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Supreme Court No. 100992-5

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

GENE GONZALEZ; SUSAN
GONZALEZ; HORWATH FAMILY
TWO, LLC; AND WASHINGTON
LANDLORD ASSOCIATION,

Petitioners,

v.

GOVERNOR JAY INSLEE AND
STATE OF WASHINGTON,

Respondents.

**BRIEF OF AMICUS ON BEHALF OF CITIZEN
ACTION DEFENSE FUND**

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I. INTRODUCTION

There is an old adage that bad facts make bad law. It is difficult to imagine worse facts than those presented by the threat to public safety faced by the state, nation, and world as a result of the recent pandemic. The plague of COVID-19 appeared early in the pandemic in Washington State and caused millions of deaths worldwide. Aside from war or famine, the virus has posed one of the most serious health and public policy challenges in our state and nation's history.

Yet the protections provided in our state and federal constitutions are not only for when times are easy and they cannot be disregarded lightly. It is during times of great crises - depressions, epidemics/pandemics, wars, and rebellions - when the restraints on government are tested and constitutional protections and rules are most important. As noted in Petitioner's brief, "...individual rights secured by the Constitution do not disappear during a public health crisis". *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020). Put more succinctly

by Benjamin Franklin, “[t]hey who can give up essential Liberty to obtain a little temporary Safety, deserve neither Liberty nor Safety.” <https://quotesfromthepast.com/benjamin-franklin-on-sacrificing-freedom-for-security/>

In order to avoid allowing bad facts to make bad law, this Court should decline the invitation of the State to disregard the longstanding protections that restrain legislative and executive power in our state constitution. In particular, this Court should rule in favor of the Petitioners because the appellate court erred in ruling that the Proclamations issued regarding landlord-tenant relations were authorized by RCW 43.06.220(1)(h), and that the Legislature’s authorization was not violative of the non-delegation doctrine. For these reasons, as well as those stated by Petitioners, this Court should uphold these important constitutional limitations on the power of the executive and legislature.

II. FACTUAL AND PROCEDURAL BACKGROUND

In the interest of judicial economy, this brief defers to the thorough recitation of the facts and procedural background of this case given by Petitioners in their brief.

III. IDENTITY AND INTEREST OF AMICUS CURIAE

The Citizen Action Defense Fund (“CADF”) is an independent, nonprofit organization based in Washington state that supports and pursues strategic, high-impact litigation in cases to advance free markets, restrain government overreach, and defend constitutional rights. The government watchdog nonprofit files lawsuits, represents affected parties, and intervenes in cases when the state enacts laws that violate the state or federal constitutions, intercedes when government officials take actions that infringe upon the First Amendment or other constitutional rights, and steps in when agencies promulgate rules in violation of state law.

CADF offers this brief to assist the Court in outlining the failure to abide by the state constitution's proscriptions on executive and legislative power presented in this case.

IV. ISSUES ADDRESSED

1. Whether the Proclamations regarding landlord-tenant relations were authorized by RCW 43.06.220(1)(h) in light of the statute as a whole?

2. If the Legislature authorized the Proclamations, was such authorization a lawful delegation of pure legislative power to suspend statutes?

V. ARGUMENT

A. The Proclamations regarding landlord-tenant relations were not authorized by RCW 43.06.220(1)(h).

The fundamental objective of statutory construction is to ascertain and carry out intent of the Legislature. *Rozner v. City of Bellevue*, 116 Wash.2d 342, 804 P.2d 24 (1991). Here, the Governor's proclamations suspending activities clearly regulated

by the Residential Landlord-Tenant Act require the court to determine the intent of the law-making branch in enacting RCW 43.06.220 which provides in pertinent part:

(1) The governor after proclaiming a state of emergency and prior to terminating such, may, in the area described by the proclamation issue an order prohibiting: . . . (h) Such other activities as he or she reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace.

(2) The governor after proclaiming a state of emergency and prior to terminating such may, in the area described by the proclamation, issue an order or orders concerning waiver or suspension of statutory obligations or limitations in the following areas: . . .

(g) Such other statutory and regulatory obligations or limitations prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency if strict compliance with the provision of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency, unless (i) authority to waive or suspend a specific statutory or regulatory obligation or limitation has been expressly granted to another statewide elected official, (ii) the waiver or suspension would conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state, or (iii) the waiver or suspension would conflict with the rights, under the First Amendment, of freedom of speech

or of the people to peaceably assemble. The governor shall give as much notice as practical to legislative leadership and impacted local governments when issuing orders under this subsection (2)(g).

In addition to the arguments regarding statutory intent and construction provided by Petitioners, this Court should also look to another significant provision of the law regarding health emergencies, which demonstrates that the Legislature intended to empower local health boards to respond to health emergencies involving respiratory virus pandemics. This Court should also consider the legislative history of the enactment of RCW 43.06.220, which further demonstrates that the law-making branch did not intend to cede to the executive the vast powers assumed by the Governor in this case. Finally, the Court should consider that, in the alternative, if the Legislature actually did intend to cede its lawmaking power to the Governor in an emergency, then such a delegation is violative of the non-delegation doctrine rooted in Article II, § 1 of the Washington State Constitution.

1. RCW Ch. 70.26 provides the framework under the law for response to respiratory pandemics.

As stated recently by this Court, the plain meaning of a statute may be discerned from all that the legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. *Washington Association of Counties v. State*, 199 Wash.2d 1, 502 P.3d 825 (2022). The legislature already provided a framework for dealing with pandemics. RCW 70.26.010 provides:

Findings—Intent.

The legislature finds that:

- (1) Pandemic influenza is a global outbreak of disease that occurs when a new virus appears in the human population, causes serious illness, and then spreads easily from person to person.
- (2) Historically, pandemic influenza has occurred on average every thirty years. Most recently, the Asian flu in 1957-58 and the Hong Kong flu in 1968-69 killed seventy thousand and thirty-four thousand, respectively, in the United States.
- (3) Another influenza pandemic could emerge with little warning, affecting a large number of people. Estimates are that another pandemic influenza would cause more than two hundred thousand deaths in our country, with as many as five thousand in Washington. Our state could also expect ten thousand to twenty-four thousand people needing hospital stays, and as many as a million people

requiring outpatient visits. During a severe pandemic these numbers could be much higher. The economic losses could also be substantial.

(4) The current Avian or bird flu that is spreading around the world has the potential to start a pandemic. There is yet no proven vaccine, and antiviral medication supplies are limited and of unknown effectiveness against a human version of the virus, leaving traditional public health measures as the only means to slow the spread of the disease. Given the global nature of a pandemic, as much as possible, the state must be able to respond assuming only limited outside resources and assistance will be available.

(5) An effective response to pandemic influenza in Washington must focus at the local level and will depend on preestablished partnerships and collaborative planning on a range of best case and worst case scenarios. It will require flexibility and real-time decision making, guided by accurate information. It will also depend on a well-informed public that understands the dangers of pandemic influenza and the steps necessary to prevent the spread of the disease.

(6) Avian flu is but one example of an infectious disease that, were an outbreak to occur, could pose a significant statewide health hazard. As such, preparation for pandemic flu will also enhance the capacity of local public health jurisdictions to respond to other emergencies.

It is therefore the intent of the legislature that adequate pandemic flu preparedness and response plans be developed and implemented by local public health jurisdictions statewide in order to limit the number of illnesses and deaths, preserve the

continuity of essential government and other community services, and minimize social disruption and economic loss in the event of an influenza pandemic.

RCW 70.26.010(5) states clearly the legislature's intent for how to respond to a pandemic involving contagious respiratory viruses such as COVID-19: "An effective response to pandemic influenza in Washington must focus at the local level . . .". The Centers for Disease control recognizes similarities in the influenza and COVID-19 viruses, including that they are both contagious respiratory illnesses, have similar symptoms, and periods that the viruses may be transmitted before a person is symptomatic. <https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm>. While there are differences, the intent language indicates that the statutory framework outlined in RCW Ch. 70.26 was intended to apply to future emerging respiratory pandemics including influenza, bird flu, and other examples of infectious diseases "that, were an outbreak to occur, could pose a significant statewide health hazard." RCW 70.26.010(6).

This Court recently noted that a general statutory provision must yield to a more specific statutory provision; this does not mean that the more specific statute invalidates the general statute, but instead, the specific statute will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment. *Washington Association of Counties v. State*, 199 Wash.2d 1, 502 P.3d 825 (2022). Here, in Chapter 70.26, the legislature specifically designated local health jurisdictions to handle pandemics involving respiratory viruses, not the state executive. The policy rationale is obvious: that pandemics may affect counties with larger populations differently than rural ones. For example, King County may need a different strategy and resources than Asotin County. While some may disagree with this policy, the Legislature makes this call as reflected in law - the executive is not at liberty to second guess it.

Instead of assisting local health authorities in adopting measures to deal with COVID-19 while ensuring the continued

availability of other important healthcare resources, Governor Inslee has adopted a one-size-fits-all approach, subjecting the entire state to measures that are no longer justified as an exercise of his authority under RCW 43.06.220. Through repeated extensions of executive orders, the Governor has refused to relinquish the powers he claimed on the basis of an emergency declaration under RCW 43.06.220, and has centralized the decision-making, rather than focusing the response to COVID-19 at the local level.

Not only does a centralized approach forfeit the benefits of localized decision making, but Governor Inslee's assertion of the authority granted by RCW 43.06.220 displaces the normal process of governance which subjects the assertion of power by one man—even by one branch of the government—to the checks and balances of other political entities both at the state and the local level. While it may be necessary in an emergency to assert such authority—to preserve the status quo until order has been restored—it is not a long-term model for governance. Just as a

temporary restraining order is put in place to preserve the status quo, but dissolves upon the opportunity for a contested hearing to determine the merits of a case- the emergency provisions in RCW 43.06.220 should be interpreted as authorizing temporary measures designed to preserve the status quo, which will give way to the normal process of governance when the immediate emergency has passed.

Because Chapter 70.26 not only anticipates a future pandemic, but anticipates that pandemics will recur at regular intervals, the use of the Governor's power to declare an emergency under RCW 43.06.220 should be limited to situations not anticipated by Chapter 70.26 RCW (such as the hospitals being overwhelmed with more cases than they can handle), and should be limited both in scope and duration to circumstances that can only be addressed by an emergency proclamation. At a minimum, this provision demonstrates that the legislature did not intend to vest the state executive with authority over respiratory pandemics, but rather vested it in local health jurisdictions.

2. The legislative history of RCW 43.06.220 further indicates that it was not intended to provide the Governor with the authority to issue the Proclamations in this case.

When legislative intent does not clearly appear on the face of statutory language, courts may resort to various tools of statutory construction, which may include consideration of legislative history and administrative interpretation of statute; however, interpretation adopted should always be one which best advances the legislative purpose. *Rozner v. City of Bellevue*, 116 Wash.2d 342, 804 P.2d 24 (1991). RCW 43.06.220 has undergone a number of amendments over the years and its legislative history indicates that the vast powers claimed by the Governor in this case were not intended.

The provision was passed in 1969 following a year of turmoil stemming from protests over the Vietnam war and civil rights that echoed similar conflict in the rest of the nation. <https://www.seattletimes.com/pacific-nw-magazine/anti-war-protests-race-riots-1968-in-seattle-looked-a-lot-like-it-did-in-the-rest-of-the-country/>. Interestingly, the one existing provision

of law that was amended was RCW 43.06.010, which listed the general powers and duties of the governor. The bill amended the governor's power to "suppress riots or unlawful strikes" and eliminated the requirement that the Governor first notify local authorities to suppress the riot or unlawful strike. 1969 ex.s. c 186 § 3. The bill also set up criminal penalties for violation of the Governor's order and made it a felony punishable by two to ten years in prison for damaging property or injuring another after a proclamation of a state of emergency, and required persons over the age of 16 to be prosecuted as an adult. Sections 3-7. The clear context and purpose of the language of the legislation was to address riots and civil disorders – health emergencies like pandemics are not clearly addressed.

The criminal penalties created by the act were later included in legislation that provided technical revisions to the sentencing code. Laws of Washington 2003 c 53 § 222. In 2008, Subsection 2 was added, which allowed the Governor to suspend certain statutory obligations or limitations. Laws of Washington

2008 c 181 § 1. The Final Bill Report provides the rationale for the need to add the ability of the Governor to suspend certain statutes:

The Governor has the authority to proclaim a state of emergency in the area of the state effected by a riot, energy emergency, public disorder, or disaster. Other than prohibiting specific activities that may be undertaken by the general public, the Governor's emergency powers include prohibiting activities that the Governor believes should be prohibited to help preserve and maintain life, health, property, or the public peace.

The usual administration of various executive functions was discovered to be inadequate to facilitate immediate response to the devastation of the December 2007 flooding. Likewise, the responses of government to the continuing needs of citizens living or working in the counties declared to be in a state of emergency, were found to be hampered by the lack of specific statutory authority for waivers or other reasonable responses to these unusual circumstances. [emphasis added]

<https://lawfilesexternal.wa.gov/biennium/2007-08/Pdf/Bill%20Reports/Senate/6950.FBR.pdf?q=20230109080405>

Ironically, it was the perceived inadequacy of the general authority of the governor to take reasonable actions to address a

state of emergency (the very authority he relies upon in this case) that led the legislature to amend the law to add circumstances in which statutory obligations may be suspended. If the Governor already possessed the power to ignore statutory provisions based upon his reasonable belief, there would have been no need for the legislature to amend the law.

In 2019, the law was amended again. SB 5260 removed the authority to issue an order prohibiting (1) the possession of firearms or any other deadly weapon in a place other than that person's place of residence or business; and (2) grant authority to waive or suspend statutory obligations or limitations for certain executive functions if strict compliance with the provision of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency, unless: authority is expressly granted to another statewide elected official; or the waiver or exemption would conflict with federal requirements that are a prescribed condition to the allocations of federal funds to the state, or first amendment rights

of freedom of speech and of the people to peaceably assemble.

Law of Washington 2019 c 472 § 2.

While the legislature expanded the ability of the Governor to suspend provisions of law during an emergency from the relatively small list enacted in 2008, that expansion came at a price. The Governor was required to consult with leadership, and for any emergency lasting longer than 30 days, the legislature was required to extend it by concurrent resolution or in writing by the leadership of the senate and house.

In conclusion, the legislative history indicates:

- RCW 43.06.220 was initially passed to address the riots and destruction to property and harm to persons during the 1960s,
- it has been expanded to address natural disasters over the years but not expressly amended to include pandemics,
- the changes to legislation that allowed for suspension of statutes was due to the Legislature's view that the Governor's authority to take actions he reasonably viewed

as necessary in an emergency were limited and inadequate where it conflicted with law, and

- while the types of statutes that could be suspended were expanded in 2019, that expansion still required legislative approval for emergencies lasting longer than 30 days. It should be noted that the record does not indicate that the Governor obtained legislative approval with regard to executive orders that had the effect of suspending the Residential Landlord-Tenant Act in the state.

This Court should find that the legislative history indicates that the intent regarding the Governor's authority is limited by law and does not allow him to effectively suspend statutes without following the procedures outlined in the law.

B. Even if the Legislature authorized the Proclamations, such authorization was not a lawful delegation of pure legislative power to suspend statutes.

The non-delegation doctrine is rooted in Article II, § 1 of the Washington state constitution. The provision vests "the

legislative power" in the legislature. While it does not define what the legislative power is, courts interpreting this provision have held that "[i]t is unconstitutional for the Legislature to abdicate or transfer its legislative function to others." *Brower v. State*, 137 Wash.2d 44, 54, 969 P.2d 42 (1998). In *Barry & Barry, Inc. v. State Dept. of Motor Vehicles*, the court adopted a two-part test for the constitutionality of a delegation of legislative authority to an administrative agency of the State. *Id.* at 163-64, 500 P.2d 540. "First, the legislature must provide standards or guidelines which indicate in general terms what is to be done and the administrative body which is to do it." *Id.*

Second, adequate procedural safeguards must be provided with regard to the procedure for promulgation of the rules and for testing the constitutionality of the rules after promulgation. Such safeguards can ensure that administratively promulgated rules and standards are as subject to public scrutiny and judicial review as are standards established and statutes passed by the legislature. *Id.*

The Governor points to broad intent language in SB 5260 which amended RCW 43.06.220 in 2019. That language provides:

Sec. 1. (1)(a) The legislature finds that the governor has broad authority to proclaim a state of emergency in any area of the state under RCW 43.06.010(12), and to exercise emergency powers during the emergency. These emergency powers have historically included the ability under RCW 43.06.220(1)(h) to temporarily waive or suspend statutory obligations by prohibiting compliance with statutory provisions during a proclaimed state of emergency when the governor reasonably believed it would help preserve and maintain life, health, property, or the public peace.

(b) The legislature further finds that, in response to issues arising from flooding events in 2007, RCW 43.06.220(2) was amended by chapter 181, Laws of 2008, to explicitly authorize the governor to temporarily waive or suspend a set of specifically identified statutes. This amendment has become problematic for subsequent emergency response activities because it has inadvertently narrowed the governor's ability to waive or suspend statutes under RCW 43.06.220(1)(h) by issuing orders temporarily prohibiting compliance with statutes not expressly identified in RCW 43.06.220(2).

(2) The legislature intends to allow the governor to immediately respond during a proclaimed state of emergency by temporarily waiving or suspending other statutory obligations or limitations prescribing the procedures for conduct of state business, or the

orders, rules, or regulations of any state agency, if strict compliance would in any way prevent, hinder, or delay necessary action in coping with the emergency.

There are two problems with the Governor's reliance on the language in this bill. First, as noted above, the legislative history of the bill indicates that the Legislature viewed the Governor's authority as too limited for activities governed by existing law, which is why it expanded his authority to suspend statutes under proscribed circumstances.

Second, assuming *arguendo*, that the Legislature did in fact intend for the Governor to either have unlimited authority to take action for as long as he wanted against any activity restricted by law or to effectively suspend a statute like the Residential Landlord-Tenant Act by fiat, such a law runs afoul of the non-delegation doctrine. It conveys the legislative power to repeal a law and fails the two-part test under this Court's precedents. If the governor's view of his authority under the law is accurate, then RCW 43.06.220 is unconstitutional because there are

neither standards and guidance for a landlord impacted by the Governor's order, nor designation of an administrative body under the government to indicate how a landlord is to proceed. There is no notice, no due process, no remedy, and it simply does not comport with even the bare minimum requirements for the rule of law.

VI. CONCLUSION

For the foregoing reasons, this Court should rule in favor of the Petitioners in this case.

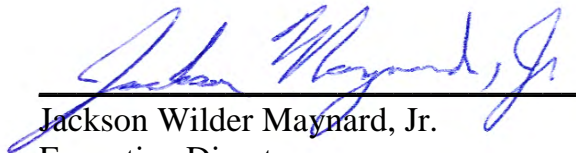
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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing **Brief of Amicus on behalf of Citizen Action Defense Fund** to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated January 9th, 2023.

A handwritten signature in blue ink, reading "Jackson Wilder Maynard, Jr.", is written over a horizontal line.

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Please note that the brief is filed on behalf of the Citizen Action Defense Fund not the Building Industry Association. I was not able to set up a separate login to the Court's web portal with the same bar number.

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