control. *Id.* The atmosphere both in and outside the Capitol, where law enforcement officers patrolled on foot and on horseback, was emotional and volatile for an extended period of time. *Id.* When Senator Erpenbach conducted the WPRL balancing test, he weighed in the balance the potential risk to the persons who had contacted him of similar threats, harassment and reprisals if he were to disclose the substance of the Constituent Communications along with the Constituent Personal Information. Erpenbach Aff., ¶ 17. Based

on the strong public policy of protecting the rights of constituents to contact him as their elected representative, because of his concern that releasing Constituent Personal Information during such a contentious and volatile atmosphere could subject them to the same type of threats, harassment and reprisals Senator Erpenbach was receiving, and because it was the substance of the communications that Senator Erpenbach took into consideration in performing his legislative function, the balance swung decidedly to not releasing the Constituent Personal Information even assuming a counterveiling policy of deterring misuse of public computers as asserted by the MacIver Institute. *Id.*

Senator Erpenbach's concerns about the continuing risk of threats, harassment and reprisals against the constituents who contacted him if he released Constituent Personal Information along with the contents of the communications and the chilling effect such disclosure would have on future communications continue. Erpenbach Aff., ¶ 18. Act 10 was recently struck down by a Dane County Circuit Court Judge, but that ruling is now on appeal. Concerns with Act 10 continue with both its opponents and supporters, and whatever the ultimate outcome in the courts many people will be disappointed and likely to express that disappointment in various ways. *Id.* One of those ways could be reprisals against those constituents who contacted Senator Erpenbach should he release the Constituent Personal Information. *Id.* In addition, without regard to the ultimate decisions as to the legality of Act 10, if constituents know that Senator Erpenbach has released Constituent Personal Information with the contents of the Constituent Communications, the next time they have concerns about contentious legislation, the likelihood that they will contact Senator Erpenbach as they did with Act 10 will be substantially reduced. *Id.* For these reasons, even undertaking the balance today, the public policies of protecting the Constituent Personal Information, and thus protecting their

unfettered right to petition their elected representative, outweighs by a substantial margin the general public policy underlying the WPRL of ensuring transparency in government. *Id.* The public policy of governmental transparency underlying the WPRL was already furthered when Senator Erpenbach produced the substance of the Constituent Communications since that is what governs Senator Erpenbach's decision-making in performing his legislative function. *Id.*

Redaction of the Constituent Personal Information while producing the Constituent Communication strikes the proper balance between the public's right to inspect records and the rights of individuals to free speech and to petition their elected representatives. The narrow denial of access to Constituent Personal Information, which really has no relationship to a government function, should be upheld because the presumption favoring disclosure is outweighed by more important policy considerations that necessitate limited access. *Munroe*, 201 Wis. 2d at 446; *Hempel*, 2005 WI at ¶ 4.

C. Deference To Senator Erpenbach's Application Of The Balancing Test And Decision To Redact Constituent Personal Information Is Warranted.

The "substantial discretion" afforded records custodians in conducting the WPRL balancing analysis warrants even a heightened level of deference to Senator Erpenbach's decision to redact Constituent Personal Information. *Seifert*, 2007 WI App at ¶ 31. As set forth in Argument, Part II, *supra,* it is the custom and practice of the Senate to allow Senators to decide whether disclosure of Constituent Personal Information is warranted. "Implicit in the senate's decision is a citizen's right to contact a legislator in person, by mail, or by telephone without any fear or suspicion that doing so would subject the citizen to inquiries from the press or anyone else regarding the nature of the conversation." *Des Moines Register*, 542 N.W.2d at 501. "The weighing of these factors is indigenous to the political process and is distinctly within

the province of the senate. As elected representatives involved with the political process, senators are conditioned to decide political questions." *Id.*

This is not the usual case in which a records custodian was called upon to weigh competing public policies. Senator Erpenbach is an elected representative who routinely makes public policy decisions in the execution of his official duties. Setting public policy is a legislative function, not a judicial function. When a legislator chooses between competing public policies, absent constitutional defects in the ***balancing result***, a court should defer to the legislator's balance. Moreover, Senator Erpenbach had a front row seat to the unprecedented circumstances surrounding the enactment of Act 10. *See* Facts Part I, *supra*. Redaction of Constituent Personal Information may not always tip in favor of nondisclosure. That is why the Senate Rule of Proceeding leaves it to each Senator to make the decision in the context of the time the request is made. Given the "context of the particular circumstances" here, nondisclosure was justified and a heightened level of deference to Senator Erpenbach's decision to redact Constituent Personal Information is warranted. *Seifert*, 2007 WI App at ¶ 31.

CONCLUSION

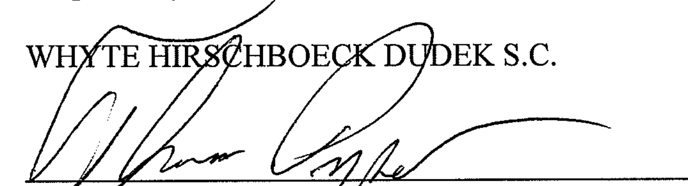
For the reasons set forth herein, the Court should dismiss the Complaint with prejudice because the issue involved is a non-justiciable political question. If the Court does not dismiss the case on non-justiciable political question grounds, the Court should enter judgment in Senator Erpenbach's favor and against the Plaintiffs finding that Constituent Personal Information is not a "record" for purposes of the WPRL, Senator Erpenbach's Wis. Const. Art. IV § 16 Speech and Debate right exempts the Constituent Personal Information from the reach of the WPRL under the specific facts of this case, and/or because the overriding public interest in protecting constituents' state and federal constitutional rights of free speech and to petition their

government and constituents' individual privacy rights far outweigh the general WPRL public policy of disclosure where the substantive Constituent Communications have been produced.

Dated the 15th day of November, 2012

Respectfully submitted,

WHYTE HIRSCHBOECK DUDEK S.C.



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