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NO. 98119-1

SUPREME COURT OF THE STATE OF WASHINGTON

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,
a non-profit organization

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

BIAW's challenge to the Governor's exercise of his constitutional veto power necessarily concerns the balance of power between the Governor and the Legislature in the legislative process. Yet the Legislature is not a party to this case, and BIAW is not suffering concrete harm caused by the Governor's veto, which is part of the lawmaking process. Accordingly, the trial court properly dismissed BIAW's lawsuit on justiciability grounds, and this Court should affirm.

Alternatively, this Court should affirm because the Governor's veto was an appropriate response to manipulative legislative drafting designed to circumvent the Governor's constitutional veto authority. Second Substitute House Bill (2SHB) 1579, 66th Leg., Reg. Sess. (Wash. 2019), a governor-requested bill relating to implementing the recommendations of the Southern Resident Killer Whale Task Force, generally strengthens the Department of Fish and Wildlife's authority to enforce the Hydraulic Code. Before passage, however, the Legislature added Section 13, which bore no relationship to the rest of 2SHB 1579, and instead incorporated a standalone "suction dredging" bill that had previously failed to pass the Legislature several times. All parties here agree that the inclusion of Section 13 threatened invalidation of the measure under Washington's single-subject and subject-in-title requirements. There is no dispute that the Governor properly vetoed Section 13.

To restrain the Governor from vetoing Section 13, however, the drafters of the amendment also embedded a poison pill within a separate section of the bill. Section 8(1)(a) as amended made the Department's increased penalty authority—a key objective of 2SHB 1579—contingent on Section 13 being "enacted into law." Section 8(1)(a)'s plain purpose, therefore, was to create an untenable choice for the Governor: either forego the right to veto Section 13 (and also risk the validity of the entire bill), or sacrifice one of the main objectives of the bill. It is this coerciveness, not the contingency language itself, which encroaches on the Governor's veto powers.

The Governor appropriately vetoed Section 8(1)(a) as part of his veto of Section 13. By holding the substantive provisions of 2SHB 1579 hostage to force the Governor's surrender of his veto authority over Section 13, the Legislature forfeited any presumption of regularity in its designation of sections versus subsections. This Court has made clear that such hostile legislative formatting is not entitled to deference in assessing the constitutionality of a veto. Because Section 8(1)(a), alone or together with Section 13, constitutes a de facto section in both purpose and effect, the Governor's veto should be upheld.

II. ISSUES

1. Does BIAW fail to present a justiciable controversy to challenge the Governor's veto of Section 8(1)(a) of 2SHB 1579?

2. Did the Governor act within his constitutional authority to veto Section 8(1)(a) together with Section 13 in response to legislative drafting designed to circumvent his constitutional veto authority?

III. STATEMENT OF THE CASE

A. In 2018, the Southern Resident Killer Whale Task Force Recommended that the Legislature Enhance the Department's Authority to Enforce the Hydraulic Code

In 2018, Governor Inslee issued Executive Order 18-02 which, among other things, created the Southern Resident Killer Whale Task Force. CP 193-95. Executive Order 18-02 concluded, in part, that: the Southern Resident Orcas are an iconic and treasured species throughout the Pacific Northwest; they hold significant cultural value to native tribes and other Washingtonians; they are endangered; they are in poor condition and struggling to raise calves; and their extinction would be an unacceptable loss to our environment, economy, and way of life. CP 193. The Task Force subsequently echoed Governor Inslee's observations and added:

> In 2018, we tragically lost three Southern Residents–Crewser (L92), Scarlet (J50) and the newborn calf of Tahlequah (J35)–bringing the number of Southern Residents to just 74. . . . The world watched as Tahlequah swam 1,000 miles with her dead calf, supported by her J-pod family, finally letting the body go after a 17-day vigil. We all grieved, and collectively realized our kinship with these highly sophisticated and emotionally intelligent mammals.
>
> . . . .

> [These orcas] also serve as an indicator of the health of our waters. Action is required immediately to help the orcas and the entire ecosystem we depend on.

CP 200, 203.

The Task Force included nearly 50 representatives from diverse sectors, including tribal, federal, local, and other state governments; state agencies; the Washington State Legislature; the private sector; nonprofit organizations; and the Government of Canada. CP 209. It established working groups to identify, research, and analyze potential actions and formulate recommendations, using the best available science, personal knowledge, and experience. CP 209. Throughout its work, the Task Force actively engaged the public by taking oral and written comments. CP 212.

The Task Force issued its report and recommendations on November 16, 2018. Its 36 recommendations were designed to support the goals of (1) increasing the abundance of chinook salmon, the Southern Resident Orcas' primary food source; (2) decreasing disturbance of and risk to Southern Resident Orcas from vessels and noise, and increasing their access to prey; (3) reducing exposure to contaminants; and (4) ensuring that funding, information and accountability mechanisms are in place to support effective implementation. CP 204, 238-268. The Task Force committed to restoring sustainable, harvestable chinook populations in healthy habitats across Washington State, and supporting and accelerating implementation of the federally-approved salmon recovery plans. CP 205.

One of the Task Force's key recommendations was for the Washington Department of Fish and Wildlife (WDFW), together with

the Washington Departments of Natural Resources (DNR) and Ecology, to "strongly apply and enforce existing habitat protection and water quality regulations" and provide all three Departments "with the capacity for implementation and enforcement of violations." CP 241. The Task Force specifically recommended enhancing WDFW's civil penalty statute (Former RCW 77.55.291 (2018), *repealed by* Laws of 2019, ch. 290, § 14) to provide the WDFW with "enforcement tools equivalent to those of local governments, Ecology and DNR." CP 242; *see also, e.g.*, RCW 76.09.170 (providing DNR with authority to levy penalties of up to $10,000 for violation of forest practice statutes and rules); RCW 70.105.080 (providing Ecology with authority to levy penalties up to $10,000 per day for violation of hazardous waste laws and regulations it enforces); RCW 70.94.431(1)(a) (authorizing Ecology to issue civil penalties up to $10,000 per day for each violation of clean air laws and regulations it enforces).

B. The House Introduced House Bill 1579 to Implement Task Force Recommendations Related to Increasing Chinook Abundance

In the 2019 legislative session, the House introduced House Bill 1579 to implement the Task Force's recommendations related to increasing chinook abundance. CP 347-58. As recommended by the Task Force, HB 1579 provided WDFW with enhanced enforcement authority over violations of the Washington State Hydraulic Code. CP 347-58. The Hydraulic Code generally requires anyone undertaking a hydraulic project to get a preconstruction permit from WDFW to ensure "the adequacy of the

means proposed for the protection of fish life." RCW 77.55.021(1).[1] HB 1579 authorized WDFW to "levy civil penalties of up to ten thousand dollars for every violation of [RCW 77.55] or of the rules that implement [RCW 77.55]. . . ." CP 353. WDFW was previously limited to imposing penalties of up to $100 a day. Former RCW 77.55.291 (2018). The bill also required WDFW to provide written notice of penalties that specified the basis for the penalty, the amount, and appeal rights. CP 353-54. It also required WDFW to adopt by rule a penalty schedule based on certain enumerated factors. CP 353-54.

Other than a change in numbering,[2] the express authorization for the Department to levy "civil penalties of up to ten thousand dollars for every violation" remained unchanged throughout several versions of the bill. CP 353-54 (HB 1579, § 7); 366 (Substitute H.B. (SHB) 1579, § 8); 379-380 (2SHB 1579, § 8).

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[1] A "hydraulic project" is "the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any salt or fresh waters of the state." RCW 77.55.011(11). The only reason WDFW may deny or condition a permit is for the "[p]rotection of fish life." RCW 77.55.021(7)(a). WDFW's permit decisions are subject to review by the Pollution Control Hearings Board, consistent with the Administrative Procedure Act (APA). RCW 77.55.021(8); *see also* RCW 77.55.011(2) (defining "Board"); RCW 43.21B.160 (APA governs appeals before the Board); RCW 43.21B.180 (judicial review under the APA for decisions of the Board).

[2] Section 7 in HB 1579 became Section 8 in SHB 1579. The House later introduced a second substitute house bill which required the Department to identify by rule personnel authorized to approve civil penalties, but that version otherwise did not substantively amend Section 8. CP 379-80.

C. Just before Passage, the Senate Added an Unrelated Section to 2SHB 1579 and Made the Amount of WDFW's Maximum Penalty Authority Contingent on Passage of that Unrelated Section

Late in the legislative session, on April 10, 2019, the Senate amended 2SHB 1579 through a striker amendment, which changed the bill in two material ways.

First, the striker amendment added Section 13, which BIAW describes as providing for "construction of three suction dredging projects in Whatcom, Snohomish, and Grays Harbor counties to aid in floodplain management strategies." CP 8 ¶ 18 (Petition), 397 (striker amendment). All parties to this case agree that Section 13 "was not a recommendation of the Southern Resident Killer Whale Task Force" or related to implementing such recommendations. CP 8 ¶ 19, 12 ¶¶ 49-50. Accordingly, BIAW has consistently maintained that the inclusion of Section 13 violated "the single-subject requirement of [the] Washington Constitution," Article II, Section 19. CP 12 ¶¶ 50-51, 164. The text of Section 13 had first been proposed by Senator Hobbs in 2015, in proposed Senate Bill 5347, which required the establishment of three demonstration projects relating to flood management, just as set forth in Section 13 of 2SHB 1579 (2019). CP 129-32 (ESSB 5347 (2015)). Although reintroduced five additional times in subsequent legislative sessions, the Legislature never passed the suction-dredging bill. CP 417-19.

Second, the striker amendment at the same time amended Section 8, which addressed WDFW's civil penalty authority. The former Section 8(1)(a) simply capped WDFW penalty authority at $10,000 per

violation. The striker amendment replaced that cap with the following provision:

> 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 [RCW 77.55] or of the rules that implement [RCW 77.55]. 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.

CP 392, 416. By making the increased maximum penalty authority specifically contingent on passage of the wholly unrelated Section 13, the striker amendment undermined a primary objective of the bill to enhance WDFW's civil enforcement authority.

2SHB 1579 as amended by the Senate was passed by the Senate and the House, and delivered to the Governor for veto or approval. CP 52.

D. Governor Inslee Vetoed Section 13 and Section 8(1)(a)

Governor Inslee approved 2SHB 1579 with two exceptions. First, he vetoed Section 13 as unconstitutional because that provision fell outside the title and scope of the bill. CP 52. BIAW does not challenge this veto, and agrees that Section 13 was outside the scope and title of the bill. CP 12 ¶¶ 49-51, 164.

Second, Governor Inslee vetoed Section 8(1)(a). As the Governor explained, "[b]y making the original civil penalty amount contingent on passage of an unconstitutional section of the bill [Section 13], the Legislature further compounded the constitutional violation." CP 52.

Additionally, "by structuring the contingency language within a subsection of Section 8, the Legislature intentionally attempted to circumvent and impede" the Governor's "veto authority by entangling an unrelated and unconstitutional provision within a recommendation of the task force." CP 52-53. In his veto message, the Governor directed WDFW to use its authority to further the intent of the Act, and to engage in rulemaking as necessary to, among other things, establish a maximum civil penalty amount no greater than that originally authorized in the bill. CP 53.

E. 2SHB 1579 as Vetoed Became Laws of 2019, Chapter 290

The Legislature did not exercise its option to reconvene and reconsider the Governor's veto. *See* Const. art. III, § 12. Accordingly, 2SHB 1579 as passed by the House and Senate and vetoed by the Governor became Laws of 2019, Chapter 290 (CP 52). *See also Petition of Washington State Emps. Ass'n*, 86 Wn.2d 124, 126, 542 P.2d 1249 (1975) ("[A]ny portion of a bill enacted by the legislature which shall have been vetoed by the Governor, and which veto is not overridden, is to be considered exactly as if such portion of the bill had never been enacted."); *Wash. State Grange v. Locke*, 153 Wn.2d 475, 485, 105 P.3d 9 (2005) ("Because the legislature did not override the governor's veto, ESB 6453, as altered by the governor's vetoes, became Laws of 2004, chapter 271."). Chapter 290 is codified in RCW 77.55. The penalty provision, specifically, is codified in RCW 77.55.440.

F. BIAW Petitioned for Emergency Rulemaking

On May 21, 2019, BIAW submitted a formal request for emergency rulemaking to WDFW. CP 123-24. Arguing the bill as enacted was either unconstitutional or stripped WDFW of all civil penalty authority, BIAW sought emergency repeal of all existing WDFW regulations for civil fines and also asked that WDFW "decline the governor's directive" to impose any fines. CP 123-24.

On June 17, 2019, WDFW formally denied BIAW's request for emergency rulemaking. CP 126-27. WDFW advised that it presumed the constitutionality of the bill as enacted and found that BIAW's petition failed to meet the statutory criteria for emergency rulemaking under RCW 34.05.350. WDFW also advised that it did not interpret Chapter 290 as stripping the agency of authority to issue civil fines. Given the requirement on WDFW of engaging in formal rulemaking to implement the bill as enacted, Director Susewind agreed as follows:

> Additionally, as an alternative means of addressing the concerns you raised in your May 21, 2019, letter, I intend to direct WDFW staff to refrain from enforcing the hydraulic code through imposing civil penalties until such time as the Fish and Wildlife Commission adopts final rules implementing 2SHB 1579.

CP 127. BIAW did not seek judicial review of WDFW's decision on its petition for rulemaking.

G. Procedural History

BIAW filed this lawsuit on July 16, 2019, seeking mandamus, injunctive, and declaratory relief against the Governor and WDFW. CP 5-16. The Legislature is not a party to this lawsuit. CP 5-16. BIAW later dismissed all but two of its claims, seeking only a declaration that the veto was invalid and mandamus relief requiring rulemaking by WDFW as though Section 8(1)(a) had not been vetoed. CP 30-31, 453.

The Parties filed cross-motions for summary judgment. CP 161, 420. The trial court denied BIAW's motion for summary judgment and granted summary judgment in favor of the Governor and WDFW, dismissing BIAW's Petition in its entirety with prejudice. CP 515-16.

BIAW appeals summary judgment and dismissal only as it relates to its claim for declaratory judgment challenging the validity of the Governor's veto. CP 517-21; Brief of Appellant (BIAW Br.).

H. WDFW Has Adopted Permanent Rules Implementing Chapter 290

Independent of this case, WDFW has been engaged in the rulemaking process to implement Chapter 290.[3] That process has culminated with the adoption of final rules which become effective

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[3] WDFW's Concise Explanatory Statement sets forth the chronology of rulemaking. *See* Wash. Dep't of Fish & Wildlife, *Concise Explanatory Statement: Hydraulic Code Rules Chapter 220-660 WAC, Incorporating elements of 2SHB 1579 into HPA rules* (Apr. 24, 2020), https://wdfw.wa.gov/sites/default/files/2020-05/wsr_20-11-019_ces.pdf. In response to BIAW's comment that WDFW lacks authority to impose a civil penalty, and that the maximum penalty adopted by WDFW was excessive, WDFW responded that it was acting according to Chapter 290 as enacted into law, and that it had specifically researched maximum civil penalty amounts imposed by other natural resources agencies in Washington before adopting the maximum in its schedule. *Id*. at 13-15.

June 12, 2020. Wash. State. Reg. 20-11-019, http://lawfilesext.leg.wa.gov/law/wsr/2020/11/20-11-019.htm (CR 103P (May 12, 2020)). As required by statute, the rules provide for technical assistance for achieving voluntary compliance with the Hydraulic Code, including providing preapplication determinations of applicability of the Hydraulic Code, as well as education, advice and consultation. *Id*. at 19-30. The rules require WDFW to issue "correction requests" and attempt to achieve voluntary compliance in most instances before taking formal enforcement action. *Id*. They provide for a range of enforcement actions not at issue here, including stop work orders. *Id*. They also provide a specific schedule for WDFW's issuance of penalties, when required. *Id*.

IV. ARGUMENT

A. BIAW's Challenge to the Validity of the Governor's Veto is Not Justiciable

BIAW seeks a declaration invalidating the Governor's veto under the Uniform Declaratory Judgments Act (UDJA), RCW 7.24. The UDJA allows persons "whose rights, status or other legal relations are affected by a statute" to "have determined any question of construction or validity arising under the . . . statute . . ." RCW 7.24.020. But rather than seek a declaration about what Chapter 290 means, or whether it is constitutional on its face or as applied, BIAW seeks to change the law's substance based on its argument that a step in the lawmaking process (the Governor's veto) was deficient. BIAW's challenge is not justiciable for two reasons. First, even if a private party like BIAW could challenge the legislative steps

leading up to the enactment of Chapter 290, BIAW lacks standing to do so here, because it did not demonstrate cognizable redressable injury caused by the veto. Second, courts do not generally inquire into legislative actions preceding the enactment of a statute that is "properly signed and fair upon its face," even based on constitutionally-required procedures. In cases like this one, where neither the Legislature nor the Governor is asking the Court to review the Governor's veto, the Court should decline BIAW's request to wade into inter-branch disputes.

1. The Governor's veto is part of the lawmaking process and Chapter 290 is the law

As a preliminary matter, BIAW expresses confusion over where the law currently stands vis-à-vis the Governor's veto,[4] but the Constitution and this Court's decisions are clear: "The Governor acts as a part of the legislature when exercising the veto power." *Petition of Washington State Emps. Ass'n*, 86 Wn.2d at 126. "[A] veto renders a legislative action as if it had not occurred." *Wash. State Legislature v. Lowry*, 131 Wn.2d 309, 330, 931 P.2d 885. The vetoed provisions do "not take effect" unless subsequently passed by a two-thirds majority of the Legislature "over the governor's objection." Const. art. III, § 12; *see also State v. Reis*, 183 Wn.2d 197, 216, 351 P.3d 127 (2015) ("The governor's veto completely removes the vetoed material from the legislation. . . .The act 'is to be considered now just as it would have been if the vetoed provisions had never been written

[4] *See, e.g.*, BIAW Br. at 6 ("They are unsure what version of the law is enforceable…"), 17 ("[W]ithout the text of Subsection 8(1)(a), the law to be enforced is unclear and the validity of the veto is still be determined.").

into the bill at any stage of the proceedings.' ") (quoting *Shelton Hotel Co. v. Bates*, 4 Wn.2d 498, 506, 104 P.2d 478 (1940)). Thus, "the Legislature has the final say on the Governor's veto" by either overriding it or doing nothing. *Lowry*, 131 Wn.2d at 331.

This Court has stated that it is "well aware of the rule that any portion of a bill enacted by the legislature which shall have been vetoed by the Governor, and which veto is not overridden, is to be considered exactly as if such portion of the bill had never been enacted." *Petition of Washington State Emps. Ass'n*, 86 Wn.2d at 126. And this Court further observed that any argument that it may be difficult for the Legislature to obtain two-thirds concurrence is "for the people to determine, not this court. If these arrangements become unsatisfactory or subjected to abuse, the people are capable of making desired changes." *Washington State Fed'n of State Emps., Coun. 28 v. State*, 101 Wn.2d 536, 547, 682 P.2d 869 (1984). "The 'check', as it has always been, will be the Legislature's two-thirds override." *Id*.

Here, after the Governor vetoed Sections 8(1)(a) and 13 from 2SHB 1579, the law as vetoed became Laws of 2019, Chapter 290 (codified in chapter 77.55 RCW). *See Wash. State Grange*, 153 Wn.2d at 485, ("Because the legislature did not override the governor's veto, ESB 6453, as altered by the governor's vetoes, became Laws of 2004, chapter 271."). The Legislature did not exercise its right to override that veto. BIAW need only refer to the Revised Code of Washington and the relevant agency rules to see what the law is. *See* RCW 77.55.440 (requiring WDFW to issue rules

governing civil penalties); WSR 20-11-019 (amending provisions in WAC 220-660). Thus, BIAW's professed confusion over what law applies is not well-founded and should not serve as a basis for justiciability.

2. BIAW failed to demonstrate that its members are personally and substantially harmed by the Governor's veto or that a declaratory judgment would redress their harm

Even if BIAW could expose the legislative history of Chapter 290 to judicial review, it still fails to establish justiciability or standing under the UDJA because its members[5] do not face actual or imminent harm by the Governor's veto.

To maintain an action "under the UDJA, a party must present a justiciable controversy based on allegations of harm personal to the party that are substantial rather than speculative or abstract." *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419, 423 (2004).[6] And since this case was decided on cross summary judgment motions, BIAW had the burden to support its justiciability allegations with admissible evidence sufficient to permit a reasonable trier of fact to find justiciability in order to avoid summary judgment and dismissal. CR 56; *Herron v. Tribune Pub. Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987)

[5] BIAW brings this lawsuit in its associational capacity on behalf of its members. For purposes of this appeal, the Governor and the Department do not challenge that if BIAW's members have standing, BIAW has associational standing to request declaratory relief on their behalf.

[6] As this Court has noted, the justiciability and standing requirements under the UDJA substantially overlap. *To Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411 n.5, 27 P.3d 1149 (2001)). "An actual, immediate dispute cannot be moot and must be ripe, and a party lacking a direct, substantial interest in the dispute will lack standing." *Id*. at 417. While this brief primarily discusses the concept of justiciability, it also implicates standing.

("[I]f the plaintiff, as nonmoving party, can only offer a 'scintilla' of evidence, evidence that is 'merely colorable,' or evidence that 'is not significantly probative,' the plaintiff will not defeat the motion.") (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-51, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986)); s*ee also Allan v. Univ. of Washington*, 140 Wn.2d 323, 329, 997 P.2d 360 (2000) (holding at summary judgment stage, plaintiff "must demonstrate 'a factual showing of perceptible harm'") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

Here, BIAW asserts that its members and customers are "insecure and uncertain" about WDFW's regulatory authority because of the veto, and are worse off because they could be penalized up to $10,000 for violating the Hydraulic Code instead of $100.[7] BIAW Br. at 6-7, 16-24. But BIAW's claimed harms are not cognizable, and, in any event, not factually supported.

a. BIAW's claimed fears of future regulatory enforcement are too remote and hypothetical to establish concrete harm

BIAW argues that the risk that its members (and, more specifically, their customers) could be financially penalized to a greater degree for

[7] BIAW does not claim that any of its members have been penalized under the law as vetoed, nor that they face imminent threat of enforcement. *See also Superior Asphalt & Concrete Co. Inc. v. Washington Dep't of Labor & Indus*., 121 Wn. App. 601, 606-07, 89 P.3d 316 (2004) ("Superior Asphalt had no standing to challenge the safety regulation because it had never been issued a citation."). Nor could it, because, at the time of suit, WDFW had suspended its use of penalties for enforcement until after it completes rulemaking to implement the new law. CP 126.

violating the Hydraulic Code is a basis for justiciability. Fundamentally, BIAW's asserted injury and interest here is entirely hypothetical and speculative, based on alleged uncertainty over future regulatory enforcement that may or may not ever come to pass. That is not enough to demonstrate justiciability.

Courts will not find a justiciable controversy or standing where the alleged injury is based on future contingent events. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 415-16, 27 P.3d 1149 (2001) (noting Court has "repeatedly refused to find a justiciable controversy where the event at issue has not yet occurred or remains a matter of speculation"); *Yakima County (West Valley) Fire Protection District No. 12 v. City of Yakima*, 122 Wn.2d 371, 858 P.2d 245 (1993) (fire district lacked standing for declaratory action nullifying annexation agreements where devaluation of property was contingent on successful future annexation that had not yet occurred); *see also Superior Asphalt*, 121 Wn. App. at 606 (absent nuisance charges, plaintiff could not show an "actual, present, and existing dispute," a "direct and substantial" interest, or a concrete injury to satisfy UDJA justiciability and standing requirements to challenge constitutionality of nuisance statute).

Federal case law governing pre-enforcement standing to challenge a statute is also instructive. A party seeking standing based on the threat of future regulatory enforcement must generally show three factors to demonstrate that a fear of future regulatory enforcement has crossed the threshold from hypothetical possibility into realistic present danger,

warranting judicial intervention. These three factors include whether: (1) the challenging party has a "concrete plan" to violate the law in question; (2) prosecuting authorities have given a "specific warning or threat" to initiate proceedings; and (3) there is a "history of past prosecution or enforcement under the challenged statute." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000).

BIAW has established none of these things. It has identified no concrete plans by its members at all, let alone plans that are likely to violate the Hydraulic Code. While one BIAW member speculates he will lose business if WDFW has increased fine authority, CP 185-86, BIAW introduces no evidence that any specific customer has decided to not move forward on a project because the risk of penalties for violating the Hydraulic Code are uncertain or too high. BIAW's generalized statements that customers will forego projects in the future is purely speculative.

BIAW has similarly failed to identify any specific warning or threat by WDFW to initiate proceedings against BIAW's members. Rather, the Hydraulic Code and the rules recently promulgated by WDFW show that the likelihood of future controversy remains highly speculative given the many processes in place for addressing uncertainty and encouraging voluntary compliance. For example, RCW 77.55.400 provides a process for obtaining a pre-application determination from WDFW as to whether a new project requires a hydraulic permit. For any request submitted under this new process, WDFW must issue a decision in writing that includes its supporting rationale, generally within 21 days of receiving the request.

RCW 77.55.400. Additionally, the law requires WDFW to provide information and technical assistance to a project proponent whenever it determines a violation of RCW 77.55 has occurred, and it must attempt to achieve voluntary compliance before taking further remedial action. RCW 77.55.410. As WDFW provides in its rules implementing Chapter 290:

> The department is responsible to help the regulated community understand how to comply. The department achieves voluntary compliance through education and technical assistance when the department advises and consults on permits, conducts compliance checks, performs on-site technical visits, or provides guidance materials written in easily understood language.
>
> When the department cannot get voluntary compliance by issuing a correction request, the department may use a range of increasingly strict enforcement tools. This ranges from issuing notices of correction and stop work orders to penalties and, when appropriate, criminal prosecution.

WAC 220-660-480 (effective June 12, 2020). Thus, to the extent there is any ambiguity about what RCW 77.55 requires of project proponents, there are also tools to address that ambiguity that could avoid the need for a penalty altogether. The existence of these processes shows that the likelihood of future disputes or injury to BIAW is highly speculative and contingent, not concrete and present.

BIAW has similarly failed to demonstrate that WDFW has any history of past prosecution against its members under Chapter 290.

BIAW has not even identified a history of prosecution under the law existing before Chapter 290's passage.

BIAW's failure to demonstrate any of these factors underscores that its claims of injury and interest here are based on the mere existence of the entire regulating framework, not an actual dispute or a concrete injury stemming from the Governor's veto of Section 8(1)(a). BIAW fails to establish justiciability or standing as a matter of law.

b. BIAW's claimed uncertainty "in the permitting process" is not caused by the veto and would not be redressed by a favorable decision

BIAW argues that Chapter 290 harms them because it "makes the permitting process less clear," subjecting their members and clients to "confusion." BIAW Br. at 6. They submitted declarations below about Chapter 290's application to single family residences; alleged uncertainty arising from this Court's decision in *Spokane County v. Washington Dep't of Fish & Wildlife*, 192 Wn.2d 453, 430 P.3d 655 (2018), and overlapping regulatory authority of state, federal, and local jurisdictions; and objections to WDFW's authority to deny permits. CP 181-87. But all of this alleged uncertainty is about other parts of Chapter 290 as enacted into law, completely unaffected by the Governor's veto of Section 8(1)(a). None of this alleged uncertainty would be redressed by a declaratory judgment declaring the veto invalid.

Prior to being vetoed, Section 8(1)(a) said nothing about when a permit is required or granted, so its veto could likewise not impact that issue.

Section 8(1)(a) simply provided two alternative maximum penalty amounts that WDFW could potentially adopt and impose after rulemaking, contingent on whether Section 13 became law. Having (or lacking) a maximum penalty amount does not change uncertainty claimed by BIAW: that multiple governmental bodies may have overlapping regulatory authority, that certain contractors may not be sure whether their project requires a permit without involving WDFW, or that permits may not ultimately be granted for some projects. Likewise, the presence or absence of a maximum penalty amount does not impact whether WDFW is required to issue a permit to single-family homes. *See* CP 182-83 ¶¶ 9-14. Even if such uncertainty is "intensified when the cost of making a mistake in the HPA process goes up," as BIAW testified (CP 182), that does not mean that the potential for higher penalties has caused any of this uncertainty. In any event, the declaratory judgment BIAW requests will not remedy this confusion.

Additionally, "[b]usiness uncertainties that arise from regulatory decisions are not the kind of concrete and particularized injuries sufficient to establish an injury in fact." *Gerber Prods. Co. v. Perdue*, 254 F. Supp. 3d 74, 81 (D.D.C. 2017). Rather, "'uncertainties' regarding the future regulatory and competitive environment . . . are highly nebulous in both character and degree[.]" *ViroPharma v. Hamburg*, 777 F. Supp. 2d 140, 147 (D.D.C. 2011), *aff'd*, 471 F. App'x 1 (D.C. Cir. 2012). Here, while one BIAW member states anecdotally he will lose business if WDFW has increased fine authority, BIAW introduces no evidence that any specific

customer has decided to not move forward on a project because the risk of penalties for violating the Hydraulic Code are uncertain or too high. BIAW's overgeneralized statements that customers will do so in the future is completely speculative and not cognizable. There is no reason to assume that a client's decision on whether to move forward on a lawful project will depend on whether *violating the law* will be subject to a $100 penalty or a $10,000 penalty. The Court should assume that clients will want to follow the law and have properly permitted projects regardless of what the risk is for violating environmental laws.

BIAW is essentially arguing that the possibility of higher penalties for taking unlawful actions violating the Hydraulic Code is chilling its members and their clients from instituting lawful hydraulic projects. This is not cognizable harm. This Court declined to find cognizable harm in a challenge to an initiative based on a claimed "chilling effect" the legislation would have on tax increase and expenditures. *Walker v. Munro*, 124 Wn.2d 402, 416, 879 P.2d 920 (1994). Distinguishing the First Amendment context in which a "chilling effect" on the exercise of First Amendment Rights "is a recognized present harm," the Court declined to extend that doctrine in other contexts. *Id*.

BIAW cites to *Clinton v. City of New York*, 524 U.S. 417, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998), for the non-controversial proposition that a party satisfies the injury prong of the standing test if it can show that it will suffer economic injury as a result of governmental action. BIAW Br. at 11-12. But *Clinton* does not stand for the broader proposition that BIAW

implies: that any potential market impact, no matter how remote, is sufficient. Instead, the United States Supreme Court in *Clinton* cited "the specificity and the importance of that injury" caused by the President's cancellation of a tax benefit that Congress had enacted with the specific purpose of benefiting a defined class of purchasers, which included the Snake River farmers' cooperative. *Id*. at 432. By cancelling the tax benefit, the President deprived the purchasers of "statutory bargaining chip" that inflicted tangible economic injury. *Id*. The Court reiterated that the parties must have "a 'personal stake' in having an actual injury redressed rather than an 'institutional injury' that is 'abstract and widely dispersed.' " *Id*. at 430 (quoting *Raines v. Byrd*, 521 U.S. 811, 829, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997)). Unlike *Clinton*, BIAW does not suggest that the Hydraulic Code itself or 2SHB 1579 was intended to benefit BIAW's members like the repealed tax benefit at issue in *Clinton*. Nor do they demonstrate an individualized injury rather than a general "institutional injury" that the Court found to be insufficient in *Clinton*. *Id*. at 430.

The *Clinton* case is also distinguishable because the plaintiffs there were facially challenging the constitutionality of an enacted statute: the "Line Item Veto Act of 1996," claiming it violated the federal constitution's Presentment Clause. *Clinton*, 524 U.S. at 421. The act itself, moreover, provided a mechanism for members of congress or others adversely affected by the act to challenge the constitutionality of the act. *Id*. at 428. Here, BIAW does not challenge the facial validity of Chapter 290 or the Hydraulic Code.

BIAW's claimed injury-in-fact is not caused by the Governor's veto and, accordingly, will not be redressed by a declaration regarding the veto's validity. Its challenge to the constitutionality of the veto is not justiciable.

3. BIAW's appeal to relaxed justiciability standards does not create cognizable harm where there is none to begin with

Implicitly acknowledging that it fails to satisfy the Court's standards for justiciability, BIAW takes a different tactic. It suggests its claim is uniquely situated at "the intersection of many areas of declaratory law with relaxed standing requirements." BIAW Br. at 18. Accordingly, BIAW argues that this Court should combine parts of each of them and announce a new rule that anyone who is "governed by a law that was unconstitutionally created [has] suffered sufficient harm to challenge that law, even before the effect of the law is felt." BIAW Br. at 19. There are multiple problems with this theory.

First, as a legal matter, by seeking to invalidate the Governor's veto, BIAW is not challenging a law; it is challenging an action that led up to that law being enacted. The effect of the Governor's veto is "as if such portion of the bill had never been enacted." *Petition of Washington State Emps. Ass'n*, 86 Wn.2d at 126. Thus, BIAW's own proposed test would not apply to this case because, as explained earlier, Chapter 290 as reflected in the session laws and Revised Code of Washington is the law. BIAW does not argue that there is anything invalid about the substance of this law.

Second, BIAW's proposed new basis for justiciability—that anyone governed by a law that was unconstitutionally created can challenge that law (or, more aptly, the creation of that law)—is circular. Its underlying claim that the law was unconstitutionally created would need to be established in order to determine if the claim could even be brought.

Third, BIAW's proposed standard for justiciability seems to do away with justiciability entirely, including the well-established enrolled bill doctrine. *See Wash. State Grange*, 153 Wn.2d at 499-500. The enrolled bill doctrine generally provides that an enrolled bill on file, duly signed and fair upon its face is conclusive evidence of the regularity of the enactment proceedings, in accordance with the constitution. *Id*. at 500 ("The court 'will not go behind an enrolled enactment to determine the method, the procedure, the means, or the manner by which it was passed in the houses of the legislature' perhaps even in the case of a flagrant violation of article II, section 38.") (quoting *Derby Club, Inc. v. Becket*, 41 Wn.2d 869, 882, 252 P.2d 259 (1953) (Hill, J., concurring)). BIAW's theory would completely eviscerate this well-established rule and, more broadly, any notion that the Court refrains from issuing advisory opinions.

Fourth, BIAW's argument is premised on it coming close to establishing justiciability under two alternative theories, but that does not mean that, collectively, BIAW has demonstrated justiciability. Analogous here, proving some, but not all, of the elements of multiple claims does not collectively prove or create one claim.

In any event, as described below, BIAW does not satisfy either of the limited exceptions in which this Court has been willing to relax its justiciability requirements.

a. BIAW does not establish a justiciable procedural injury

BIAW argues that its challenge to the veto is sufficient to confer standing under a "procedural injury" theory. BIAW Br. at 19. But the procedural injury basis for justiciability applies to challenges to *agency* action that impact concrete rights, not procedural steps taken in the lawmaking process. *See, e.g.*, *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 303, 268 P.3d 892 (2011) (failure of Department of Ecology to review permit application and consider whether the withdrawal of groundwater would "impair existing rights or be detrimental to the public welfare" as required by statute constituted procedural injury impacting appellant's concrete interest in its water rights (quoting RCW 90.030.290(3))).[8] To demonstrate justiciability of a procedural injury, a party must:

> (1) identify a constitutional or statutory procedural right that the government has allegedly violated, (2) demonstrate a reasonable probability that the deprivation of the procedural right will threaten a concrete interest of the party's, and

[8] *See also, e.g.*, *Allan*, 140 Wn.2d at 330 (citing *Lujan*, 504 U.S. 555); *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 790, 920 P.2d 581 (1996) (failure of Apprenticeship Council to give an adjudicatory hearing before denying application for certification of training program violated APA, and applicant did not have to show result would have been different to have procedural injury); *Envtl Def. Ctr., Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003) (reviewing challenge that EPA considered information it was prohibited from considering in promulgating an administrative rule that made certain properties subject to regulation).

> (3) show that the party's interest is one protected by the statute or constitution.

Five Corners Family Farmers, 173 Wn.2d at 303. Here, BIAW is complaining about the process of lawmaking; not an agency action that failed to protect a separate constitutionally- or statutorily-protected interest.

Even if the concept of a "procedural injury" applied to lawmaking, BIAW's appeal for a relaxed justiciability standard fails because it has not established a concrete interest belonging to BIAW that the procedure in question was required to protect. *See Allan*, 140 Wn.2d at 330 ("[E]ssential to the assertion of 'such procedural rights' [is] a 'concrete interest . . . protectable by a requirement of formal adjudicatory proceedings.' " (quoting *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 795, 920 P.2d 581 (1996))). BIAW does not have a concrete, legally protected interest in there being a law that identifies a $100 maximum penalty for violating the Hydraulic Code. And the constitutional limits on the Governor's veto authority do not exist to protect any such interest. *See Carrick v. Locke*, 125 Wn.2d 129, 136, 882 P.2d 173 (1994) ("Unlike many other constitutional violations, which directly damage rights retained by the people, the damage caused by a separation of powers violation accrues directly to the branch invaded. The maintenance of a separation of powers protects institutional, rather than individual, interests.").

Indeed, invoking the doctrine separation of powers as an individual "procedural right" would swallow the injury-in-fact requirement altogether

by providing standing for any member of the public to challenge any law at any time based on the mere assertion that the formation of the law violates separation of powers. “The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.” *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974)). “[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.” *Id*. at 483; *cf. Vovos v. Grant*, 87 Wn.2d 697, 699, 555 P.2d 1343 (1976) (interest sufficient to confer standing “cannot be simply the abstract interest of the general public in having others comply with the law”). Courts have “repeatedly” “rejected claims of standing predicated on ‘the right, possessed by every citizen, to require that the Government be administered according to law.’ ” *Valley Forge Christian Coll.*, 454 U.S. at 482–83 (quoting *Fairchild v. Hughes*, 258 U.S. 126, 129, 42 S. Ct. 274, 66 L. Ed 499 (1922)).

BIAW relies heavily upon this Court’s discussion of separation of powers in *State v. Rice*, 174 Wn.2d 884, 279 P.3d 849 (2012) to suggest that the constitutional restrictions on veto power are individual rights,[9] but

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[9] BIAW Br. at 8-9, 23-24.

that case is very distinguishable. There, a criminal defendant who had been convicted and sentenced for sex offenses challenged his sentence by arguing that the underlying charging statutes unconstitutionally forced prosecuting attorneys to file supplemental charges based on special allegations, thereby violating separation of powers. *Rice,* 174 Wn.2d at 892-93. Rice was not challenging the process of lawmaking, he was challenging the facial validity of the law. As this Court noted, it " 'regularly consider[s] constitutional challenges to criminal statutes in the prosecutions brought under them,' *State v. Ruff*, 122 Wn.2d 731, 734, 861 P.2d 1063 (1993), including challenges based on the separation of powers doctrine." *Id*. The Court also said that separation of powers is "especially important within the criminal justice system, given the substantial liberty interests at stake and the need for numerous checks against corruption, abuses of power, and other injustices." *Id*. at 901. No such interests are at play here, and BIAW is not even challenging the facial validity of a statute; it is challenging the underlying procedure involved in enacting the statute.

Last, a relaxed standard of causation is warranted on a cognizable procedural injury claim because it is often impossible to show that the outcome of an administrative proceeding would have been different when proper procedural protections were not afforded. In such cases, parties claiming procedural injury need not (because they cannot) establish absolute causation that the result of the administrative decision would have been different, and " 'the court should make a judgment as to whether the causal relation is probable enough to allow

standing.' " *Johnson v. Stuart*, 702 F.2d 193, 196 (9th Cir. 1983) (quoting *Boating Indus. Ass'ns v. Marshall,* 601 F.2d 1376, 1383 (9th Cir. 1979)). But the Court still requires a legally-protected interest with a causal relationship to the claimed procedural violation. And no such leeway is required here, because there are no proof challenges associated with what the outcome would have been if the Governor did not veto Section 8(1)(a).

BIAW's direct challenge to the Governor's veto authority is well outside the boundaries of a procedural injury claim that would warrant a relaxed causation test for justiciability.

b. BIAW's challenge does not rise to the level of an issue of broad overriding import

BIAW also claims that the Court should do away with usual justiciability requirements because its proffered issue is one of broad overriding import. "An issue is of substantial public importance when it immediately affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally." *Wash. State Hous. Fin. Comm'n v. Nat'l Homebuyers Fund, Inc.,* 193 Wn.2d 704, 718, 445 P.2d 533 (2019) (internal quotation marks omitted). BIAW has not alleged or established that the veto of a penalty cap applicable only to persons who: (1) engaged in hydraulic projects, (2) violated the Hydraulic Code, and (3) failed to remedy their violations through voluntary compliance and technical assistance measures, immediately affects substantial segments of the population. Nor does it demonstrate that the veto's validity or invalidity has a significant bearing

on commerce, finance, labor, industry, or agriculture generally. The law as vetoed does not specify what penalty amounts WDFW may impose; WDFW made that determination in rulemaking. Those rules are subject to APA judicial review, which is the appropriate forum for making challenges to WDFW's exercise of its authority.

This Court has recognized limited exceptions to the justiciability requirements "only on those rare occasions where the interest of the public in the resolution of an issue is overwhelming and where the issue has been adequately briefed and argued." *To-Ro Trade Show*, 144 Wn.2d at 416 (internal quotation marks omitted). The Court has cautioned, however, it would be an "overstatement" to suggest that Washington case law is "replete with cases of major public import in which [the] court dispensed with the justiciability test," and the court "will not render judgment on a hypothetical or speculative controversy, where concrete harm has not been alleged."[10] *Walker*, 124 Wn.2d at 415. Rather, "on [] rare occasion," the Court has "rendered an advisory opinion as a matter of comity for other branches of the government or the judiciary." *Id.* at 417.

BIAW claims that this case presents an issue of great importance because it will guide this Court's decision-making in a separate case between the Governor and the Legislature. BIAW Br. at 24. BIAW's efforts to bootstrap standing in this case based an entirely separate case brought by

[10] As this case was decided on cross summary judgment motions, BIAW needed to *demonstrate* an admissible factual basis for its alleged concrete harm, not just allege it. CR 56.

the Legislature should be rejected. Here, unlike there, the Legislature does not seek this Court's opinion. Under Article III, section 12, Chapter 290 became law because the Legislature did not override the veto. *See also Wash. Fed'n of State Emp. v. State*, 101 Wn.2d 536, 544-45, 682 P.2d 869 (1984) ("In approving or disapproving legislation, the Governor acts in a legislative capacity and as part of the legislative branch of government . . . . The veto is upheld if the Legislature fails to override it.") (internal quotation marks omitted). BIAW has no challenge to the constitutionality of the four corners of Chapter 290 as enacted, but rather seeks review of the Governor's veto, which, together with the Governor's veto message, is part of the legislative history of the resulting law. *See Wash. State Grange*, 153 Wn.2d at 490-91 (noting "Washington courts have looked to the governor's interpretation of legislation as an element of legislative history when interpreting statutes"). BIAW's academic question of whether this particular veto exceeded the Governor's authority does not constitute an issue of overwhelming public importance that would justify the court "stepping into the prohibited area of advisory opinions." *To-Ro Trade Shows*, 144 Wn.2d at 416 (quoting *Diversified Indus. Dev. Corp v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)).

4. The enrolled bill doctrine precludes BIAW's attempt to invalidate the veto

This Court should also affirm dismissal because BIAW is improperly seeking to challenge the validity of Chapter 290 based not on the face of the law, but on the claimed invalidity of the Governor's act

during the process of lawmaking. But "[j]ust as the legislature may not go beyond the decree of the court when a decision is fair on its face, the judiciary will not look beyond the final record of the legislature when an enactment is facially valid, even when the proceedings are challenged as unconstitutional." *Brown v. Owen*, 165 Wn.2d 706, 722, 206 P.3d 310 (2009). It must be remembered that "the governor, when acting upon bills passed by both houses of the legislature, is a part of the legislature, and acting in a legislative capacity." *Shelton Hotel Co.*, 4 Wn.2d at 506. Accordingly, the enrolled bill doctrine[11] precludes this challenge.

From very early on, this Court has been consistently loathe to go behind the face of an enacted law to question its validity based on procedural steps taken in the lawmaking process. *See, e.g.*, *State ex rel. Reed v. Jones*, 6 Wash. 452, 454, 477, 34 P. 201 (1893) (refusing to address claim "that the legislature disregarded several mandatory provisions of the constitution which it was incumbent upon them to observe before any bill could become law" because "authority, reason, public policy, and convenience require[d the Court] to hold that the enrolled bill on file, when

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[11] The Legislature defines an "enrolled bill" as a "bill passed by both houses, which incorporates all amendments, and to which has been attached a certificate of enrollment indicating the date passed, votes cast on the bill, and the certifying officers' signatures[,]" prior to being presented to the Governor. Washington State Legislature, *Glossary of Legislative Terms*, *https://apps.leg.wa.gov/billinfo/glossary.aspx* (last visited May 28, 2020). Although the Governor's approval or veto occurs after that, it is still part of the legislative process, and the same rationale has been applied to actions occurring after the bill is presented to the Governor. *See State ex rel. Dunbar v. Bd. of Equalization*, 140 Wash. 433, 249 P. 996 (1926). Additionally, the original case setting forth this enrolled bill doctrine seems to consider the relevant conclusive document (i.e., the "enrolled bill") as the "bill on file in the office of the secretary of state," bearing the signatures of the presiding officers of the respective houses *and* the governor. *State ex rel. Reed v. Jones*, 6 Wash. 452, 454, 34 P. 201 (1893).

fair upon its face, must be accepted without question by the courts, as having been regularly enacted by the legislature").

The Court has applied this reasoning to decline inquiring into "whether a bill was properly repassed after the governor's veto." *State ex rel. Dunbar v. Bd. of Equalization*, 140 Wash. 433, 447, 249 P. 996 (1926). Likewise, it has refused to review whether a veto violated Article II, section 38, which prohibits amendments to bills that change the scope and object of the bill. *Wash. State Grange*, 153 Wn.2d at 499-500. "The legal theory upon which the enrolled bill rule rests is that the legislature is a coordinate branch of government, in no way inferior to the judicial branch, and thus its final record of the enactment 'imports absolute verity.'" *Id*. at 500 (quoting *Roehl v. Pub. Util. Dist. 1*, 43 Wn.2d 214, 222, 261 P.2d 92 (1953)). In a different context, this Court has extended the rationale underlying the enrolled bill doctrine to decline to hear a challenge that a failed bill should have passed. *Brown,* 165 Wn.2d at 723 ("[E]ven where" a party claims "that constitutionally mandated procedures were not followed," the Court has "declined to examine the history of a bill" with narrow exceptions.).

While, as a matter of comity, the Court has been willing to review procedural lawmaking challenges when requested by coequal branches of government, neither the Legislature nor the Governor is asking for review here. *See Walker*, 124 Wn.2d at 417; *Citizens Council Against Crime v. Bjork*, 84 Wn.2d 891, 895, 529 P.2d 1072 (1975) (reviewing post-veto "procedure followed by the legislature" despite petitioner's inability to

show that the law as enacted infringed on petitioner's constitutional rights based on Governor's "request for an advisory opinion").[12]

Here, BIAW does not challenge the face of the law (i.e., Chapter 290, or RCW 77.55.440 specifically) as violating the Constitution, but instead seeks to change what the operative law says based on its claim that the procedure for arriving at the law was invalid. This Court has expressed its reluctance to wade into such disputes, even when specifically requested by a co-equal branch of government. *Lowry*, 131 Wn.2d at 321; *Washington State Legislature v. State*, 139 Wn.2d 129, 137, 985 P.2d 353 (1999) (hereinafter *Locke*) (describing Court's "constitutional mandate" to "referee a dispute between the legislature and the Governor regarding the parameters of the Governor's veto power under art. III, § 12"). It should be especially wary here, where *no* branch of government is requesting the Court's intervention, and BIAW has not even demonstrated harm from the claimed violation.

B. The Governor's Veto is Constitutional

If the Court reaches the issue, it should affirm the Governor's veto of Section 8(1)(a) as a proper exercise of the Governor's constitutional

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[12] Many veto challenge cases involve the Legislature as a party. *See, e.g.*, *Lowry*, 131 Wn.2d at 309; *Washington State Legislature v. State*, 139 Wn.2d 129, 137, 985 P.2d 353 (1999) (hereinafter *Locke*); *Wash. State Motorcycle Dealers Ass'n v. State*, 111 Wn.2d 667, 763 P.2d 442 (1988). Others involved members of the Legislature. *See, e.g.*, *Wash. State Grange*, 153 Wn.2d 475. The fact that the Court has never addressed whether it will wade into veto challenges not requested by the Legislature or the Governor reflects only that such arguments against justiciability have not been made in this context. In failing to raise the issue sua sponte, the Court may have reasonably concluded that the Governor wanted the Court to adjudicate questions raised in the prior veto challenges.

veto authority. Legislative designation of sections that are not "true to the spirit of the constitution" are not conclusive. *See Lowry*, 131 Wn.2d at 320. Here, the Legislature's attempt to insulate a plainly unconstitutional section of the bill from valid veto by holding hostage an entirely different subsection is not "true to the spirit of the constitution." It should not be allowed to stand. The Governor's veto of Section 8(1)(a) was a logical extension of his proper veto of Section 13 because the sole and manifest purpose of the subsection was to prevent veto of Section 13. Subsection 8(a)(1) is a *de facto* section under *Lowry* and thus properly within the scope of the Governor's constitutional veto power.

1. The Legislature's manipulative drafting of subsection 8(1)(a) is not entitled to deference

Neither the Court nor the Governor is required defer to the Legislature's designation of sections and subsections in a bill when the Legislature uses hostile formatting to circumscribe the Governor's veto authority. Although the Governor is generally limited to vetoing whole sections from substantive legislation, the Legislature's designation of what constitutes a section is not dispositive. Courts play an important role to "delineate and maintain the proper constitutional balance between the coordinate branches of our State government with respect to the veto." *Lowry*, 131 Wn.2d at 313. As such, the designation of a section is not "entrust[ed]" to "the sole discretion of the Legislature." *Id.* at 320. Rather, it is the Court's "constitutional responsibility to define a 'section' to which the Governor's veto applies." *Id*. The constitution does not allow the

Legislature to use "artful legislative drafting" to encroach on or circumvent the Governor's veto authority. *Id*. Thus, in actual inter-branch disputes, the Court "*must* carry out [its] mandate" to "decide whether legislative designation of sections is true to the spirit of the constitution." *Id*.

In *Lowry*, the Court addressed whether the Governor properly vetoed two subsections of a bill rather than an entire section. The entire section included 103 subsections, each of which repealed an entire act or section of the code. *Id*. at 314. The Court upheld the veto of the two subsections under article III, section 12, concluding that the Legislature's formatting constituted "legislative manipulation of the designation of sections in a bill to forestall exercise of the gubernatorial veto." *Id*. at 319. The Court described its core concern in evaluating the constitutionality of the veto as ensuring "that neither the Legislature nor the Governor will so conduct its affairs—the Legislature in bill drafting and the Governor in exercising the veto—that the coordinate branch of government is substantially deprived of the fair opportunity to exercise its constitutional prerogatives as to legislation." *Id*. at 321. In this regard, the Court examines the Legislature's formatting decisions to determine "whether legislative designation of sections is true to the spirit of the constitution" and the roles and powers assigned to the coordinate branches. *Id*. at 320, n.6.

The Court refused, however, to offer a "bright-line definition[ ] of legislative . . . manipulation," fearing that such a definition was "more likely to provide guidelines for evasion should the Legislature . . . be so inclined." *Id*. at 321. The Court noted that drafting designed to "evade the

gubernatorial veto" might be harder to detect than in *Lowry*, yet equally constitutionally infirm. *Id*. at 319. "An imaginative legislator can include a variety of popular and unpopular provisions that normally would appear in separate sections of the larger piece of legislation in a single section so as to circumvent the gubernatorial veto," the Court observed. *Id*. The Court must "perceive and correct such attempted action;" otherwise, the Governor is left with the "Hobson's choice" of either vetoing what are essentially multiple de facto sections, or none at all. *Id*.

Two years after *Lowry*, the Court again had occasion to determine the constitutionality of a gubernatorial veto in the face of cleverly-drafted legislation that, at first blush, appeared to foreclose a veto. In *Locke*, 139 Wn.2d 129, the Court found that the Legislature's inclusion of multiple substantive provisions regarding childcare copayment schedules in an appropriations bill raised "the specter of circumvention sufficiently to disregard deferring to the Legislature's designation." *Id.* at 141. The primary evidence of circumvention cited by the Court was the Legislature's designation of the vetoed items as sections in versions of prior legislation that had previously failed to pass the Legislature.

In disregarding the Legislature's formatting, the Court noted that the designation of a section (or proviso in the context of budget bills) "can be too easily manipulated by the mere placement of a number or letter, or artificial division into paragraphs." *Id*. at 142. Instead of being bound by the Legislature's "artificial divisions by number or letter," the Court held that "an examination of the language in question and the operative effect of such

language indicates the nature" of the provision. *Locke*, 139 Wn.2d at 143. Ultimately in that case, however, the veto of the appropriations item was not upheld because the Governor did not veto enough of the language requiring copayments to constitute a veto of an entire budget proviso. *Id*. at 144.

This Court recently clarified the type of coercive tactics that warrant disregarding the Legislature's designation of sections and subsections in *Eyman v. Wyman*, 191 Wn.2d 581, 424 P.3d 1183 (2018) (plurality). There, the lead opinion explained that demonstrating legislative manipulation did not require "proof that the legislators harbored individual, subjective animosity or the desire to deceive." *Id*. at 604 (Gordon McCloud, J., with three Justices concurring). Rather, "the real *Lowry* test simply reflects the implied constitutional principle that one branch of government cannot infringe on the legislative powers secured by the constitution to the other coordinate branches through creative or clever legislation." *Id*. at 607. The lead opinion affirmed that, rather than establishing a bright-line test that can later serve as guidepost for increasingly clever manipulation, courts should focus on whether the Legislature has used "creative or clever" techniques to "substantially deprive" the Governor of "the fair opportunity to exercise [his] constitutional prerogatives as to legislation." *Id.* at 607 (internal quotation marks omitted) (citing *Lowry*, 131 Wn.2d at 320). Likewise, the dissenting opinion described *Lowry* as "effectuat[ing] the implied constitutional premise that one branch of government may be restrained when a natural consequence of its actions is to circumvent the powers

reserved to another branch." *Id.* at 629 (Stephens, J., dissenting, joined by Johnson, J., and Owens, J.).

Here, the Legislature plainly used clever drafting to substantially deprive the Governor of the constitutional right to veto Section 13. There is no dispute here that the Governor's veto of the Section 13 was a proper exercise of his constitutional veto authority. *See Wash. State Grange*, 153 Wn.2d at 489 ("The plain language of article III, section 12 clearly allows the governor to veto entire *sections* of non-appropriation bills."). But instead of accepting the Governor's constitutional prerogative to veto Section 13, the Legislature used "hostile formatting" to try to insulate the section from a valid veto by embedding a poison pill defense of the section into an entirely unrelated subsection of the bill. In the same striker amendment that added Section 13, the Legislature amended subsection 8(1)(a) to make WDFW's increased penalty authority effective only if Section 13 was enacted into law. CP 386-400.

By making Section 8(1)(a) contingent on Section 13 being enacted into law, the Legislature was obviously trying to prevent the Governor from vetoing Section 13. The *only* realistic way that Section 13 would not be "enacted into law" such that the contingency language in Section 8(1)(a) would have taken effect would have been if the Governor vetoed Section 13. Of course, Section 13 might also have not been "enacted into law" if the Legislature removed it by amendment prior to passage. But if the Legislature had modified 2SHB 1579 prior to passage to remove Section 13 prior to passage, it would have also removed the reference to it in

Section 8(1)(a). Both sections were in the same piece of legislation and equally amenable to amendment. The only logical way Section 13 could not be "enacted into law" such that the poison pill in Section 8(1)(a) would be triggered was if the Governor vetoed Section 13. The Legislature's purpose for making Section 8(1)(a) contingent on Section 13 being enacted into law was an obvious attempt to preclude the Governor from vetoing Section 13. This is not an acceptable purpose. *See Lowry*, 131 Wn.2d at 319.

The parties agree that Section 8 and Section 13 have no logical relationship to each other and that Section 13 duplicated an entirely independent bill that had failed to pass *five times* before it was added at the eleventh hour before passage of HB 1579 by the Legislature. CP 418-19. The parties further agree that inclusion of Section 13 would have violated Washington's constitutional "single subject" rule had it not been vetoed. Embedding a poison-pill defense of Section 13 into subsection 8(1)(a) thus created the same type of "Hobson's Choice" for the Governor that was condemned in *Lowry*. If the Governor had deferred to the Legislature's manipulative "interweaving" of protections for Section 13 into subsection 8(1)(a), he would have been forced to either accept Section 13, potentially compromising the constitutionality of the entire bill, or veto Section 13 and thereby sacrifice one of the main objectives of the bill. *Lowry*, 131 Wn.2d at 319; *see, e.g.,* Laws of 2019, Ch. 290, Title & Sec. 1. This coercive and artful drafting "substantially deprive[d]" the Governor of "the fair opportunity to exercise [his] constitutional prerogatives as to

legislation." *Eyman*, 191 Wn.2d at 607 (internal quotation marks omitted). This Court should not hesitate to "strike down" this effort to thwart the balance of powers. *Id*.

The manipulative purpose of Section 8(1)(a) is underscored by BIAW's shifting and implausible explanations regarding the purpose of subsection 8(1)(a) beyond pressuring the Governor not to veto Section 13. Now before this Court, BIAW does not appear to proffer any non-manipulative explanation for the Legislature's drafting of Section 8(1)(a). BIAW Br. at 13. To the trial court, BIAW characterized Sections 8(1)(a) and 13 as a routine effort at building legislative "consensus" by tacking Section 13, which had repeatedly failed to pass the House as a standalone bill, to 2SHB 1579, which had passed the House with large margins. CP 455, 462-63. BIAW further suggested the Senate included the contingency language to "ensure that Section 13 would survive the *House's* review." CP 462 (emphasis added). What BIAW describes, however, is unconstitutional logrolling that, if accepted by the Governor, would have compromised the constitutionality of the entire bill. *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 675, 278 P.3d 632 (2012) ("The Washington State Constitution does not allow lawmakers to cobble together unrelated pieces of legislation to garner votes. Nor does it allow legislators to attach unpopular laws to popular laws in order to gain approval for legislation that would not otherwise pass, a practice commonly known as 'logrolling.' ").

BIAW's explanation for the contingency language also makes no sense. Making WDFW's penalty authority contingent on Section 13 being "enacted into law" did not at all constrain the House from excising Section 13 *and* the contingency language. If the House could have amended 2SHB 1579 to remove Section 13, it could have just as easily removed the contingency language in Section 8(1)(a). But for the Governor's veto authority, therefore, it was entirely within the Legislature's control whether Section 13 became law. Section 8(1)(a) was drafted specifically to thwart the Governor's veto of Section 13 by holding hostage a key enforcement mechanism of the bill and coercing his acceptance of an unconstitutional section he had every right to veto. The Legislature cannot use artful drafting to create such an impossible "Hobson's Choice" as a toll for exercising the veto. *Lowry*, 131 Wn.2d at 319.

BIAW also speculated to the trial court that the Legislature's motivation for drafting Section 8(1)(a) may have been "budget and vote counts," CP 464, but that contention is unsupported by any evidence, and at best goes to why the Legislature included Section 13 in 2SHB 1579. It does not explain why the Legislature made the penalty authority in Section 8 contingent on Section 13—an entirely unrelated section—being "enacted into law." As part of 2SHB 1579 as passed by the Legislature, Section 13 was obviously going to be "enacted into law" unless the Governor vetoed it. The only plausible purpose for tying WDFW's increased penalty authority in Section 8(1)(a) to the demonstration projects in Section 13

being "enacted into law" was to dissuade the Governor from exercising his constitutional authority to veto Section 13.

Additionally, BIAW's speculative theories about alternative legislative motives do not pan out. There is no evidence that 2SHB 1579 was at any risk of failing to pass the House or the Senate without inclusion of Section 13, even if that were the relevant question. The vote count in both houses reflects an almost entirely party-line vote. CP 497-514.[13] There is no evidence that Senator Hobbs or any other senator would not have voted for 2SHB 1579 without Section 13. Likewise, while the Legislature may, at times, make an expenditure contingent on a revenue source, there is no basis for assuming the reverse is true—that the Legislature would have made a revenue-generating provision[14] contingent on additional, unrelated expenditures.

Moreover, the Court should be wary of BIAW's invitation to delve into the minds of individual legislators rather than to discern manipulation from the plain words of the legislation and its legislative history. *See Eyman*, 191 Wn.2d at 605-06 (declining to apply a subjective inquiry about the intent of individual legislators when identifying circumvention). In any event, the relevant question is not why the Legislature included Section 13 to begin with, but why it drafted Section 8(1)(a) to be contingent

[13] The only reason that 2SHB 1579 "lost votes" in the second vote by the House, as BIAW characterizes it, is that two democratic representatives were excused from the vote. CP 502-03. Likewise, two republican representatives were excused from the vote, so the vote went from 59 to 39 in the first vote to 57 to 37 in the second.

[14] HPA penalties primarily act as a deterrent, not a revenue-generating device. CP 75.

on Section 13 being "enacted into law." There is no plausible explanation for that drafting choice other than to prevent the Governor's veto. Section 8(1)(a) was drafted to forestall the Governor from exercising his constitutional veto authority, and accordingly, was appropriately vetoed.

2. Section 8(1)(a) is a de facto section that was appropriately vetoed with Section 13

Because Section 8(1)(a) was drafted to circumvent the Governor's veto power over Section 13, it was appropriately excised as part of the Governor's veto of Section 13. BIAW argues in generic terms that subsection 8(1)(a) differs from the vetoed subsections in *Lowry* because it is not a standalone legislative act and because its contents relate to the remaining subsections of Section 8. BIAW Br. at 12-13. BIAW also argues that this Court should apply *Lowry*'s definition of an appropriation "proviso" to conclude that Section 8(1)(a) is not a *de facto* section because it addresses the same "topic" addressed in the remainder of Section 8. BIAW Br. at 15-16.

But BIAW's proposed "test" would establish the type of bright-line rule this Court has long rejected.[15] Under BIAW's test, legislative manipulation would be insulated from a veto as long as the Legislature was

[15] The *Lowry* decision recounts the "checkered history" of litigation regarding gubernatorial vetoes, and, in the end, rejects previous "tests" governing what constitutes separate "sections" amenable to veto, instead preserving the Court's authority to "ensure that neither the Legislature nor the Governor will so conduct its affairs. . . that the coordinate branch of government is substantially deprived of the fair opportunity to exercise its constitutional prerogatives as to legislation." *Lowry*, 131 Wn.2d at 317-21.

clever enough in "interweaving" its manipulative efforts into a subsection of the bill. The *Lowry t*est does not elevate form over substance in such fashion. Rather, the *Lowry* test is satisfied when the Legislature's "bill drafting" "substantially deprive[s]" the Governor of the "fair opportunity to exercise" his veto power. *Lowry*, 131 Wn.2d at 321 (internal quotation marks omitted); *see also Locke*, 139 Wn.2d at 139-41 (also describing the *Lowry* test as "legislative drafting that so alters the natural sequences and divisions of a bill to circumvent the Governor's veto power," or drafting that "raises the specter of circumvention"); *Eyman*, 191 Wn.2d at 604 (describing *Lowry* intervention as warranted when the Legislature uses "hostile formatting to evade the governor's power to veto legislation"), 629 (Court intervenes when "natural consequence of" one branch of government's actions "is to circumvent the powers reserved to another branch"); *Wash. State Grange*, 153 Wn.2d at 489 ("Thus, when discussing the proper definition of 'section,' this court has indicated that it will intervene to prevent obvious circumvention of the veto power by the legislature or equally obvious manipulation of that power by the governor."). No matter how stated, that test is satisfied here.

Instead of returning to the inherently subjective analysis required to define a "section" that has long rejected by this Court, it should instead look to the "operative effect" of the challenged provision with an eye towards ensuring that a coordinate branch of government is not "substantially deprived of the fair opportunity to exercise its

constitutional prerogatives as to legislation." *Lowry*, 131 Wn.2d at 321. Here, the operative effect of Section 8(1)(a) was to substantially deprive the Governor of the constitutional prerogative of vetoing Section 13. It had no other purpose. It should thus either be treated as a separate *de facto* section, or as part of the Governor's veto of Section 13.

The veto of Section 8(1)(a) as part of the veto of Section 13 makes perfect sense given the purpose and effect of both provisions. Section 8(1)(a) had the discrete and obvious purpose of preventing the Governor from exercising his constitutional veto authority, by conditioning WDFW's maximum penalty authority on a completely unrelated and improperly-included section. The remainder of Section 8—authority and direction to WDFW to impose a penalty schedule, specification of who can impose such penalties, notice requirements, and the process for collection of the penalty—is not at issue and is the proper subject for legislation updating and strengthening WDFW's enforcement authority.

There is no non-manipulative explanation for embedding the poison-pill defense of Section 13 into Subsection 8(1)(a). Its plain purpose was to create an impossible choice for the Governor between increased enforcement authority or vetoing Section 13. The Governor's

veto of the *de facto* section creating that impossible choice is valid.

V. CONCLUSION

The Governor and WDFW respectfully request that this Court affirm the trial court's order granting summary judgment to them and denying it to BIAW.

RESPECTFULLY SUBMITTED this 29th day of May 2020.

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I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the above document to be served on the following via the Court's electronic filing system:

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