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Washington State Court of Appeals
Division I

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Docket No. 64415-7-I

King Cy. Sup. Ct. Cause No. 09-2-06928-0 SEA

NORTHWEST ANIMAL RIGHTS NETWORK, et al.,

Plaintiffs-Petitioners,

-against-

STATE OF WASHINGTON, et al.,

Defendants-Respondents.

APPELLANTS' REBUTTAL BRIEF

ORIGINAL

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I. STRICT REPLY

Plaintiffs, through counsel Adam P. Karp, strictly reply to the Respondents' response.

II. REBUTTAL STATEMENT OF FACTS

Plaintiffs rebut misstated assertions made in *Respondents' Brief* as follows:

1. The *Amended Complaint* identified the precise constitutional provisions alleged to have been violated by the plain language of the Exemptions. CP 2-3 ¶ 8, CP 6-8 ¶¶ 25-33. Additional grounds for these challenges were articulated in the document that conferred standing – viz., the Dec. 8, 2008 written demand to the Attorney General, which was refused on Dec. 22, 2008. CP 3 ¶¶ 15-16 & CP 33-43.

2. The Plaintiffs identified the specific acts alleged to be illegal in the *Amended Complaint* (CP 2 ¶ 5) and the *Second Amended Complaint* (CP 127-29 ¶ 25(a)-(l)).

3. The *Second Amended Complaint* alleged special injury, thereby permitting special taxpayer standing whether or not the complaint was “facial” or injury systemic. CP 123 ¶¶ 12-13.

4. In addition to the state law, Plaintiffs challenged KCC 11.04.530 and 11.28.110 and all other city and county codes that incorporate the state Exemptions by reference. **CP 5 ¶ 23.**

5. Plaintiffs explicitly sought injunctive and declaratory relief to cease enforcement of the unconstitutional parts of an existing law, relying on both the UDJA and the taxpayer derivative suit mechanisms. **CP 8 ¶ 34 and ¶ B; CP 130 ¶ 36.** In this regard, the Respondents admit that the “proper mechanism to facially challenge the content of a statute is to request a declaratory judgment under the UDJA,” which Plaintiffs did. ***Respondents’ Brief, at 15; CP 7-8 ¶¶ 24-34.***

6. At footnote 2 of page 4, Respondents note that Plaintiffs did not appeal denial of their motion to strike. Denial of a motion to strike an affirmative defense does not equate with granting a reciprocal motion for judgment on the pleadings on that defense, if only because of the burden shift. Indeed, precisely such an attempt was rejected by Judge Inveen, who dismissed on standing and justiciability, not ripeness.

III. REBUTTAL ARGUMENT

Plaintiffs rebut Respondents’ arguments as follows:

A. *Twombly’s* Plausibility Standard is Not Washington Law.

The plausibility standard first enunciated in *Bell Atl. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007) is not the law of Washington. *Cf. Respondents' Brief* at 17. In *Orwick v. City of Seattle*, 103 Wn.2d 249 (1984), the Supreme Court considered a plaintiff's complaint that the Court of Appeals dismissed, and that it obviously thought was overly conclusory. Indeed, the Court noted:

Here, the petitioners' complaint alleged the violation of a statute, and that the actions of the defendants were patently unjust, caused economic harm, impaired the public's perception of the legal system and violated the federal and state constitutions. How these allegations lead to a conclusion of relief for these petitioners is unstated. In their brief, petitioners claim that the defendant's actions are contrary to common notions of justice. These shotgun assertions hardly allow a trial court to evaluate the potential legal merits of any legal theory and the elements thereof.

Id., at 255-56. Nevertheless, and despite the complaint's shortcomings, the Supreme Court reversed dismissal of the plaintiff's claim to recover money damages: "Given the liberality of pleading and construction in favor of the nonmoving party these allegations are sufficient, though barely, to survive a motion to dismiss for failure to state a claim." *Id.*, at 257. The Court also held that if there should be any changes to how CR 12(b)(6) motions are decided in Washington, it should be done through the Court's formal rulemaking process. *Id.*, at 256 (emphasis added). What was true in 1984 when *Orwick* was decided is just as true today.

Moreover, since *Orwick* and *Twombly*, Washington courts have noted their refusal to adopt *Twombly*'s plausibility standard. See *McCurry v. Chevy Chase Bank, F.S.B.*, 144 Wash.App. 900 (2008), *rev. granted*, 165 Wn.2d 1027 (2009); *Davenport v. Washington Educ. Ass'n*, 147 Wash.App. 704, 715 n.24 (2008)(noting *Twombly* not adopted in Washington, but concluding standard immaterial under the circumstances), *rev. granted*, 166 Wn.2d 1005 (2009). Even when the text of state and federal rules is identical, federal precedent is not binding on the Supreme Court. *Orwick*, at 256 (rejecting *less* rigorous federal interpretation of one aspect of counterpart to CR 12(b)(6) as “folly”). Incompatible federal interpretations are not followed with respect to state rules. *Orwick*, at 255-56. Thus, adopting the federal interpretation is not automatic, but requires analysis of the rules' purposes and federal courts' reasoning.

If how a CR 12(b)(6) motion should be decided is to be changed after nearly fifty years of applying the approach derived from *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957)(see *Mills v. Orcas Power & Light Co.*, 56 Wn.2d 807, 811 (1960)), it should not be done by judicial decision without proper comment and study. The U.S. Supreme Court's new plausibility standard raises significant constitutional and access to justice

concerns, and the perceived discovery problems that the Supreme Court stated justified the change do not appear to in fact exist.

The *Twombly* standard is also undefined and imprecise, unnecessarily destabilizing Washington practice and creating an unacceptable risk of impairing access to court and trial by jury. In applying *Twombly*, the Supreme Court distinguishes between factual allegations and legal conclusions. While disclaiming any intention to return to “the hyper-technical code-pleading regime of a prior era,” see *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009), this distinction resurrects a vestige of code pleading, see *Twombly*, 550 U.S. 589-90 (Stevens, J., dissenting). The problematic nature of this legal-factual distinction is confirmed by the majority and dissenting opinions in *Ashcroft* itself. Compare *Ashcroft* at 1949-52 (5-Justice majority casting allegations as mere legal conclusions), with *id.* at 1959-61 (4-Justice dissent characterizing same allegations as factual).

More importantly, the vague and imprecise nature of the plausibility standard, coupled with the need to perform traditional factfinding functions such as drawing inferences and considering alternative explanations, carries an unacceptable risk of infringing on the state constitutional rights of access to court and trial by jury. See Wash.

Const. art. I §§ 10, 21; *see generally Putnam v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974 (2009)(access to court); *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636 (1989)(jury trial). For example, Washington courts have historically given nonmoving parties in summary judgment proceedings the benefit of all reasonable inferences under the record in order to ensure access to court and to preserve the right to trial by jury. *See Preston v. Duncan*, 55 Wn.2d 678, 683 (1960). This same sensibility must obtain when the court is reviewing pleadings on a motion pursuant to CR 12(b)(6).

As noted in the original brief, CR 12(b)(6) motions are treated more or less identically to CR 12(c) motions. *See Davenport v. Washington Educ. Ass'n*, 147 Wash.App. 704, 715 (II, 2008); *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 214 (2005). For the above reasons, and following the Supreme Court's holding in *Orwick*, the Plaintiffs amply satisfied the liberal notice pleading standard of our state. When the challenged language of Ch. 16.52 RCW is compared against the constitutional provisions cited, the court and Respondents are able to understand the gravamen of the action. Further, a "facial challenge" is, by definition, one that does not turn on specific facts or allegations except, with respect to the threshold questions of standing and justiciability, (a)

identifying the law facially challenged; (b) identifying the constitutional provisions upon which the challenge is made; and (c) stating facts that confer generalized taxpayer standing. The germane, well-pleaded facts in the *Amended Complaint* are:

Taxpayer Status. Plaintiffs Bjork and NARN's taxpayer statuses with the County and State are confirmed. CP 2-3 ¶¶ 2, 3, 13, 14.

Government Action. Defendants' actions in relation to Ch. 16.52 RCW and the allegedly illegal exemptions are broadly referenced. CP 2-6, ¶¶ 5, 17-23. The *Second Amended Complaint* identified the myriad of other government actions implicit as well as necessary to effectuate and give life to the criminal law's inclusions and exclusions.

Attorney General's Office Declination. The requirement of the State refusing a taxpayer demand is alleged. CP 2-3, ¶¶ 5, 7, 15, 16.

Illegality of Government Action. Specific violations of state and federal constitutional law have been attributed to provisions of Ch. 16.52 RCW. CP 2-3, 6-8, ¶¶ 8, 25-34. Factual allegations must be accepted as true for purposes of a CR 12(c) motion.

Taxpayer Derivative Suit as Second Claim for Relief. The Plaintiffs sought injunctive and declaratory relief as a common law taxpayer action. CP 8, ¶¶ 35-36.

Recall that Respondents' CR 12(c) motion did not address the merits of the Plaintiffs' claims that the Exemptions were in fact unconstitutional. Instead, the only matters subject to CR 12(c) were standing, ripeness, and justiciability under the UDJA and common law. In that respect, abiding by the exceedingly liberal notice pleading rules of Washington¹ and the equally deferential rules disfavoring dismissal under CR 12,² it was error to dismiss Plaintiffs' complaint.

B. UDJA Standing Principles Harmonize with Common Law.

At page 17, Respondents cite to *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411-12 (2001) to assert that direct damage is needed to sustain an action to declare a statute unconstitutional. However, *To-Ro*, *High Tide Seafoods*, and *DeCano* were not actions seeking standing under taxpayer derivative suit principles. Further, taxpayer suit cases have repeatedly held that direct damage to the taxpayer is presumed whenever government engages in illegal conduct, obviating the need to prove special injury. See *Boyles*, at 615 (taxpayer status provides standing to sue though alleged injury is generalized, meaning directly damaging to all taxpayers).

¹ See CR 8(a) and *Schoening v. Grays Harbor Comm. Hosp.*, 40 Wash.App. 331 (1985), noting that plaintiffs need not plead detailed facts supporting a cause of action but only give a short and plain statement of the claim.

² Courts should deny a motion if any hypothetical situation conceivably raised by the complaint is legally sufficient to support plaintiff's claim. *Bravo v. Dolsen Co.*, 125

Next, at page 18 the Respondents cite to *State v. Cook*, 125 Wash.App. 709, 720-21 (2005) as authority that Article III standing principles apply to an UDJA cases. Yet *Cook* and *Lujan* were not state taxpayer derivative suits or even UDJA claims, and can be disregarded. Further, King County Superior Court is not an Article III court subject to federal standing principles.

C. Political Question Not a Bar.

At page 28, Respondents note that the Plaintiffs are improperly asking the court to inquire into political questions by invading the prerogative of the Legislature to criminalize conduct. This assertion, in essence, urges the concept of separation of powers as a bar to judicial review. Ironically, it is the Legislature’s own failure to mind governmental boundaries – by delegating its functions to the executive and judicial branch and nongovernmental actors – that prompted Plaintiffs to seek judicial recourse in restoring the proper equilibrium of democratic power in the first place. Instead of asking the court to create new criminal law, the Plaintiffs are merely asking for the judicial branch to do its job (recall *U.S. v. Munoz-Flores*, 495 U.S. 385, 390-91 (1990), noting it is the courts’ “duty to review” laws for constitutionality), ensuring that the legislature

Wn.2d 745 (1995).

does not cross the separation of powers line, enact a law that unconstitutionally confers preferential treatment, lacks due process, and relies on amorphous “standards.” Once stricken, the legislature will be free to enact a proper law with input from all stakeholders.

D. Illegal Governmental Acts Follow Necessarily from Implementation and Enforcement of Unconstitutional Law.

Respondents cite no authority categorically stating that general-injury (as opposed to special injury) taxpayer suits may not be brought to challenge the enacting of unconstitutional laws, on the premise that the passing of an illegal statute is not a government “act.” Yet the Supreme Court concluded that an “initiative measure limiting the taxing power” is as “much a legislative act as is [a statute].” *Love v. King Cy.*, 181 Wash. 462, 469 (1935). “The passage of an initiative measure as a law is the exercise of the same power of sovereignty as that exercised by the Legislature in the passage of a statute.” *Id.*

To be clear, no challenge has been made to the Legislature’s compliance with rules of parliamentary procedure. Instead, they challenge the product of that process, including fundamentally the delegating of core legislative functions to the executive branch (i.e., police officers, animal control officers, prosecutors), the judicial branch (i.e., all judges), nongovernmental and unelected private parties, and randomly-selected

sets of six or twelve jurors to define what is and what is not criminal. The thrust of this suit seeks to preserve the tenets of representative democracy.

Analogous to *NJSPCA v. NJDA*, 196 N.J. 366 (2008), where the New Jersey Department of Agriculture impermissibly subdelegated core legislative authority to what were arguably private interests in defining what fell into the safe harbor for “routine husbandry practices,” the violation here is more flagrant in that the Washington Legislature bypasses any agency deliberation and rulemaking process that would permit public input on what are primarily criminal matters, resulting in the state exercising its powers of compulsion at the direction of a nebulous and unknown group. By letting certain unidentified members of the public define what is and is not a crime without any guiding or intelligible standards, the Legislature and King County Council (adopting the challenged exemptions by incorporation) impermissibly delegated criminal lawmaking authority. Hence, the very act of passing the challenged exemptions constituted an illegal and unconstitutional delegation and properly stated a claim to be redressed by the trial court as a taxpayer action and UDJA claim. Further, passing a tainted law causes a host of other government-sanctioned acts and omissions, through selective enforcement, nonenforcement, and encouragement of third party acts and

omissions that Plaintiffs alleged were unconstitutional on due process, equal protection, and other grounds.

1. Noncriminal Taxpayer Suits Only?

No case says that taxpayer standing principles will not permit facial challenges to a criminal law, yet this is the practical effect of Respondents' argument – i.e., to restrict taxpayer suits to civil law challenges. To accept Respondents' position will result in amputating the reach of decades-old common law doctrine by practically permitting taxpayer challenges only to noncriminal laws, while disregarding that:

Crimes have always represented a special case, constitutionally and philosophically. The criminal penalty represents the ultimate governmental intrusion on individual freedom, together with a sense of community approbation not present in other government action.

Mark D. Alexander, Note, *Increased Judicial Scrutiny for the Administrative Crime*, 77 Cornell L. Rev. 612, 644-46 (1992). Taxpayers' rights to challenge illegal and invalid government acts are not restricted only to those noncriminal in nature.

Yet Respondents persist in demanding that the Plaintiffs furnish an “act” distinct from passage of an allegedly illegal law in order to serve as a qualifying taxpayer litigant. True, most noncriminal state and local laws instruct or permit a public official to administer, enforce, enter into contract, buy, sell, regulate, or otherwise do some act in order to effectuate

the purposes of the enacted law. For example, a law raising taxes directs the Department of Revenue to collect that tax; a law permitting a lottery directs the Washington State Lottery Commission to monitor and conduct the lottery; a law assigning county prisoners to a work release program directs the relevant agencies to implement that program (*see Boyles*, 103 Wn.2d 610 (1985)); a law requiring preemployment drug testing directs the personnel department to administer that test (*Robinson*, 102 Wash.App. 795 (2000)); a law allowing a PUD to sell appliances directs the PUD to go into that business (*Kightlinger*, 119 Wash.App. 501 (2003)).

But what “act” would ever exist in the criminal justice system other than its presumptive enforcement by the police-prosecutor complex? Once a criminal law is enacted, it becomes the official duty of law enforcement to police the law and for the prosecuting attorney to prosecute that law. Upon going into effect, a new criminal statute is put into circulation among the executive and judicial branches, and becomes the law of Washington. At any moment after the effective date, those not exempt are immediately subject to prosecution upon violating that law. Charged with these administrative and enforcement duties, much like state agencies conferred the responsibility of enacting WAC provisions and

regulating certain industries, are the executive and judicial branches. The constitution directed the Legislature to determine the duties of the prosecuting attorney. See Const. art. XI, § 5 (Legislature to prescribe the duties of the prosecution attorney). The Legislature promptly assigned various duties to the prosecuting attorney, among which was the obligation to “[p]rosecute all criminal and civil actions in which the state or the county may be a party.” RCW 36.27.020(4). By the time Washington attempted statehood in 1889, the criminal prosecution function was vested in the constitutionally created, locally-elected executive branch office of the prosecuting attorney. Const. art. XI, §§ 4-5; *State v. Campbell*, 103 Wn.2d 1, 25-26 (1984), *cert. den’d*, 471 U.S. 1094 (1985)(recognizing prosecuting attorney as executive branch official).

Even though statutorily obligated to prosecute all criminal actions, the prosecutor retains discretion to forego filing charges. See RCW 9.94A.411. In exercising this discretion with respect to Ch. 16.52 RCW, however, the prosecutor is making what amounts to a legislative decision – i.e., defining what is, in fact, justifiable (i.e., exempt) animal cruelty. A prosecutor’s decision not to file charges is virtually unreviewable by the courts. The primary barrier to such review is the separation of powers doctrine, which recognizes that the executive branch may not exercise

judicial power, and the judiciary cannot enter upon executive functions. *People v. Smith*, 53 Cal.App.3d 655 (1975).

2. *Nondelegation Violation as Illegal Act of Legislature.*

Such a notion undermines the nondelegation doctrine and the “principle of legality.” Herbert L. Packer, *The Limits of the Criminal Sanction* 80 (1968); John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 189 (1985). Crimes must be legislatively rather than judicially (or even executively) defined.

The principle of legality forbids the retroactive definition of criminal offenses. It is condemned because it is retroactive and also because it is judicial – that is, accomplished by an institution not recognized as politically competent to define crime.

Jeffries, at 190. The court system is “an institution not recognized as politically competent to define crime.” *Jeffries*, at 190.

Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

U.S. v. Bass, 404 U.S. 336, 348 (1971). *Bass* states the overarching principle in criminal law that the legislative branch, not the police, prosecutors, or courts, and certainly not the regulated entities themselves, should define the contours of criminal prohibitions. Yet this is precisely what Ch. 16.52 RCW has sanctioned. In so doing, it violates the

nondelegation doctrine and the rule of lenity. The rule of lenity is one species of the nondelegation doctrine.

Consider, finally, the rule of lenity, which says that in the face of ambiguity, criminal statutes will be construed favorably to criminal defendants. One function of the lenity principle is to ensure against delegations. Criminal law must be a product of a clear judgment on Congress's part. Where no clear judgment has been made, the statute will not apply merely because it is plausibly interpreted, by courts or enforcement authorities, to fit the case at hand. The rule of lenity is inspired by the due process constraint on conviction pursuant to open-ended or vague statutes. While it is not itself a constitutional mandate, it is rooted in a constitutional principle, and serves as a time-honored nondelegation canon.

Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 332 (2000)(concluding that nondelegation doctrine is “alive and well” having been “relocated rather than abandoned”). The concern of allowing police, prosecutors, and judges to define what constitutes animal cruelty is that ambiguous criminal statutes tempt them to be unfairly selective in enforcing criminal law. *See, e.g., U.S. v. Kozminski*, 487 U.S. 931, 951-52 (1988).As Justice Scalia noted several years ago:

the Justice Department ... knows that if it takes an erroneously narrow view of what it can prosecute the error will likely never be corrected, whereas an erroneously broad view will be corrected by the courts when prosecutions are brought. Thus, to give persuasive effect to the Government's expansive advice-giving interpretation of [a criminal statute] would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity.

Crandon v. U.S., 494 U.S. 152, 178 (1990) (emphasis added). Justice

Scalia's comments apply inversely as well, where the county prosecutor takes an erroneously broad view of what it cannot prosecute due to the ambiguous and impermissible statutory exemptions. Thus, while prosecutors might have an institutional interest in expansively interpreting criminal statutes, such predisposition does not apply in the face of quite broad and vague exemptions to prosecution.

Well aware of the rule of lenity, prosecutors will steer clear of prosecuting cases that might trigger the challenged exemptions due to our legal system's instinctive distaste for extinguishing individual liberty without clear legislative warrant and desire to assure citizens fair notice of what is proscribed. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 345-46 (1994)(quoting *U.S. v. Bass*, at 349). While prosecutors might be tempted to test the uncertain limits of an ambiguously-worded criminal law, where those limits are so broadly stated, a prosecutor will not likely invest political capital, funds, and office resources to charging behavior that has a high risk of falling through the exemptions "cracks." And though the institutional legitimacy of deterring animal cruelty has garnered support over the years, animal crimes do not enjoy the same primacy in triage as human crimes. As with prosecutors, judges and juries will be functioning with too little guidance in applying

criminal law standards to individual cases, leading to a high rate of reversible errors. “Delegated criminal lawmaking and lenity cannot peacefully coexist.” Kahan, at 347.

Due process implications also arise so that individuals have advance notice of what conduct will subject them to criminal penalties. Lenity reflects “the due process value” that criminal punishment is illegitimate unless individuals are given “reasonable notice that their activities are criminally culpable.” William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1029 (1989). Then-Judge and later Solicitor General Kenneth Starr observed:

[i]n the criminal context, courts have traditionally required greater clarity in draftsmanship than in civil contexts, commensurate with the bedrock principle that in a free country citizens who are potentially subject to criminal sanctions should have clear notice of the behavior that may cause sanctions to be visited upon them.

U.S. v. McGoff, 831 F.2d 1071, 1077 (D.C.Cir.1987).

Of additional concern with Ch. 16.52 RCW is separation of powers. Under Article I and the separation of powers, “the lawmaking function belongs to Congress ... and may not be conveyed to another branch or entity.” *Loving v. U.S.* 517 U.S. 748, 758 (1996).

Legislative power is nondelegable. Congress can no more ‘delegate’ some of its Article I power to the Executive than it could ‘delegate’ some to one of its committees. What Congress does is to *assign responsibilities* to the Executive

Id., at 777 (Scalia, J., concurring in part and concurring in the judgment).

The distinction is between impermissible delegation of *lawmaking* functions and permissible delegations of responsibility to *execute* or *administer* the laws:

The true distinction ... is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Loving, at 758-59 (quoting *Field v. Clark*, 143 U.S. 649, 693-94 (1892)).

In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935), this Court invalidated a statute purporting to delegate the authority to adopt codes of industrial conduct implementing the capacious standard of “fair competition.” This Court opined that “[t]he Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.” *Id.*, at 529.

And in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), the U.S. Supreme Court applied *Schechter Poultry* to strike down a provision of the Bituminous Coal Conservation Act of 1935 delegating power to fix maximum hours of labor and minimum wages when adopted by a majority of its members as an unlawful delegation of legislative authority to private

individuals because it allowed the majority to force the code upon an unwilling minority:

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas. Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. **The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.** The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.

Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936)(emphasis added). As with *Carter*, the challenged exemptions permit a presumptive majority of an ill-defined industry to determine what is criminal among its competitors and individuals who may not be commercially raising animals but otherwise engaging in cruel handling methods.

Limits on delegations of power are necessary to foster the political processes that check congressional action. Open-ended delegations are

objectionable because they permit responsibility for government action to pass out of the hands of the legislature and thereby undermine this electoral check. As Congressman Levitas once acknowledged: “When hard decisions have to be made, we pass the buck to the agencies with vaguely worded statutes.” 122 Cong. Rec. H10, 685 (Sept. 21, 1976). One of his colleagues added: “[T]hen we stand back and say when our constituents are aggrieved or oppressed by various rules and regulations, ‘Hey, it’s not me. We didn’t mean that. We passed this well-meaning legislation’ ” *Id.* at H10,673 (statement of Rep. Flowers). Justice Brennan incisively observed:

[F]ormulation of policy is a legislature’s primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive to the same degree to the people.

United States v. Robel, 389 U.S. 258, 276 (1967) (concurring opinion).

While the Supreme Court has upheld relatively broad delegated standards in the past, after diligent search, it appears to have never done so when the standards are to be determined by the very persons subject to penalty for violation of those standards. In *Schechter Poultry*, the Court determined that Section 3 of the National Industrial Recovery Act was “without precedent” in part because “[i]t supplie[d] no standards for any

trade, industry, or activity,” *id.*, at 848, and could be “used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose, and the industry itself prescribes as being wise.” *Id.* at 843.

While the majority will likely represent the lowest common denominator for “accepted” humane treatment, this self-legislation comes at the expense of the primary beneficiaries of the animal cruelty law – viz., those animals to be protected from cruelty, which otherwise applies to all livestock except with respect to what is deemed “accepted” or “customary.” Putting aside the fundamental interests of the animals, which were central to the Legislature’s intent of passing Pasado’s Law and amendments, the existing exemptions foster such ambiguity and deference as to reward special interests with criminal immunity and transform them into a criminal organization with an acquittal-defining monopoly. This subjects the older-generation, smaller-scale, and less solvent livestock producers to prosecution when they may be continuing to engage in outmoded animal husbandry practices lagging behind the changing mores and economics of industry, medical research, large animal veterinary care, and bioethics, but lack the resources and influence to impact the evolution of criminally defining what is no longer “accepted.”

Washington has invalidated several statutes on nondelegation grounds. See *State ex rel. Kirschner v. Urquhart*, 50 Wn.2d 131, 135 (1957); *State v. Matson Co.*, 182 Wash. 507 (Wash. 1935) (“[T]he [unlawful] delegation of power is not only to a state administrative officer, [but to] a special privileged group of private persons. [The Act] sets up a tribunal [] in each industry headed by the director which ... has the power to amend, modify, or revoke what appellants claim has become by adoption or reference the statutory law of the state.”). As quoted by the Supreme Court in *Matson Co.*, and following its reasoning to strike down the Agriculture Adjustment Act:

It is difficult to conceive of a more complete abdication of legislative power than is involved in this act. **Not only is the power to determine whether or not there shall be a law at all delegated to an indefinite class or group, but the Governor and all other public officers are rendered powerless to act except upon the initiative of a preponderant majority of a group.** It must be borne in mind that the power delegated is not the power to organize and adopt self-governing ordinances. **The power delegated is the power to frame and adopt a code which, when approved, becomes a law with penal sanctions.**

Id., at 514-515 (quoting *Gibson Auto Co. v. Finnegan*, 259 N.W. 420, 423 (1935)(emphasis added)).

A criminal law was stricken as an unconstitutional delegation of lawmaking authority in *In re Powell*, 92 Wn.2d 882, 891 (1979)(finding that legislature’s delegation to Board of Pharmacy the right to promulgate

an emergency regulation rescheduling a drug as a controlled substance without notice and public comment procedures, which, having been so rescheduled makes possession a crime, was an unconstitutional delegation). *State v. Brown*, 95 Wash.App. 952, 957-58 (III, 1999) noted that, “Where a felony is in question agencies must provide adequate notice for the procedural safeguards to be sufficient.” *Brown* cited *Powell* to conclude that the charge of offense of persistent prison misbehavior against a prison inmate was properly dismissed on grounds of nondelegation where the Department of Corrections had the exclusive right to define “serious infraction.” The challenged exemptions in the case at bar provide immunity for felonious animal cruelty.

Here, unlike *NJSPCA*, our Legislature never asked the Washington Department of Agriculture to conduct hearings and prepare regulations that would define what is, in fact, an “accepted animal husbandry practice,” or the Washington Department of Health’s Veterinary Board of Governors to define what is an “accepted veterinary medical practice.” Hence, any safeguards implicit in the rulemaking process by a state agency were ignored, compounding the unconstitutional nature of this law. The New Jersey Supreme Court held that the safe harbor for “routine husbandry practices” failed to comply with the

statutory directive that the practices be humane and constituted an impermissible subdelegation. “In fact, because of the nature of the entities included within the safe harbor exemption, the Department did not simply engage in a subdelegation, but did so in favor of some entities that also might be described as private interests.” *NJSPCA v. NJDA*, 196 N.J. 366, 400 (2008).

The Respondents argue that whether the challenged exemptions of Ch. 16.52 RCW apply is to be decided by the jury, but this position assumes at least three prior government acts – viz., (a) the executive act of the law enforcement or animal control officer to in fact refer a case to the prosecutor, (b) the executive act of the prosecutor to in fact charge the case, and (c) the judicial act of a judge deciding not to dismiss the case on a *Knapstad* motion. Each of these acts involves an unconstitutional delegation of legislative authority to the other branches of government. If it violates nondelegation doctrine to let other public officials define what constitutes a crime, then how could six or twelve jurors be permitted to make such a decision?

Dated this Mar. 10, 2010
ANIMAL LAW OFFICES

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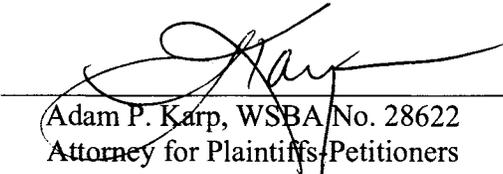
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Mar. 10, 2010, before 5 p.m., I caused a true and correct copy of the foregoing APPELLANTS' BRIEF (without table of contents and table of authorities); and on Mar. 10, 2010, after 5 p.m., I caused same with table of contents and table of authorities to be served upon the following person(s) in the following manner:

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