No. 78637-2

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE FARM BUREAU FEDERATION, WASHINGTON STATE GRANGE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, EVERGREEN FREEDOM FOUNDATION, WASHINGTON ASSOCIATION OF REALTORS, and STEVE NEIGHBORS,

Respondents,

v.

CHRISTINE O. GREGOIRE, Governor of the State of Washington; STATE EXPENDITURE LIMIT COMMITTEE; and STATE OF WASHINGTON,

Appellants.

BRIEF ON BEHALF OF NATIONAL CONFERENCE OF STATE LEGISLATURES APPEARING AS AMICUS CURIAE

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I. INTRODUCTION

Although the underlying merits of this action concern the interpretation of recent legislative enactments, a potentially far more important issue concerning fundamental matters of legislative independence arises from the procedural history of the case. In resolving a discovery dispute, the trial court properly upheld an assertion of the legislative privilege of Const. art. II, § 17 not to produce documents related to a bill that were not part of its public record. Respondents seek to nullify this privilege.

This issue presents a question of first impression concerning the extent to which the judicial branch may question legislators and their staff about the legislative process. Of course, the judicial branch must routinely oversee the legislature's *output*, both in interpreting ambiguous or conflicting statutes (as with the underlying merits of this action), as well as in determining whether a statute is constitutional. But as the framers of the Constitution understood, and as the trial court recognized, it is inappropriate for the judicial branch to question the motivation and conduct of legislators and their staff when considering and enacting legislation.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The National Conference of State Legislatures ("NCSL") is a bipartisan organization founded in 1975 to serve the legislators and staffs of the nation's 50 states, its commonwealths, and territories. One of NCSL's

primary purposes is to improve the quality and effectiveness of state legislatures. It also seeks to promote a sound understanding of the legislative process. NCSL is a frequent advocate for state interests before the federal government. When appropriate, it also appears in court as *amicus curiae* to defend legislative prerogatives. NCSL's interest in this proceeding is in securing the constitutional independence of the legislative branch and promoting a robust separation of powers by protecting the Washington legislature's historic privilege against the use of compulsory process to question their motivations for and processes of enacting a law.

III. ISSUE OF CONCERN TO AMICUS CURIAE NCSL

Does the speech or debate clause of the Washington Constitution, article II, § 17, "No member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate," provide state legislators and their staff with an absolute privilege against compelled questioning about, or production of documents and other materials integrally related to, their legitimate legislative activities?

IV. STATEMENT OF THE CASE

In Snohomish County Superior Court, Respondents alleged that a state revenue measure violated the Taxpayer Protection Act, RCW 43.135. Respondents sought discovery of all communications "from or to the Office of Fiscal Management, the state Treasurer's office, the House Appropriations

Committee, or its members or staff, or the Senate Ways and Means Committee, or its members or staff, or the Governor's Office" regarding SB 6078 or SB 6090, or regarding transfers into or out of several budget accounts. CP 1612-15. Respondents also sought documents from the Expenditure Limit Committee ("ELC") (comprising the chairs of the House Appropriations and Senate Ways and Means Committees, the Director of Financial Management, and the Attorney General). CP 1615-16.

In response, the State produced all responsive documents found in the offices of the Governor, State Treasurer, or Attorney General. CP 1612-17; 970 n.3. The State also produced a variety of materials from the legislative branch, including the "Bill Files" from both legislative committees, all documents pertaining exclusively to ELC business (rather than legislative business), and all legislative branch communications with outside entities other than the executive branch's Office of Financial Management ("OFM") in its capacity as the Legislature's budget advisor. *Id.* The State prepared privilege logs identifying other potentially responsive material pertaining to internal legislative deliberations in the House, Senate, and the OFM, asserting the legislative privilege of article II, § 17. CP 1629-46.

Plaintiffs moved to compel production of the withheld material, arguing that article II, § 17 should be construed to provide legislators only immunity from suit. After briefing and argument, the trial court denied the

motion, properly concluding "that legislators are not answerable to the judicial branch of government about their deliberative processes," and that section 17 should be construed liberally to protect "all essential activities that are an integral part of the legislative function." CP 1169. The court added six qualifications: (1) privileged material must be an integral part of the legislative process; (2) privileged material cannot be purely factual; (3) privileged material must be internal legislative documents or materials solicited for a legislative purpose; (4) the privilege extends to legislative aides and state employees when acting in a supporting role for legislative activities; (5) the privilege pertains to all forms of litigation, including declaratory judgment actions; (6) the privilege applies both before and after any underlying legislation is enacted. CP 1169-71.

In response to a supplemental discovery motion, the trial court reaffirmed that the legislative privilege applied to communications between legislative staff and OFM staff on subjects integrally related to the legislative process, while also concluding that many OFM records were unprivileged because they were purely "factual," rather than what the court characterized as deliberative materials or policy advice. The court granted the motion to compel in part and denied it in part. CP 1186-89.

In a hearing on March 17, 2006, the trial court disposed of plaintiffs' and defendants' motions for summary judgment, granting and denying each

in part. Thereafter, defendants appealed the summary judgment award, and plaintiffs cross-appealed both the summary judgment award and the January 13 and February 28 orders denying their motions to compel discovery.

V. ARGUMENT

> *[R]epresentatives, in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches, Judiciary and Executive.*

8 WORKS OF THOMAS JEFFERSON 322-23 (1797) (writing jointly with James Madison), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 336 (Philip B. Kurland & Ralph Lerner, eds., 1987).

The genius of American constitutional government lies in its tri-partite structure, which the framers of the U.S. Constitution carefully crafted, and which each of the fifty states deliberately adopted. Although state-by-state variations in this structure in turn are another hallmark of our federal republic, all states share the federal model's understanding that the legislative branch must be co-equal to, and functionally independent of, the other branches. Washington, like forty-two other states, has protected legislative independence with an express constitutional privilege that precludes the judicial branch from questioning the motivation and conduct of legislators and their aides when carrying out their constitutional responsibilities.

After a thorough and thoughtful analysis, the trial court properly recognized that Washington's constitutional legislative privilege applies to

legislative documents. This Court should affirm that article II, § 17 provides legislators not only an immunity from suit for their legislative work but also an absolute privilege against compelled questioning – including document production – concerning their legitimate legislative activities. Indeed, if anything, the privilege should be broader than the privilege that the trial court recognized, by also protecting legislators against compelled disclosure of purely *factual* material, as well as *unsolicited* material, provided it is an integral part of the legislative process.

A. ARTICLE II, SECTION 17 SHOULD BE CONSTRUED TO INCLUDE A PRIVILEGE FROM DISCOVERY

The principle of legislative independence protected in article II, § 17 has a storied historical pedigree that compels its application to the discovery matters at issue here. The text of section 17 supports this construction, notwithstanding its stylistic variation from some other constitutions. Indeed, section 17 is functionally identical to the Speech or Debate Clause of the U.S. Constitution, which federal courts have consistently applied to privilege legislative documents. Many states, including three with identical language, have similarly interpreted their analogous provisions.

1. *Article II, Section 17 Flows From a Rich History of Protecting the Legislature Against Judicial and Executive Encroachment*

When the framers of the Washington Constitution in 1889 provided that "No member of the legislature shall be liable in any civil action or

criminal prosecution whatever, for words spoken in debate," CONST. art II, § 17, they were codifying several centuries of British and American experience in protecting legislative independence. That experience included King Charles I's seizure of the legislative papers of five members of Parliament in 1642, in addition to efforts later that century to prosecute members of Parliament for speeches *and reports* critical of the Crown. *See* Mary P. Clarke, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 1 (1943); Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1130 (1973).

In reaction to these and other intrusions by the Crown, the English Bill of Rights enacted a legislative privilege that protected not only parliamentary speech and debate, but also parliamentary *documents and proceedings*. *See* Reinstein & Silverglate, *supra*, at 1129-33. In full, this English provision read: "That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." 1 W. & M. 2, c. 2, § 9 (1689).

In the colonies, the legislative privilege was seen "as a fundamental privilege without which the right to deliberate would be of little value." *See* Clarke, *supra*, at 97. Justice Story described the privilege as a "great and vital privilege . . . without which all other privileges would be comparatively unimportant, or ineffectual." II Joseph Story, COMMENTARIES ON THE

CONSTITUTION § 863 (1833). As the U.S. Supreme Court has said:

> The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense."

Tenney v. Brandhove, 341 U.S. 367, 373, 71 S. Ct. 783, 95 L. Ed. 2d 1019 (1951) (quoting II WORKS OF JAMES WILSON (Andrews ed. 1896) 38).

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon the conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.

Id. at 377.

Over the years, a variety of textual styles have been used to express this principle. The Articles of Confederation closely followed the English Bill of Rights, providing that "Freedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress . . . ." ART. OF CONFEDERATION, art. V. In drafting the U.S. Constitution, the Committee on Style then revised this language, without

comment, to read "for any Speech or Debate in either House, [Members] shall not be questioned in any other Place." U.S. CONST. art. I, § 6; *see* Reinstein & Silverglate, *supra*, at 1136 n.122. When Massachusetts adopted its constitution a few years earlier, its privilege included this rationale: "The freedom of deliberation, speech, and debate, in either house of the legislature, *is so essential to the rights of the people*, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." MASS CONST. OF 1780, art. XXI (emphasis added).

As the history of legislative privilege illustrates, it has the same purpose, regardless of the style of text used: to protect elected representatives from judicial and executive compulsion, actual or threatened. Neither the executive branch, nor private citizens, nor powerful special interests should be permitted to use the judicial process to harass and intimidate legislators in the performance of their legislative duties. By thus protecting legislative independence, the legislative privilege ultimately protects the public interest.

2. *Article II, Section 17 Establishes a Legislative Privilege Like Its Historical Antecedents*

The text of Washington's speech or debate clause accomplishes the same purpose as its historical antecedents. Article II, § 17 reads: "No member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate." This privilege also serves to protect the legislative process from judicial compulsion, and

accordingly it should be construed broadly to accomplish this purpose.

For instance, although a narrow construction of section 17 might extend it only to words spoken in debate, the Court of Appeals easily rejected this approach and construed it to "clothe members of the legislature with an absolute privilege to utter or *publish* defamatory statements *in the course of the performance of legislative business*." *Martonik v. Durkan*, 23 Wn. App. 47, 54, 546 P.2d 1054 (1979) (emphasis added). Likewise, the U.S. Supreme Court did not hesitate in construing the federal privilege to cover not only "speech or debate" but also every activity that is "an integral part of the deliberative and communicative processes" of considering legislation. *Gravel v. United States*, 408 U.S. 606, 625, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972); *see Kilbourn v. Thompson*, 103 U.S. 168, 204, 26 L. Ed. 377 (1881).

Similarly, the text of section 17 providing that no legislator "shall be liable" in judicial proceedings should be construed broadly to effectuate the public purpose of the legislative privilege. Although Respondents argue that this phrasing limits Washington's legislative privilege to an immunity from suit or prosecution, and does not encompass a privilege against questioning, such a cramped reading is by no means even textually required. The nineteenth century dictionaries upon which Respondents themselves rely demonstrate plainly that the contemporary understanding of the word "liable" at the time the Washington Constitution was drafted included the meaning

"answerable." Resp. Br. at 61-62. Of course, being "answerable" includes being subject to "questioning in a judicial proceeding." *See Wisconsin v. Beno*, 116 Wis.2d 122, 341 N.W.2d 668, 678 (Wis. 1984).

The difference between the federal formulation of "shall not be questioned" and the state formulation of "shall [not] be liable," or in other words "subject to questioning in a judicial proceeding," is only a difference in style.

3. *The Broad Scope of the Federal Constitution's Analogous Legislative Privilege is Instructive*

Given the obvious functional similarity between article II, § 17 and the federal Speech or Debate Clause, the U.S. Supreme Court's construction of this Clause provides sound interpretive guidance. As this Court observed in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), "[f]ederal precedent in areas addressed by similar provisions in our state constitutions can be meaningful and instructive." *Id.* at 60 (quoting *New Jersey v. Hunt*, 91 N.J. 338, 363, 450 A.2d 952 (1982) (Handler, J., concurring)). Although the Court in *Gunwall* identified six nonexclusive factors that might call for an exception to this principle, *see id.* at 61-62, none of them applies here.

Indeed, the only additional argument that Respondents make, beyond their reliance on the textual variation, is that nineteenth century suspicion of legislative power provides a historical basis for reading section 17 narrowly. However, while the drafters of the state Constitution may have intended to

constrain the legislature's power, they were fully able to do so through the range of substantive limits on its power that the Respondents have already identified, *see* Resp. Br. at 67-68. Nothing about the constitutional history suggests that the drafters also intended to destroy the essential independence of the legislative branch by exposing it to compelled judicial questioning, contrary to principles of legislative privilege then several centuries old.

The federal Speech or Debate Clause therefore provides a fully developed jurisprudence of legislative privilege on which this Court can rely for guidance. The privilege extends to all of a member's "legislative acts," *United States v. Brewster*, 408 U.S. 501, 512, 92 S. Ct. 2531, 33 L. Ed. 2d 507 (1972), and covers much more than immunity from suit, *see Gravel*, 408 U.S. at 625. Lower federal courts have repeatedly applied the Speech or Debate Clause broadly to protect Congress's ability to gather legislative information as it sees fit. *See generally* Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm. & Mary L. Rev. 221, 255-258 (2003) (summarizing cases).

4. *Other States with Similar Legislative Privilege Provisions Also Have Interpreted Them Broadly to Further Their Vital Purpose*

Analogous legislative privilege provisions in other states further reinforce the trial court's recognition that article II, § 17 protects the legislature against compelled discovery. Forty-three states have some form of legislative privilege in their state constitution, and several of the remaining

seven states have found such a privilege to be implied in their structure of separated powers. *See* Huefner, *supra*, at 236-37 & n.54. But four states in particular – Arizona, Maryland, Nebraska, and Wisconsin – have legislative privilege provisions that most closely match the text of section 17. *See id.* at 238; ARIZ. CONST. art. IV, pt. 2, § 7; MD. CONST. art. III, § 18; NEB. CONST. art. III, § 26; WIS. CONST. art. IV, § 16. The trial court noted two of these provisions that have been the subject of judicial interpretation, each construing the language "No member of the legislature shall be liable . . . " as synonymous with the language "shall not be questioned" of the federal Speech or Debate Clause. *See Arizona Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 75 P.3d 1088, 1095 (2003); *Wisconsin v. Beno*, 341 N.W.2d at 677-78. The Maryland Constitution, which includes both language similar to the federal clause (MD. CONST. Dec. of Rights, art. 10) and language similar to the Washington clause (MD. CONST. art. III, § 18), has likewise been construed in pari materia with the federal clause. *Blondes v. Maryland*, 16 Md.App. 165, 294 A.2d 661, 665-66 (1972).

Wisconsin v. Beno is especially persuasive, given that the framers of the Washington Constitution modeled its speech or debate clause on the Wisconsin Constitution. In *Beno*, the Wisconsin Supreme Court conducted an independent analysis of the proper meaning of a provision that, except for an additional comma, is textually identical to article II, § 17. After

investigating the provenance of its constitutional provision, the court reported that the drafters of the Wisconsin Constitution had surveyed other existing versions of the legislative privilege and had sought not to narrow the privilege but to employ then-current language to convey the same meaning "most fully." *Beno*, 341 N.W.2d at 677 (quoting JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN (Tenney, Smith, and Holt, 1848)). Accordingly, the court held that this provision grants legislators both immunity from suit and a privilege against judicial compulsion – or "liability to court process" – with respect to subpoenas and discovery matters. *See id.* at 677-78.

B. A ROBUST LEGISLATIVE PRIVILEGE ABSOLUTELY PROHIBITS COMPELLED QUESTIONING OF LEGISLATORS OR THEIR STAFF CONCERNING ANY LEGITIMATE LEGISLATIVE ACTIVITIES

In addition to affirming a legislative privilege against compelled questioning or document production concerning matters that are integral to the legislative process, this Court should recognize specific contours of the privilege that are at least as broad as those recognized below. The trial court properly held that the privilege must apply to staff engaged in essential legislative activities, and that where it applies, the privilege is absolute. But the trial court was unduly restrictive in not applying the privilege to purely factual information in the legislature's possession, or to unsolicited material received by the legislature, that pertains to legitimate legislative activities.

1. *The Privilege Must Apply to Staff as Well as to Members*

To effectuate its purpose, the legislative privilege must apply to activities of staff as well as of members. As the U.S. Supreme Court said regarding a Senator's aide preparing for a committee meeting, "for the purpose of construing the privilege a Member and his aide are to be 'treated as one' . . . . [T]he 'Speech or Debate Clause prohibits inquiry into things done . . . as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally.'" *Gravel*, 408 U.S. at 616. The protection afforded a legislator's personal staff also protects committee staff. *See Doe v. McMillan*, 412 U.S. 306, 312, 93 S. Ct. 2018, 36 L. Ed. 2d 912 (1973); Huefner, *supra*, at 293-94.

It would eviscerate the legislative privilege if it did not apply to staff performing activities that would be protected if performed by a legislator. Members routinely rely on staff to conduct background research, collect information, and prepare advice concerning potential legislation, just as jurists routinely rely on judicial clerks to assist them with core judicial functions. Reliance on staff for these functions must be respected as the legislature's judgment that this assistance is essential to the legislative process. If staff can be forced to respond to questions about this legislative work, or if the resulting documents are subject to compelled release, then the members themselves will have lost the ability to conduct their legislative

duties independent of the other branches, and "the central role of the Speech or Debate Clause – to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary – will inevitably be diminished and frustrated." *Gravel*, 408 U.S. at 617 (citation omitted).

2. *The Privilege is Absolute*

Once it is determined that the activities of a legislator or legislative staff fall within the "legitimate legislative sphere," the protection of the speech or debate clause is absolute. *See Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975). Although most common law privileges are qualified, qualification is inappropriate with respect to the constitutional legislative privilege. First, by its terms, this privilege is unqualified. More importantly, the privilege's purpose of protecting legislative independence cannot be served if the judicial branch has the power to trump the privilege. The legislature must be secure in its knowledge that its internal operations are sacrosanct.

The privilege protects legislators "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85, 87 S. Ct. 1425, 44 L. Ed. 2d 324 (1967). "[L]egislative independence is imperiled" whenever "judicial power is . . . brought to bear on Members of Congress." *Eastland v. United States Servicemen's Fund*, 421 U.S. at 503.

The proceedings in the trial court illustrate what should *not* happen in a case of this kind. After the Attorney General, legislative staff, and members had expended substantial time identifying their nonpublic communications related to the passage of SB 6078 and SB 6090 and provided them to the court for its *in camera* inspection to determine, among other things, whether some of the communications were "factual" rather than "deliberative," the court inadvertently ordered the release of one privileged e-mail message "within a string of other e-mail messages" and had to order the parties to black it out and not further distribute it. Order ¶ 4, CP 1183. The compulsion to respond to the request should have ended as soon as it appeared that the internal documents related to legitimate legislative activity.

3. *The Privilege is Limited to Legitimate Legislative Activities*

Although the legislative privilege must be absolute where it applies, it is appropriately circumscribed by applying it only to activities that are integral to the constitutional processes of considering and enacting legislation. Legislators may not use the privilege to shield official but nonlegislative activities from inquiry. Accordingly, "political" acts of a legislator or aide are not entitled to the privilege. *United States v. Brewster*, 408 U.S. at 512.

The legislature conducts the vast majority of its work in public, and documents from these public processes are public. But to enable legislators

to explore ideas freely, the legislative privilege must extend to documents conveying internal discussions regarding pending or future legislation, or prepared for individual legislators to explore policy options, as are at issue here. At the point that legislators take any formal action on these ideas – in committee hearings or on the floor – the process is thoroughly public.

4. *The Privilege Should Apply to Purely Factual Material, as Well as to Unsolicited Materials, that Pertain to Potential Legislation*

Although the trial court properly limited the legislative privilege to the legitimate parts of the legislative process, it erred in concluding that both purely factual materials and unsolicited materials are outside this category. In order to eliminate the threat of using the judicial process to intimidate or second-guess the legislative process, any internal legislative communications, even of purely factual material, must be absolutely protected if they concern potential legislation. *See* Reinstein & Silverglate, *supra*, at 1153-57. Even purely factual communications almost always will reveal details of the deliberative process through the manner of their selection or presentation. It must remain the legislators' prerogative to decide what information to rely on, how to make use of this information, and when to share it outside the legislature.

The Public Records Act, RCW 42.56, on which the trial court relied to exempt purely factual documents from the legislative privilege, is inapposite. Open government *statutes* do not provide a basis for overcoming

the legislative privilege, because the privilege provides individual legislators with a *constitutional* protection to conduct their legislative activities as they see fit, which even the institution ordinarily cannot waive. *See* Huefner, *supra*, at 286-88.

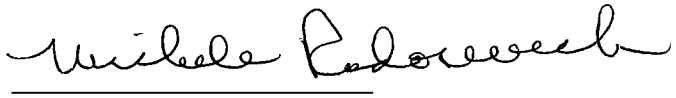
Likewise, unsolicited materials from citizens or lobbyists concerning legislative matters must also be privileged in the hands of the legislature. Unsolicited legislative communications frequently have been, and should continue to be, the impetus for meaningful policy ideas. It is for the legislature alone to control this information. Even though these identical materials may be unprivileged in the hands of those who sent them to the legislature, legislators themselves simply should not be vulnerable to, or burdened by, judicial inquiry concerning the sources of their legislative proposals and related information. The resulting legislative output will stand or fall on its own merits, but the judicial branch oversteps its bounds – and the limitations of article II, § 17 – if it looks behind legislative enactments and intrudes upon the legislative process itself.

VI. CONCLUSION

For the foregoing reasons, the National Conference of State Legislatures, as Amicus Curiae, respectfully asks this Court to affirm the Snohomish County Superior Court's rulings of January 13, 2006, and February 28, 2006, holding that article II, § 17 provides state legislators and

their staff with an absolute privilege against compelled production of legislative documents. If any refinement of the rulings below is in order, it is in the direction of affording the legislative branch greater independence in how it performs its constitutional responsibilities by clarifying that purely factual material and unsolicited material in the legislature's possession are also privileged if they are a legitimate part of the legislative process.

RESPECTFULLY SUBMITTED this 26th day of October, 2006.



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