Supreme Court No. 98119-1-II

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 APPELANT

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I. INTRODUCTION

The Governor overstepped his constitutional limitations by vetoing Subsection 8(1)(a) of Second Substitute House Bill 1579 ("HB 1579"), to the detriment of all those regulated by RCW 77.55 and especially homebuilders. The trial court found that homebuilders had not sufficiently proven they were harmed by the veto, making the case non-justiciable for lack of standing. This decision ignored the harm suffered by builders and the importance of the issue presented. This Court should reverse and decide the case on the merits.

II. ISSUES PRESENTED FOR REVIEW

1) Whether the Governor's veto of a subsection violates Article III § 12 of the Washington Constitution, which requires the Governor veto "no less than an entire section?"

2) Does the Legislature's use of contingent language linking separate topics in a bill constitute a palpable attempt at dissimulation of the Governor's veto authority?

3) Whether builders who are regulated by the law created through the Governor's suspect veto have the right to challenge the validity of that veto.

III. STATEMENT OF THE CASE

The Petitioner, Building Industry Association of Washington ("BIAW") is a nonprofit trade association that advocates for Washington homebuilders at the Legislature and in agency rulemaking. BIAW's nearly 8,000 members are engaged in all aspects of home construction. CP 178. The hydraulic permitting process in RCW 77.55 governs many BIAW

members because of their work in coastal areas. CP 180; See, e.g. CP 184-187. These members rely on a predictable, constitutional civil enforcement of RCW 77.55 to conduct their business. See, e.g., CP 184-187.

In 2019, legislation upended the civil enforcement program for RCW 77.55, undermining the predictability and constitutionality of that process. During the 2019 legislative session, the Washington State Legislature passed HB 1579 titled "Relating to implementing recommendations of the Southern Resident Killer Whale Task Force related to increasing chinook abundance[.]"Along with its strategy of increasing chinook abundance, HB 1579 was the latest in a long line of attempts to accomplish two goals: 1) require single family home builders to go through the same hydraulic permitting process as commercial construction and 2) increase civil fines. CP 52 (repealing RCW 77.55.141, which required WDFW "shall" issue permits for bulkheads for single-family residences); CP 44; CP 182.

While agreeing with the goal of increasing chinook abundance, BIAW has consistently disagreed with these other two goals, in part, because of the effect on building industry. BIAW's Government Affairs team has opposed both goals through several sessions, including 2019. CP 182-183. Government Affairs Director Jan Himebaugh has spoken with BIAW members regularly, in her legislative updates, about these attempts

and has consistently heard that these fines and the more stringent permitting process would make members' businesses suffer because of increased uncertainty and risk due in part to recent changes in law. A permitting process with uncertain applicability and high fines for misapplication deters potential clients. CP 182. CP 185-186. Despite BIAW's lobbying efforts, HB 1579 ultimately passed and hit BIAW's members on both fronts. CP 183.

The bill's path through the Legislature was not a simple one. On January 24, 2019, Representative Fitzgibbons introduced the first version of HB 1579, the original bill, to the House of Representatives. CP 152-156. In that version, the fines for violating RCW 77.55 were increased from $100 per day to $10,000 per violation. The original bill also repealed the existing fine authority. After being voted out of committee, the bill received an impressive 59 yeas and 39 nays on the House floor on March 7, 2019. *Id*. It was then sent to the Senate.

In the Senate, HB 1579 received its First Reading on March 9, 2019 and was referred to the Agriculture, Water, Natural Resources & Parks Committee. Senator Van De Wege, Chair of that committee, proposed an amendment that did two things. First, the amendment added Section 13 to the bill, which created and funded three suction dredging pilot projects. Second, it amended the penalty section of the bill, Section 8,

by making the original increase in civil penalties contingent on the enactment of Section 13. *Id.* Senator Hobbs supported the amendment, as he had proposed the suction dredging projects as stand-alone legislation two sessions prior. His bill passed in the Senate but failed in the House. CP 128-132.

HB 1579, as amended, passed out of the Committee on Agriculture and was referred to Ways and Means on April 2. The amended bill received a "do pass" recommendation from the Ways and Means Committee on April 8. On April 10, the day after the committee cut-off, the Senate passed the bill by a margin of two votes. CP 154; CP 475-476, CP 477.

As a result of the amendment, HB 1579 passed the Senate, but only by two votes. Senator Van De Wege, the amendment sponsor, and Senator Hobbs, who had proposed legislation substantively identical to the amendment, both voted aye. CP 154-156. On April 18, the amended version of HB 1579 passed again in the House, now with 57 votes. The amendment cost two votes in the House, but ultimately allowed the bill to pass both chambers. *Id*.

On May 8, 2019, Governor Inslee signed HB 1579 into law, but vetoed both Subsection 8(1)(a) and Section 13 of the bill. CP 37-53. In his veto message, the Governor directed WDFW to rulemake to implement

the original bill, introduced by Rep. Fitzgibbons, which had not passed in the Senate. CP 52. However, WDFW had lost even its existing authority to fine because HB 1579 also repealed the statutory language which had once empowered WDFW to institute fines. *Id. See, contra*, CP 428.

When BIAW learned about the Governor's veto, BIAW sent WDFW a petition for rulemaking consistent with the current language of the bill. BIAW requested that the agency (1) repeal Washington Administrative Code sections (WACs) based on the repealed fine authorization statute, RCW 77.55.291 and (2) disregard the Governor's direction to create fines without statutory authority. CP 122-124. In response to BIAW's first request, WDFW stated that, while repeal of the existing WACs was inappropriate, WDFW would not impose civil penalties based on the outdated WACs. CP 125-127. In response to BIAW's second request, WDFW disagreed that the statute, as vetoed, failed to provide authority for fines and stated the agency would go through formal rulemaking to create new WACs, allowing civil penalties, based on the text of HB 1579. *Id.*

The legal chaos that has resulted from compounding constitutional violations (first by the legislature in passing a bill which violated the Single Subject rule, then exacerbated by the Governor's subsection veto) costs BIAW's members whose businesses rely on construction projects

near shorelines.[1] See, CP 184-187. They know potential clients are intimidated by the threat of enormous fines, deciding to forego or postpone projects or improvements to avoid the potential for hefty fines. *Id*. Because HB 1579's fine structure makes the permitting process less clear and dramatically increases the fine amounts, BIAW members will lose more business. CP 182; CP 184-187. This risk is intensified by other changes to the permitting process not challenged by this lawsuit, but do create added confusion for homebuilders. They are unsure of what version of the law is enforceable and what fines they may face if they violate it.

[1] The declaration on which this statement is based was drafted prior to the COVID 19 emergency and should be read as a statement about Mr. Roberts' experience prior to the changes that crisis has brought.

IV. ARGUMENT

The Washington Constitution is both an empowering and a limiting document. For example, in Article III§12, the Constitution grants the Governor the power to veto sections of legislation, but expressly limits that power by requiring that the Governor veto no less than a whole section. These constraints on government are also rights for the governed-especially for those affected by legislation that the Governor illegally vetoed. Overstepping constitutional limits deprives Washingtonians of their right to a procedurally just government.

Governor Inslee overstepped when he vetoed less than a whole section of HB 1579. The vetoed portion, Subsection 8(1)(a), was less than a whole section in both form and function. The Respondents' briefing below does not contradict this textual fact, but rather argues that Governor Inslee was justified in upending the balance of powers because the Legislature had already, intentionally exceeded its own authority. This justification fails because it is factually inaccurate and because even if it were true, the Governor is not freed from his own constitutional constraints. The veto was unconstitutional.

The Petitioner has a right to challenge this unconstitutional veto. BIAW's members were better off before the veto, satisfying the Uniform Declaratory Judgment Act's injury requirement. Even if this were not the

case, the Court should still decide the case on the merits because it is an issue of great public importance that has been adequately presented by the parties. The Court should decide the case on the merits by finding that the Governor violated Article III§12.

A. The Constitution Empowers the Branches in a Balanced, Separated Way, For the Benefit of the Citizenry.

The Washington Constitution creates a balanced legislative power, designed to empower and protect Washingtonians. The Governor engages in the legislative process when exercising his veto authority. As Article I§1 makes clear, Washington is keenly aware that all just power is derived from the consent of the governed. The heart of this issue is a chilling, flagrant breach of the separation of powers that are an integral part of the authority that Washingtonians have granted the state. *See, e.g., Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310, 316 (2009) (holding that "Our constitution does not contain a formal separation of powers clause. Nonetheless, the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine." (In re Salary of Juvenile Dir., 87 Wn.2d 232, 238-40, 552 P.2d 163 (1976)).

This Court said it best in *State v. Rice*, holding:

> The separation of powers doctrine is "one of the cardinal and fundamental principles of the American constitutional system" and forms the basis of our state government. W*ash. State Motorcycle Dealers Ass'n v. State,* 111 Wn.2d 667, 674, 763 P.2d 442 (1988). Under Washington's constitution, governmental authority is divided into three branches—legislative, executive, and judicial—and "[e]ach branch of government wields only the power it is given." *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002) […] This constitutional division of government is "'for the protection of individuals'" against centralized authority and abuses of power.

State v. Rice, 174 Wn.2d 884, 900-01, 279 P.3d 849, 857 (2012) (some internal citations omitted). Here, the Governor has attempted to wield power that the people expressly took away through amending the constitution. The Governor does not have authority to veto less than a whole section of a bill. When a past Governor tried, the people of Washington rose up to say that we did not want him to have that power. *Wash. State Motorcycle Dealers Ass'n v. State*, 111 Wn.2d 667, 674, 763 P.2d 442, 446 (1988) (recounting the history of Article III§12). As this Court pointed out, the limitations on each branch are "for the protection of individuals." BIAW is asking this Court to protect its members from the Governor's overreach.

B. The Governor Ignored the Separation of Powers and Violated Article III§12 by Vetoing Subsection 8(1)(a).

Article III§12 outlines the Constitutional limitations on the Governor's legislative activity. It limits the Governor's veto power by

requiring him to veto at least a whole section. Subsection 8(1)(a) was less than a whole section and the Governor vetoed it. A plainer case could not be stated. The Governor argues that the Legislature's drafting was an attempt to dissimulate his veto authority, giving him the right to veto less than the whole section. The facts do not support this conclusion, but even if they did, the Governor would still be bound by Article III § 12.

1. The Governor Violated Article III § 12.

The central, indisputable fact is that the Governor did something that the constitution expressly prohibits him from doing. The constitution prohibits the governor from vetoing less than a whole section. Wash. Const. Art. III§12. The Legislature designated Subsection 8(1)(a) as less than a whole section. The Legislature's designation is ordinarily conclusive. *Wash. 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). The Court should defer to the Legislature's structural designation unless the drafting "so alters the natural sequences and division of a bill [so as] to circumvent the Governor's veto power[.]" *Eyman v. Wyman*, 191 Wn.2d 581, 607, 424 P.3d 1183 (2018) (quoting *Lowry*, 131 Wn.2d at 320) (alterations in original).

Here, the Legislature drafted a complete section, Section 8, with several subparts. The Governor vetoed Subsection 8(1)(a), leaving the

remainder of the section in disarray. This leaves confusion for those trying to apply the law and violates Wash. Const. Art. III § 12.

2. The Governor Cannot Show that the Legislature's Drafting Was A Palpable Attempt at Dissimulation.

The Governor has tried to justify his unconstitutional act by blaming the Legislature. He claimed that "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 unconstitutional provision within a recommendation of the task force." CP 52-53. The Governor was relying on *Washington State Legislature v. Lowry*, 131 Wn.2d 309, 931 P.2d 885 (1997), in which the Supreme Court held that

> The Legislature's designation of a section is conclusive unless it is obviously designed to circumvent the Governor's veto power and is a palpable attempt at dissimulation. But where […] we discern legislative drafting that so alters the natural sequences and divisions of a bill to circumvent the governor's veto power, we reserve the right to strike down such maneuvers.

Lowry, 131 Wn.2d at 320.

In that case, the Governor argued that the "subsections" he vetoed were actually sections and therefore appropriate candidates for veto. The Court agreed that the Legislature's designation of subsections was disingenuous because the "Section" contained 103 subsections, which each repealed a single, distinct statute. The Court held that this bundling

"alter[ed] the natural sequences and divisions of a bill to circumvent the Governor's veto power" and upheld the veto. This is something the Governor must prove, as the Court presumes that the Legislature's designations were correct. *Lowry*, 131 Wn.2d at 320.

To overcome this presumption, the Governor must meet an exacting standard. The Court has stated that standard in two different ways. In *Legislature v Lowry,* the Court stated that the section designations could be disregarded where there was a "palpable attempt at dissimulation of the Governor's power." In *Washington State Legislature v. State*, 139 Wn.2d 129, 985 P.2d 353 (1999), the Court stated it slightly differently holding that the Legislature's designation of a section is not conclusive when the designation is "obviously designed to circumvent the Governor's veto power." *State* also explained how the Court would conduct its analysis. The Court analyzed "the language in question and the operative effect," finding that in that case, those together "indicate[d] the nature of the proviso." *State*, 139 Wn.2d at 143. In other words, the text must show that the bill was designed, intentionally to circumvent the governor's power.

Unlike the bill in *Lowry,* there is no evidence from the structure of HB 1579 that the legislature's designation of Subsection 8(1)(a) as a subsection was "a palpable attempt at dissimulation." The subsection is an

integral piece of the rest of Section 8, as one would expect from a part of a whole. Subsection 8(1)(a) provides direction to WDFW to charge civil penalties for violations of RCW 77.55, up to a certain amount. The rest of Section 8 gives clarity and specificity to that direction, such as Subsection 8(1)(b) which identifies which personnel within WDFW has authority to issue civil penalties. While the veto in *Lowry* altered the natural sequence, the veto here follows a natural sequence. It is a true subsection

Respondents are also unable to satisfy the standard from *Legislature*, which asks if the structure was "obviously designed to circumvent" the Governor's authority. The word "obvious" is defined as "so simple and clear as to be unmistakable" and "disappointingly simple and easy to discover or interpret." *Barrett v. Lucky Seven Saloon, Inc*., 152 Wn.2d 259, 268, 96 P.3d 386, 390 (2004). Palpable is synonymous with the terms 'easily perceptible,' 'plain,' 'obvious,' and 'manifest'. *State ex rel. Pac. Power & Light Co. v. Dep't of Pub. Works*, 143 Wn.2d 67, 85, 254 P. 839, 845 (1927). The Respondents seem to acknowledge this burden, arguing that the "only plausible explanation for conditioning [Subsection 8(1)(a)] on enactment of Section 13 was to prevent the Governor from exercising his constitutional authority to veto Section 13." CP 442. They must show that there is no other plausible explanation; they have not done so.

3. Even If the Legislature Was Attempting to Circumvent the Governor, He Is Still Bound By Article III§12.

The Legislature was not attempting to circumvent the Governor's power, but even if it was, the Governor was not justified in his actions. The Court has never held that where the Legislature attempts to circumvent the Governor's veto authority, Article III §12 does not apply. Instead the Court only asks if the Legislature was being disingenuous to determine whether to give deference to the Legislature's designation of Sections and Subsections. *See, e.g., Lowry,* 131 Wn.2d at 320-21 (holding that "The Legislature's designation of a section is conclusive unless it is obviously designed to circumvent the Governor's veto power[.]")

Thus, while appellant does not concede that the Legislature is guilty of artful drafting, even in a circumstance in which both the legislature and the governor are at fault, the Court should then review the text to determine where sections actually end and begin. The best articulation of this analysis resides in *Washington State Legislature v. State*, 139 Wn.2d 129, 985 P.2d 353 (1999). In that case, this Court applied *Lowry* to a veto that struck a legislative formula to establish copayment requirements for doling out financial aid. However, the veto did not strike the mandate that copayments be required. The Court held that both the Legislature and the Governor had violated the Constitution, the first by artful drafting and the second by

vetoing less than a whole proviso. After finding that the bill raised "the specter of circumvention sufficiently to disregard deferring to the Legislature's designation of [the vetoed portion] as a single and complete subsection, incapable of division[,]" the Court went on to analyze the text to determine where the true section or proviso began and ended. *Legislature*, 139 Wn.2d at 141-144. Based on the text, this Court re-drew the boundaries of the relevant provisos. The new boundaries showed that Governor Locke did not veto a whole section because the sentence mandating copayments "naturally fit together" with the vetoed copayment schedule, making them a single proviso on copayments. The Court held that the veto violated Article III § 12. *Id.*

The veto here has the same flaw. Even if linking the fee amount in Subsection 8(1)(a) to the enactment Section 13 was an attempt at dissimulation, the Governor may not veto less than a whole proviso. If the Court finds that the link was dissimulative, *Legislature* holds that the Court must then determine proper boundaries for the fine proviso. Here, the fine amounts and administration are one topic. Like the copayment proviso in *Legislature*, Section 8, mandates an action (fines) and sets out criteria for administering it (the schedule). Like the veto in *Legislature*, Governor Inslee vetoed one piece of a bill, but left a part which addresses the same

topic and naturally fits together with the vetoed portion. The result here should be the same as the result in *Legislature*.

C. Declaratory Relief Is Appropriate Where Governmental Bodies Disagree, Harming Those They Govern.

BIAW has standing to challenge the Governor's veto of Subsection 8(1)(a) under the Uniform Declaratory Judgment Act (UDJA) because the veto made the law less clear, damaging BIAW members now,[2] and less favorable to builders, which will harm members in the future. Furthermore, if the law is allowed to stand as it is, BIAW's members will be governed by a law that was not created through a constitutional process, which violates the rights of the people as discussed in IV§A., *supra*. Finally, the trial court's decision that this is not an issue of great public importance is undermined by the oral decision's emphasis on the importance of a conflict between two branches of government. This Court should decide the case on the merits.

1. Declaratory Relief Is Appropriate Because BIAW Members Are Worse-Off after the Unconstitutional Act.

This case presents precisely the type of harmful uncertainty that the UDJA was designed to resolve. The Act was intended to "afford relief from uncertainty and insecurity with respect to rights, status and other

[2] Assuming this case is heard in a post-Emergency time frame.

legal relations[.]" RCW 7.24.120. The Washington Supreme Court has established a two-part standing test for the UDJA. First, the Court determines whether the interest sought to be protected is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee. Then, the Court asks if the action being challenged has caused injury in fact, economic or otherwise, to the party seeking standing. *Wash. State Hous. Fin. Comm'n v. Nat'l Homebuyers Fund*, Inc., 193 Wn.2d 704, 712, 445 P.3d 533, 537 (2019).

These requirements are met based on the facts alleged below. Just as described in RCW 7.24.120, there is insecurity here because the governor has created a procedurally defective law and the agency, WDFW, has stated an intent to follow the Governor's direction. However, without the text of Subsection 8(1)(a), the law to be enforced is unclear and the validity of the veto is still to be determined. BIAW's members are certainly regulated by HB 1579, which satisfies the zone of interest component of the test and also satisfied the trial judge below. Verbatim Report of Proceedings at 41. Insecurity and uncertainty about the power of a regulatory body harms BIAW members now, as shown by the Himebaugh and Roberts Declarations. CP 181-183 and CP 184-187. Furthermore, if allowed to be enforced, BIAW's members face potential fines that are one hundred times higher than they were without the veto.

By vetoing a cap on the possible penalty, the Governor removed a guaranteed maximum risk that builders were taking when they began a project that is governed by the hydraulic project approval process. These are two certain harms which satisfy the injury component of standing.

For a federal comparison, the best case on point is also a veto case: *Clinton v. City of N.Y.*, 524 U.S. 417, 431, 118 S. Ct. 2091, 2099 (1998). There, the president's veto struck a provision which was favorable to the plaintiffs, creating "substantial contingent liability" and affects the borrowing power, financial strength, and fiscal planning of the potential obligor. The Supreme Court of the United Sates held that that this contingent liability was sufficient injury in fact to present a justiciable controversy. Here, a potential fine, like a contingent liability, is created by Governor Inslee's veto. This is sufficient to give standing to BIAW. An unclear, procedurally unjust legislative action which governs BIAW's members and makes them worse-off than they were before the action is a perfect use of the UDJA. This Court should decide the case on the merits.

2. The UDJA Provides an Appropriate Remedy for this Situation Because Its Broad Reach Protects Washingtonians From Laws that Are Not Created Through a Constitutional Process.

This case sits at the intersection of many areas of declaratory law with relaxed standing requirements. It is an issue of great public

importance, discussed below, it is a procedural violation, and it is a constitutional violation. Because of these trends, this Court should expressly hold that those who are governed by a law that was unconstitutionally created have suffered sufficient harm to challenge that law, even before the effect of the law is felt.

This proposition is not far-fetched, but an application of existing state and federal law. Federally, "the failure of an administrative agency to comply with procedural requirements in itself establishes sufficient injury to confer standing, even though the administrative result might have been the same had proper procedure been followed." *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 867-68 (9th Cir. 2003) (citing *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)). The type of harm suffered through an insufficient process is the process itself, not the outcome.

Not only is the type of harm a low bar, but the link between the challenged activity and the harm is not required to be direct. A plaintiff who shows that a causal relation is "probable" has standing, even if the chain cannot be definitively established. *Johnson v. Stuart*, 702 F.2d 193, 195-96 (9th Cir. 1983) (school students and their parents had standing to challenge a statute that limited the texts that might be selected for teaching, even though it could not be shown whether any specific book had been rejected under this statute or for other reasons). Here, Petitioner

has standing because a causal relation between harm and the governmental act is probable.

This understanding of procedural violations as harm is also the natural conclusion when reading this Court's decisions on standing for procedural violations and constitutional defects. For example, black letter law that holds that where the injury complained of is procedural, standing requirements are relaxed. *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wash.2d 787, 794-95, 920 P.2d 581 (1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n. 7, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992)). To show a procedural injury, a party must (1) identify a constitutional or statutory procedural right that the government has allegedly violated, (2) show a reasonable probability that the deprivation of the procedural right will threaten a concrete interest of the party's, and (3) show that the party's interest is one protected by the statute or constitution. See *Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 1151, 173 L.Ed.2d 1 (2009*); Hall v. Norton*, 266 F.3d 969, 977 (9th Cir.2001); *Seattle Bldg. & Constr. Trades Council*, 129 Wn.2d at 795, 920 P.2d 581. The lessened standard, reasonable probability that the deprivation will threaten a plaintiff's interest, is easily satisfied here. Again, BIAW has alleged facts in this motion sufficient to demonstrate standing and harm to members resulting from the

compounding constitutional violations in this legislation under the relaxed standards applied by the Court for procedural violations.

The most analogous case is *Wash. Fed'n of State Emps. v. State*, 101 Wn.2d 536, 682 P.2d 869 (1984), in which the Washington Federation of State Employees ("WFSE") challenged a veto of a portion of legislation which governed state civil service changes, with the potential to affect issues ranging from salary to layoffs. The vetoed portion would have required legislative approval of all administrative rules implementing the act. WFSE challenged the Governor's veto because it violated Article III §12. The Court did not exercise its ever present right to reject claims based on standing, but turned to the merits. *Wash. Fed ' n of State Emps.*, 101 Wn.2d at 544. The union sued before the legislation affected any employee or caused any rule changes, and yet the Court heard this case because the changes to employment practices would eventually affect union members.

So too here. Was it technically possible that no union members' salaries changed? That the agencies would not change their rules to conform to the enacted law? That the new rules would not cost the employees anything, but maybe even benefit them? Of course. But the Court allowed the union to challenge the law because the Court trusted the union to define what harmed its members and because judges need not

forgo common sense when establishing standing. While technically possible that the veto would not impact any WFSE members, the Court exercised its common sense to look past this improbable outcome.

Here, it is technically possible the veto will not affect any BIAW members because they may cease to engage in work near water or because the agency will suddenly change course in its rulemaking. But the Court does not have to forgo commonsense. Just like salaries and retirement plans will be renegotiated, builders will continue to build. The veto changes the way builders in coastal areas build. Therefore, just like the union, BIAW has standing.

Here, BIAW's member and staff have asserted that this law impacts members. This Court should give their expertise deference, just as the Court did the union. This Court can see that a law with uncertain breadth and multiple agencies, each permitted to define its import, can easily be accidentally violated. If the Court were to limit challenges under Article III § 12 to Legislative suits, it would be a novel decision and would expose private parties to governmental abuse without recourse.

Courts have routinely made exceptions to the typical justiciability requirements for declaratory judgment actions challenging constitutionality, especially when, as here, the party challenging the government action has enough interest in the outcome to adequately brief

the issue. *See, e.g., Seattle School District v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978) (Court can resolve question of constitutional interpretation if a case involves issue of great public importance, there has been adequate briefing by the parties, and the opinion of the Court will be beneficial to other branches of government); *Walker v. Munro*, 124 Wn.2d 175, 876 P.2d 435 (1972) (Justiciability requirement is not rigorously enforced in cases of public interest); *Seattle-First Nat'l Bank v. Crosby*, 42 Wn. 2d 234, 254 P.2d 732 (1953) (Court may entertain declaratory judgment action even if not ripe); *Kitsap County v. Smith*, 143 Wn. App. 893, 180 P.3d 834 (2008) (If an issue is of sufficient public importance that public interest is served by the court's determination, the court may entertain a declaratory judgment action absent an actual and justiciable controversy).

Finally, the Governor's violation of the authority of the Legislature violates the constitution's protections for individuals, just as much as the protection afforded to the other branches. As this Court said in *State v. Rice*, "Although a violation of the separation of powers doctrine "accrues directly to the branch invaded, the underlying purpose of the doctrine is "the protection of individuals […] [O]ne branch cannot simply consent to a separation of powers violation by another branch." *State v. Rice*, 174 Wn.2d 884, 906, 279 P.3d 849, 860 (2012). BIAW has a right to vindicate

on behalf of its members, whether or not the Legislature joins the suit, because the Separation of Powers Doctrine is for the benefit of the governed, not the government.

3. The Court Should Resolve Such an Important Issue on the Merits.

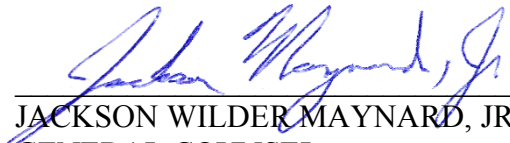
If conflict exists between the Legislature and the Governor, it is an issue of great public importance. The Legislature is bringing a similar action over another unconstitutional veto in 2019, proving the public importance of clearly defining Article III § 12. Washington State Legislature v. Governor Jay Inslee, no. 19-2-04397-34, (Wash. Aug. 30, 2019)(Odyssey). Cases on issues of great public importance are resolvable on adequate briefing where the opinion of the Court would benefit other branches of government. *See Seattle Sch. Dist. v. State* 90 Wn.2d 476 (1978). Here, the Legislature would benefit as they are waiting for an answer to a similar question. Individual legislators have also advised the Court on their own need for clarity on the issue presented in this case. If this is not an issue of great public importance, what is?

V. CONCLUSION

In conclusion, this Court should reverse the lower court's ruling. The Petitioner has standing and the veto was unconstitutional. To refuse to reach the merits in this case would limit all future litigants who seek to

right constitutional wrongs. Court should reverse and decide that the Governor's veto was unconstitutional.

Respectfully submitted this 30th day of March, 2020,

By: 

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Certificate of Service

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