

No. 78637-2

(Snohomish County Superior Court No. 05-2-10166-9)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE FARM BUREAU FEDERATION,
WASHINGTON STATE GRANGE, NATIONAL FEDERATION
OF INDEPENDENT BUSINESS, BUILDING INDUSTRY ASSOCIATION
OF WASHINGTON, EVERGREEN FREEDOM FOUNDATION,
WASHINGTON ASSOCIATION OF REALTORS,
and STEVE NEIGHBORS,

Respondents,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington;
STATE EXPENDITURE LIMIT COMMITTEE; an agency of the State of
Washington; and STATE OF WASHINGTON,

Appellants.

**RESPONDENTS' OPENING BRIEF ON CROSS-APPEAL AND
RESPONSE TO STATE'S OPENING BRIEF**

Richard M. Stephens, WSBA No. 21776
Samuel A. Rodabough, WSBA No. 35347
Brian D. Amsbary, WSBA No. 36566
Attorneys for Respondents

GROEN STEPHENS & KLINGE LLP
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
Telephone: (425) 453-6206

ORIGINAL

06 SEP 29 AM 7:59
CLERK

3

Table of Contents

I.	NATURE OF THE CASE	1
II.	RESPONDENTS' ASSIGNMENTS OF ERROR	3
III.	ISSUES PRESENTED.....	3
IV.	STATEMENT OF THE CASE.....	6
A.	Taxpayer Protection Act	6
1.	Spending Limit.....	8
2.	Expenditure Limit Committee	8
3.	Adjustments to the State Expenditure Limit.....	10
4.	Voter Approval for Exceeding Spending Limit.....	12
5.	Emergency Reserve	12
B.	Legislature's Reenactment of the TPA.....	13
C.	Legislative Action During the 2005 Session	14
D.	Procedural History	17
V.	ARGUMENT	21
A.	The Trial Court Erred in Determining That The State Expenditure Limit that Guides the Budgeting Process is the Limit Established the November Following the Budgeting —A "Limit" is Effective Only if Known Before Budgeting Occurs.....	21
B.	ESSB 6896 Does Not Render this Case Moot.....	25
1.	ESSB 6896 Does Not Change the Law as the State Argues in its Brief.....	27
2.	The Trial Court Correctly Determined that ESSB 6896 Did Not Deprive the Trial Court of Jurisdiction to Review the State Expenditure Limit.....	28
3.	The State's Interpretation of ESSB 6896 Would Violate Art. II, Sec. 37 of the State Constitution.....	31
4.	ESSB 6896 Cannot Retroactively Cure an Illegal Tax—Said Retroactivity Would Violate Due Process.....	33

C.	The State’s Triangulation Is Ineffectual to Increase the State Expenditure Limit	36
1.	The “Appropriation” of \$250 Million from the GF to the VRDEA Was Not an “Actual Expenditure” for Purposes of Rebasng the FY 2006 State Expenditure Limit	37
2.	The Transfers of Funds of \$250 million from the VRDEA to the HSA and then to the GF Did Not Increase the FY 2005 State Expenditure Limit.....	40
3.	Increasing the Any Spending Limit as a Result of Any Portion of the Triangulation of Funds Violates the Letter and Spirit of the TPA	43
D.	Part XI of ESHB 2314 Is Subject to the Voter Approval Requirement of RCW 43.135.035(2)(a) Because It Is at Worst, a Tax Increase, and at Best, Revenue Neutral.....	45
E.	The Legislature’s Self-Imposed Voter Approval Requirement Does Not Suffer From The Constitutional Infirmities Identified In <i>Amalgamated Transit</i>	47
1.	The Analysis in <i>Amalgamated Transit</i> Relied Upon by the State is Obiter Dictum in its Most Gratuitous Form	47
2.	Unlike I-695 Considered in <i>Amalgamated Transit</i> , the Voter Approval Requirement of the TPA is Narrow in Scope	48
3.	Unlike I-695, the TPA Has Been Self-Imposed by the Legislature.....	51
4.	A Finding that the Voter Referral Requirement of the TPA is Unconstitutional Does Not Provide the State the Relief it Seeks	53
5.	The Dicta in <i>Amalgamated Transit</i> Must Yield to More Persuasive Authority and Controlling Authority.....	55
F.	The Trial Court Erred in Creating Legislative and Executive Privileges Unrecognized in this State’s Statutes or Jurisprudence	56
1.	Washington Courts Are Reticent to Create New Privileges.....	57
2.	The Washington Constitution Does Not Contain the Claimed Privileges	60
a.	Legislative Privilege.....	60

	b. Executive Privilege	68
3.	The Public Policy of This State Favors Broad Disclosure of Governmental Documents	69
4.	If This Court Does Create the Claimed Privileges, They Should be Strictly Limited.....	74
CONCLUSION.....		78

Table of Authorities

Cases

<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2000).....	passim
<i>American Mail Line, Ltd. v. Gulick</i> , 411 F.2d 696 (D.C. Cir. 1969).....	72
<i>Avara v. Baltimore News American Division</i> , 440 A.2d 368 (Md. 1982).....	66
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990).....	25
<i>Blanchard v. Golden Age Brewing Co.</i> , 188 Wash. 396, 63 P.2d 397 (1936).....	30
<i>Brouillet v. Cowles Pub'g Co.</i> , 114 Wn.2d 788, 791 P.2d 526 (1990).....	72
<i>City of Tacoma v. State</i> , 117 Wn.2d 348, 816 P.2d 7 (1991).....	33
<i>Eastland v. U.S. Servicemen's Fund</i> , 421 U.S. 491, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975).....	64
<i>Estate of Hemphill v. State, Dep't of Revenue</i> , 153 Wn.2d 544, 105 P.3d 391 (2005).....	35
<i>Gravel v. United States</i> , 408 U.S. 606, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972).....	64
<i>Haueter v. Cowles Pub. Co.</i> , 61 Wn. App. 572, 811 P.2d 231 (1991).....	74
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978).....	72
<i>In re Cross</i> , 99 Wn.2d 373, 662 P.2d 828 (1983).....	30, 57, 78
<i>In re Recall of Call</i> , 109 Wn.2d 954, 749 P.2d 674 (1988).....	62
<i>In re Estate of Burns</i> , 131 Wn.2d 104, 928 P.2d 1094 (1997).....	34
<i>Judd v. Am. Tel. & Tel. Co.</i> , 152 Wn.2d 195, 95 P.3d 337 (2004).....	45
<i>Kilbourn v. Thompson</i> , 103 U.S. 168, 26 L. Ed. 377 (1880).....	64
<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002).....	45
<i>Landgraf v. USI Film Prods.</i> , 511 U.S. 244 (1994).....	33

<i>Larson v. Seattle Popular Monorail Auth.</i> , 156 Wn.2d 752, 131 P.3d 892 (2006)	48
<i>Liberty Bank of Seattle, Inc. v. Henderson</i> , 75 Wn. App. 546, 878 P.2d 1259 (1994)	74
<i>Limstrom v. Ladenburg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998)	78
<i>Manufactured Housing Communities of Washington v. State</i> , 142 Wn.2d 347, 13 P.3d 183 (2000)	64
<i>Martonik v. Durkan</i> , 23 Wn. App. 47, 596 P.2d 1054 (1979)	62
<i>McGowan v. State</i> , 148 Wn.2d 278, 60 P.3d 67 (2002)	54
<i>Mebust v. Mayco Manufacturing Co.</i> , 8 Wn. App. 359, 506 P.2d 326 (1973)	71, 72
<i>Niemeier v. Watergate Special Prosecution Force</i> , 565 F.2d 967 (7th Cir. 1977).....	72
<i>NLRB v. Sears, Roebuck & Co.</i> , 421 U.S. 132, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975)	72
<i>O'Connor v. Dep't of Social & Health Servs.</i> , 143 Wn.2d 895, 25 P.3d 426 (2001)	71
<i>Prison Legal News, Inc. v. Department of Corrections</i> , 154 Wn.2d 628, 115 P.3d 316 (2005),	78
<i>Roberson v. Perez</i> , 123 Wn. App. 320, 96 P.3d 420 (2004)	71
<i>Saldin Securities, Inc. v. Snohomish Cnty.</i> , 80 Wn. App. 522, 910 P.2d 513 (1996)	30
<i>Senear v. Daily Journal-American</i> , 97 Wn.2d 148, 641 P.2d 1180 (1982)	59
<i>Seven Gables Corp. v. MGM/UA Entertainment Co.</i> , 106 Wn.2d 1, 721 P.2d 1 (1986)	47
<i>Sidor v. Public Disclosure Commission</i> , 25 Wn. App. 127, 607 P.2d 859 (1980)	74
<i>Snedigar v. Hoddersen</i> , 114 Wn.2d 153, 786 P.2d 781 (1990)	78
<i>State v. Alvarez</i> , 128 Wn.2d 1, 904 P.2d 754 (1995)	44
<i>State v. Beno</i> , 341 N.W.2d 668 (Wis. 1984).....	65
<i>State v. Burden</i> , 120 Wn.2d 371, 841 P.2d 758 (1992)	74

<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	61
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	44
<i>State v. Maxon</i> , 110 Wn.2d 564, 756 P.2d 1297 (1990).....	57, 58, 59
<i>State v. Paul</i> , 87 Wash. 83, 151 P. 114 (1915).....	13
<i>State v. Rinaldo</i> , 102 Wn.2d 749, 689 P.2d 392 (1984).....	59
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	64
<i>State v. T.K.</i> , 139 Wn.2d 320, 987 P.2d 63 (1999).....	33
<i>State v. Watson</i> , 146 Wn.2d 947, 51 P.3d 66 (2002).....	61
<i>Sterling Drug, Inc. v. FTC</i> , 450 F.2d 698 (D.C. Cir. 1971).....	72
<i>Trammel v. United States</i> , 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980).....	58, 74
<i>Twelker v. Shannon & Wilson, Inc.</i> , 88 Wn.2d 473, 564 P.2d 1131 (1977).....	74
<i>Tyler Pipe Indus. Inc. v. State, Dep't of Revenue</i> , 105 Wn.2d 318, 715 P.2d 123 (1986) (1987).....	34
<i>United States v. Johnson</i> , 383 U.S. 169, 86 S. Ct. 749, 15 L. Ed. 2d 681 (1966).....	66
<i>United States v. Nixon</i> , 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).....	58, 69, 77
<i>Univ. of Pennsylvania v. E.E.O.C.</i> , 493 U.S. 182, 110 S. Ct. 577, 107 L. Ed. 2d 571 (1990).....	59
<i>W.R. Grace & Co. v. State</i> , 137 Wn.2d 580, 973 P.2d 1011 (1999).....	34, 35
<i>Walker v. Munro</i> , 124 Wn.2d 402, 879 P.2d 920 (1994).....	55
<i>Washington Fed'n of State Employees v. State</i> , 98 Wn.2d 677, 658 P.2d 634 (1983).....	45
<i>Washington State Farm Bureau Fed'n v. Reed</i> , 154 Wn.2d 668, 115 P.3d 301 (2005).....	1, 2, 36
<i>Washington Water Jet Workers Ass'n v. Yarbrough</i> , 151 Wn.2d 470, 90 P.3d 42 (2004).....	61

<i>Weyerhaeuser Co. v. King County</i> , 91 Wn.2d 721, 592 P.2d 1108 (1979).....	32, 33
<i>Zylstra v. Piva</i> , 85 Wn.2d 743, 539 P.2d 823 (1975).....	68

Statutes

RCW 35.21.870	56
RCW 35.95.040	56
RCW 42.17.310(1)(i).....	72
RCW 42.56.280	70, 72, 73
RCW 43.135.010	passim
RCW 43.135.025	passim
RCW 43.135.035	passim
RCW 43.135.045	12
RCW 43.135.060	12, 33
RCW 43.135.080	1, 13, 14, 52
RCW 76.09.240	32
RCW 81.100.030	56
RCW 81.100.060	56
RCW 82.14.340	56
RCW 82.46.035	56
RCW 82.80.010	56

Legislative Bills

ESHB 2314	passim
ESSB 6090, § 1607.....	15
ESSB 6090, § 1701.....	15
ESSB 6896.....	passim

Other Authorities

8 WIGMORE ON EVIDENCE (3d ed. 1940).....	56, 57
Brian Snure, Comment, <i>A Frequent Recurrence To Fundamental Principles: Individual Rights, Free Government, And The Washington State Constitution</i> , 67 WASH. L. REV. 669 (1992)	67

Robert F. Utter & Hugh D. Spitzer, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE (2002).....	64, 65
THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889 (Rosenow ed., 1962).....	65
BLACK’S LAW DICTIONARY (1891).....	62
Edward J. Imwinkelried, 2 THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 7.6.4 (2002).....	77
Kristen L. Fraser, <i>Method, Procedure, Means, and Manner: Washington’s Law of Law-Making</i> , 39 GONZ. L. REV. 447 (2003-04).....	63
Steven F. Huefner, <i>The Neglected Value of the Legislative Privilege in State Legislatures</i> , 45 WM. & MARY L. REV. 221 (2004).....	66, 67
Wilfred J. Airey, <i>A History of the Constitution and Government of Washington Territory</i> (1945).....	67

Constitutional Provisions

WASH. CONST. art. I, § 1.....	56
WASH. CONST. art. II, § 1.....	47, 50, 51, 56, 68
WASH. CONST. art II, § 11.....	63
WASH. CONST. art. II, § 17.....	60, 61
WASH. CONST. art. II, § 19.....	68
WASH. CONST. art. II, § 24.....	68
WASH. CONST. art. II, § 25.....	68
WASH. CONST. art. II, § 28.....	68
WASH. CONST. art. II, § 29.....	68
WASH. CONST. art. II, § 36.....	68
WASH. CONST. art. II, § 37.....	68
WASH. CONST. art. II, § 38.....	68
WASH. CONST. art. II, § 39.....	68
WASH. CONST. art. III, § 1.....	77
U.S. CONST. Art. I, § 6.....	63

I. NATURE OF THE CASE

Historically, crisis budgeting has plagued the State of Washington. During years of lean tax revenue, citizens faced hard choices between cutbacks in essential government services or new tax increases. Similarly, during years of plenty, planning for lean years on the horizon was non-existent. In 1993, the voters of our State enacted a comprehensive solution to crisis budgeting—Initiative 601, the Taxpayer Protection Act (TPA). *See* 43.135.010 *et seq.* (codifying Initiative Measure No. 601, approved Nov. 2, 1993, Laws of 1994, ch. 2). The TPA applies to the government the same age-tested financial advice given to our citizens—create a budget, stick to that budget, and save for a rainy day.

Although the Legislature has the inherent authority to repeal the TPA, it has opted instead to “reenact[] and reaffirm[]” it. RCW 43.135.080. The Legislature has, however, occasionally amended the TPA, including a recent suspension of the supermajority voting requirement for tax increases. *See* RCW 43.135.035(1) (Laws of 2005, ch. 72, § 2); *see also* *Washington State Farm Bureau Fed’n v. Reed*, 154 Wn.2d 668, 115 P.3d 301 (2005). Tellingly, however, the Legislature has never disturbed one of the TPA’s hallmarks—revenue bills that “will result in expenditures in excess of the state expenditure limit...shall not take effect until approved by a vote of the people.” RCW 43.135.035(2)(a).

On April 22, 2005, the Legislature adopted Engrossed Substitute House Bill (ESHB) 2314. *See* Laws of 2005, ch. 514. Parts I and II of ESHB 2314 increased taxes on extended warranties, self-service laundry facilities and liquor, among others, to generate revenues for the General Fund (GF) in excess of the existing state expenditure limit. *Id.* However, instead of submitting ESHB 2314 to the voters as required by RCW 43.135.035(2)(a), the Office of Financial Management (OFM) and the Expenditure Limit Committee (ELC) collaborated with the Legislature to undertake a pattern of unseemly conduct to increase the state expenditure limit. Such conduct included transferring \$250 million of state funds between accounts in a shell game of deception.

On July 19, 2005, Respondents filed the instant lawsuit seeking a declaration that (1) ESHB 2314 was ineffective until approved by the voters under RCW 43.135.035(2)(a) and (2) the transfer of state funds between accounts did not operate to artificially increase the state expenditure limit. *See* Clerk's Papers (CP) 998-1007. After expressly providing the State with the highest degree of deference in relevant jurisprudence, the trial court was constrained to agree with Respondents. *Trans.* (Mar. 17, 2006) at 44-58. Specifically, the trial court held that the Legislature's actions were a "palpable attempt at dissimulation." *Id.* at 57 (quoting *Washington State Farm Bureau Fed'n v. Reed*, 154 Wn.2d at 675).

II. RESPONDENTS' ASSIGNMENTS OF ERROR

1. The trial court erred in entering the Order Partially Granting Summary Judgment in Favor of Plaintiffs and Partially in Favor of Defendants and Denying Motion for Reconsideration dated May 1, 2006 (Order). *See* CP 8-12; 1369-1373. Specifically, the trial court erred in determining that the state expenditure limit by which ESHB 2314 is gauged for purposes of compliance with the voter approval requirement of RCW 43.135.035(2)(a) was the adjusted fiscal year (FY) 2005 state expenditure limit established in November of 2005, and not the established FY 2005 state expenditure limit from November of 2004. *Id.* The trial court additionally erred in concluding that Part XI of ESHB 2314 did not trigger the voter approval requirement of RCW 43.135.035(2)(a). *Id.*

2. The trial court erred in entering its Order Denying Plaintiffs' Motion to Compel Discovery dated February 14, 2006 and its Order Granting in Part and Denying in Part Plaintiffs' Supplemental Motion to Compel Discovery dated March 17, 2006. CP 886-900. Specifically, the trial court erred in creating both a legislative and executive privilege that precluded Respondents from obtaining certain discovery relevant to its claims. *Id.*

III. ISSUES PRESENTED

1. The trial court held that the state expenditure limit by which ESHB 2314 is gauged for purposes of compliance with the voter approval

requirement of RCW 43.135.035(2)(a) was the adjusted FY 2005 state expenditure limit established by the expenditure limit committee in November of 2005, and not the established FY 2005 state expenditure limit from November of 2004 (*i.e.*, the budgeting process occurs before establishing the limit that is intended to guide that process). Does this conclusion comply with chapter 43.135 RCW, which is expressly intended to provide a limit to guide the actions of the executive and legislative branches?

2. Two days prior to the hearing in the trial court on cross-motions for summary judgment, the Legislature enacted ESSB 6896, which by its express terms adopted a state expenditure limit that was to be “adjusted as provided by [chapter 43.135 RCW].” *See* ESSB 6896, Sec. 7(6). Does this bill render the instant case moot when (1) the relief sought in Respondents’ Complaint is an adjustment of the state expenditure limit based upon the standards of chapter 43.135 RCW, CP 998-1007, (2) the bill simply cannot divest a coordinate branch of government from performing its function of judicial review, and (3) the bill violates Article II, Section 37 of the Washington State Constitution?

3. The express purpose of the state expenditure limit is to “[e]stablish a limit on state expenditures that will assure that the growth rate of state expenditures does not exceed the growth rate of inflation and state population.” Former RCW 43.135.010(4)(a). Can RCW 43.135.035(4) and

(5) be interpreted to authorize potentially limitless increases to the state expenditure limit by shifting funds between various state accounts, where the shifts of funds (1) would frustrate the very purpose of the TPA to “[e]stablish a *limit* on state expenditures,” *id.* (emphasis added), (2) do not result in any net increase in revenue to the State, and (3) are devoid of any conceivable fiscal purpose other than to artificially increase the state expenditure limit?

4. Part XI of ESHB 2314 increases the sales tax on cigarettes. See ESHB 2314, Part XI (Section 1102), CP 775. The trial court accepted the State’s argument that Part XI was not subject to the voter approval requirement of RCW 43.135.035(2)(a) because it claimed the tax was revenue neutral (*i.e.*, the tax increase was merely designed to offset the expected decrease in demand for cigarettes as a result of the tax increase). Is the trial court’s determination correct under the standards set forth in chapter 43.135 RCW?

5. The trial court declined to reach the State’s challenge to the constitutionality of the TPA under this Court’s analysis in *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000) because the issue “was not raised by the pleadings.” CP 11. In the event that this Court determines that the constitutionality of the TPA should be decided in this case, does *Amalgamated Transit* require a finding of unconstitutionality where (1) the analysis relied upon by the State is clearly

obiter dictum, (2) the TPA is now a creature of the Legislature, despite its origins as an initiative, and (3) unlike I-695, the TPA requires voter approval of only a narrow class of bills?

6. The trial court expressly stated that it was “creat[ing]” both expansive legislative and executive privileges that have not previously been recognized by any Washington court. CP 894. Do such privileges exist when they are neither supported by Washington jurisprudence nor the public policy of this State?

IV. STATEMENT OF THE CASE

The instant case presents a diverse array of complex issues, including state accounting practices and procedures, state expenditure limit calculations, and the interplay between taxation/revenue and budgeting, among others. Accordingly, in order for the Court to reach an informed resolution of the instant case, Respondents review herein key aspects of the TPA, facts relevant to Respondents’ cross-claims, and the trial court’s various rulings in this matter.

A. Taxpayer Protection Act

On November 2, 1993, the TPA was approved by the voters of the State of Washington, and was subsequently codified at chapter 43.135 RCW. *See* RCW 43.135.010 *et seq.* As previously indicated, the TPA sought to apply to the government the same age-tested financial advice given to our

citizens—create a budget, stick to that budget, and save for a rainy day. The TPA expanded upon earlier efforts to apply these simple concepts to government, including Initiative 62, which was adopted in 1979 and sought to limit the growth of state tax revenues. *See* Initiative 62 (Laws of 1980, ch. 1) approved Nov. 6, 1979, repealed by 601.

The TPA adopted several findings that give insight into its intended purpose, including one that states:

The current budgetary system in the state of Washington lacks stability. The system encourages crisis budgeting and results in cutbacks during lean years and overspending during surplus years.

RCW 43.135.010(3).

The TPA also included several statements of intent, including the following:

- (4) It is therefore the intent of this chapter to:
 - (a) Establish a limit on state expenditures that will assure that the growth rate of state expenditures does not exceed the growth rate of inflation and state population;
 - ...
 - (f) Provide for voter approval of tax increases;

Former RCW 43.135.010(4)(a) and (f). The TPA consists of various interconnected components forming a comprehensive legislative scheme to provide the stability and continuity necessary to avoid crisis budgeting.

1. Spending Limit

First, the TPA prohibits spending moneys from the general fund (GF) in excess of the state expenditure limit, *see* RCW 43.135.025(1), unless there has been a declaration of emergency, *see* RCW 43.135.035(3)(a)-(b). The state expenditure limit for a given fiscal year is “the previous fiscal year’s state expenditure limit increased by a percentage rate that equals the fiscal growth factor,” RCW 43.135.025(3), which is currently defined as an average of inflation and population change.¹ *See* RCW 43.135.025(7). The state expenditure limit guides the efforts of the legislative and executive branch in preparing the state budget.

The budget document submitted by the governor to the legislature under RCW 43.88.030 shall reflect the state expenditure limit established under chapter 43.135 RCW and shall not propose expenditures in excess of that limit.

RCW 43.88.033.

2. Expenditure Limit Committee

Second, in order to ensure full compliance with the TPA, an independent state agency was created to calculate and adjust the state expenditure limit—the Expenditure Limit Committee (ELC).² *See* RCW 43.135.025(5). As correctly observed by Judge Allendoerfer below, the ELC

¹ Commencing July 1, 2007, the fiscal growth factor will be indexed to “average growth in state personal income” as opposed to inflation and population change. RCW 43.135.025(7).

² Originally, the state agency charged with this responsibility under the TPA was the Office of Financial Management. *See* Former RCW 43.135.025(5).

is intended to be the “watchdog” of the TPA. Trans. (Feb. 28, 2006) at 17; Trans. (Mar. 17, 2006) at 37. By explicit statutory design, the ELC is an independent state agency that retains exclusive authority to set the state expenditure limit. RCW 43.135.025(5). Although the ELC has a formal meeting each November in which it calculates the respective state expenditure limits, members of the ELC perform their functions year round. *See* Trans. (Feb. 28, 2006) at 15.

The ELC is currently comprised of the Director of the Office of Financial Management, chairs of the Senate Means and Ways Committee and House of Representatives Appropriations Committee, and a representative from the Attorney General’s Office. *See* RCW 43.135.025(5).³ Thus, although the ELC is comprised of several members of the Legislature, those members are acting in administrative function when serving on the ELC.

At its annual meeting each November, the ELC is required by statute to calculate three state expenditure limits. *See* RCW 43.135.025(6) (“Each November, the state expenditure limit committee shall adjust the expenditure limit for the preceding fiscal year...and then project an expenditure limit for the next two fiscal years.”). Thus, *the ELC calculates a state expenditure limit for each given fiscal year three times over a span of three years.*

³ Commencing July 1, 2007, the ELC will be expanded to include the ranking minority members of the Senate Means and Ways Committee and House of Representatives Appropriations Committee. *See* RCW 43.135.025(5).

Relevant to the present case, for example, in November 2004, the ELC established the limit for FY 2006.⁴ In November of 2005, approximately half way through FY 2006, the ELC adopted an adjusted limit for FY 2006. Finally, in November 2006, after the close of FY 2006, which occurs on June 30, 2006, the ELC sets a final limit for FY 2006. *Respondents refer to these limits throughout their brief as the “established limit,” “adjusted limit,” and “final limit,” respectively.*

3. Adjustments to the State Expenditure Limit

Third, under the TPA certain events may trigger adjustments to the various state expenditure limits. The TPA narrowly defines the circumstances that justify such adjustments, including program cost shifts/transfers and actual expenditures. Adding an additional layer of complexity to this matter, the type of adjustment being performed determines which expenditure limit must be adjusted.

The first type of adjustment that the ELC is authorized to perform occurs when program costs or funds have been shifted or transferred in or out of the GF. The limit is adjusted upward “if moneys are transferred to the state general fund from another fund or account.” RCW 43.135.035(5). Similarly, the limit is adjusted downward “if moneys are transferred from the state general fund from to another fund or account.” RCW 43.135.035(4).

⁴ FY 2006 begins on July 1, 2005 and ends on June 30, 2006. *See* RCW 43.88.020(12).

Adjustments based upon the transfer of funds have an immediate effect on the state expenditure limit existing at the time of the transfer. Thus, if the Legislature transferred funds into the GF on June 30, 2005, the last day of FY 2005, the expenditure limit for FY 2005 would be adjusted upward in an amount equal to the transferred funds. Similarly, if the transfer occurred on July 1, 2005, the first day of FY 2006, the expenditure limit of FY 2006 would be adjusted accordingly.

The second type of adjustment that the ELC is authorized to perform occurs when the ELC “adjust[s] the expenditure limit for the preceding fiscal year based on *actual expenditures* and...the fiscal growth factor.” RCW 43.135.025(6) (emphasis added). This is often referred to as a “rebasings” of the state expenditure limit. CP 339; 684. As a result of rebasing, it is worth noting that the final state expenditure limit of any given fiscal year is ultimately of little, if any, significance. This is because, in establishing the limit for the following year, the ELC does not utilize the prior fiscal year’s final expenditure limit for any portion of its calculation. Rather, pursuant to RCW 43.135.025(6), the ELC calculates the limit based upon the prior year’s “actual expenditures.” Thus, through rebasing, the TPA employs a “spend it or lose it” principle. CP 1067. If not all funds are expended up to the capacity of the spending limit, the unused spending capacity is lost the following fiscal year. *Id.*

Unlike an adjustment for a **transfer** of funds, which has an immediate effect on the state expenditure limit in existence at the time of the transfer, an adjustment based on **actual expenditures** can affect the state expenditure limit only for the following fiscal year. Thus, for example, if the State failed to expend all funds under the spending limit in FY 2005, the “spend it or lose it principle” of rebasing would require that the limit for FY 2006 be calculated based upon the funds actually expended in FY 2005 and not based upon the FY 2005 limit itself (which would be higher).

4. Voter Approval for Exceeding Spending Limit

Fourth, limitations were placed on a narrow class of revenue legislation. Under the TPA, “[i]f...legislative action... will result in expenditures in excess of the state expenditure limit, then the action of the legislature shall not take effect until approved by a vote of the people at a November general election.” RCW 43.135.035(2)(a).

5. Emergency Reserve

Finally, the TPA established a rainy day fund or “emergency reserve.” RCW 43.135.045(1). When state revenues exceed the expenditure limit, excess revenue is placed in the emergency reserve. *Id.* Thus, during years of robust tax revenue, the State can adequately prepare for the lean tax year on the horizon. The TPA also protects local jurisdictions by prohibiting the State from imposing unfunded mandates. RCW 43.135.060.

B. Legislature’s Reenactment of the TPA

Although the Legislature retains the authority to repeal the TPA, the Legislature has not chosen to exercise that authority. Instead, the Legislature has done the exact opposite—expressly ratifying the TPA:

Initiative Measure No. 601 (chapter 43.135 RCW, as amended by chapter 321, Laws of 1998 and the amendatory changes enacted by section 6, chapter 2, Laws of 1994) **is hereby reenacted and reaffirmed.** The legislature also adopts chapter 321, Laws of 1998 to continue the general fund revenue and expenditure limitations contained in this chapter 43.135 RCW after this one-time transfer of funds.

RCW 43.135.080(1) (emphasis added). Accordingly, the TPA is a creature of the Legislature—a self-imposed limitation for fiscal discipline and good governance based on the findings which were also readopted.⁵

In fact, as recently as 2005, the Legislature has reaffirmed its commitment to the principles underlying the TPA. For example, the Legislature reaffirmed that “citizens of the state benefit from a state expenditure limit” and extolled the virtues of “strict spending accountability and protection of...taxpayers.” *See* Laws of 2005, ch. 72, § 1 (codified at RCW 43.135.010)).

⁵ Although legislation adopted via the initiative process is coequal to bills of the Legislature, *State v. Paul*, 87 Wash. 83, 90, 151 P. 114 (1915), this Court apparently drew a distinction between the two in *Amalgamated Transit*, 142 Wn.2d at 233-34. Because the TPA is now a self-imposed limitation, reference to the enactment as “Initiative 601” may mistakenly lead one to conclude that it was never adopted by the Legislature. Thus, Respondents refer to it by its given and more accurate title, the Taxpayer Protection Act (TPA). *See* RCW 43.135.902.

C. Legislative Action During the 2005 Session

Although the Legislature has “reenacted and reaffirmed” the TPA, RCW 43.135.080(1), the Legislature has also opted to amend it over the years. However, the Legislature has not found it expedient to amend or repeal the requirement that new revenue not “exceed the state expenditure limits established under [chapter 43.135 RCW].” RCW 43.135.035(1).

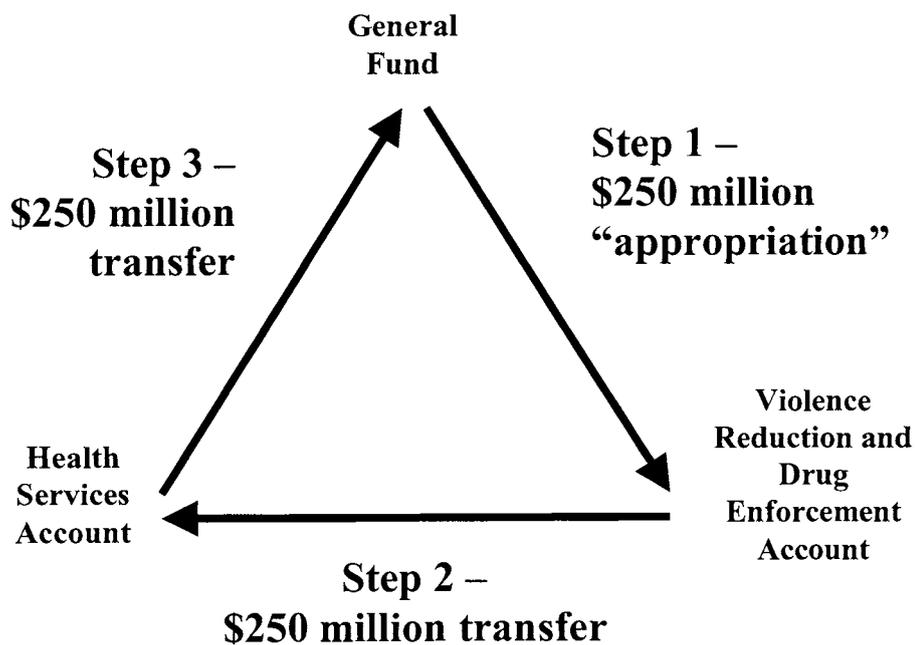
On April 22, 2005, the Legislature adopted ESHB 2314. CP 725-93. ESHB 2314 raised taxes related to liquor, cigarettes, extended warranties and self-service laundry facilities. The Department of Revenue estimated the increase in revenues in FY 2006 from ESHB 2314 to be \$130,568,000. CP 795.

At the time that ESHB 2314 was adopted in 2005, the only existing state expenditure limit established by the ELC for FY 2006 was the established limit calculated at the meeting in November of 2004. That limit was \$12,362,600,000. CP 691. ESHB 2314 raised revenues over that limit. Trans. (Mar. 17, 2005) at 50. Accordingly, under RCW 43.135.035(2)(a), ESHB 2314 should be ineffective until approved by the voters.

Perhaps lacking the political gumption to amend or repeal the TPA, the Legislature devised a plan to artificially increase the state expenditure limit so as to avoid the voter approval requirement of RCW 43.135.035(2)(a). On June 14, 2005, the Legislature “appropriated” \$250 million from the

General Fund (GF) to the Violence Reduction and Drug Enforcement Account (VRDEA). *See* ESSB 6090, § 1607 (Laws of 2005, ch. 518, § 1607). The Legislature expressly directed that these funds were “solely for deposit.” *See id.* at § 1607. The following day, the same \$250 million was transferred from the VRDEA to the Health Services Account (HSA), and then from the HSA back to the GF where it first originated. *See* ESSB 6090, § 1701. Respondents refer to these transfers of funds collectively as “triangulation, which can be illustrated as follows:

“Triangulation” of Funds



As a result of these apparently meaningless transfers of funds, Respondents expected that the State would take the position that the transfers operated to effectuate an increase in the state expenditure limit.

Respondents' expectation was well founded.

Based upon the above triangulation, at the ELC meeting in November of 2005, it is undisputed that the ELC made both types of adjustments discussed above—an adjustment for the transfer and an adjustment for the “appropriation,” which was expressly “solely for deposit,” as if it represented actual expenditures. *See* Br. of State at 12-13.

First, the ELC made adjustments based upon transfers. Recall that adjustments based upon transfers of funds have an immediate effect on the state expenditure limit existing at the time of the transfer. Because the above transfers of funds occurred in FY 2005, the ELC increased the FY 2005 expenditure limit by \$250 million as a result of the final leg of the triangulation, from the HSA to the GF. CP 470. *See also* RCW 43.135.035(5) (requiring an increase in the limit for funds transferred into the GF). The ELC did not, however, decrease the FY 2005 state expenditure limit by \$250 million as a result of the transfer of funds from the first leg of the triangulation, from the GF to the VRDEA. *See* RCW 43.135.035(4) (requiring a reduction in the limit for funds transferred out of the GF). This is because the first leg was labeled as an “appropriation” and not a “transfer” of funds, which would have required a reduction to the limit.

Second, the ELC made adjustments based upon actual expenditures. Recall that adjustments based upon actual expenditures affect the state

expenditure limit only for the following fiscal year. The ELC treated the “appropriation” in the first leg of the triangulation, from the GF to the VRDEA as an “actual expenditure.” *See* Br. of State at 12 (conceding this ELC adjustment based on RCW 43.135.025(6)); CP 1287-89. Thus, in projecting the FY 2006 expenditure limit, the ELC also increased the FY 2006 spending limit by \$250 million.

D. Procedural History

On July 19, 2005, Respondents filed the instant lawsuit seeking a declaration that (1) ESHB 2314 is ineffective until approved by the voters under RCW 43.135.035(2)(a) and (2) that the transfer of funds between state accounts was ineffectual to increase the limit. CP 998-1007.

Respondents subsequently served the State with discovery requests, including requests for production of documents. Instead of receiving responsive documents, Respondents received privilege logs withholding hundreds of documents. CP 1606-46. Specifically, Defendants asserted a “legislative privilege” to justify withholding in their entirety approximately 193 documents, and in part, approximately 11 documents. Similarly, Defendants asserted an “executive privilege” to justify withholding approximately 8 documents.

Respondents subsequently filed a Motion to Compel Discovery, asserting, among other arguments, that the privileges claimed by the State

were not recognized under Washington jurisprudence. CP 1651-74. On January 13, 2006, the trial court denied Respondents' motion, and expressly indicated a willingness to "creat[e]" these privileges. CP 886-900. The trial court did, however, circumscribe the privileges with six limitations and ordered the State to revisit the withheld documents in light of these new limitations. *Id.* Only a token number of additional documents were provided in response to the trial court's order. Accordingly, Respondents filed a Supplemental Motion to Compel Discovery. CP 1557-1572. Realizing the State had wrongfully withheld documents by extrapolating the new legislative privilege and applying it to an administrative agency, the trial court granted the Motion. CP 218-310.

The documents obtained by Respondents as a result of the Supplemental Motion to Compel Discovery merely confirmed what Respondents had already suspected— OFM and the ELC conspired with the Legislature to simultaneously move the same funds among three accounts to artificially increase the state expenditure limit. For example, legislators invited OFM staff to "provide . . . options to increase the limit pretty significantly . . . without amending the expenditure limit statute." CP 316. Similarly, others plotted an "attack on the limit," CP 318, and extolled the "huge loophole," in the TPA, CP 327, and its "very leaky spending limit," *id.* In short, a plan was put in place to artificially increase the expenditure limit

to avoid the voter approval requirement of RCW 43.135.035(2)(a).

On March 17, 2006, the trial court considered cross-motions for summary judgment and granted Respondents' motion. Trans. (Mar. 17, 2006) at 58. The trial court first held in favor of the State that the expenditure limit by which ESHB 2314 is gauged for purposes of compliance with the voter approval requirement of RCW 43.135.035(2)(a) was the adjusted FY 2005 state expenditure limit established by the expenditure limit committee in November of 2005, and not the established FY 2005 state expenditure limit from November of 2004. *Id.* at 44-49.

Nonetheless, after expressly providing the State with the highest degree of deference in relevant jurisprudence, the trial court was constrained to agree with Respondents. Trans. (Mar. 17, 2006) at 44-58. The trial court held that the Legislature had indeed improperly manipulated funds in an attempt to increase the state expenditure limit by \$250 million. Specifically, the trial court determined that the first leg of the triangulation, from the GF to the VRDEA, should not be considered an expenditure for purposes of adjusting the limit based on actual expenditures. For purposes of estimating actual expenditures at the time of enacting a budget, an appropriation is generally an acceptable "proxy" for an actual expenditure. However, this so-called "appropriation" was "solely for deposit" and could not be reasonably considered the same as an expenditure. Rather, the triangulation merely

created the illusion that the State had additional funds. The trial court also held that were it not for this \$250 million increase, ESHB 2314 was subject to the voter approval requirement of RCW 43.135.035(2)(a). The trial court concluded that the Legislature's actions were a "palpable attempt at dissimulation," Trans. (Mar. 17, 2006) at 57, and ordered that certain portions of ESHB 2314 were ineffective until approved by the voters.

The State subsequently filed a Motion for Reconsideration on the trial court's oral ruling. CP 105-117. The State successfully argued that Part XI of ESHB 2314, which raised taxes on cigarettes, should not be subject to the voter approval requirement of RCW 43.135.035(2)(a). In short, the trial court accepted the State's argument that Part XI was revenue neutral because the increase in taxes was merely designed to offset the reduction in demand due to the increased tax. The trial court then entered its first written order on summary judgment. CP 1369-73.

Finally, Respondents filed a Motion for Reconsideration of the trial court's order. The Motion essentially sought to correct a previous oversight by Respondents. Specifically, Respondents had only previously requested a reduction in the FY 2005 state expenditure limit of \$250 million as a result of the transfer of funds from the HSA into the GF. With an increased understanding of the admittedly complex state expenditure limit, Respondents realized that the ELC had also increased the 2006 state

expenditure limit by \$250 million based on actual expenditures, the so-called “appropriation” from the GF to the VRDEA. The trial court granted Respondents’ Motion.

V. ARGUMENT

A. **The Trial Court Erred in Determining That The State Expenditure Limit that Guides the Budgeting Process is the Limit Established the November Following the Budgeting —A “Limit” is Effective Only if Known Before Budgeting Occurs**

Under RCW 43.135.035(2)(a), if the Legislature enacts legislation that raises revenue in excess of the state expenditure limit, the legislation is ineffective until approved by the voters.

If the legislative action...will result in expenditures in excess of the state expenditure limit, then the action of the legislature shall not take effect until approved by a vote of the people at a November general election.

RCW 43.135.035(2)(a).

RCW 43.135.035(1) broadly lists the potential legislative actions that may trigger this voter approval requirement of RCW 43.135.035(2)(a): “any action or combination of actions by the legislature that raises state revenue or requires revenue-neutral tax shifts.” The adoption of ESHB 2314 unquestionably constituted “legislative action” under this provision.

The question then is, did ESHB 2314 raise revenue in excess of the state limit expenditure limit? To answer this question, the Court must determine what state expenditure limit is referred to in RCW 43.135.035(2)(a).

Respondents contend that in order for this provision to have any meaning, the state expenditure limit by which legislative action is measured is the only limit that had been established by the ELC, the only entity with authority to establish such a limit, **at the time of the enactment**. Chapter 43.135 RCW unequivocally indicates that the ELC establishes the limit. RCW 43.135.025(5) describes the ELC as the entity charged with “determining and adjusting” the state expenditure limit. While members of the Legislature may predict future revenues based upon its proposed enactments, the existing statutory scheme prevents the Legislature from setting its own state expenditure limit midcourse and taking legislative action that increases taxes as contemplated by RCW 43.135.035 without a vote of the people. The Legislature must take the officially adopted state expenditure limit and submit proposed legislative action that would raise revenue in excess of the state expenditure limit to the voters. *See* RCW 43.135.035(2)(a).

The state expenditure limit established in November of 2004 for the fiscal biennium starting on July 1, 2005, and ending on June 30, 2007 was \$25,107,200,000. CP 695. The budget adopted by the Legislature in SB 6090 is based on revenue which exceeds that limit by raising a total of \$25,952,414,000. CP 816. Thus, the Legislature took legislative action in excess of \$845,214,000 of the state expenditure limit. The voters have not approved this legislative action to exceed the state expenditure limit. Therefore,

under the plain directive of RCW 43.135.035(2)(a), these tax increases may not be effective until approved by the voters as provided in RCW 43.135.035(2)(b).

It makes sense that the ELC sets the state expenditure limit each November for the following two fiscal years. *See* RCW 43.135.025(6). It gives the ELC the opportunity to make adjustments to the state expenditure limit after bills raising revenue are submitted to the voters. It also provides the Legislature will establish an undisputed state expenditure limit before the legislative session begins each year.

That the relevant state expenditure limit for purposes of enacting legislation is the most recent limit established by the ELC is further buttressed by RCW 43.88.033, which was also a part of the TPA.

The budget document submitted by the governor to the legislature under RCW 43.88.030 shall reflect the state expenditure limit **established** under chapter 43.135 RCW and **shall not propose expenditures in excess of that limit**.

RCW 43.88.033 (emphasis added). This statute uses the past tense, “established,” to describe the state expenditure limit, and not a “to be determined in the future” state expenditure limit. RCW 43.88.060 requires the Governor to submit the budget document on the 20th day of December. If the Governor cannot propose a budget that exceeds a state expenditure limit

“established under chapter 43.135 RCW,” the only limit available to guide the Governor is the limit established just one month before her submission.⁶

Finally, in resolving this issue, the Court should be mindful of the changes in 1993 to the previous version of the Intent section of the TPA codified at RCW 43.135.010, which have not been subsequently amended by the legislature. First, the people declared in I-62, adopted in 1979:

(1) The continuing increases in our state tax burden and the corresponding growth of state government is contrary to the interest of the people of the state of Washington.

Codified at RCW 43.135.010(c). Second, in the TPA, the people added to the Intent section that:

(4) It is therefore the intent of this chapter to

...

(f) Provide for voter approval of tax increases.

RCW 43.135.010(4)(f) (emphasis added). Clearly, the intent of the TPA and its predecessor, I-62, was to stabilize the growth of state government and give people the right to vote on tax increases. If the Legislature is free to ignore the limit established by the ELC when adopting tax increases and the Legislature predicts its own, new limit, these purposes will be thwarted. If a

⁶ Historically, governors have complied with Respondents’ view of this statute. For example, the Governor proposed a budget for 2003-2005 of \$22,979,400,000. *See* CP 836. The state expenditure limit identified in that budget was \$23,715,400,000, clearly more than the proposed budget. Similarly, the Governor’s proposed a budget for 2005-2007 of \$26,153,700,000. *See* CP 83. The state expenditure limit identified in that budget was \$26,547,100,000. Each of these biennial budgets indicates that the Governor understood that the state expenditure limit for a particular fiscal biennium is the limit established in the prior November.

statute can be construed in a manner consistent with the statement of purpose, it should be so construed. *See Bennett v. Hardy*, 113 Wn.2d 912, 928, 784 P.2d 1258 (1990) (court should interpret statute so as to best advance the legislative purpose).

B. ESSB 6896 Does Not Render this Case Moot

In a transparently desperate effort to hide its egregious misconduct from being exposed to the light of day in a court of law, the Legislature enacted ESSB 6896 mere days before the trial court hearing on cross motions for summary judgment. *See* Laws of 2006, Ch. 56, § 7 (codified at RCW 43.135.025(6)). The relevant portion of ESSB 6896, which was obscured in a largely unrelated bill, reads as follows:

In calculating the expenditure limit for fiscal year 2006, the calculation shall be [1] the expenditure limit established by the state expenditure limit committee in November 2005 [2] adjusted as provided by this chapter and [3] adjusted to include the fiscal year 2006 state general fund appropriations to the pension funding stabilization account, the health services account, and the student achievement fund...

ESSB 6896, §7(6) (numbering added). The State erroneously takes the position that ESSB 6896 renders this case moot. *See* Br. of State at 23-28.

It should be observed by this Court that the mere existence of ESSB 6896 is a tacit admission by the Legislature that it did indeed exceed the state expenditure limit. Nonetheless, this amendment failed to achieve the purpose argued by the State in this case.

At the outset, it must be noted that the State's insinuation that Respondents were dilatory in addressing the effect of ESSB 6896 on the instant litigation is wholly disingenuous. *See* Br. of State at 27 ("For the first time in their reply memorandum on their motion for reconsideration, Respondents argued that ESSB 6896, § 7(6) violated article II, section 37 of the state constitution.").

ESSB 6896 was signed into law by Governor Gregoire on March 15, 2006, just two days before the trial court hearing on cross motions for summary judgment. Nonetheless, the State did not brief whether ESSB 6896 rendered the instant case moot until the State filed its Response to Plaintiffs' Motion for Reconsideration on May 25, 2006.⁷ CP 1061-1154. Not only was this several months after the enactment of ESSB 6896, but it was also after Respondents had already successfully obtained a favorable oral ruling on summary judgment. *See* Trans. (Mar. 17, 2006). Perhaps even more remarkable, the State filed its own Motion for Reconsideration on April 22, 2006, setting forth all of the reasons that it believed the trial court's disposition on summary judgment was erroneous. CP 105-117. That Motion was also wholly devoid of any reference to ESSB 6896, even though it had been signed into law over a month prior. *Id.*

⁷ The State filed a Citation to Supplemental Authority on March 13, 2006 identifying ESSB 6896.

Finally, when the State addressed ESSB 6896 in its reply to the Respondents' Motion for Reconsideration, it never argued mootness. CP 1070-74. Mootness is essentially a new argument raised by the State for the first time on appeal. If any party was dilatory in raising ESSB 6896, the State is the culpable party. The State's actions deprived the trial court of adequate briefing regarding the effect of ESSB 6896. The State's criticism of Respondents is accordingly improper and unfounded.

1. ESSB 6896 Does Not Change the Law as the State Argues in its Brief

First, the law at the time ESSB 6896 was adopted required that the ELC determine and adjust the limit as provided by chapter 43.135 RCW. ESSB 6896 is nothing more than a repeat of existing law by declaring that the state expenditure limit for FY 2006 is the limit established by the ELC and recognizing that the chapter provides for adjustments to that limit. Respondents contend that this section of ESSB 6896 made no substantive change to the law. If this section of ESSB 6896 makes a substantive change in the law, the change must be sweeping because it purports to deprive the court of jurisdiction to review an ELC decision, it fails to amend the remainder of the statute which retains the ELC's exclusive jurisdiction, and it raises serious concerns under Article II, Section 19 of the Washington Constitution.

Second, ESSB 6896 purports to adopt the adjusted FY 2006 limit established by the ELC in November of 2005. If Respondents are correct as addressed above that ESHB 2314 is to be evaluated in light of the only limit established at that time, the one set in November of 2004, then ESSB 6896 is irrelevant to this case.

2. The Trial Court Correctly Determined that ESSB 6896 Did Not Deprive the Trial Court of Jurisdiction to Review the State Expenditure Limit

The State's desperate argument that the enactment of ESSB 6896 renders this case moot is not an argument about mootness at all. Rather, under the guise of mootness, the State is really arguing that ESSB 6896 stripped the trial court of jurisdiction to review both (1) the actions of the ELC, a state agency, and (2) the state expenditure limit under the standards set forth in chapter 43.135 RCW.

The trial court determined that ESSB 6896 did not, by its very terms, deprive it of jurisdiction to review the state expenditure limit. *See* CP 2434.

In this regard, the trial court's order succinctly stated:

The Court declares that ESSB 6896 § 7 (6) providing that 'In calculating the expenditure limit for fiscal year 2006, the calculation shall be the expenditure limit established by the state expenditure limit in November 2005...' must be construed as referring to said expenditure limit as modified by this Court.

CP 2434.

The State incorrectly argues that this portion of the trial court's order is "untenable because the amendment was signed into law (and became effective) two days before the trial court heard oral argument on summary judgment..." Br. of State at 27. The trial court's order is not intended to refer to any specific timing or sequence of events. Rather, it is a clear reference to the court's continued jurisdiction to review the actions of the ELC and to review the expenditure limit under chapter 43.135 RCW. The trial court's reasons for so holding are not difficult to discern.

First, this case demonstrates the havoc that may result if an amendment to a statute, even a technical or inconsequential amendment, automatically renders moot any judicial proceeding involving the application of the statute. This case is not moot simply because the Legislature made the reaffirming amendment in ESSB 6896.

Second, ESSB 6896 states that the applicable expenditure limit is "the expenditure limit established by the state expenditure limit committee in November 2005." The ELC is a named defendant in this case, and the trial court clearly has the inherent authority to review the ELC's actions in establishing the state expenditure limit. This is because "[s]uperior courts have inherent authority to review judicial and nonjudicial actions of administrative agencies pursuant to article 4, section 6 of the state constitution." *Saldin Securities, Inc. v. Snohomish Cnty.*, 80 Wn. App. 522,

528, 910 P.2d 513 (1996), *aff'd* 134 Wn.2d 288, 949 P.2d 370 (1998); *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 415, 63 P.2d 397 (1936).

Moreover, ESSB 6896 states that the expenditure limit adopted by the ELC in November of 2005 is subject to being “adjusted as provided by this chapter [43.135 RCW].” ESSB 6896 §7(6). Respondents’ Complaint specifically requested that the trial court apply the standards of chapter 43.135 RCW regarding adjustments. CP 1007. Thus, the instant lawsuit seeks a determination that the limit adopted by the ELC must be adjusted downward as required by the standards set forth in chapter 43.135 RCW. This is a question of law reserved for the courts.

In any event, the State’s rendition of the doctrine of mootness is curious. As correctly indicated by the State, “[a] case is moot if a court can no longer provide effective relief.” Br. of State at 23 (citing *In re Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983)). In *Cross*, for example, appellant’s principal claim for release from detention was moot after appellant was granted release. *Id.* Obviously, under such circumstances the Court could not grant the relief sought.

In contrast, in the instant case, Respondents’ primary claim is that ESHB 2314 is ineffective until approved by the voters as required by RCW 43.135.035(2)(a). The State makes no argument why ESSB 6896 prevents

this Court from rendering effective relief. Although this Court may determine that ESSB 6896 answers the final question presented by this litigation, the doctrine of mootness is something entirely different.⁸

The trial court correctly determined that it retained jurisdiction to review the state expenditure limit. The instant lawsuit is entirely consistent with the text of ESSB 6896 and does not render the instant case moot.

3. The State's Interpretation of ESSB 6896 Would Violate Art. II, Sec. 37 of the State Constitution

The trial court's order states that the issue of the constitutionality of ESSB 6896 was not properly before it. *See* CP 2434. Although Respondents assign error to this decision, this Court has authority to review this argument under RAP 2.5(a)(3). *See* RAP 2.5(a)(3) (stating that constitutional issues may be raised for the first time on appeal).

ESSB 6896 purports to establish an expenditure limit without amending those sections of chapter 43.135 RCW that give exclusive authority to the ELC to establish the state expenditure limit. Specifically, ESSB 6896 amends RCW 43.135.025(6). However, under RCW 43.135.025(5), which is not amended by the statute, the ELC is granted exclusive authority to

⁸ Because both the facts and law are clearly on Respondents' side, the State is desperately seeking for a procedural technicality to provide it an "out." If anything, the State should be arguing that this case is not ripe. Although Respondents disagree with this position, the State has always argued that the spending limit by which ESSB 2314 must be gauged for purposes of the voter approval requirement of RCW 43.135.035(2)(a) is the **final** state expenditure limit for FY 2006. *Trans.* (Mar. 17, 2006) at 31-33. That limit will not be known until the ELC meets in November of 2006.

establish the state expenditure limit. As indicated above, the Legislature's attempt to amend this subsection is either an impotent amendment merely reaffirming the status quo, or it is a dramatic change from the exclusive authority given to the ELC, thus violating Article II, Section 37.

The most authoritative case interpreting Article II, Section 37 is *Weyerhaeuser Co. v. King County*, 91 Wn.2d 721, 592 P.2d 1108 (1979). In *Weyerhaeuser*, this Court held that an amendment to the Forest Practices Act violated Article II, Section 37 because the amendment had a significant effect on the scope of the County's authority, even though the amendment in question amended the very same section:

Prior to the 1975 enactment, subsection (4) of RCW 76.09.240 expressly reserved to local government all authority granted by the SMA. The amendments, however, add several paragraphs to subsection (4) which effectively deprive local governments of the power to regulate forest practices in the shoreline.

Id. at 728-29.

The same analysis was provided by the trial court in response to an argument by the State that yet another bill enacted by the Legislature in 2005 dictated the result in this case:

Turning now to the State's motion for reconsideration, I find that section 1701 of the budget bill, that is, ESSB 6090, is a directive by the legislature that the expenditure limit shall be increased by \$250 million. Mr. Even argues that that's a good reason to uphold it, because the legislature so directed. However, I find that the legislature doesn't have that authority. Under RCW 43.135.025(b), only the Expenditure

Limit Committee can set the expenditure limit each year, not the legislature... The legislature, of course, does retain the power to amend state statutes, and it could give itself jurisdiction to set the expenditure limit, if it chose to... An attempt to do that...is a violation of Article 2 Section 37 of the constitution. *See Weyerhaeuser v. King County*, 91 Wn. 2d 721.

Trans. (May 1, 2006) at 34.⁹

**4. ESSB 6896 Cannot Retroactively Cure an Illegal Tax—
Said Retroactivity Would Violate Due Process**

If the Court were to give ESSB 6896 the effect argued by the State, it would also violate due process. As this Court noted in *State v. T.K.*, 139 Wn.2d 320, 327, 987 P.2d 63 (1999), “amending a statute does not necessarily mean that the prior statute ceases to exist.” This attempt to amend the adjusted FY 2006 state expenditure limit to rehabilitate unlawful taxes enacted over six months prior to the ELC’s adjustment and a whole year prior to the amendment, as the Superior Court noted, was ineffective. In essence, the Legislature is attempting to rewrite the statutory conditions under which the taxes in ESHB 2314 were adopted long after its enactment.

Courts disfavor retroactivity because of the unfairness of impairing a vested right or creating a new obligation with respect to past transactions. *Landgraf v. USI Film Prods.*, 511 U.S. 244, ___ (1994) (stating that a statute has a

⁹ Another provision in chapter 43.135 RCW provides that the Legislature shall not impose on local governments mandates without providing funding to accomplish them. RCW 43.135.060(1). In *City of Tacoma v. State*, 117 Wn.2d 348, 816 P.2d 7 (1991), this Court found no obstacle to providing the remedy in the existing statute even though the Legislature had decided to impose the mandate but subsequently decided not to provide the funding. While the Legislature in *City of Tacoma* could have amended the requirement that it provide funding, it had not done so. Similarly, the Legislature could amend the provisions regarding the expenditure limit, but until it does, it is bound by them.

genuinely retroactive effect if it impairs rights a party possessed when he acted, increases his liability for past conduct, or imposes new duties with respect to completed transactions).

In re: Estate of Burns, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997) (citations omitted). Here, the citizens of Washington have a vested right to vote on taxes which are expected to raise revenue in excess of the expenditure limit.

This Court has dealt with a series of cases which dealt with an analogous situation. See *Tyler Pipe Indus. Inc. v. State*, 105 Wn.2d 318, 715 P.2d 123 (1986) *rev'd*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987). In this series of cases, the United States Supreme Court held that a Washington B&O tax unconstitutionally discriminated against interstate commerce. Issues ensued over the question as to whether the Court's ruling would apply to others, and whether it invalidated the entire tax, or just the extent to which the tax was discriminatory.

W.R. Grace & Co. v. State, 137 Wn.2d 580, 973 P.2d 1011 (1999), was the latest, and as this Court noted, "hopefully final" case, regarding this tax. This Court noted that the United States Supreme Court in *Tyler Pipe* held that a judicial ruling of unconstitutionality applied retroactively to those who paid under the unconstitutional tax scheme prior to the Court's decision, but that the Legislative scheme to provide a remedy of tax credits, rather than a refund, would apply retroactively as well.

The plaintiffs in *W.R. Grace* argued that they should be entitled to a refund for **all** taxes paid, not just that portion of the tax that was deemed discriminatory, on the theory that an unconstitutional tax is a nullity in its entirety. This Court rejected the argument. *Id.* at 596. In regard to the present pending case, the ineffectiveness of ESHB 2314 is due to the failure to comply with voter approval requirements of RCW 43.135.035(2)(a), not because there is a collateral effect which violates the constitution.

Important to this case, however, is the recognition in *W.R. Grace* that an illegal tax must have a corresponding remedy.

By providing manufacturers with tax credits for unconstitutional taxes paid, a clear and certain remedy is provided which cures the unconstitutional deprivation by equalizing the tax disparity between those manufacturers and manufacturers who were not subjected to the unconstitutional B&O taxes.

Id. at 600. The lesson is that the Legislature can “cure” an illegal tax and the cure can apply retroactively, but the “cure” must result in the taxpayers either obtaining a refund or a tax credit paid. The Legislature cannot “cure” illegally adopted taxes by retroactively redefining the conditions under which they were adopted. The attempt to do so with ESSB 6896 is ineffective.

These principles can be seen at work in *Estate of Hemphill v. State, Dep’t of Revenue*, 153 Wn.2d 544, 105 P.3d 391 (2005). This Court held that an invalid estate tax entitled the taxpayers to a refund, regardless of the Court’s invitation to the Legislature to fix the estate tax. *Id.* at 552. While

the Legislature could enact a new estate tax, there was never any suggestion that the Legislature could revive the old estate tax *post hoc*.

C. The State’s Triangulation Is Ineffectual to Increase the State Expenditure Limit

In defense of the State’s position that the triangulation of funds properly increased the expenditure limit, the State criticizes the trial court for comparing the financial shell game to the standard of review used in *Washington State Farm Bureau Federation v. Reed*, 154 Wn.2d at 675. Br. of State at 36 (“*Reed* provides no support for the superior court’s approach”). The State ignores that this Court was giving the Legislature the greatest amount of deference possible in *Reed* for the legislative declaration of an emergency. The superior court was merely commenting that even if the State is given the greatest amount of deference, the triangulation of funds fails to accomplish the goal because it was a “palpable attempt at dissimulation.” Trans. (Mar. 17, 2006) at 57.

As if the State’s “triangulation” of funds was not deceptive enough, the State perpetuates this deception in its brief by intentionally analyzing the various stages of the triangulation out of order. The first leg of the State’s triangulation, the \$250 million “appropriation” from the GF to the VRDEA, is the shaky foundation upon which the final leg of the triangulation rests, the \$250 million transfer from the HSA to the GF. Respondents will address the

individual stages of this triangulation in the order in which they occurred to avoid replicating the obfuscation of the State's brief.

1. The "Appropriation" of \$250 Million from the GF to the VRDEA Was Not an "Actual Expenditure" for Purposes of Rebasing the FY 2006 State Expenditure Limit

At the outset it should be acknowledged that there is no longer a dispute between the parties as to whether the ELC artificially increased the FY 2006 state expenditure limit by \$250 million as a result of the "appropriation" from the GF to VRDEA, the first leg of the triangulation. Respondents' Motion for Reconsideration before the trial court provided overwhelming evidence tracing the State's financial paper trail to affirmatively demonstrate this increase. CP 1287-90. Inasmuch as the State now concedes that, from a factual standpoint, the \$250 million increase to the FY 2006 state expenditure limit did occur, the only question before the Court is whether the trial court erred in concluding that this "appropriation" was not really an expenditure for purposes of adjusting the state expenditure limit.

As has been previously explained, the ELC may make two types of adjustments to the state expenditure limit. The first type of adjustment occurs when program costs or funds have been shifted or transferred in or out of the GF. The limit is adjusted upward "if moneys are transferred to the state general fund from another fund or account." RCW 43.135.035(5). Similarly, the limit is adjusted downward "if moneys are transferred from the state

general fund from to another fund or account.” RCW 43.135.035(4).

Adjustments based upon the transfer of funds have an immediate effect on the state expenditure limit in existence at the time of the transfer.

The second type of adjustment that the ELC is authorized to perform occurs when the ELC “adjust[s] the expenditure limit for the preceding fiscal year based on *actual expenditures* and...the fiscal growth factor.” RCW 43.135.025(6) (emphasis added). This is often referred to as a “rebasin” of the state expenditure limit, which employs a “spend it or lose it” principle. CP 339; 684. Unlike an adjustment for a transfer of funds, which has an immediate effect on the state expenditure limit in existence at the time of the transfer, an adjustment based on actual expenditures affects the state expenditure limit only for the following fiscal year. *See* RCW 43.135.025(6).

The State has consistently characterized the initial transfer of funds from the GF the VRDEA as an “appropriation,” and not a transfer of funds. The State must necessarily take this position because, if labeled as a transfer, the first step of this triangulation alone would actually result in a reduction in the state expenditure limit of \$250 million. *See* RCW 43.135.035(4) (requiring a reduction in the state expenditure limit for “moneys...transferred from the state general fund to another fund or account.”).

Instead, the State conveniently labels the first leg of the triangulation as an “appropriation” (*i.e.*, an actual expenditure of funds). As previously

indicated, the ELC may adjust the projected state expenditure limit for the following year based on the previous year's actual expenditures. *See* RCW 43.135.025(6). The "appropriation" occurred on June 14, 2005, just two weeks before the close of FY 2005. Accordingly, the ELC increased the FY 2006 limit by \$250 million on the erroneous assumption that this last minute deposit was an actual expenditure.

The trial court was asked to determine whether the Legislature's game of semantics had any legal effect. In making the determination to recharacterize the "appropriation" as a transfer, the trial court considered several facts. First, the mere movement of funds only gave the appearance of new funds being available. *Trans.* (Mar. 17, 2006) at 53. Second, communications from OFM and legislative staff indicated that the preferred terminology was "appropriation" and not "transfer." *Id.* Thus, by mere semantics, the OFM purported to authorize millions in additional state spending. *Id.* Third, in order to ensure that the funds had not really been appropriated from the GF to the VRDEA (*i.e.*, that they were available to be spent), the funds were declared to be "solely for deposit." *Id.* Fourth, the \$250 million in "appropriated" funds remained in the VRDEA for less than a day. *Id.* Finally, the ELC summarily adopted an increase to the FY 2006 state expenditure limit based upon its uncritical reliance on OFM budgetary figures at its annual meeting. *Id.* at 54. This Court should likewise review

these simple facts to determine that the \$250 million “appropriation” from the GF to the HSA was ineffective to increase the spending limit.

2. The Transfers of Funds of \$250 million from the VRDEA to the HSA and then to the GF Did Not Increase the FY 2005 State Expenditure Limit

If the first leg of the triangulation is of no legal effect, the remainder of the triangulation must also crumble under the same shaky foundation. Accordingly, the State erroneously asserts that the transfer of \$250 million from the HSA to the GF operated to increase the FY 2005 state expenditure limit by \$250 million.

The State correctly observes that under RCW 43.135.035(5), the expenditure limit may be adjusted upward “if moneys are transferred to the state general fund from another fund or account.” *Id.* However, as observed by the trial court, if the first leg of the triangulation, the \$250 million appropriation from the GF to the VRDEA had been properly designated as a transfer in the first instance, the first leg of the triangulation would have resulted in a reduction of \$250 million to the FY 2005 state expenditure limit. *See* RCW 43.135.035(4). Under such a scenario, the initial transfer of \$250 million from the GF to the VRDEA would reduce the FY 2005 state expenditure limit by \$250 million, and the final leg of the triangulation, the transfer of the \$250 million from the HSA back into the GF would increase the FY 2005 state expenditure limit by \$250 million, resulting in no net

change in the limit. Although this is how the triangulation should have been treated by the ELC, **this is not what happened here.**

Instead, the Legislature, OFM staff, and the ELC all operated on the premise that the initial step of the triangulation was an “appropriation,” and the final leg of the triangulation was a “transfer.” Because the effect of a transfer on the state expenditure limit is immediate, the FY 2005 limit was increased by \$250 million. However, because “actual expenditures” affect only the following year’s expenditure limit, the FY 2006 limit was also increased by \$250 million.

Communications from OFM staff indicate how the combination of an appropriation and a transfer operate simultaneously to increase the state expenditure limits twice over the period of two fiscal years. Irv Lefberg, Assistant Director of Forecasting at OFM, explained in an email to Mike Wills, Budget Coordinator of the Senate Ways and Means Committee, how the state expenditure limit could be raised in an email entitled “601 Limit - 11th hour.” Specifically, Mr. Lefberg described how the first and third step of the triangulation affects the limit:

- 1) **Spend** (not a money transfer) GF-S dollars into the Health Services account in the 2005 supplemental. This expenditure is subject to the 2005 limit; but **is not a money “transfer” and should not require a reduction to the limit.**
- 2) In 2006...transfer money from HSA to GF-S, **which raises the limit.**

CP 325 (emphasis added).

In the same e-mail string, Mr. Lefberg provided an additional clarification as to how the limit is raised twice (i.e., over two fiscal years) through triangulation:

I think before you can do more of #2 [*i.e.* raising the state expenditure limit via transfers into the general fund], you need to do more of #1. i.e. you need to spend more in the 2005 supplemental into HSA, **which raises the limit for 05-07 thru re-basing**; and then, as a result of doing #1, you have more dollars in HSA to transfer to GF-S in 2006 and 2007, **which also raises the limit.**

CP 324 (emphasis added).

In addition, Pam Davidson, Senior Budget Assistant to the Governor in OFM, also explained how the triangulation artificially increases the state expenditure limit over two fiscal years by double the amount of the funds originally triangulated. In this e-mail string, OFM staff realized that the expenditure limit had been exceeded at that time by approximately \$41 million. *See* CP 1307 (“[W]e are over the limit overall by \$41 m[illion].”). To resolve the problem, Ms. Davidson suggested that the triangulation remedy “could be done with... about \$20 million,” essentially half the amount of the limit overage. *Id.*

Finally, Ms. Davidson explicitly stated how the \$41 million state expenditure limit overage could be fully remedied by a \$20 million triangulation:

In the 2005 supplemental, spend some GF-S money into the Health Services Account, which will help raise the limit in FY06, then in 2005-07, shift it back to GF-S by increasing the HSA fund shift, **increasing the limit again.... [Y]ou get more bang for you buck . . . since you raise the limit twice.**

CP 349. The final transfer from the HSA to the GF was just as essential to the State's triangulation as the original "appropriation" from GF to the VRDEA. In fact, the purported appropriation was essential also for the ultimate transfer to the GF because the HSA did not have \$250 million in its fund to transfer to the GF until the money shifting through the VRDEA occurred. The combination operated to artificially increase both the FY 2005 and FY 2006 state expenditure limits.

3. Increasing the Any Spending Limit as a Result of Any Portion of the Triangulation of Funds Violates the Letter and Spirit of the TPA

To date, the State has never provided any explanation for the triangulation of funds. Respondents asked in discovery what the State's purpose was for the appropriation and transfer.

INTERROGATORY NO. 22: Identify all purposes for transfers and appropriations referred to in paragraphs 40 and 41 of the Complaint in this matter other than to raise the state expenditure limit.

ANSWER: The transfers and appropriations at issue were conducted pursuant to legislation.

CP 844. Apparently, the only purpose the State would admit to with respect to these transfers and appropriations was because they were required by

legislation. Finally, in its brief, the State admits that the sole purpose of the triangulation of funds was to increase the expenditure limit. Br. of State at 35.

Yet, the State ironically demands that this Court effectuate the Legislature's purpose in authorizing the triangulation of funds and the intended effect on the state expenditure limit. *Id.* (citing *State v. Alvarez*, 128 Wn.2d 1, 11, 904 P.2d 754 (1995) for the proposition that this court must discern and give effect to legislative intent and that the intent is to raise the state expenditure limit). Tellingly, not once does the State argue that this Court also has a responsibility to discern and give legislative intent to the TPA. The obvious reason is that the triangulation of funds violates the letter and spirit of the TPA.

Surely, neither the voters nor the Legislature intended to create a scheme that effectively results in no limit at all. If the State can "appropriate" \$250 million, then the Legislature could easily move \$25 **billion** in the same manner, resulting in no effective limit whatsoever. The statute cannot be construed to allow an absurd result of effectively increasing the state expenditure limit simply by labeling a transaction an "appropriation." *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (courts must avoid absurd results when interpreting statutes).

Rather, the Court should conclude that the increase in the limit authorized by RCW 43.135.035(5) is limited to situations where "moneys are transferred to the state general fund from another fund or account" and the

funds are not immediately replenished to the other account either directly or indirectly from the GF. To rule otherwise, renders the state expenditure limit meaningless and nothing more than a sham. *See Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 202, 95 P.3d 337 (2004) (no portion of a statute shall be rendered meaningless or superfluous through interpretation).

The TPA established a state expenditure limit and its provisions should be read in light of its purposes. *See Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) (“courts should read [a statute] in its entirety, instead of reading only a single sentence or a single phrase”). There is a common law principle that a party should not be allowed to do indirectly what it clearly cannot do directly. *See, e.g., Washington Fed’n of State Employees v. State*, 98 Wn.2d 677, 687, 658 P.2d 634 (1983). The Court should declare that the Legislature cannot render the state expenditure limit meaningless by circuitously triangulating funds to accomplish indirect tax increases to avoid the voter approval requirement of RCW 43.135.035(2)(a).

D. Part XI of ESHB 2314 Is Subject to the Voter Approval Requirement of RCW 43.135.035(2)(a) Because It Is at Worst, a Tax Increase, and at Best, Revenue Neutral

It is undisputed from Respondents’ motion for summary judgment that Part XI of ESHB 2314 increases the sales tax on cigarettes. *See* ESHB 2314, Part IX (Section 1102), CP 775. It was also undisputed that part of that sales tax was dedicated to the GF. The trial court apparently accepted the

State's argument that Part XI was not subject to the voter approval requirement of RCW 43.135.035(2)(a) because it was revenue neutral (*i.e.*, the tax increase was merely designed to offset the expected decrease in demand for cigarettes as a result of the tax increase).

Respondents contend that the fact that Part XI raised a tax to be deposited in the GF along with other tax increases which result in raising funds over the limit is sufficient to find that this Part should have been submitted to the voters. The fact that the State **argues** that it is revenue neutral is irrelevant because RCW 43.135.035(1) refers to "legislative action" as including revenue neutral tax shifts.

However, if the Court believes that a tax increase which is theoretically neutral in regard to the GF is sufficient to avoid the voter approval requirement of RCW 43.135.035(2)(a), then the Court must recognize that the State failed in its opposition to the Respondents' Motion or in their Motion for Reconsideration to provide sufficient evidence that the tax increase was revenue neutral in regard to the GF. The sole evidence referred to is CP 806-08, which is far from clear in establishing that the portion of the tax dedicated to the general fund raised no additional revenue. A party opposing summary judgment may not rely on speculation, but must provide evidence that clearly establishes its version of the facts. *Seven Gables Corp.*

v. MGM/UA Entertainment Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The cryptic references in CP 806-08 do not meet that standard.

E. The Legislature’s Self-Imposed Voter Approval Requirement Does Not Suffer From The Constitutional Infirmities Identified In *Amalgamated Transit*

The trial court determined that the State’s claim that the voter referral requirement of RCW 43.135.035(2)(a) was unconstitutional under the analysis provided in *Amalgamated Transit*, 142 Wn.2d 183 (2000), was not properly before the court. If this court decides to reach this issue, it should be squarely rejected.

1. The Analysis in *Amalgamated Transit* Relied Upon by the State is Obiter Dictum in its Most Gratuitous Form

In a final attempt to justify a clear disregard for the TPA, the State argues that RCW 43.135.035(2)(a) is unconstitutional under the rationale of *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000). Specifically, the State argues that *Amalgamated Transit* stands for the proposition that “it is not within the initiative power of the people under Article II, Section 1(b) of the Washington Constitution . . . to require voter approval of future tax increases.” Br. of State at 41. The State’s reliance on *Amalgamated Transit* is misplaced.

Most obviously, the portion of *Amalgamated Transit* relied upon by the State is *obiter dictum* and, as such, provides no precedential value. The *Amalgamated Transit* court held that Initiative 695 (I-695) was

unconstitutional because it violated the single subject rule of Article II, Section 19 of the State Constitution. *Id.* at 217. However, the Court then proceeded to take the unnecessary analysis that I-695 was unconstitutional on several other grounds, including the one upon which the State relies.

When a statement in a Supreme Court opinion is “unnecessary and wholly incidental to the basic decision” it is not controlling and is *dicta*. *Burress v. Richens*, 3 Wn. App. 63, 66, 472 P.2d 396 (1970). The analysis in *Amalgamated Transit* relied upon by the State is “incidental” to the “basic decision” of the Court. By holding that I-695 violated the single subject requirement, the Court invalidated I-695 **in its entirety**. The analysis which was unnecessary to the Court’s decision, and upon which Defendants’ rely regarding the referendum power, related only to a **single provision of I-695**.

Moreover, the fact that the *Amalgamated Transit dictum* was referenced later in *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 759, 131 P.3d 892 (2006), does not transform *dictum* into the holding of the case. The analysis in *Amalgamated Transit* relied upon by the State is clearly *dicta* and this Court commences with a clean slate.

2. Unlike I-695 Considered in *Amalgamated Transit*, the Voter Approval Requirement of the TPA is Narrow in Scope

Moreover, even if this Court considers the *dicta* in *Amalgamated Transit* to be persuasive, it simply does not control the disposition of this

case. The initiative considered in *Amalgamated Transit*, I-695, differs significantly in its approach and scope than the TPA. These differences are of constitutional magnitude.

As the State correctly observes, the relevant portion of I-695 required voter approval on “[a]ny tax increase imposed by the state.” CP 619 (citing Laws of 2000, ch. 1 § 2(1))(emphasis added). As this Court noted, the voter approval provision was even broader. It applied not only to state taxes, but also to local taxes and fees and “any monetary charge by government.” 142 Wn.2d at 193. The scope of this provision was of particular concern to the *Amalgamated Transit* court and appears to have controlled its constitutional analysis. In fact, the court stressed the universality of the provision no less than 14 times in the section addressing this very constitutional question.¹⁰

¹⁰ “I-695, section 2(1) provides that **any tax increase** imposed by the state **shall require voter approval.**” *Id.* at 231 (emphasis added)

“[S]ection 2 **automatically suspends** in the future **every tax-related action of government** until the voters approve or disapprove of the action.” *Id.* (emphasis added)

“section 2 is therefore **universal**” *Id.* (emphasis added)

“[A]s a **universal referenda provision** section 2...*Id.* (emphasis added)

“We uphold the trial court’s ruling on the basis that **section 2 establishes a referendum process applying to every piece of future tax legislation.**” *Id.* (emphasis added)

“Under section 2 of I-695 **all state tax measures** passed by the legislature **are automatically subject to voter approval.**” *Id.* (emphasis added)

“Section 2 of I-695 **effectively authorizes mandatory referendum elections on all future tax legislation** passed by the Legislature where the Legislature has not referred the legislation” *Id.* at 232 (emphasis added)

In light of the foregoing, it simply is not credible for the State to argue that the limitless scope of I-695’s voter referral provision was not relevant to the holding of *Amalgamated Transit* with respect to Article II, Section 1(b) of the State Constitution. *See* Br. of State at 43 (“Although the voter approval requirement of RCW 43.135.035(2)(a)...operates on a narrower class of revenue bills [than I-695]...this difference does not appear to be a significant one under the rationale of the Court in *Amalgamated Transit*.”).

Again, the quotes in Footnote 10 were pulled exclusively from that section of the *Amalgamated Transit* opinion upon which the State so heavily relies. The Court even expressed concern that I-695 was so broad in scope

“As did the trial court, we conclude that **section 2 calls for universal referenda** on all legislation...” *Id.* (emphasis added)

“[S]ection 2 has the effect of replacing the referendum petition process for **any** future state taxing legislation.” *Id.* (emphasis added)

“None of these cases cited by the State involves the question here whether a legislative body (here the people) can require voter approval as a condition to **all future** taxing legislation passed by the Legislature, as opposed to a specific piece of legislation. *Id.* at 235 (italics in original; emphasis added)

“Here, section 2 encompasses **all future** state legislation imposing increased taxes as defined in I-695.” *Id.* (italics in original; emphasis added)

[T]he State and the Campaign cite no cases, and none have been found, permitting conditioning **all future state measures** of a certain class on voter approval absent a constitutional amendment to that effect.” *Id.* at 242 (italics in original; emphasis added)

“[S]uch voter approval requirements are unlike section 2 of I-695. First, only a specified type of tax is at issue, **not all future tax measures**.” *Id.* at 243 (emphasis added)

We hold that section 2 of I-695 violates the four percent signature requirement of art. II, § 1(b) because it effectively establishes a referendum procedure applying to **every piece of future taxing legislation** without regard to the four percent signature requirement. *Id.* at 244 (emphasis added)

that it would require votes even on non-controversial items for which there was no public opposition. *Id.* at 231. The emphasis on this sheer breadth of I-695 is so pervasive in *Amalgamated Transit*, especially the section analyzing Article II, Section 1(b) of the State Constitution, that it clearly formed the basis of the Court’s opinion. Even the holding of that section, the final quote reproduced in Footnote 10 above, expressly refers to the limitless scope of I-695.

In contrast, the TPA is extremely narrow in scope. It requires voter approval for only those legislative actions that “result in expenditures in excess of the state expenditure limit.” RCW 43.135.035(2)(a). Attempts to exceed the state expenditure limit have been so rare, that to the best of Respondents’ knowledge, the instant litigation represents the only litigation where this has occurred since the inception of the TPA nearly 13 years ago. Clearly, *Amalgamated Transit* is not controlling for this very reason.

3. Unlike I-695, the TPA Has Been Self-Imposed by the Legislature

The *Amalgamated Transit* court rejected the notion that the people could not require the Legislature to refer certain issues to a statewide vote. The Court reasoned that I-695 was a restriction placed on the Legislature by the voters without following the requisite four percent voter signature requirement—a requirement that does not apply to bills referred by the

Legislature. On this account, the TPA is also vastly different from I-695.

The Legislature has subsequently reenacted, reaffirmed, and ratified the TPA.

Unlike I-695 at issue in *Amalgamated Transit*, the voter approval requirements were readopted by the Legislature in RCW 43.135.080.

Although the Legislature retains the authority to repeal the TPA, the Legislature has not chosen to exercise that authority. Instead, the Legislature has done the exact opposite—expressly ratifying the TPA.

Initiative Measure No. 601 (chapter 43.135 RCW, as amended by chapter 321, Laws of 1998 and the amendatory changes enacted by section 6, chapter 2, Laws of 1994) **is hereby reenacted and reaffirmed.** The legislature also adopts chapter 321, Laws of 1998 to continue the general fund revenue and expenditure limitations contained in this chapter 43.135 RCW after this one-time transfer of funds.

RCW 43.135.080(1) (emphasis added). As such, the TPA is a creature of the legislature—a self-imposed limitation for fiscal discipline and good governance.

The TPA does not present a scenario in which the voters are imposing tax limitations on an unwilling Legislature. Clearly, the imposition of a restraint on the Legislature by the voters was a concern for the *Amalgamated Transit* court:

Finally, under section 2 of I-695 the legislation that is allegedly conditioned is not legislation enacted by the people acting in their legislative capacity but is instead legislation enacted by the Legislature. Thus, the legislative body passing the tax legislation is not the legislative body determining that

effectiveness would be expedient only on approval of the voters.

Id. at 242. Here, the Legislature has enacted the TPA and affirmatively decided that it is expedient to obtain voter approval for legislation resulting in revenue in excess of the state expenditure limit to the voters. Likewise, the legislation at issue in the instant case, ESHB 2314, is also a product of that same legislative body.

4. A Finding that the Voter Referral Requirement of the TPA is Unconstitutional Does Not Provide the State the Relief it Seeks

Finally, even if the State prevails on its argument that the voter approval requirement in RCW 43.135.035(2) is unconstitutional, that does not give the State the practical result that it seeks. If it is unconstitutional for the TPA to require a vote of the people on a narrow class of taxes, then the State is still left with the remainder of RCW 43.135.035(2), because the TPA contains an express severability clause. *See* RCW 43.135.903 (“If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.”).

The relevant portion of the statute reads as follows:

If the legislative action under subsection (1) of this section will result in expenditures in excess of the state expenditure limit, then the action of the legislature shall not take effect until approved by a vote of the people at a November general election.

RCW 43.135.035(2)(a). If the voter approval requirement is unconstitutional, the State is left with the following language:

If the legislative action under subsection (1) of this section will result in expenditures in excess of the state expenditure limit, then the action of the legislature shall not take effect ...

*Id.*¹¹ Similarly, even if this Court were to strike this subsection in its entirety, RCW 43.135.025(1) is an independent portion of the TPA that expressly reiterates the same principle: “The state shall not expend from the general fund during any fiscal year state moneys in excess of the state expenditure limit established under this chapter.”

The voter approval procedure is a **remedy** to allow the Legislature to exceed the expenditure limit. If the remedy is unconstitutional, the action of the Legislature that raises taxes in excess of the state expenditure limit remains ineffective under current law. The State’s argument on constitutionality clearly does not provide the relief it seeks.

¹¹ Striking the voter approval requirement under *Amalgamated Transit* raises severability issues. “An act or statute is not [invalid] in its entirety unless invalid provisions are unseverable and it cannot reasonably be believed that the legislative body would have passed one without the other, or unless elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes.” *McGowan v. State*, 148 Wn.2d 278, 294, 60 P.3d 67 (2002). Here, the vote requirement and the prohibition on exceeding the expenditure limit are severable. Keeping the prohibition on exceeding the state expenditure limit without the remedy of a vote requirement clearly accomplishes the unquestionable legislative purposes of providing continuity to the growth of state government and expenditures declared in RCW 43.135.010. Likewise, it can reasonably be believed that the people and the legislature would have enacted an enforceable expenditure limit even if the voter approval requirement was not present.

5. The Dicta in *Amalgamated Transit* Must Yield to More Persuasive Authority and Controlling Authority

In addition, *Amalgamated Transit* simply does not stand for the proposition that the Legislature cannot refer a category of bills to the people under any circumstances. In the original challenge to the constitutionality of the TPA, *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994), the State Supreme Court recognized the Legislature’s authority to refer bills to the people pursuant to Article II, Section 1 of the State Constitution: “Referring a bill to the voters is a constitutional power of the Legislature, and we will not interfere with that power.” *Id.* at 423. The *Amalgamated Transit* court reaffirmed this principle: “Nor does it mean that the Legislature cannot refer a measure to the people for a statewide vote. Plainly it can do so, not, however, as conditional legislation, but rather through the referendum process set forth in article I, section 1(b).”¹² *Amalgamated Transit*, 142 Wn.2d at 183.

Respondents believe that the *dicta* in *Amalgamated Transit* analysis is incorrect. Our State Constitution clearly states that “[a]ll political power is inherent in the people, and governments derive their just powers from the

¹² Tellingly, neither the *Amalgamated Transit* court nor the State, which quotes this same excerpt, offer any suggestion as to the Court’s distinction between “conditional legislation” and the “referendum process set forth in article I, section 1(b).” Because Article I, § 1(b) simply does not exist, Plaintiffs assume that the *Amalgamated Transit* court meant Article II, § 1(b). However, the only requirement in Article II, § 1(b) is the signature requirement of four percent of voters. Certainly, the Court was not mandating the Legislature to go out and seek signatures when it refers a bill to the people. Thus, it appears that the Court was advising that only the Legislature can require certain bills to be approved by the voters.

consent of the governed....” Art. I, § 1. Accordingly, the authority to require voter approval for bills that would result in expenditures above the state expenditure limit is within the power of the people and the Legislature. Moreover, it is common for the Legislature to authorize taxes that are not effective until passed by the voters.¹³

In short, there are numerous reasons and authorities for concluding that the *dicta* in *Amalgamated Transit* is incorrect that were not considered by the Court in that case. If the Court believes that the merits of the *dicta* should be considered, Respondents urge the Court to invite further briefing on this issue.

F. The Trial Court Erred in Creating Legislative and Executive Privileges Unrecognized in this State’s Statutes or Jurisprudence

A popular Government, without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

– James Madison¹⁴

¹³ See, e.g., RCW 82.46.035 (real property excise tax); RCW 82.80.010 (motor vehicle and special fuel tax); RCW 82.14.340 (criminal justice sales and use tax); RCW 81.100.030 (employee excise tax); RCW 81.100.060 (motor vehicle excise tax); RCW 81.104.170 (sales and use tax); RCW 35.21.870 (utility tax); RCW 35.95.040 (business and occupation tax).

¹⁴ Letter to W.T. Barry, Aug. 4, 1822, in 9 WRITINGS OF JAMES MADISON 103 (Hunt ed., 1910) (quoted in Edward J. Imwinkelried, 2 THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 7.7.1 (2002)). See also 8 WIGMORE ON EVIDENCE § 2378(a) (3d ed. 1940).

During the proceedings in the trial court, Respondents¹⁵ sought to compel the production of certain documents relating to manipulation of the state expenditure limit during the 2005 legislative session. CP 1651-74. In response, the State asserted that the documents were protected by legislative privilege, executive privilege, or both. CP 968-90. Despite the fact that such privileges have never been recognized in this state’s statutes or jurisprudence, the trial court expressly “creat[ed]” these privileges, subject to certain exceptions, *see* Trans. (Jan. 13, 2006) at 2-5, 6-7, and allowed the State to withhold several potentially probative documents. CP 218-310. The decision to create these privileges should be reversed, inasmuch as it is contrary to fundamental tenets of Washington law, inconsistent with the plain language of the state constitution, and against public policy as declared by the Public Records Act.

1. Washington Courts Are Reticent to Create New Privileges

Washington courts have long been hesitant to create new evidentiary privileges by judicial fiat. *See State v. Maxon*, 110 Wn.2d 564, 566, 756 P.2d 1297 (1990). This tenet is a sound one and should guide the Court here.

For centuries it has “been recognized as a fundamental maxim that the public . . . has a right to every man’s evidence,” 8 WIGMORE ON EVIDENCE § 2192 (3d ed. 1940), a right that extends to “all that is needed for the

¹⁵ Cross-appellants on this issue.

ascertainment of truth,” including documents, *Id.* at § 2193. Evidentiary privileges, “[w]hatever their origins, [represent] exceptions to the demand for every man’s evidence . . . [and lie] in derogation of the search for truth.” *United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); *accord Maxon*, 110 Wn.2d at 569, and 8 WIGMORE ON EVIDENCE § 2192. Consequently, courts will create and apply privileges only where necessary to protect transcendent societal interests. *See Trammel v. United States*, 445 U.S. 40, 50, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980); *accord Maxon*, 110 Wn.2d at 576.

No such interests are implicated here. If they were, surely the Legislature would have acted to protect those interests sometime during the past 117 years. Indeed, the vast majority of privileges recognized in this state are creatures of statute, not judicial decision. *See, e.g.*, RCW 5.60.060(2) (attorney-client); RCW 5.60.060(3) (clergyman or priest); RCW 7.75.050 (dispute resolution center); RCW 5.60.060(1) (husband-wife); RCW 2.42.160 (interpreter in legal proceeding); RCW 18.53.200 (optometrist-patient); RCW 5.60.060(4) (physician-patient); RCW 18.83.110 (psychologist-client); RCW 74.04.060 (public assistance recipient); RCW 5.60.060(5) (public assistance officer); RCW 5.62.020, 5.62.030 (registered nurse); RCW 5.60.070 (mediation); RCW 5.60.060(6) (peer support group counselor); RCW 5.60.060(7) (sexual assault advocate); RCW 5.60.060(8) (domestic violence

advocate). *But see State v. Rinaldo*, 102 Wn.2d 749, 689 P.2d 392 (1984),
and *Senear v. Daily Journal-American*, 97 Wn.2d 148, 641 P.2d 1180 (1982)
(recognizing journalist privilege).

Accordingly, whether to cloak internal legislative and executive communications in privilege is ultimately a question for the Legislature to decide. To date, the Legislature – though certainly aware of the recognition of such privileges elsewhere – has decided not to create these privileges in this state. This fact weighs heavily against judicially creating such privileges now. *See Univ. of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 189, 110 S. Ct. 577, 107 L. Ed. 2d 571 (1990) (Supreme Court is reluctant to recognize privilege in area where it appears that Congress has considered relevant competing concerns but has not provided privilege itself).

Indeed, the Legislature’s inaction utterly defeats fulfillment of the common law test for creating new privileges. *See Maxon*, 110 Wn.2d at 572 (setting forth Wigmore’s common law test for creating new privilege). This test has four factors, all of which must be satisfied before a privilege will be created:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the

disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Id. (emphasis in original).

While some of these conditions are arguably satisfied here, the fact that the Legislature – a body uniquely positioned and qualified to weigh and act upon these concerns – has not seen fit to recognize the claimed privileges ultimately defeats fulfillment of the test. If the community, as represented by the Legislature, felt that the confidences and relationships implicated here were essential to the functioning of the political branches, and were unduly threatened by the possibility of disclosure in litigation, surely it would have acted to guard those relationships by enacting protective privileges.

2. The Washington Constitution Does Not Contain the Claimed Privileges

a. Legislative Privilege

The trial court principally grounded its creation of a legislative privilege in the Speech and Debate Clause of the Washington Constitution. *See* Trans. (Jan. 13, 2006) at 2 (citing WASH. CONST. art. II, § 17). However, neither the clause’s text, nor the historical circumstances under which it was enacted, nor the century of case law applying the clause, nor the interpretations of similar clauses in other jurisdictions support the judicial creation of such a privilege in this state. *Cf. State v. Gunwall*, 106 Wn.2d 54,

61-62, 720 P.2d 808 (1986) (listing factors to consider in construing state constitutional analog to federal constitutional provision).¹⁶

i. Text and Washington Caselaw: “When interpreting constitutional provisions, [this Court] look[s] first to the plain language of the text and will accord it its reasonable interpretation.” *Washington Water Jet Workers Ass’n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004). “The words of the text will be given their common and ordinary meaning, as determined at the time they were drafted.” *Id.* This ordinary meaning should be ascertained from a standard dictionary. *See State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002).

The Speech and Debate Clause provides that “No member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate.” WASH. CONST. art. II, § 17. The key word in here is “liable.” In the late nineteenth century, “liable” was defined to mean “[b]ound; obliged in law or equity; responsible; answerable. The surety is *liable* for the debt of his principal. The parent is not *liable* for debts

¹⁶ Two of the *Gunwall* factors are not particularly relevant here: preexisting state law and structural differences. There is no germane preexisting state law, and the structural differences between the state and federal systems do not bear upon the issue here.

Conversely, it is almost axiomatic that the powers and privileges of a state legislature are especially a matter of state, rather than federal, concern. Accordingly, it suffices to simply note that there is no reason why the privileges of state and federal legislators must correspond exactly.

contracted by a son who is a minor, except for necessities.” Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 661 (Goodrich ed., 1862) (emphasis in original). Contemporaneous legal dictionaries confirm this meaning. See, e.g., BLACK’S LAW DICTIONARY 713 (1891) (defining “liable” to mean “[b]ound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation, or restitution”). Consequently, rather than providing an evidentiary privilege, Washington’s Speech and Debate Clause simply holds legislators not bound, obliged, or responsible – *i.e.*, immune from suit – “for words spoken in debate,” such as in a suit for defamation or slander.

Washington case law interpreting the Speech and Debate Clause supports this conclusion. See *Martonik v. Durkan*, 23 Wn. App. 47, 54, 596 P.2d 1054 (1979) (adopting view of Attorney General that Speech and Debate Clause merely allows legislators “to utter or publish defamatory statements in the course of legislative business” immune from suit), *review denied*, 93 Wn.2d 1008 (1980); *In re Recall of Call*, 109 Wn.2d 954, 958, 749 P.2d 674 (1988) (stating that clause only “protects legislators from civil action or criminal prosecution for words spoken in debate”). Indeed, the types of documents requested here have apparently always been discoverable in Washington. See Kristen L. Fraser, *Method, Procedure, Means, and Manner: Washington’s Law of Law-Making*, 39 GONZ. L. REV. 447, 486

n.351 (2003-04) (describing trial court cases in which legislative information was subject to discovery process). Moreover, given that speech and debate in the Washington Legislature are publicly aired on the internet, radio and television, and that the legislative chambers are open to public observation by constitutional mandate, *see* WASH. CONST. art II, § 11, it makes little sense to conclude that the Speech and Debate Clause was intended to allow legislators or their staffs to hide documents from public view.

It is beyond dispute that this case has nothing to do with holding a legislator liable for words spoken in debate. No legislator has been sued in this case, either individually or in his official capacity. Nor, for that matter, has the legislature been sued as a body. The clause is inapplicable here.

ii. Other Jurisdictions' Speech and Debate Clauses: Contrasting language in the federal Speech and Debate Clause reinforces the conclusion that the Washington Speech and Debate Clause merely immunizes legislators from suit for words spoken in debate.

Rather than merely declaring that legislative members shall not be “liable” for words spoken in debate, the federal Speech and Debate Clause provides that “for any Speech or Debate in either House, [Senators and Representatives] *shall not be questioned* in any other Place.” U.S. CONST. Art. I, § 6 (emphasis added). The sweep of this language is plainly broader than the limitation on liability contained in the Washington Speech and

Debate Clause, and has been construed accordingly by the United States Supreme Court. *See, e.g., Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975) (stating “that legislators acting within the sphere of legitimate legislative activity should be protected not only from the consequences of litigation’s results but also from the burden of defending themselves” (internal quotations omitted)); *Gravel v. United States*, 408 U.S. 606, 616, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972) (finding Congressional aides protected by federal Speech and Debate Clause).

However, given the fundamental textual differences between the federal and state clauses, this line of authority provides no support for creating a legislative privilege under the Washington Constitution. In fact, the contrast in language supports a narrow construction of the state clause, insofar as the drafters of the Washington Constitution were certainly aware of the federal text and the Supreme Court’s broad reading of that text, *see Kilbourn v. Thompson*, 103 U.S. 168, 203-04, 26 L. Ed. 377 (1880) (endorsing liberal construction of Speech and Debate Clause), and rejected it in favor of the narrower wording before the Court here.¹⁷

¹⁷ *See Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 358, 13 P.3d 183 (2000) (“[O]rdinary rules of textual and constitutional interpretation, as well as the logic of federalism, require that meaning be given to the differences in language between the Washington and United States Constitutions”); *accord* Robert F. Utter & Hugh D. Spitzer, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 10 (2002); *cf. State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (“Another fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms.”).

Nor do judicial interpretations of other states' speech and debate clauses lend support for creating a legislative privilege under the Washington Constitution. The trial court partially relied upon judicial interpretations of the Wisconsin and Arizona speech and debate clauses to justify creating a legislative privilege in this state. This reliance was misplaced. While the evidence indicates that the Washington Speech and Debate Clause was drawn from the Wisconsin Constitution of 1848, *see* Utter & Spitzer at 60, *and* THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889 at 241, 534 (Rosenow ed., 1962), the Wisconsin clause was not construed to contain an evidentiary privilege until 1984. *See State v. Beno*, 341 N.W.2d 668 (Wis. 1984). Accordingly, this interpretation obviously could play no role in the framing or ratification of Washington's Speech and Debate Clause, and could not affect its meaning. Similarly, Arizona's constitution was not even enacted until 1912, logically precluding it from affecting the meaning of the Washington Constitution.

Indeed, to the extent that the practices of other states are relevant at all to the interpretation of this state's constitution, they counsel against creation of a legislative privilege. As one advocate of a wide-ranging legislative privilege concedes

The story of state court jurisprudence regarding the Speech or Debate privilege stands in marked contrast to the broad and now well-established protections of the federal Speech or Debate Clause . . . **To date, less than half of the states are**

consistently on record as applying the privilege to protect the range of actors and activities that federal courts have found protected under the United States Constitution. More ominously, although many state courts that have analyzed their Speech and Debate clause purport to embrace broad application following the federal model, **they have in a variety of circumstances instead applied the provisions in narrow ways.**

Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 259 (2004) (emphasis added); see also *Avara v. Baltimore News American Division*, 440 A.2d 368, 371 (Md. 1982) (stating that Maryland’s Speech and Debate clause was inapplicable because plaintiffs sought declaratory relief, “and in no way whatsoever seek[] to impeach any proceedings, or impose liability on any Defendant, either civil or criminal.”).

iii. Historical Context: Protection of legislative speech and debate is deeply rooted in the Anglo-American tradition. Nothing in these historical roots, however, supports the creation of an evidentiary privilege. As Justice Harlan has lucidly explained, ancient speech and debate protections were developed to prevent criminal prosecution of the Crown’s parliamentary enemies, *United States v. Johnson*, 383 U.S. 169, 180-82, 86 S. Ct. 749, 15 L. Ed. 2d 681 (1966), not to cloak parliamentary communications in evidentiary privilege or even to provide immunity from civil suit.

The particular context within which the Washington Speech and Debate Clause was enacted further counsels against judicial creation of a

legislative privilege. Distrust of state legislatures was widespread in late nineteenth century America, *see* Huefner, 45 WM. & MARY L. REV. at 241, and Washington's territorial legislature was a notoriously corrupt body, engaging in a wide array of abuses. Brian Snure, Comment, *A Frequent Recurrence To Fundamental Principles: Individual Rights, Free Government, And The Washington State Constitution*, 67 WASH. L. REV. 669, 671 (1992); Wilfred J. Airey, *A History of the Constitution and Government of Washington Territory* at 207-15 (1945) (unpublished doctoral thesis available at the University of Washington Law School Library). This produced a collective distrust of legislative power on the part of our constitutional framers:

Washington's citizens feared governmental tyranny, a tyranny they generally identified with the legislative branch. The settlers, who were primarily immigrants from other states, had extensive experience with and knowledge of legislative abuses. In addition, Washington Territory itself experienced legislative abuses. In 1862-63, the legislature reportedly passed no general laws, but enacted more than 150 pieces of special legislation for the benefit of 'private interests against the general welfare.' The delegates to the Constitutional Convention carried these experiences with them; one delegate remarked that if a stranger were to step into the convention "he would conclude that we were fighting a great enemy and that this enemy is the legislature."

Snure, 67 WASH. L. REV. at 671. To prevent the continuance of these abuses, our state's constitutional framers sought to curb the power of the legislature in a variety of ways. *See* WASH. CONST. art. I (declaration of rights); art. II, §

19 (single subject and subject in title rules); art. II, § 24 (legislature prohibited from granting divorces); art. II, § 25 (ex post facto increases in governmental compensation prohibited); art. II, § 28 (eighteen classes of special legislation prohibited); art. II, § 29 (contracting out prison labor prohibited); art. II, § 36 (bills must be introduced more than ten days before legislative session adjourns); art. II, § 37 (amended laws must be set forth in full); art. II, § 38 (scope and object rule); art. II, § 39 (legislators prohibited from accepting favors from railroads). The narrow language, and a narrow construction, of our Speech and Debate Clause is wholly consistent with these limitations on legislative power.

b. Executive Privilege

The trial court's creation of an executive privilege rests upon even shakier constitutional ground. As the trial court expressly acknowledged, "no . . . constitutional provision in this state refers to executive privilege." Trans. (Jan. 13, 2006) at 6. Instead, the trial court relied upon general separation of powers concerns to justify its decision. *Id.* at 6-7.

The separation of powers doctrine is certainly important; it is not absolute, however. *See Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). Nor are the concerns implicated by the doctrine here weightier than the concerns expressly protected by the Speech and Debate Clause, concerns just demonstrated to be insufficient to support judicial creation of a

legislative evidentiary privilege. Indeed, while the United States Supreme Court has seen fit to recognize a robust presidential privilege under the United States Constitution, *see Nixon*, 418 U.S. at 705-06, the diplomatic and national security concerns that underlie this privilege, *see id.* at 706, 710-11, are utterly absent at the state level. Moreover, judicial creation of an executive privilege would actually serve to undermine the doctrine: exalting the executive at the expense of both the judiciary and the Legislature, undermining the effectiveness of our system of justice – which depends upon full development of all relevant facts. *See id.* at 709.

3. The Public Policy of This State Favors Broad Disclosure of Governmental Documents

The public policy of this state, as declared in the Public Records Act, chapter 42.56 RCW,¹⁸ also counsels against judicial creation of a legislative or executive privilege.¹⁹ RCW 42.56.030 proclaims

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

¹⁸ The Public Records Act was formerly codified within chapter 42.17 RCW, but was recently recodified by Laws of 2005, chapter 274.

¹⁹ It should also be noted that while respondents have not utilized the Public Records Act for discovery, Washington jurisprudence authorizes them to do so. *See O'Connor v. Dep't of Social & Health Servs.*, 143 Wn.2d 895, 907, 25 P.3d 426 (2001) (holding that plaintiffs could obtain documents from government defendants via the Civil Rules for pretrial discovery or the Public Records Act).

This statement evidences a broad **legislative** commitment to open government, a commitment that is wholly inconsistent with **judicial** creation of a legislative or executive privilege. Nevertheless, the trial court relied in part upon the Public Records Act in creating the privileges during the proceedings below. *See* Trans. (Jan. 13, 2006) at 1, 7. This reliance was severely misplaced.

While the trial court did not state which portions of the Public Records Act it relied upon in making its decision, Respondents presume that it looked to RCW 42.56.280. That section provides:

Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this chapter, except that a specific record is not exempt when publicly cited by an agency in connection with any agency action.

RCW 42.56.280. There are several reasons why this section provides no support for the judicial creation of the claimed privileges against discovery.

First and most basically, exceptions to the Public Records Act are not evidentiary privileges. As was amply demonstrated *supra*, at 58-59, the Legislature knows how to create discovery privileges and the Public Records Act is not how it is accomplished. For example, although the general public could not obtain personnel records via the Public Records Act, private litigants would certainly be entitled to such information if relevant to their pending cause of action. *Cf. Roberson v. Perez*, 123 Wn. App. 320, 96 P.3d

420 (2004) (sanctioning municipality for withholding personnel records of employee in a response to discovery), review denied, 96 P.3d 420 (2004).

Second, the scope of documents available via discovery under the Civil Rules is not limited to documents that would otherwise be available under a Public Records Act request. In *O'Connor*, 143 Wn.2d 895, this Court held that a litigant could proceed with discovery under either the Civil Rules or the Public Records Act. Although the litigant could not use the Public Records Act as a loophole to obtain documents that would not otherwise be available via the pretrial discovery, the converse is not true.

Indeed, Washington courts have always distinguished between statutes that prevent the general public from inspecting documents and the pretrial discovery process. In *Mebust v. Mayco Manufacturing Co.*, 8 Wn. App. 359, 506 P.2d 326 (1973), the Court was asked to determine whether RCW 51.28.070 created an evidentiary privilege that made industrial insurance claims files non-discoverable. The statute expressly stated that “[i]nformation contained in the claim files and records of injured workmen...[s]hall be deemed confidential and shall not be open for public inspection.” In holding that such files were subject to discovery, the *Mebust* Court reasoned that this language does not have the same import as the term “privilege.” *Id.* at 360. The “effective administration of justice requires strict circumscription of the limits of testimonial privilege.” *Id.* at 361.

Similar to the statute in *Mebust*, the statute here exempts documents “from public inspection and copying.” It does not create a “privilege” that insulates such documents against discovery. In fact, RCW 42.56.280 does not even contain the stronger “confidential” language employed by the statute in *Mebust*, which was still insufficient to create an evidentiary privilege.

Even if this case had been brought within the context of a public records request, rather than in the discovery process of litigation, the information sought by Respondents would still be subject to disclosure. “The purpose of the [deliberative process] exemption [from disclosure under the Public Records Act] severely limits its scope.” *See Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978). Because the exemption is intended to safeguard the free exchange of ideas, recommendations, and opinions **prior to decision**, the opinions or recommendations actually implemented as policy **lose their protection when adopted by the agency.**²⁰ Here, the proposed legislation which necessitated the communications that are the subject of Respondents’ discovery requests have already been considered and adopted by the Legislature. Accordingly, all of the documents withheld

²⁰ *Id.* (citing former RCW 42.17.310(1)(i), now recodified as amended at RCW 42.56.280); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed. 29 (1975); *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969); *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967 (7th Cir. 1977); *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971)). *See also Brouillet v. Cowles Pub’g Co.*, 114 Wn.2d 788, 799-800, 791 P.2d 526 (1990).

pursuant to this privilege and the so-called “deliberative process” are no longer protected from disclosure.

Additionally, only those portions of documents actually reflecting policy recommendations and opinions may be withheld under the exemption. Factual data, even when contained within otherwise exempt memoranda, must therefore be produced because the rationale for the exemption – protection of the decision-making process – is wholly inapplicable to factual material. *See Hearst*, 90 Wn.2d at 133. Many of the documents sought by Respondents do not expose the deliberative process, but only facts, assumptions, or perceived facts upon which such decisions were based.

Finally, to the extent that the State attempts to assert an executive privilege that is non-statutory, it does not appear that Washington law supports such a privilege. During the CR 26(i) discovery conference in this case, the State’s counsel attempted to clarify what he intended by asserting the executive privilege:

I want to be sure to clarify that the executive privilege is more than the cited statute. As the responsive pleading and the privilege log state, it is also based on the executive privilege, also known as the deliberative process privilege.

CP 1650. All references to the “deliberative process” in relevant Washington jurisprudence appear to find their genesis in the exemption contained in RCW 42.56.280. Any other references to the “executive privilege” are in the

context of affording members of the executive branch a privilege to make defamatory statements and publications while in an official capacity.²¹

4. If This Court Does Create the Claimed Privileges, They Should be Strictly Limited

Those privileges that are recognized in this state are construed narrowly, so as to exclude as little relevant evidence as possible. *See State v. Burden*, 120 Wn.2d 371, 376, 841 P.2d 758 (1992); *see also Trammel*, 445 U.S. at 50 (Supreme Court construes privileges narrowly). Assuming this Court agrees with the trial court and creates legislative and executive privileges in this state, it should also ensure that these privileges are strictly and narrowly defined.

The trial court placed six “restrictions” on the application of the privileges it created:

1. Essential Legislative Function

[P]rotected communications must be an integral part of the legislative process. That is, they must be deliberative, containing opinions, recommendations or advice about policies or proposed legislation. This broadly includes all essential activities that are an integral part of the legislative function. However, it would not include political acts or administrative tasks of legislators. For example, in this case, it would not include the administrative task of some select legislators who are

²¹ *See, e.g., Twelker v. Shannon & Wilson, Inc.*, 88 Wn.2d 473, 564 P.2d 1131 (1977); *Liberty Bank of Seattle, Inc. v. Henderson*, 75 Wn. App. 546, 562-64, 878 P.2d 1259 (1994); *Haueter v. Cowles Pub. Co.*, 61 Wn. App. 572, 586-88, 811 P.2d 231 (1991); *Sidor v. Public Disclosure Commission*, 25 Wn. App. 127, 132-33, 607 P.2d 859, *review denied*, 93 Wn.2d 1020 (1980).

asked to sit on the Expenditure Limit Committee while they're functioning on that committee.

Transcript (Jan. 13, 2006) at 3.

2. Factual Material

The communications, to be privileged, cannot be purely factual in nature unless the manner of selecting or presenting those facts will reveal the deliberative process, or unless the facts are inextricably intertwined with the policy making or legislative process.

Id. at 4.

3. Internal Communications

The privileged materials must be internal communications and papers stating opinions and recommendations of state employees, or information directly solicited by legislators for legislative purposes. That would not include unsolicited citizen letters or lobbyist's communications to legislators or their staff. It would not include mandated governmental reports to the legislature such as the reports required of the Expenditure Limit Committee to the legislature under RCW 43.135.025 subparagraph 5.

Id. at 4.

4. Legislative Aides or Alter Egos

The privilege applies to legislative aides and employees who are the alter ego of a legislator or legislative body or committee, and are acting in a supporting role for legislative deliberations. This would not include the Expenditure Limit Committee.

Id. at 4-5.

5. Any Aspect of Litigation

The privilege applies to all types of litigation, including declaratory judgment actions. The privilege exists to protect the integrity of the legislative process, not just to protect legislators personally. Disclosure of privileged legislative communications is just as intrusive in a declaratory judgment action as it would be in any other type of civil or criminal action.

Id. at 5.

6. Timeframe

The privilege applies before and after the enactment of legislation which is the subject matter of the communication in question. This is consistent with maintaining the fundamental integrity of the legislative process.

Id. at 6.

Some of these restrictions are well considered, or are sensible adjuncts to the recognition of any privilege, and should be affirmed by this Court in the event it creates the claimed privileges. Others, however, broaden the privilege in a manner inconsistent with this state's constitution and this Court's jurisprudence.

For example, restrictions three (in part) and four are flawed insofar as they broadly protect the communications of legislative or executive aides or employees. The Speech and Debate Clause does not speak of aides, it speaks of "member[s] of the legislature." In the same vein, the executive branch is composed of a small group of elected officials, *see* WASH. CONST. art. III, § 1

(defining the executive branch); the Constitution says nothing about their aides. To the extent that an aide is communicating with an elected official covered by either privilege, invocation of the privilege seems appropriate. However, it is inconsistent with the rule that privileges are to be construed narrowly to allow invocation of the privilege when the aide communicates with someone other than a covered elected official – any confidentiality that the privilege purports to protect is inherently destroyed in such a situation.

In addition, if this Court creates the claimed privileges, they should be qualified, rather than absolute. Even at the federal level, the executive privilege is qualified, subject to “the fundamental demands of due process” *Nixon*, 418 U.S. at 713. Moreover, whereas the language of the federal Speech and Debate Clause supports an absolute legislative privilege, the narrow language of the Washington Speech and Debate Clause does not. Accordingly, there is little, if anything, to justify creation of absolute executive or legislative privileges in this state; upon a sufficient showing of importance and necessity, such privileges should give way to the legitimate demands of the judicial process. *See* Edward J. Imwinkelried, 2 *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 7.6.4 (2002) (explaining relevant case law).

Finally, the any assertion of legislative or executive privilege in this state should be subject to rigorous *in camera* review. This Court has

consistently endorsed the utility of such review, *see, e.g., Prison Legal News, Inc. v. Department of Corrections*, 154 Wn.2d 628, 115 P.3d 316 (2005), and *Limstrom v. Ladenburg*, 136 Wn.2d 595, 615, 963 P.2d 869 (1998), describing it as “a relatively costless and eminently worthwhile method to insure that the balance between [one party’s] claims of irrelevance and privilege and [the other’s] asserted need for the documents is correctly struck.” *Snedigar v. Hoddersen*, 114 Wn.2d 153, 167, 786 P.2d 781 (1990).

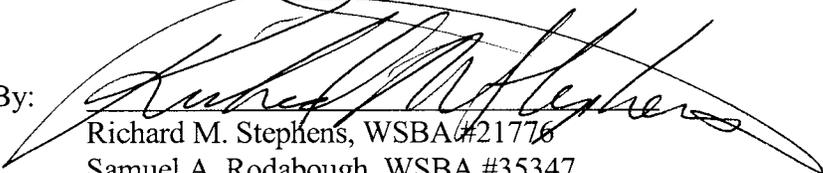
CONCLUSION

Respondents urge the Court to reverse the trial court’s ruling on the privileges, reverse the trial court’s holding that PART XI of ESSB 2314 was effective without a vote and affirm the decision that Parts I and II of ESSB 2314 are ineffective until approved by the voters.

RESPECTFULLY submitted this 28th day of September, 2006.

GROEN STEPHENS & KLINGE LLP

By:



Richard M. Stephens, WSBA #21776
Samuel A. Rodabough, WSBA #35347
Brian D. Amsbary, WSBA #36566
Attorneys for Respondents Cross-Appellants

DECLARATION OF SERVICE

I, Linda Hall, declare:

I am not a party in this action.

I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP in Bellevue, Washington.

On September 28, 2006, a true and correct copy of Respondents' Opening Brief on Cross-Appeal and Response to State's Opening Brief was transmitted via e-mail and placed in an envelope, which envelope with postage thereon fully prepaid was then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington, addressed to the following persons:

Attorneys for Appellants

Maureen A. Hart
Jeffrey T. Even
Attorney General of the State of Washington.
1125 Washington St. S.E.
P. O. Box 40100
Olympia, WA 98504-0100

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 28th day of September, 2006 at Bellevue, Washington.


Linda Hall