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STATE OF WASHINGTON
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Washington State
Supreme Court

Supreme Court No. 981191

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, a nonprofit organization

Appellant,

v.

JAY INSLEE in his official capacity as WASHINGTON STATE GOVERNOR, THE STATE OF WASHINGTON, and the WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE,

Respondents.

BRIEF OF AMICI CURIAE SENATORS IN SUPPORT OF BIAW'S STATEMENT OF GROUNDS FOR DIRECT REVIEW BY THE STATE SUPREME COURT

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I. INTRODUCTION

The Supreme Court should resolve this case at the earliest possible moment. The case presents an issue that is crucial to the Legislature's ability to perform its constitutional duty.[1] It asks whether the Governor must comply with the plain meaning of the state constitution Article III § 12, which limits the Governor's veto power to no less than a whole proviso of a bill. The case also asks whether contingent language constitutes a palpable attempt at dissimulation of the Governor's veto authority.

This Court should review the case under RAP 4.2(a)(4) for two reasons. First, the Governor's unconstitutional veto sets a dangerous precedent. The Governor's unconstitutional direction to a state agency to implement language in a version of a bill that did not pass both chambers of the Legislature in his veto message, compounds this problem. This direction constitutes a gross violation of the doctrine of the separation of powers, the veto authority of the governor, and if followed by the agency, requires rulemaking without statutory authority. Second, legislators need

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[1] The Appeal is not limited to the Petitioner's standing. The Rules of Appellate Procedure make no such limitation and the Supreme Court routinely reviews the merits of cases in which the trial court decided the case on procedural grounds. *See, e.g., Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 730 P.2d 653 (1986).

guidance on how to craft legislation so as not to inadvertently violate the Court's definition of dissimulating the governor's veto power. The use of contingent language is ubiquitous in bill drafting and if the Court accepts the Governor's bright line rule to prohibit it, then the ability of the Legislature to enact policy will be detrimentally affected.

II. IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are a bipartisan group of four senators from the Washington State Senate who are interested in ensuring that laws the Legislature passes are enacted subject only to the constitutional use of the veto power by the Governor. The case centers on Second Substitute House Bill 1579, 2019 ("HB 1579"), but the issues are much broader than the bill. This is not an argument over the content of the bill, as evidenced by the identity of amici. Although not representing the Legislature as a whole, the individual legislators signing on as Amici Curiae have relevant knowledge and expertise of how the case may affect the execution of their duties as legislators. They are State Senators Steve Hobbs, Steve O'Ban, Michael Padden, and Kevin Van De Wege. Senators Hobbs and Van De Wege voted for the bill, while Senators O'Ban and Padden voted against it. Amici's interest is in a just process, not a preferred outcome.

III. ISSUE OF INTEREST TO AMICI CURIAE

1) Whether the Legislature's use of contingent language constitutes a palpable attempt at circumvention of a governor's veto authority.

2) Whether the Governor's unconstitutional use of his veto authority is a matter of broad public import.

IV. ARGUMENT

The Governor's interpretation of Wash. Const. Art. III § 12 would constitute a drastic change in law, impacting the legislative process. Because of this impact on the Legislature's activities, amici support Appellant's request for direct review by this Court under RAP 4.2(a)(4). The Governor's veto message and arguments at the trial court show that he believes that 1) contingent language constitutes a palpable attempt at dissimulation and 2) that if the bill presented for his signature did seek to restrict his authority, he would be free from the constraints of Article III § 12. Both ideas are novel and, if accepted by the Court, would negatively affect the Legislature as it changes the process of efficient bill drafting.

Appellant Building Industry Association of Washington's ("BIAW") Statement of Grounds fully explains the factual background for this momentous case. RAP 4.2(a)(4) allows for discretionary review by the Washington State Supreme Court in a "case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." In brief, BIAW's suit challenges the Governor's use of his

veto authority in vetoing a subsection of HB 1579. Article III § 12 provides in part that:

> If any bill presented to the governor contain several sections or appropriation items, he may object to one or more sections or appropriation items while approving other portions of the bill: Provided, That he may not object to less than an entire section, except that if the section contain one or more appropriation items he may object to any such appropriation item or items.

In HB 1579, the Governor vetoed the following language in subsection 8(1)(a):

> **(1)(a)** If section 13 of this act is enacted into law by June 30, 2019, the department may levy civil penalties of up to ten thousand dollars for every violation of this chapter or of the rules that implement this chapter. If section 13 of this act is not enacted into law by June 30, 2019, the department may levy civil penalties of up to one hundred dollars for every violation of this chapter or of the rules that implement this chapter. Each and every violation is a separate and distinct civil offense.

In his veto message, the Governor provided the following rationale.

> By making the original civil penalty amount contingent on passage of an unconstitutional section of the bill, the Legislature further compounded the constitutional violation. In addition, by structuring the contingency language within a subsection of Section 8, the Legislature intentionally attempted to circumvent and impede my veto authority by entangling an unrelated and unconstitutional provision within a recommendation of the task force. In vetoing this subsection, I direct the department to continue to use its authority to secure the effect of the statute, to establish a maximum civil penalty not to exceed the penalty amount established in the original bill, and to use its rulemaking authority to support these efforts as needed.

This veto message shows that the Governor believes contingent language is sufficient evidence to disregard the Legislature's designation of a

section and that any limitation on his authority justifies disregarding Article III § 12. The validity of those beliefs is an issue this Court should resolve quickly, to facilitate informed drafting by the Legislature and to prevent improper vetoes by the Governor.

A. Legislators Need Clarity from This Court Regarding the Use of Contingent Language in Legislation.

If this Court accepts the Governor's argument that contingent language is sufficient evidence to disregard the Legislature's designation of something as a section or subsection, amici urge the Court to clarify this immediately. The Legislature uses contingent language throughout its work and a bright-line rule that makes that drafting susceptible to a line item veto would change the drafting process.

1. The Use of Contingent Language is Common in Bill Drafting.

All Amici have used contingent language in drafting bills this year. *See, e.g.*, Senate Bill 5578 (2019) (including a severability clause); Senate Bill 5114 (2019) (application of act contingent on population size); Senate Bill 5487 (2019) (including a severability clause); Senate Bill 6606 (2020) ("Section 4 of this act takes effect immediately upon a court of final jurisdiction holding that [Initiative No. 976] is no longer enjoined from effectiveness"). Amici were not the first legislators to link law to other

procedural occurrences. See, e.g., Washington Laws, 2011 Ch. 58, p. 594; ("No less than eighty percent must be used for the purposes of providing housing counselors for borrowers, except that this amount may be less than eighty percent only if necessary to meet the funding level specified for the office of the attorney general under subsection (2) of this section and the department under subsection (4) of this section"); Washington Laws, 2010 Ch. 1, p. 5; ("If the bill is not enacted by June 30, 2009, the amount provided in this subsection shall lapse"); Washington Laws, 2011, Ch. 5 p. 325 ("If Second Substitute Senate Bill No. 5676 is enacted the allocations are formula-driven, otherwise the office of the superintendent shall consider the funding provided in this subsection as a fixed amount, and shall adjust funding to stay within the amounts provided in this subsection"). This common drafting technique should not be treated as evidence of dissimulation, let alone proof of it. That said, if the Court does intend to accept that rule, legislators should know immediately.

2. The Bright-Line Rule for Which the Governor Advocates Will Detrimentally Affect the Ability of the Legislature to Enact Consensus Based Policy.

In the best light possible, the Governor is advocating for a bright-line rule that linking provisions of a bill that do not govern identical topics automatically constitutes a palpable attempt at dissimulation. In

Washington Legislature v. Lowry, 131 Wn.2d 309, 321, 931 P.2d 885, 892 (1997), this Court declined to "offer bright-line definitions of legislative or gubernatorial manipulation." That holding should guide the Court here. A bright-line rule that certain drafting will make legislation susceptible to a line-item veto will change the way in which legislation is written. Linking topics is one of the ways legislators can find common ground on contentious issues. It allows drafting to account for multiple possible outcomes and budget changes. Taking this tool away from the Legislature would make agreement harder to reach. For this reason, the Court should grant review.

B. The Limitations on the Governor's Veto Authority Under Article III § 12 Constitutes a Matter of Great Public Importance.

The use and abuse of the veto power are issues of public import, counseling review under RAP 4.2(a)(4). As this Court noted in *Lowry,* the Governor and the Legislature could manipulate their legislative power in an unconstitutional way. *Lowry*, 131 Wn.2d at 321. This point was also explained in *Washington State Legislature v. State,* 139 Wn.2d 129, 985 P.2d 353 (1999), when the Court held that the Legislature's section designation was not conclusive because of apparent circumvention, while also holding that the Governor violated Article III § 12 by vetoing all but a

sentence in the same section. The Governor may veto no less than a whole section and failure to do so encroaches on the Legislature's authority.

1. The Governor May Not Veto Less Than a Whole Section.

The Governor vetoed a portion of HB 1579 which was a part of a whole, not a de facto section. The vetoed portion was a piece of one substantive statutory change: the new fine authority that the bill gave to the Department of Fish and Wildlife. The vetoed piece was a fundamental part of that whole. The impropriety of this veto is both demonstrated and exacerbated by the Governor's veto message. The instruction was necessary because the veto removed an integral piece of the bill, showing the veto's impropriety under Article III § 12. The instruction also exacerbated the violation because Article III § 12 is designed to preserve a balance between the Governor and the Legislature. Instructing an agency, the Department of Fish and Wildlife, to enforce a version of a law that never passed in the Senate shows precisely the type of power grabbing Article III § 12 attempts to prevent.

2. The Court Should Intervene Because Vetoing Less Than a Whole Section Threatens the Balance of Powers.

The Legislature has primary authority and responsibility in drafting the State's laws. Wa. Const. Art. II § 1. As part of this primacy, the

Legislature is entitled to deference in its designation of sections and subsections. *Legislature v. Lowry*, 131 Wn.2d 309, 320, 931 P.2d 885, 891 (1997); *CLEAN v. State of Wash.*, 130 Wn.2d 782, 928 P.2d 1054 (1996). By vetoing Subsection 8(1)(a) and directing the agency to substitute the corresponding subsection in the "original bill," the Governor erased the Senate's influence in HB 1579. The Governor has the right to remove language, but that right is not absolute. The Governor does not have the right to replace a subsection with one the Governor found more attractive.

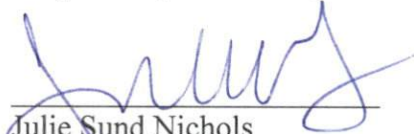
In the Governor's veto message, he asserted that the Legislature had sought to circumvent his authority. This assertion seeks to justify his invasion of the Legislature's authority. This Court should address the validity of the assertion and the invasion. If it is not quickly resolved, the Governor's pen will move again before this Court has even had a chance to hear the case. This case presents an urgent issue that this Court should resolve.

V. CONCLUSION

This case presents an urgent issue of broad public import. Allowing it to navigate through the Court of Appeals and discretionary review processes before reaching this Court's final decision would harm Amici's ability to perform their legislative duties, proving that this Court should

accept review and provide guidance to the other branches as soon as possible.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing Amici Brief to be served via electronic mail, pursuant to an e-service agreement, on this date to counsel for the parties at:

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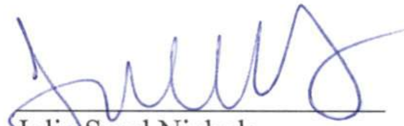

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