

No. 81287-0

SUPREME COURT OF THE STATE OF WASHINGTON

LISA BROWN, Washington State Senator and Majority Leader of the
Washington State Senate,

Petitioner,
v.

BRAD OWEN, Lieutenant Governor of the State of Washington,

Respondent.

**AMICUS CURIAE BRIEF OF THE
AMERICAN LEGISLATIVE EXCHANGE COUNCIL**

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Micah L. Balasbas, WSBA No. 40235
6823 41st Ave SE
Lacey, WA 98503
(360) 870-2505 Phone

Seth L. Cooper, WSBA No. 34597
1101 Vermont Ave NW, 11th Floor
Washington, DC 20005
(202) 742-8524 Phone
(202) 466 3801 Fax

Attorneys for Amicus Curiae

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I. IDENTITY OF *AMICUS CURIAE*

The American Legislative Exchange Council (ALEC) is the nation's largest non-partisan individual membership association of state legislators. ALEC has more than 2,000 members in state legislatures across the United States. Its mission is to advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty, through a non-partisan, public-private partnership between America's state legislators and concerned members of the private sector, the federal government, and the general public. ALEC is also generally concerned with matters of legislative accountability and the separation of powers. Furthermore, ALEC's Tax & Fiscal Policy Task Force is particularly concerned with the importance of transparent, responsible government taxing and spending policies.

II. INTEREST OF *AMICUS CURIAE*

ALEC believes that the separation of powers is foundational to constitutional, republican government. Separation of powers principles are safeguards of limited government and help protect individual liberty from unaccountable, concentrated power.

ALEC supports supermajority requirements on the premise that tax increases fuel excessive government spending. Therefore, to more effectively control the budgetary process, the ability to raise taxes or enact new taxes should be made as politically difficult as possible, require broad consensus, and be held to a high standard of accountability.

III. STATEMENT OF THE CASE

As *amicus curiae*, ALEC adopts the Statement of the Case of Brad Owen, Lieutenant Governor of the State of Washington, Respondent.

IV. ARGUMENT

A. The Court Does Not Have Original Jurisdiction Because Petitioner Does Not State a Claim in Mandamus

The writ of mandamus—meaning literally “we command,” is an order issued by a judicial body upon a lower court or government official to perform ministerial duties. *Black's Law Dictionary* 973 (7th ed. 1999). Mandamus relief was described by Sir William Blackstone as:

a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the

king's dominions, requiring *them to do some particular thing therein specified which appertains to their office and duty*, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice.

Marbury v. Madison, 5 U.S. 137, 147, 2 L.Ed 60 (1803)

(*Quoting Blackstone's Commentaries*, Vol. 3, at 100)(emphasis added).

The writ could not be issued to “the king himself, to Parliament nor the judiciary, except such inferior courts as the higher courts had the power to review.” *People v. Best*, 187 N.Y. 1, 4, 79 N.E. 890, 116 Am.St.Rep. (1907). Thus at common law, the writ did not run to the legislative branch of the government. See *Wells v. Purcell*, 67 Ark. 456, 462, 592 S.W.2d 100 (1979) (cites omitted). “In other words, the mandamus does not issue against the government itself.” *People*, 187 N.Y. at 5.

1. Issuance of a Writ of Mandamus Requires Existence of an Official Duty that an Officer is Required to Perform

Under article IV, section 4 of the Washington Constitution, the Supreme Court of Washington has original jurisdiction over “mandamus to all state officials.” The Court’s original jurisdiction

to issue a writ of mandamus is both nonexclusive and discretionary.

Id. (citing *Department of Ecology v. State Fin. Comm.*, 116 Wn.2d 246, 804 P.2d 1241 (1991)). “[M]andamus is an extraordinary writ.”

Walker v. Munro, 124 Wn.2d 402, 407 P.2d 920 (1994). The

purpose of the writ of mandamus

is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or in another. It may, as alleged in the present case, have arisen from the acceptance of an office which has imposed the duty upon its incumbent.

United States ex rel. Lewis v. Boutwell, 84 U.S. 604, 607, 21 L. Ed. 721, 722 (1873).

This Court has held that mandamus is an appropriate remedy “[w]here there is a specific, existing duty which a state officer has violated and continues to violate.” *Walker*, 124 Wn.2d at 408. However, “mandamus may not be used to compel the performance of acts or duties which involve discretion on the part of public official.” *Id.* at 410. Furthermore, the act of mandamus “cannot lie to control discretion” of the official. *In re Personal Restraint of Richard J. Dyer*, 143 Wn.2d 384, 20 P.3d 907 (2001).

Acts performed under the legal authority vested in the office of the public official according the established procedures or instructions are ministerial acts. *See Black's Law Dictionary* 1101 (7th ed. 1999) (defining “ministerial” as “[o]f or relating to an act that involves obedience to instructions or laws instead of discretion, judgment or skill”); *State ex rel. Grinsfelder v. Spokane St. Ry. Co.*, 19 Wash. 518, 525, 53 P. 719 (1898)(stating that mandamus may be issued “to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station....”) (*quoting* Bal. Code, § 5755, Laws 1895, p. 117, § 16). Ministerial acts involve official duties not characterized by individual judgment as discretionary acts are. *See State ex rel. Clark v. Seattle*, 137 Wash. 455, 461, 242 P.966(1926). Discretionary acts require the individual judgment of the official and are not dictated by the terms of official duties. *See Black's Law Dictionary* 479 (7th ed. 1999) (defining “discretion” as “[a] public official’s power or right to act in certain circumstances according to personal judgment and conscience”; defining “discretionary act” as “[a] deed involving an exercise of personal judgment and conscience”).

This court summarized the distinction between ministerial duties and discretionary decision making in *Clark*:

The distinction between merely ministerial and judicial and other official acts is that where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial.

Clark, 137 Wash. at 461 (quoting 18 R.C.L. (Mandamus), p. 116.)

2. Petitioner’s Request Should be Dismissed because a Writ Cannot Properly Be Issued to Compel Performance of a Discretionary Duty

“Though mandamus will lie to direct an officer to exercise the discretion which it is his duty to exercise, mandamus will not lie to compel performance of a discretionary act.” *Peterson v.*

Dept. of Ecology, 92 Wn.2d 306, 314, 596 P.2d 285 (1979). See also *Lillions v. Gibbs*, 47 Wn.2d 629, 633, 289 P.2d 203 (1955).

The court may consider whether the public official has failed to exercise his discretionary power, “acting in an arbitrary and capricious manner.... [However], [o]nce officials have exercised their discretion, mandamus does not lie to force them to act in a

particular manner. *Aripa v. Dept. of Social and Health Services*, 91 Wn.2d 135, 140-141, 588 P.2d 185 (1978).

A failure on the part of the Lieutenant Governor, acting as President of the Senate to exercise his discretion would have granted this court the ability to issue a writ requiring the President to act, though the Court could not require the President to act in a particular manner. The President of the Senate acted when he ruled upon the point of order raised in consideration of Senate Bill 6931. This act was based upon his personal judgment and conscience; his discretion. This court cannot issue a writ dictating that the President of the Senate exercise his discretion in a particular way.

The President of the Senate's decision on the point of order was *not* a ministerial act. The decision was not dictated by the Constitution, by statute nor by the rules governing the Senate. The President of the Senate was required under the rules of the Senate, Engrossed Senate Resolution (ESR) 8601, Duties of the President, Rule 1.4, to rule on the point of order based on upon his judgment and discretion. *See* Agreed Statement of Facts (ASF) 35.

Sen. Brown's request that this Court issue a writ of mandamus should be dismissed. The requirements for the Court to issue a writ are not met because the decision made by the President of the Senate was discretionary.

B. Requested Writ of Mandamus Would Violate the Separation of Powers by Infringing on the Legislature's Authority

"One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments-the legislative, the executive, and the judicial-and that each is separate from the other." *Carrick v. Locke*, 125 Wn.2d 129, 134, 882 P.2d 173 (1994). The separation of powers is rooted in the very structure of the federal Constitution. The Enabling Act under which the Washington Constitution and several other state constitutions were framed and ratified required that "[t]he constitutions shall be republican in form" and "not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." Enabling Act, ch. 180, sec. 4, 25 Stat. 676 (1889).¹

¹ "The constitutions of the several states, inheritors of the federal

Echoing the U.S. Constitution, the Washington Constitution's structure embodies separation of powers principles.² The state constitution divides the "political power" that is "inherent in the people," article I, section 1, into "legislative authority," article II, section 1, "executive power," article III, section 2, and "judicial power," article IV, section 1. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002).

This Court has frequently reaffirmed the co-equal status of the three branches of government under the Washington Constitution. *See, e.g., Washington State Coalition for the Homeless v. Department of Social and Health Services*, 133 Wash.2d 894, 945, 949 P.2d 1291 (1997) ("[i]n the past, this court has been sensitive to the prerogatives and responsibilities of the coordinate branches of our state government"); *State v. Clausen*, 108 Wash. 133, 137, 183 P. 115 (1919).

constitutional legacy, also embody the principle." *In re Juvenile Director*, 87 Wn.2d 232, 240, 552 P.2d 163 (1976) (citing *Zylstra v. Piva*, 85 Wn.2d 743, 754, 539 P.2d 823 (1975) (Utter, J., concurring)).

² "[T]he separation of powers doctrine embedded in the federal constitution applies only to the federal government, and does not control the functioning of our state government. We continue to rely on federal principles regarding the separation of powers doctrine in order to interpret our state

**1. The Separation of Powers Principles
Protect the Fundamental Functions of Each
Branch of Government**

The inherent equality of the three branches of government under the separation of powers precludes invasion of any one branch's basic powers by the other branches. "The purpose of the doctrine is to prevent one branch of government from aggrandizing itself or encroaching upon the 'fundamental functions' of another." *Moreno*, 147 Wn.2d at 505 (citing *Carrick*, 125 Wn.2d at 135). In *State ex rel. Gunning v. Odell*, 58 Wn.2d 275, 278, 362 P.2d 254 (1961), this Court stated that "[t]he right of a legislative body to exercise its legislative powers will not be invaded by the judicial branch of the government. The separation of powers doctrine is so fundamental that it needs no discussion."

"Unlike many other constitutional violations, which directly damage rights retained by the people, the damage caused by a separation of powers violation accrues directly to the branch invaded. The maintenance of a separation of powers protects institutional, rather than individual, interests." *Carick*, 125 Wn.2d at

constitution's stand on this issue. *Carrick*, 125 Wn.2d at 135 n1. See also *Seattle*

136 (*citing Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851, 106 S.Ct. 3245 (1986)). However, damage caused by breaches of separation of powers principles has profound implications for the preservation of liberty. As Washington's Declaration of Rights provides, "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." WASH. CONST. Art. I, § 32.³

This Court's respect for fundamental separation of powers principles is manifest in a variety of decisions exhibiting judicial restraint from involvement in legislative decision making. *See, e.g., Hillis v. Dept. of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997) (determining that separation of powers precluded court intrusion upon legislative budget-making prerogative); *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), (declining to prescribe in detail what constituted basic education under the state constitution but leaving the remedy to the Legislature). Rightful legislative

Sch. Dist. 1 v. State, 90 Wn.2d 476, 504, 585 P.2d 71 (1978).

³ "This provision has primarily been viewed as an interpretative mechanism in connection with individual rights, and has also been used to define principles of

power includes discretionary decision making authority concerning its internal lawmaking processes.

2. The Ability of the Legislative Authority to Make Discretionary Rulings Under Internal Rules is a Fundamental Function of the Lawmaking Process

The ability to prescribe its own rules is an essential component of the powers of the Legislative authority provided under article II. “A legislative assembly, when established, becomes vested with all the powers and privileges which are necessary and incidental to a free and unobstructed exercise of its appropriate functions.” *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 302, 174 P.3d 1142 (2007); *State ex rel. Robinson v. Fluent*, 30 Wn.2d 194, 203-04, 191 P.2d 241 (1948) (quoting *Ex parte McCarthy*, 29 Cal. 395 (1866)) (internal quote omitted).

“Insofar as legislative power is not limited by the constitution it is unrestrained.” *Cedar County Comm. v. Munro*, 134 Wn.2d 377, 386, 950 P.2d 446 (1998) (quoting *Moses Lake Sch. Dist. No. 161 v. Big Bend Cmty. Coll.*, 81 Wn.2d 551, 555, 503 P.2d

state and local government.” *Brower v. State*, 137 Wn.2d 44, 69, 969 P.2d 42 (1998)(citing *Seeley v. State*, 132 Wash.2d 776, 809-12, 940 P.2d 604 (1997)).

86 (1972)): The Senate's adoption of its own internal rules of operation and its discretionary decision making under those rules are part of the "powers and privileges" necessary for it to exercise its legislative functions.

The procedural rules adopted by the Washington Senate pursuant to the Washington Constitution, article II, section 9, command respect under the separation of powers. Article II, section 1 expressly provides that "[t]he legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called by the legislature of the state of Washington." Under article III, section 16, "[t]he lieutenant governor shall be presiding officer of the state senate." *See also* RCW 43.15.010(1) ("The lieutenant governor serves as president of the senate"). Article II, section 9 states that "each house may determine the rules of its own proceeding."

The procedural rules that the Senate adopted for itself under article II, section 9 reads:

The president may speak to points of order in preference to members, arising from the president's seat for that purpose, and shall decide all questions of order subject to an appeal to the senate by any

member, on which appeal no member shall speak more than once without leave of the senate.

ASF 35 (ESR 8601, Duties of the President, Rule 1.4). Rulings made by the Lieutenant Governor when serving in the capacity of President of the Senate may be appealed by any member of the Senate to the full Senate for a vote. ASF 39 (ESR 8601, Point of Order-Decision Appealable, Rule 32). A simple majority vote of the Senate overrides points of order rulings by the President of the Senate. ASF 38-9 (ESR 8601, Voting, Rule 22).

This case is sparked by a ruling of the Senate President that, by the rules of the Senate, "a super-majority vote of this body-that is, 33 votes-is needed for final passage." ASF 21. No senator ever appealed the President's ruling "as the judgment of the senate." See ASF 39 (ESR 8601, Point of Order-Decision Appealable, Rule 32). The Senate adopted for itself under which the President of the Senate made this ruling and the Senate may freely alter it at any time, by a simple majority, the rules by which it is governed. Under the Senate's rules and its judgment on the point of order, the bill was defeated on final passage. Only 25 Senators voted in favor of the

bill, with 21 Senators opposed, one Senator absent and two Senators excused. ASF 21.

Because the ruling by the President of the Senate in this case was a discretionary ruling based on internal procedures of operation, it falls within the ambit of the legislative authority's fundamental functions and is not properly subject to a writ of mandamus.

3. Separation of Powers Principles Prohibit the Issuance of Writs of Mandamus Against Legislative Officers Making Discretionary Decisions Under Internal Rules of Procedure

Case precedents respect the separation of powers in the context of actions requesting writs of mandamus to compel officers of the legislative branch to perform certain activities residing within those offices' respective internal, procedural rules. *In State ex rel. Daschbach v. Myers*, 38 Wn.2d 330, 332, 229 P.2d 506 (1951), this Court held that “[t]he legislature and this court are co-ordinate branches of our state government, and we cannot interfere with the legislature in its legislative process, but are limited to a consideration of the constitutionality and interpretation of its acts.” There this Court rejected a request for a writ of mandamus to be issued against the President of the Senate and others in the legislature “directing

them to affix the true date of passage upon a bill, and true dates upon the proceedings of the legislature relative thereto.” *Id.* at 331.

More recently, this Court stated in *Walker v. Munro* that “When directing a writ to the Legislature or to its officers, a coordinate, equal branch of government, *the judiciary should be especially careful not to infringe on the historical and constitutional rights of that branch.*” 124 Wn.2d at 407(emphasis added). This Court described as “certainly not an appropriate subject for mandamus,” the duties of the Speaker of the House of Representatives and the President of the Senate to preside over the Legislature. *Id.* at 410. In *Walker*, this Court refused to grant a writ of mandamus, concluding that “[t]he signing of a bill is not a ministerial task, as it involves a decision regarding the number of votes required for a particular action and whether those votes have been properly cast.” *Id.*

Here, the President of the Senate’s discretionary ruling related to the proper number of votes under Senate operating rules adopted and maintained by a simply majority vote of the Senate. ASF 35 (ESR 8601, Duties of the President, Rule 1.4; ASF 38-9 (ESR 8601,

Voting, Rule 22). The members of the Senate all declined to exercise any challenge to the rules, thereby exercising their discretionary power to acquiesce to the President of the Senate's decision as the judgment of the Senate. *See* ASF 39 (ESR 8601, Point of Order-Decision Appealable, Rule 32). Because the President of the Senate's ruling at issue in this case involves matters of discretion similar to those at issue in *Daschbach* (affixing the date of passage on a bill and affixing dates upon related legislative proceedings) and *Walker* (ascertaining the number of votes required for a specific action and the proper casting of those votes), issuance of the requested writ of mandamus would violate the separation of powers.

4. Judicial Restraint from Involvement in the Legislative Authority's Internal Operations Co-Exists with the Judicial Duty of Interpreting and Weighing the Constitutionality of Laws Passed by the Legislative Authority

This Court's respect for the Legislature's inherent authority to prescribe its own parliamentary procedures and make discretionary decisions under them is a critical component of the relationship between the two branches under the Washington Constitution.

Judicial restraint from involvement in discretionary decision-making by the members of the Legislature coexists with judicial vigilance in interpreting and assessing the constitutionality of laws passed by the Legislature. For instance, in *State v. Clausen*, this Court refused to second-guess the Legislature's own fact-finding and decision-making on the basis of separation of powers principles while simultaneously reaffirming the power of the judiciary to set aside laws passed by the Legislature when they are found to be contrary to constitutional standards:

Exactly what is sought by respondent is to have the court, as triers of facts, impeach the judgment of another and co-ordinate branch of the government, as triers of facts. In declining to do so we rely not alone upon a consideration of the well-recognized delicacy of judicial interference with legislative powers, but also upon the cold and manifest reason that by the clearly defined and respected form of co-ordinate departments of our government we have no power to do so. Courts may declare legislative enactments invalid in some cases, but not because judicial power is superior in degree or dignity to the legislative.

108 Wash. at, 137, 183 P. 115 (1919). This Court's decision in *Smith v. City of Centralia*, is also instructive of the constitutional necessities of both judicial restraint from interference with Legislative procedural decisions and judicial vigilance in assessing

the constitutionality of the laws the Legislature passes:

It undoubtedly is a general rule that the courts will not interfere with an action of a body exercising legislative functions to correct mere errors or mistakes in its proceedings, or to prevent the passage of a law or ordinance duly pending before a legislative body, because it may conceive that the law or ordinance will be ineffective if passed, but clearly the courts have power to inquire into the validity of a law or ordinance after it has passed the legislative body and an attempt to enforce it is made or threatened to the injury of the personal or property rights of the citizen. The courts have exercised this power since the foundation of the government, and it is not necessary now to enter into a discussion of the principles that are thought to justify it.

55 Wash. 573, 576, 104 P. 797 (1909). *See also Futurewise v. Reed*, 161 Wn.2d 407, 411, 166 P.3d 708 (2007) (“That the law enacted by an initiative might be unconstitutional does not mean that it is beyond the power of the State to enact”); *State ex rel. Day v. Martin*, 64 Wn.2d 511, 392 P.2d 435 (1964) (recognizing a distinction between cases involving “the procedural functions of the legislature,” with “the interpretation of an appropriation act” that is a question properly decided by the courts).

In this case, the President of the Senate expressly made a discretionary ruling under the Senate’s procedural rules. ASF 21.

The President of the Senate equally expressed that his discretionary judgment was *not* a judicial ruling:

Under our Constitutional framework of separation of powers, the authority for determining a legal conflict between the Constitution and a statute is clearly vested with the courts. It is for this reason that the President has a long-standing tradition of refraining from making legal determinations, and he does so, again, in this case.

Petition at Ex. D. Accordingly, this Court can and should respect the separation of powers by refusing to judicially second-guess a legislative officer's discretionary ruling falling within the legislative authority's fundamental function of lawmaking while nonetheless reaffirming the judiciary's power to interpret and analyze the constitutionality of laws passed by the legislative authority.

V. CONCLUSION

For the foregoing reasons, *amicus curiae* American Legislative Exchange Council urges the Court to dismiss the petition.

RESPECTFULLY SUBMITTED this 8th day of August, 2008.

By: _____
Micah L. Balasbas, WSBA No. 40235
Seth L. Cooper, WSBA No. 34597

CERTIFICATE OF SERVICE

I, Micah L. Balasbas declare and state as follows:

1. I am over the age of eighteen and competent to testify to the matters herein.
2. I am an attorney at law. My business and mailing address is: 6823 41st Ave SE, Lacey, WA 98503
3. On August 8, 2008, I caused to be served a copy of the **AMICUS CURIAE BRIEF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL** on the following, per the method indicated:

Hugh Spitzer
Thomas F. Ahearne
Ramsey Ramerman
Foster Pepper PLLC
1111 Third Avenue, suite 3400
Seattle, WA 98101-3299
Attorneys for Petitioner

Delivery Method: *Via U.S. Mail*

Robert M. McKenna, Attorney General
Maureen Hart, Solicitor General
Jeffrey T. Even, Deputy Solicitor General
James K. Pharris, Deputy Solicitor General
PO Box 40100
Olympia, WA 98504-0100

Delivery Method: *Via U.S. Mail*

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Lacey, Washington, this 8th day of August, 2008.

Micah L. Balasbas

The President of the Senate equally expressed that his discretionary judgment was *not* a judicial ruling:

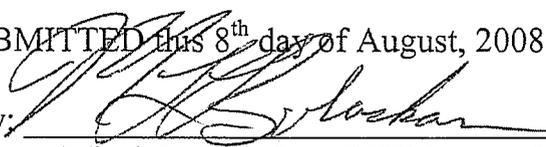
Under our Constitutional framework of separation of powers, the authority for determining a legal conflict between the Constitution and a statute is clearly vested with the courts. It is for this reason that the President has a long-standing tradition of refraining from making legal determinations, and he does so, again, in this case.

Petition at Ex. D. Accordingly, this Court can and should respect the separation of powers by refusing to judicially second-guess a legislative officer's discretionary ruling falling within the legislative authority's fundamental function of lawmaking while nonetheless reaffirming the judiciary's power to interpret and analyze the constitutionality of laws passed by the legislative authority.

V. CONCLUSION

For the foregoing reasons, *amicus curiae* American Legislative Exchange Council urges the Court to dismiss the petition.

RESPECTFULLY SUBMITTED this 8th day of August, 2008.

By: 

Micah L. Balasbas, WSBA No. 40235
Seth L. Cooper, WSBA No. 34597

CERTIFICATE OF SERVICE

I, Micah L. Balasbas declare and state as follows:

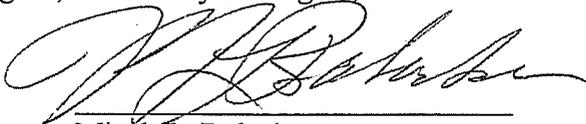
1. I am over the age of eighteen and competent to testify to the matters herein.
2. I am an attorney at law. My business and mailing address is: 6823 41st Ave SE, Lacey, WA 98503
3. On August 8, 2008, I caused to be served a copy of the **AMICUS CURIAE BRIEF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL** on the following, per the method indicated:

Hugh Spitzer
Thomas F. Ahearne
Ramsey Ramerman
Foster Pepper PLLC
1111 Third Avenue, suite 3400
Seattle, WA 98101-3299
Attorneys for Petitioner
Delivery Method: Via U.S. Mail

Robert M. McKenna, Attorney General
Maureen Hart, Solicitor General
Jeffrey T. Even, Deputy Solicitor General
James K. Pharris, Deputy Solicitor General
PO Box 40100
Olympia, WA 98504-0100
Delivery Method: Via U.S. Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Lacey, Washington, this 8th day of August, 2008.



Micah L. Balasbas