NO. 98119-1

SUPREME COURT OF THE STATE OF WASHINGTON

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,
a non-profit organization

Petitioner,

v.

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

Respondents.

RESPONDENTS' BRIEF IN ANSWER TO BRIEF OF AMICI CURIAE FOUR SENATORS IN SUPPORT OF STATEMENT OF GROUNDS FOR DIRECT REVIEW

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I. INTRODUCTION

Contrary to the characterization of these four amici senators, the Governor is not advocating for a bright line rule prohibiting the use of contingency language in legislation. Rather, this appeal can be resolved on either one of two narrow grounds. First, the trial court correctly concluded that BIAW did not establish that any of its members were harmed by the Governor's veto of Section 8(1)(a) of Second Substitute House Bill 1579 (2SHB 1579), 66th Leg., Reg. Sess. (Wash. 2019). Accordingly, BIAW lacked standing to challenge it. Second, the veto was proper because, under the specific facts of this case, the Legislature drafted the measure with the clear objective of circumventing the Governor's veto power. This Court's precedent is clear that when the Legislature engages in such manipulative drafting, the Court has the constitutional responsibility to strike down such maneuvers.

Amici's additional qualm with the Governor's veto message is not part of BIAW's appeal and, accordingly, does not present a reason for direct review. In any event, this Court's case law is already clear that the Governor may express his opinion as to the proper interpretation of a section of a bill in his veto message. While such an expression is indicative of legislative intent, it does not have the legal effect of rewriting the section.

Like BIAW, these four senators do not present a compelling case for why this Court should accept direct review, and the responents respectfully request that the Court decline it.

II. ARGUMENT

Amici claim that direct review is warranted only under RAP 4.2(a)(4), which authorizes a party to seek direct review in a "case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." As explained below, this appeal does not implicate such a case.

A. Amici Misstate the Governor's Rationale for his Veto and his Position Regarding the Use of Contingency Language

Fundamentally, amici's brief rests on a mischaracterization of the Governor's reason for exercising his veto power and his position regarding the appropriate use of contingency language in legislation. Contrary to amici's representation, the Governor has never advocated for a bright line rule that precludes the Legislature from ever using contingency language. Rather, the Governor takes issue with the specific contingency language used in 2SHB 1579, which was designed to circumvent the Governor's constitutional veto power.

The legislative drafting at issue in this case demonstrates an obvious purpose of preventing the Governor from exercising his undisputed power

to veto a section of substantive legislation. *See* Wash. Const. art. III, § 12. In Section 8(1)(a) of 2SHB 1579, the Legislature tied a critical enforcement mechanism in this Governor-requested legislation to a newly-added, completely unrelated provision—Section 13—being "enacted into law." Section 13 had, in fact, been previously introduced as standalone legislation by one of the amici senators, but it failed to pass both houses. Engrossed Substitute S.B. 5347, 64th Leg., Reg. Sess. (Wash. 2015); Resp'ts' Answer To Statement Of Grounds For Direct Review, App. E at 65-66. Knowing that the substance of Section 13 was unlikely to be independently enacted into law, the drafters of the amendment instead inserted it into 2SHB 1579. Resp'ts' Answer To Statement Of Grounds For Direct Review, App. E at 49-63. Then, the drafters tried to insulate Section 13 from veto by making the main driver of the legislation—increasing the Department's enforcement authority in Section 8—contingent on Section 13 becoming law. There is no dispute that Section 13 lacked any logical relationship to Section 8 or the rest of 2SHB 1579.[1] There is no dispute that the Governor had constitutional authority to veto Section 13.

[1] BIAW has consistently maintained that the Legislature's inclusion of Section 13 in 2SHB 1579 violated article II, section 19 of the Washington Constitution because it introduced a second subject and was outside the scope of the title of the bill. Resp'ts' Answer To Statement Of Grounds For Direct Review, App. A at 8, App. D at 19.

By making Section 8(1)(a) of 2SHB 1579 contingent on Section 13 of 2SHB 1579 being enacted into law, the Legislature was trying to prevent the Governor from vetoing Section 13. The *only* 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. Under these facts, Section 8(1)(a) was drafted with the obvious purpose of precluding the Governor from vetoing 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 in that case, the contingency language in Section 8(1)(a) would have been referring to a section that did not exist. Thus, if the Legislature had modified 2SHB 1579 prior to passage to remove Section 13, it would have, at the same time, removed the contingency language in Section 8(1)(a). Both sections were in the same piece of legislation and equally amenable to amendment. The only 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. Thus, the Legislature's purpose for making Section 8(1)(a) contingent on Section 13 being enacted into law was to preclude the Governor from vetoing Section 13. This is not an acceptable purpose.

By contrast, there are many legitimate uses of contingency language, as some of the examples raised by amici demonstrate. For

example, it makes logical sense that an appropriation allocated for a specific purpose would lapse if its underlying purpose ceases to be in existence. *See, e.g.*, Amici Br. at 8 (citing Laws of 2010, 61st Leg., 2d Sp. Sess., ch. 1, § 109(6); Laws of 2011, 62d Leg., Reg. Sess., ch. 5, § 508(7)). It is also reasonable for the Legislature to make some laws contingent on events beyond its control, such as court rulings deciding the validity of initiatives, or population size. *See* Amici Br. at 7 (citing S.B. 6606, 66th Leg., Reg. Sess. (Wash. 2020); S.B. 5114, 66th Leg., Reg. Sess. (Wash. 2019)). It might even be logical in some instances to make one piece of legislation contingent on whether another separate piece of legislation passes. Contingencies may exist for all kinds of legitimate reasons.

What the Legislature may not do, however, is to draft legislation with the obvious purpose of circumventing the Governor's veto power. Here, the Legislature drafted one part of its legislation to dissuade the Governor from vetoing another section *within the same piece of legislation*. In such instances, the clear intent of the contingency language is to impede the Governor from exercising his veto power, something this Court will not tolerate. *See Washington State Legislature v. Lowry*, 131 Wn.2d 309, 320-21, 931 P.2d 885 (1997). Finding legislative circumvention here does not undermine the valid function contingency language may have in other circumstances.

B. When Addressing Legislative Circumvention, the Court Has Broad Authority to Define a Section Subject to Gubernatorial Veto

Amici also seem to argue that the Governor's veto of Section 8(1)(a) cannot stand even if there was legislative circumvention, because the Governor should still be bound by the Legislature's designation of sections. *See, e.g.*, Amici Br. at 6-7. But this Court has squarely rejected that argument. *Lowry*, 131 Wn.2d at 320-21. Where the Legislature engages in clever drafting with the obvious purpose of interfering with the Governor's authority to veto "sections," its legislative designation of "sections" is not conclusive. *Id*. The Court "reserve[s] the right to strike down such maneuvers." *Id*.

C. The Legal Effect of the Governor's Interpretation of 2SHB 1579 as Vetoed is Already Well-Established, and Not Part of BIAW's Appeal

Last, amici take issue with the Governor's veto message, claiming that it constitutes an "unconstitutional direction to a state agency to implement language in a version of a bill that did not pass[.]" Amici Br. at 3, 10-11. As a preliminary matter, this is not a claim that BIAW is pursuing in this case, so amici cannot raise it as a basis for review. *See Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) ("[A]ppellate courts will not enter into the discussion of points raised only by amici curiae."). BIAW is only seeking declaratory relief "regarding the invalidity of the Governor's veto

of Subsection 8(1)(a) of HB 1579," and "a writ of mandamus enforcing the above declaration." Resp'ts' Answer To Statement Of Grounds For Direct Review, App. B at 14.

In any event, this Court has already rejected amici's argument in *Washington State Grange v. Locke*, 153 Wn.2d 475, 490, 105 P.3d 9 (2005). There, the Grange argued that the Governor improperly attempted to re-write a section of the legislation at issue by providing his interpretation of it in his veto message. *Id*. This Court rejected that argument, and concluded that the Governor may express his interpretation of what a law means through his veto message, even "forcefully," as such a message is "an element of legislative history." *Id*. "The expression of such an opinion is within the governor's prerogative[.]" *Id*.

Here, the Department is engaged in rulemaking based on the plain language of 2SHB 1579. As the Department explained in rejecting BIAW's rulemaking petition:

> WDFW does not interpret 2SHB 1579 to eliminate its statutory authority to enforce the hydraulic code (RCW 77.55) through civil penalties. To the contrary, the law's plain language requires WDFW to adopt rules to, among other things, develop a schedule for assessing the amount of civil penalties it will impose for hydraulic code violations.

App. at 1 (attached) (Stipulation, Attach. E). WDFW is not relying on the Governor's veto message for its authority to engage in

rulemaking. App. at 1. Amici's additional argument in this regard is not a basis for direct review.

III. CONCLUSION

For the foregoing reasons, and the reasons expressed in their answer to BIAW's Statement of Grounds for Direct Review, respondents respectfully request that this Court deny direct review of BIAW's appeal.

RESPECTFULLY SUBMITTED this 3rd day of March 2020.

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APPENDIX

State of Washington
DEPARTMENT OF FISH AND WILDLIFE
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Main Office Location: Natural Resources Building, 1111 Washington Street SE, Olympia, WA

June 17, 2019

Jan Himebaugh
Building Industry Association of Washington
111 21st Avenue Southwest
Olympia, Washington 98501

Dear Ms. Himebaugh:

On May 21, 2019, the Washington Department of Fish and Wildlife (WDFW) received your letter, addressed to me as WDFW's Director, seeking emergency repeal of Washington Administrative Code (WAC) 220-660-480. The following day, you submitted a petition form to the Fish and Wildlife Commission, but that form appeared to also be a request directed to me. Thus, pursuant to Revised Code of Washington (RCW) 34.05.330(1), I am responding to your request for emergency repeal of WAC 220-660-480.

I am hereby denying your request for the following reasons:

- WDFW presumes the constitutionality of duly enacted statutes, including those that become effective after the 2019 Legislative Session.

- Your request does not meet the statutory criteria for promulgating emergency rules under RCW 34.05.350. First, Second Substitute Senate House Bill (2SHB) 1579, enacted as Laws of 2019, chapter 290, does not become effective until July 28, 2019, eight days after the 60-day maximum period RCW 34.05.330(1) provides for responding to your request. Second, even if it were effective immediately, the law does not require emergency rules. Third, promulgating emergency rules to implement 2SHB 1579 is not necessary to preserve public health, safety, or general welfare, nor is it necessary for federal funding purposes or to implement the state budget.

- Further, WDFW does not interpret 2SHB 1579 to eliminate its statutory authority to enforce the hydraulic code (RCW 77.55) through civil penalties. To the contrary, the law's plain language requires WDFW to adopt rules to, among other things, develop a schedule for assessing the amount of civil penalties it will impose for hydraulic code violations.

WDFW will engage in formal rulemaking expressly required by 2SHB 1579 pursuant to the Administrative Procedure Act (RCW 34.05). This will include filing a Prenotice of Inquiry to solicit public comments on possible rulemaking related to this new law before filing a Notice of

Proposed Rulemaking with the Washington Code Reviser. You and other stakeholder groups will therefore have opportunities to participate in WDFW's efforts to implement 2SHB 1579 through formal rulemaking procedures.

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.

If you disagree with this decision, you may, in accordance with RCW 34.05.330, seek further review by the joint administrative rules review committee or Governor Inslee.

Thank you for bringing your concerns forward and proposing solutions through the rulemaking process. Feel free to call me if you have any questions.

Sincerely,

Kelly Susewind
Director

cc: Fish and Wildlife Commission
Margen Carlson, Acting Assistant Director, Habitat Program

CERTIFICATE OF SERVICE

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:

Jackson Wilder Maynard, Jr.
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DATED this 3rd day of March 2020, at Olympia, Washington.

s/ Wendy R. Otto
WENDY R. OTTO
Legal Assistant

SOLICITOR GENERAL OFFICE

March 03, 2020 - 3:10 PM

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Comments:

Respondents' Brief In Answer To Brief Of Amici Curiae Four Senators In Support Of Statement Of Grounds For Direct Review

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