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No. 84483-6

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CITY OF SEATTLE, a municipal corporation,

*Petitioner,*

v.

ROBERT M. MCKENNA, Attorney General, State of Washington,

*Respondent.*

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**PETITIONER'S OPENING BRIEF (*Corrected*)**

---

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**TABLE OF CONTENTS**

Page

I. INTRODUCTION ..... 1

II. ISSUES PRESENTED..... 1

III. STATEMENT OF THE CASE..... 1

    A. Fact History..... 1

    B. Procedural Posture of the Petition..... 4

IV. ARGUMENT..... 4

    A. The Court should exercise its original jurisdiction over this matter..... 4

    B. The Washington Attorney General has only the authority granted by the Legislature..... 6

    C. No Washington statute grants the Attorney General the authority at issue in this case. .... 11

    D. Case law does not support expansive authority. .... 17

    E. Being “independently elected” does not confer extra-statutory powers on the Attorney General..... 26

    F. When the Attorney General lacks express statutory authority, he cannot act unilaterally. .... 27

    G. Mandamus is appropriate to compel a public official to undo an unauthorized act. .... 29

H. The writ should issue to resolve a matter of significant public interest.....31

V. CONCLUSION..... 34

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b>CASES</b>	
<i>Berg v. Gorton</i> , 88 Wn.2d 756, 567 P.2d 187 (1977) .....	18
<i>Boe v. Gorton</i> , 88 Wn.2d 773, 567 P.2d 197 (1977) .....	18
<i>Cathcart-Maltby-Clearview Community Council v. Snohomish Cy.</i> , 96 Wn.2d 201, 634 P.2d 853 (1981) .....	33, 34
<i>City Of Seattle v. State</i> , 103 Wn.2d 66, 694 P.2d 641 (1985) .....	32
<i>City Of Tacoma v. O'Brien</i> , 85 Wn.2d 266, 534 P.2d 114 (1975) .....	6, 32
<i>Clark v. Barnard</i> , 108 U.S. 436, 2 S. Ct. 878, 27 L.Ed. 780 (1883) .....	24
<i>College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.</i> , 527 U.S. 666, 119 S. Ct. 2219, 144 L.Ed.2d 605 (1999) .....	24
<i>Dep't. Of Ecology v. Campbell &amp; Gwinn</i> , 146 Wn.2d 1, 43 P.3d 4 (2002) .....	14
<i>Farris v. Munro</i> , 99 Wn.2d At 329-30 .....	33, 34
<i>Hancock v. Terry Elkhorn Mining Co.</i> , 503 S.W.2d 710 (Ky. 1973) .....	11
<i>Heavey v. Murphy</i> , 138 Wn.2d 800, 982 P.2d 611 (1999) .....	6
<i>Humphrey v. McLaren</i> , 402 N.W. 2d 535 (Minn. 1987) .....	11

<i>In Re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation,</i> 747 F.2d 1303 (9 <sup>th</sup> Cir. 1984) .....	25, 26
<i>In Re Yand's Estate,</i> 23 Wn.2d 831, 162 P.2d 434 (1945) .....	5
<i>Landmark Development v. City Of Roy,</i> 138 Wn.2d 561, 980 P.2d 1234 (1999) .....	13
<i>Nisqually Delta Assoc. v. City Of Dupont,</i> 95 Wn.2d 563, 627 P.2d 956, (1981) .....	15
<i>Ordell v. Gaddis,</i> 99 Wn.2d 409, 662 P.2d 49 (1983) .....	33
<i>Osborn v. Grant County,</i> 130 Wn.2d 615, 926 P.2d 911 (1996) .....	26, 27
<i>Regents Of The Univ. Of Cal. v. Bakke,</i> 98 S. Ct. 2733 (1977) .....	20
<i>Reiter v. Walgren,</i> 28 Wn.2d 872, 184 P.2d 571 (1947) .....	33
<i>State Ex Rel. Boyles v. Whatcom County Superior Court,</i> 103 Wn.2d 610, 694 P.2d 27 (1985) .....	31,32
<i>State Ex Rel. Burlington Northern v. Wash. State Util. &amp; Transp. Comm'n (WUTC),</i> 93 Wn.2d 398, 609 P.2d 1375 (1980) .....	29, 30
<i>State Ex Rel. Distilled Spirits Institute v. Kinnear,</i> 80 Wn.2d 175, 492 P.2d 1012 (1972) .....	34
<i>State Ex. Rel. Hartley v. Clausen,</i> 146 Wash. 588, 264 P. 403 (1928) .....	5, 27, 28
<i>State Ex Rel. Mason v. Board Of Comm'rs Of King County,</i> 146 Wash. 449, 263 P. 735 (1928) .....	28, 29, 30
<i>State Ex Rel. Reynolds v. Hill,</i> 135 Wash. 442, 237 P. 1004 (1925) .....	19

<i>State Ex Rel. Strecker v. Listman</i> , 156 Wash. 562, 287 P. 663 (1930).....	29,30
<i>State Ex Rel. Winston v. Seattle Gas &amp; Electric Co.</i> , 28 Wash. 488, 68 P. 946 (1902).....	passim
<i>State v. Asotin County</i> , 79 Wash. 634, 140 P.2d 914 (1914).....	25
<i>State Of Florida, Et Al. v. United States. Dept. Of Health And Human Services, Et Al.</i> , Case No.: 3:10-Cv-91-RV/EMT (N.D.Fla. ).....	2, 4
<i>State v. Gore</i> , 101 Wn.2d 481, 681 P.2d 227 (1984).....	6
<i>State v. Herrmann</i> , 89 Wn.2d 349, 572 P.2d 713 (1977).....	14, 15
<i>State v. Taylor</i> , 58 Wn.2d 252, 362 P.2d 247 (1962).....	20, 21, 22, 23
<i>Taylor v. Redmond</i> , 89 Wn.2d 315, 571 P.2d 1388 (1977).....	15
<i>Walker v. Munro</i> , 124 Wn.2d 402, 879 P.2d 920 (1994).....	18, 19
<i>Washington Natural Gas Co. v. PUD No. 1 Of Snohomish County</i> , 77 Wn.2d 94, 459 P.2d 633 (1969).....	33
<i>Washington State Labor Council v. Reed</i> , 149 Wn.2d 48, 65 P.3d 1203 (2003).....	6
<i>Yelle v. Bishop</i> , 55 Wn.2d 286, 347 P.2d 1081 (1959).....	6, 10, 11, 27, 34
<i>Young Americans For Freedom v. Gorton</i> , 91 Wn.2d 204, 588 P.2d 195 (1978).....	19, 20, 23, 24

## STATUTES

Ark. Stat. §25.16.703 .....	13
Fla. Stat. §16.01(5).....	13
K.R.S. 15.020.....	11
Minn. Stat. §8.01.....	13
RCW 11.110.100-130 (1967) .....	22
RCW 18.130.195 .....	17
RCW 19.105.070 .....	17
RCW 19.86.080 .....	15
RCW 26.33.400 .....	17
RCW 36.16.030 .....	27
RCW 42.17.400 .....	15
RCW 42.52.490 .....	15
RCW 43.10.020(2).....	17
RCW 43.10.030 .....	11, 13, 16, 21
RCW 43.10.030(1).....	5, 13, 21, 23
RCW 43.10.030(2).....	16, 17
RCW 43.10.040 .....	13, 14, 15, 16
Sess. Law 1887-88, p. 8 (Ballinger's Ann. Codes & St. §§ 169, 4753).....	9
Territorial Laws, chapter VII, Section 6 .....	21

## CONSTITUTIONS

Const. art. III, §2 .....	27
Const. art. III, §5 .....	28
Const. art III, §21 .....	6
Const. art. IV, §4.....	4

## COURT RULES

RAP 16.2(d).....	4
------------------	---

## MISCELLANEOUS

17 McQuillan, Municipal Corporations §51:13 (3 <sup>rd</sup> ed. 2004), at 777 .....	29
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## **I. INTRODUCTION**

Respondent, Washington Attorney General Robert M. McKenna, exceeded his authority when he joined the State of Washington as a plaintiff in a federal lawsuit challenging the constitutionality of federal health reform legislation. Petitioner, the City of Seattle, seeks a writ of mandamus directing the Attorney General to undo his unauthorized act by withdrawing the State of Washington from the federal lawsuit.

## **II. ISSUES PRESENTED**

1. Does the Washington Attorney General have authority to join the State of Washington as a plaintiff in a federal lawsuit over the objection of the Governor and without any State agency or officer as a client?

2. Lacking such authority, should a writ of mandamus issue requiring Respondent to undo his unauthorized act by withdrawing the State of Washington as a plaintiff from the federal case?

## **III. STATEMENT OF THE CASE**

### **A. Fact History.**

Attorney General McKenna joined a complaint on behalf of the State of Washington in the United States District Court for the Northern

District of Florida,<sup>1</sup> challenging the federal Patient Protection and Affordable Care Act.<sup>2</sup> The caption reads in part, “State of Washington, by and through Robert M. McKenna, Attorney General of the State of Washington.” Plaintiff descriptions include, “The State of Washington, by and through Robert A. [sic] McKenna, Attorney General of Washington, is a sovereign state in the United States of America.”<sup>3</sup>

The Attorney General acted unilaterally. No state agency or officer requested joinder in the Florida case; to the contrary, the Governor, the State Insurance Commissioner, the Speaker of the House, and the Majority Leader of the Senate all objected to the Attorney General’s action. Agreed Statement of Facts, Attachment 5. Respondent did not seek the Governor’s concurrence before joining the complaint. Agreed Statement of Facts, p.2, ¶7.

The Governor sought to counter the Attorney General’s inaccurate allegations<sup>4</sup> in the Florida case with respect to the impact of healthcare

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<sup>1</sup> *State of Florida, et al. v. United States. Dept. of Health and Human Services, et al.*, Case No.: 3:10-cv-91-RV/EMT (N.D.Fla.) (the “Florida case”).

<sup>2</sup> Agreed Statement of Facts, Attachment 1.

<sup>3</sup> An Amended Complaint was filed later that contains the same caption and description of the party for the State of Washington. Agreed Stmt. of Facts, Attachment 8.

<sup>4</sup> Allegations in the original Complaint include, for example:

34. None of the Plaintiffs agreed to become a Medicaid partner of the federal government with an expectation that the terms of its participation would be altered significantly by the federal government so as to make it financially infeasible for that state either to remain in or to withdraw from the Medicaid program.

reform on Washington by: (1) requesting that Respondent proceed solely in his capacity as Attorney General, not on behalf of the State, *id.*, Attachment 5; and (2) seeking the federal court's permission to file an amicus brief in the Florida case. Respondent refused the Governor's request, instead proposing that the State of Washington be both plaintiff and defendant in the Florida case. *Id.*, Attachment 6. The federal district court denied the Governor's request to file as *amici*. *Id.*, Attachment 15.

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35. None of the Plaintiffs agreed to become a Medicaid partner of the federal government with an expectation that the federal government would increase significantly its control and reduce significantly that state's discretion with respect to the Medicaid program.

39. The Act greatly alters the federal-state relationship, to the detriment of the states, with respect to Medicaid programs specifically and healthcare coverage generally.

41. Those states left with no practical alternative but to participate in the Act will have to expand their Medicaid coverage to include all individuals under age 65 with incomes up to 133 percent of the federal poverty level. The states' coverage burdens will increase significantly after 2016, both in actual dollars and in proportion to the contributions of the federal government.

43. The Act will have an impact on all Plaintiffs and in a manner similar to its impact on Florida, as described herein by way of example.

51. The Act effectively requires that Florida immediately begin to devote funds and resources to implement the Act's sweeping reforms across multiple agencies of government.

55. Plaintiffs cannot afford the exorbitant and unfunded costs of participating under the Act, but have no choice other than to participate.

## **B. Procedural Posture of the Petition**

The City of Seattle petitioned this Court to exercise its original jurisdiction and issue the following writ of mandamus:

Respondent, Attorney General Robert M. McKenna, is hereby ordered to file the necessary pleadings in the United States District Court for the Northern district of Florida to withdraw the State of Washington from the case of *State of Florida, et al. v. United States Department of Health and Human Services, et al.*, Case No. 3:10-cv-91. Respondent shall comply with this order within ten court days of the issuance of this writ.

Attorney General McKenna did not ask for transfer of the Petition to Superior Court, arguing instead that the Petition should be dismissed. Recognizing that there are no factual disputes and that the important legal issue presented merited exercise of this Court's original jurisdiction, the commissioner ruled that the Petition should be retained and heard by the Court. RAP 16.2(d); Ruling on Original Action, pp.4-5. The Attorney General did not appeal the Commissioner's ruling.

## **IV. ARGUMENT**

### **A. The Court should exercise its original jurisdiction over this matter.**

The Court has original jurisdiction in mandamus as to all State officers. Const. art. IV, §4. The Court should exercise its original jurisdiction in this case (1) to settle the constitutional and statutory limits of the Attorney General's authority, (2) correct a mistake that was key to prior decisions by this Court, and (3) resolve an issue of significant public interest.

This Court is the final authority on issues requiring construction of the State's constitution and statutes. *State ex. rel. Hartley v. Clausen*, 146 Wash. 588, 592, 264 P. 403 (1928). The Attorney General appears to believe he is authorized unilaterally to make the State a plaintiff in a federal lawsuit, broadly interpreting the constitutional and statutory provisions defining his office in lieu of express statutory authority to undertake such litigation. The Attorney General further asserts that being an "independently elected constitutional officer" somehow clothes him in extra-statutory authority to act unless expressly prohibited by the constitution, statutes, or case law. Agreed Statement of Facts, Attachment 6, p.2. Only this Court can resolve whether the Attorney General has authority outside of the constitution and state statutes.

The Court should also exercise its original jurisdiction to revisit prior decisions that relied upon an incorrect version of RCW 43.10.030(1), one of the principal statutes regarding the Attorney General. See discussion *infra*, at 24-26. A key word was dropped from the published version of the statute, leading this Court to construe it to provide far broader authority to the Attorney General than the correct language would have supported. The Court should reexamine the meaning of a statute when its prior decisions were "incorrect, through a mistaken conception of the statute or rule." *In re Yand's Estate*, 23 Wn.2d 831, 837, 162 P.2d 434 (1945). A lower court

cannot correct this Court's prior decisions. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

Finally, this Court exercises its jurisdiction when a significant public interest is involved. *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 54, 65 P.3d 1203 (2003); *Heavey v. Murphy*, 138 Wn.2d 800, 804, 982 P.2d 611 (1999); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 268, 534 P.2d 114 (1975). The public has a significant interest in knowing whether the Attorney General is authorized to unilaterally make the State a plaintiff in a federal lawsuit without any agency or officer as a client and over the Governor's objections.

**B. The Washington Attorney General has only the authority granted by the Legislature.**

Washington's constitution provides as follows:

The attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law.

Const. art. III, § 21 (emphasis added). Use of the phrase "prescribed by law" in the constitution means the officer has only the powers granted by the state legislature. *Yelle v. Bishop*, 55 Wn.2d 286, 295-96, 347 P.2d 1081 (1959) (State Auditor has no common law powers); *State ex rel. Winston v. Seattle Gas & Electric Co.*, 28 Wash. 488, 497, 68 P. 946 (1902) (Attorney General has no common law powers).

This Court first considered the scope and sources of the Attorney General's authority in 1902, less than three years after the State's constitution took effect. *Winston*, 28 Wash. 488. The question in that case was whether the Attorney General could bring a *quo warranto* action against the Seattle Gas & Electric Co. to determine whether it had legal grounds to use city streets for gas pipelines. In response to the Attorney General's assertion that he had common law powers, the Court stated:

The appellant assumes that the attorney general of this state, by virtue of his office, is, like the attorney general of England, clothed with common-law power to institute this suit, as it was the duty of the attorney general under the common law to represent the crown in such actions as this, and that therefore the attorney general of this state on his own motion can institute this suit. Political power in this state inheres in the people, and by constitutional or statutory authority the exercise of this power in behalf of the people is delegated to certain officers. In the exercise of power the officer is controlled by the law theretofore declared. The attorney general of the state, although bearing the same title as the attorney general of England, is not a common-law officer. There is nothing in a mere name. Because the particular office filled by the relator is called the office of 'attorney general,' it does not follow therefrom that he has the same powers as the attorney general of England under the common law. Every office under our system of government, from the governor down, is one of delegated powers. . . . The constitution and statutes of this state define his power. To the constitution, therefore, and the laws enacted in pursuance thereof, we must look for these powers, and not to the common law.

*Id.* at 495-96 (emphasis added).

Turning to the constitution, the Court explained that “[t]he use of the term ‘attorney general,’ as used in the constitution, must be interpreted in the light of the laws of the territory in existence at the time the constitution was adopted.” *Id.* at 496. The Court noted that the Territorial Legislature had created the office of the Attorney General by statute in 1888 and “expressly defined his duties.” *Id.* Those duties were:

- (1) To appear for and represent the people of the territory before the supreme court in all cases in which the territory or the people of the territory are interested.
- (2) To institute and prosecute all actions and proceedings in favor of, or for the use of, the territory, which may be necessary in the execution of the duties of any territorial officer.
- (3) To defend all actions and proceedings against any territorial officer, in his official capacity, in any of the courts of this territory or the United States.
- (4) To consult and advise the several district prosecuting attorneys in matters relating to the duties of their office; and when in his judgment the interest of the people of the territory require it, he shall attend the trial of any party accused of crime and assist in the prosecution.
- (5) To consult with and advise the governor and other territorial officer, and give, when requested, written opinions upon all legal or constitutional questions relating to the duties of such officers respectively.
- (6) To prepare, when necessary, proper drafts for contracts and other writings relating to subjects in which the territory is interested.
- (7) To give written opinions, when requested by either branch of the legislative assembly, or committees thereof, upon constitutional or legal questions.
- (8) To enforce the proper application of funds appropriated to the public institutions of the territory and to prosecute corporations for failure or refusal to make the reports required by law.
- (9) To keep in proper books a register of all cases prosecuted or defended by him, in behalf of the territory or its officers, and of all proceedings had in relation thereto, and to deliver the same to his

successor in office. (10) To keep in his office a book in which he shall record all the official opinions given by him during his term of office, which book shall be by him delivered to his successor in office. (11) To pay into the territorial treasury all moneys received by him for the use of the territory. (12) To attend to and perform any other duties which may, from time to time, be required of him by law.

*Id.* at 496-97 (quoting Sess. Laws 1887-88, p. 8 (Ballinger's Ann. Codes & St. §§ 169, 4753). The Court concluded that this statute did not authorize the Attorney General to bring a *quo warranto* action.

The Court also noted that the legislature had enacted numerous statutes granting the Attorney General authority in very specific circumstances, such as representing the State when it appropriates land, prosecuting criminal violations of the laws regulating dentistry, and assisting and advising the dairy commissioner, the fish commissioner, and the state grain commission. Given the array of specific authorizing statutes the Court concluded:

The legislation of the state shows that the legislature has not considered that the attorney general is clothed with any other power than that conferred upon him by the constitution or by express legislative enactment. Where it has been deemed necessary for the attorney general to appear and represent the state, authority for that purpose has been given to him by express enactment.

*Id.* at 501-02 (emphasis added). The Court ruled, “Nowhere is there any express provision of the law authorizing the attorney general to institute the suit in question.” *Id.* at 499.

The decision in *Winston* has added significance because it was issued so soon after adoption of the state constitution. The Court emphatically rejected the notion that the Attorney General possessed any common law powers, insisting that his authority must be expressly provided by statute. More than fifty years later, the Court again interpreted the constitutional phrase “prescribed by law,” this time regarding the State Auditor. *Yelle*, 55 Wn.2d at 295-96.<sup>5</sup> “The Washington constitution is not silent as to the powers and duties of the office of auditor and the common-law duties or implied powers cannot attach to the office, but only those as

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<sup>5</sup>In *Yelle* the Court quoted at length from an Arizona case regarding the provision in that state’s constitution, which, like Washington’s, provides that the Attorney General’s duties are prescribed by law:

[I]f the constitution had created the office of attorney general without referring to its powers and duties it might have been true under the authorities cited that the term ‘attorney general’ had been used in its common law acceptance since Arizona is a state in which the common law prevails; but that when the constitution provided in the same article in which it created the office of attorney general . . . that his duties ‘shall be ‘as prescribed by law’ it could not be said that the constitution was silent as to his powers and duties; that while it was true the constitution did not enumerate his duties but in stating that they shall be as ‘prescribed by law’ it referred to them and clearly made it the duty of the legislature to say what they should be.

may be prescribed by law.” *Id.* at 297 (emphasis in original). Plainly, in Washington,<sup>6</sup> the Attorney General lacks common law powers. *Id.*

**C. No Washington statute grants the Attorney General the authority at issue in this case.**

The principle statute granting the Attorney General authority is RCW 43.10.030. This statute is almost identical to the one that preceded adoption of the state constitution, another indication that the constitution did not expand the Attorney General’s powers. The Attorney General shall:

(1) Appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested;

(2) Institute and prosecute all actions and proceedings for, or for the use of the state; which may be necessary in the execution of the duties of any state officer;

(3) Defend all actions and proceedings against any state officer or employee acting in his or her official capacity, in any of the courts of this state or the United States;

(4) Consult with and advise the several prosecuting attorneys in matters relating to the duties of their office, and when the interests of the state require, he or she shall

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<sup>6</sup> In some other states the Attorney General does have common-law powers due to different language in the constitution or statutes. *E.g.*, *Humphrey v. McLaren*, 402 N.W. 2d 535, 543 (Minn. 1987); *Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710, 715 (Ky. 1973). Minnesota’s constitution lacks the limiting language “prescribed by law.” Kentucky’s constitution does contain the phrase “prescribed by law,” but a statute authorizes the Attorney General to “exercise all common law duties and authority pertaining to the office of the attorney general under the common law, except when modified by statutory enactment.” 503 S.W.2d at 715 (quoting K.R.S. 15.020).

attend the trial of any person accused of a crime, and assist in the prosecution;

(5) Consult with and advise the governor, members of the legislature, and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties of such officers;

(6) Prepare proper drafts of contracts and other instruments relating to subjects in which the state is interested;

(7) Give written opinions, when requested by either branch of the legislature, or any committee thereof, upon constitutional or legal questions;

(8) Enforce the proper application of funds appropriated for the public institutions of the state, and prosecute corporations for failure or refusal to make the reports required by law;

(9) Keep in proper books a record of all cases prosecuted or defended by him or her, on behalf of the state or its officers, and of all proceedings had in relation thereto, and deliver the same to his or her successor in office;

(10) Keep books in which he or she shall record all the official opinions given by him or her during his or her term of office, and deliver the same to his or her successor in office;

(11) Pay into the state treasury all moneys received by him or her for the use of the state.

Only subsection (3) mentions the federal courts and it only authorizes the Attorney General to defend state officers, not make the State a plaintiff.

Under the maxim *expressio unius est exclusio alterius*, the Legislature's inclusion of the federal courts in one section means the other sections

authorize the Attorney General to act only in state courts. *Landmark Development v. City of Roy*, 138 Wn.2d 561, 572-73, 980 P.2d 1234 (1999).

In some other states, statutes expressly authorize the Attorney General to appear for the state in federal courts. *E.g.*, Minn. Stat. §8.01 (Attorney General may “appear for the state in all causes in the supreme and federal courts wherein the state is directly interested”); Fla. Stat. §16.01(5) (Attorney General, “Shall appear in and attend to such suits or prosecutions in any other of the courts of this state or in any courts of any other state or of the United States”); Ark. Stat. §25.16.703 (“The Attorney General shall maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts”). Washington’s Legislature chose not to grant our Attorney General that authority.

Attorney General McKenna argues, however, that the first subsection of RCW 43.10.030, combined with RCW 43.10.040, grants the Attorney General broad authority to act whenever he deems it to be in the state’s interest. RCW 43.10.030(1) authorizes the Attorney General to “appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested.” This grant of authority is limited, as discussed above, to state courts. It is also limited to appellate courts. *See* discussion *infra* at 24-26.

The other statute relied on by Attorney General McKenna, RCW

43.10.040, provides:

The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions, except those declared by law to be the duty of the prosecuting attorney of any county.

In construing a statute the court does not read the words in isolation, but also considers related provisions to determine the “plain meaning.” *Dep’t. of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002).

The language now codified as RCW 43.10.040 was enacted in 1941 as the first section of a chapter with several related sections. Appendix, Ex. B. The second section barred state agencies and officers from hiring their own legal counsel. *Id.* The third section authorized the Attorney General to employ experts to assist with litigation. *Id.* Together, these provisions dictate who represents state agencies and officers.

In *State v. Herrmann*, the Court explained:

It is clear that the purpose of Laws of 1941, chapter 50 was to end the proliferation of attorneys hired by various state agencies and place the authority for representation of state agencies in the Attorney General.

89 Wn.2d 349, 354, 572 P.2d 713 (1977). In restricting state agencies and officers to legal representation by the Attorney General's Office, the Legislature did not grant the Attorney General broad authority to unilaterally initiate lawsuits whenever he deems the State's interest to be implicated.

Construing RCW 43.10.040 as a broad grant of authority would, moreover, render obsolete many other statutes that grant the Attorney General authority to act in specific circumstances. *E.g.*, RCW 42.17.400 (Attorney General may bring civil action to enforce state campaign financing law); RCW 42.52.490 (upon a written determination by the Attorney General that the action of an ethics board was clearly erroneous or if requested by an ethics board, the Attorney General may bring a civil action to enforce the state ethics code); RCW 19.86.080 (Attorney General may enforce the consumer protection statute).

"Whenever possible, courts should avoid a statutory construction which nullifies, voids, or renders meaningless or superfluous any section or words." *Nisqually Delta Assoc. v. City of DuPont*, 95 Wn.2d 563, 568, 627 P.2d 956, (1981); *see also Taylor v. Redmond*, 89 Wn.2d 315, 319, 571 P.2d 1388 (1977). Since construing RCW 43.10.040 as a broad grant of authority would render numerous statutes superfluous, that construction cannot be correct. The Legislature intended RCW 43.10.040 to limit who

would provide legal services to state agencies and officers, nothing more. Neither RCW 43.10.030 nor RCW 43.10.040 grant the Attorney General authority to unilaterally join the State as a plaintiff in the Florida case.

During oral argument before the commissioner in the instant case, Respondent argued that he had authority to join the State as a plaintiff in the Florida case under RCW 43.10.030(2), which grants the Attorney General authority to:

Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer.

When the commissioner asked which state officer had duties that allegedly made the action necessary, the reply was the Attorney General himself.

There are two fatal flaws in this argument. First, the Attorney General did not make himself a plaintiff in the Florida case, he made the State a plaintiff in its sovereign capacity.<sup>7</sup> See case caption and description of plaintiffs, *supra*, at 5. Further, the allegations in the Complaint are clearly being made on behalf of states, not individual state officers. See excerpts, *supra*, n. 4.

And, in his response to the Governor's request that he identify himself as the plaintiff, he declined on the grounds that he was acting in a

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<sup>7</sup>In the Amended Complaint, the caption and description of the parties were unchanged. Agreed Statement of Facts, Attachment 8.

“representative capacity.” Agreed Statement of Facts, Attachment 6, p.2.  
Respondent cannot have it both ways.

The second flaw is more fundamental. The Attorney General’s broad interpretation of RCW 43.10.020(2) would mean he could involve the State in litigation any time he chose. Such an interpretation would render superfluous statutes that authorize the Attorney General to act in the name of the state in specific circumstances. For example, “[T]he attorney general in the name of the state . . . may bring an action” to enforce statutes regulating camping resorts. RCW 19.105.070. “[T]he attorney general acting in the name of the state may petition for the recovery of civil penalties” when a health professional is practicing without a license. RCW 18.130.195. “The attorney general may bring an action in the name of the state against any person” illegally advertising children available for adoption. RCW 26.33.400. There would be no need for these statutes, or the many others that grant authority to act in the name of the state in specific circumstances, if the Attorney General could initiate litigation on behalf of the state whenever he deemed it necessary to fulfill his own duties.

**D. Case law does not support expansive authority.**

In Respondent’s briefing to the commissioner, he argued that case law supports an expansive view of his authority. In the companion cases

of *Berg v. Gorton*, 88 Wn.2d 756, 769, 567 P.2d 187 (1977) and *Boe v. Gorton*, 88 Wn.2d 773, 775, 567 P.2d 197 (1977), the question presented was whether the Attorney General “had an absolute duty” to recover funds expended under a program later determined to be unconstitutional. In *Berg* the plaintiffs sued the Attorney General for monetary damages and in *Boe* the plaintiff sought a writ of mandamus. There was no dispute over whether the Attorney General had statutory authority to recover the funds. The issue was whether he must do so. The Supreme Court held that the Attorney General has discretion when to exercise authority expressly granted to him by statute.

*Berg* and *Boe* stand for the unremarkable principle that when the Attorney General has been expressly granted authority by statute, he then has discretion over how and when to exercise it. The question in this case is whether the Attorney General has been granted authority to take the challenged actions in the first place.

In *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994), another case relied upon by Respondent, the petitioners sought a writ of mandamus directing several State officers (including the Attorney General) “to adhere to the requirements of the Washington State Constitution and to prohibit them from implementing and enforcing

Initiative 601.” *Id.* at 407. The Court declined to issue a writ compelling a general course of conduct which would include discretionary actions.

In *State ex rel. Reynolds v. Hill*, 135 Wash. 442, 237 P. 1004 (1925), the Court explained that its reluctance to issue a writ of mandamus directed toward a general course of conduct was “for the reason that it is impossible for the court to oversee the performance by the officer of his duties; that mandamus contemplates the necessity of outlining the exact things to be done, to be pointed out in the writ, and is not designed for use when continuous action is to be engaged in.” *Id.* at 445. The writ was sought in that case to compel the Walla Walla City Commissioners to remove gasoline pumps that were obstructing sidewalks. The Court granted the writ because the requested “remedy does not call for any supervision of a general line of conduct, or demand a continuing course of action.” *Id.*

The Petition in this case is not directed at a general course of conduct. It seeks to compel Respondent to do one thing – withdraw the State of Washington from the Florida case.

Attorney General McKenna also relies on *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 588 P.2d 195 (1978). The Court should review that decision cautiously, however, due to an error in a prior guiding decision. Further, the circumstances in *Young Americans* differ dramatically

from this case.

In *Young Americans*, the Attorney General filed an amicus brief in the *Bakke* affirmative action case,<sup>8</sup> then pending in the United States Supreme Court. The brief was filed “to preserve the right of the University [of Washington] to serve the interests of all of its students in education for life and careers in a pluralistic, multi-racial society . . .” Appendix, Ex.G (1977 WL 189504 Brief of Amicus Curiae State of Washington, at 2). Plaintiffs sued the Attorney General and an assistant attorney general individually, seeking damages for “abridgment of their constitutional rights.” 91 Wn.2d at 206. The Court affirmed dismissal of their claim, explaining:

In *Taylor* we held that RCW 43.10.030(1), as it then read, authorized the Attorney General to enforce charitable trusts by way of an accounting action, although the statutes did not embody a clear command to the Attorney General to do so. We reasoned that “inasmuch as the proper management of charitable trusts is a matter of public concern, this is a case in which the state is interested.”

*Id.* at 209 (citing *State v. Taylor*, 58 Wn.2d 252, 255, 362 P.2d 247 (1962)).

In the footnote to the statement above, the *Young Americans* court quoted the statute that it apparently thought the *Taylor* court had relied upon:

“The attorney general shall:

“(1) Appear for and represent the state before the supreme

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<sup>8</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L.Ed.2d 750 (1977).

court in all cases in which the state is interested; . . .” RCW 43.10.030(1).

(emphasis added). That was the correct wording of the statute at the time of the *Taylor* decision, but the *Taylor* court had relied upon an erroneous version of the statute, which it quoted in its decision:

In RCW 43.10.030, the legislature has provided that  
‘The attorney general shall:

‘(1) Appear for and represent the state before the courts in all cases in which the state is interested;

58 Wn.2d at 256 (emphasis added). Due to the erroneous substitution of “the courts” for “the supreme court,” the *Taylor* court thought the Legislature had authorized the Attorney General to appear in all state courts.

The error arose as follows. Before Washington became a state, the statute provided the Attorney General with authority to “appear for and represent the people of the Territory before the supreme court in all cases in which the Territory or the people of the Territory are interested.” Territorial Laws, chapter VII, Section 6, 1<sup>st</sup> paragraph (1888) (emphasis added). The same wording was used in early codifications of Washington laws. Appendix, Ex. C (Rem. Rev. Statutes, ch. 9, §112(1) (1932)).

A new codification, which renumbered and rearranged the statutes, was prepared in 1949. Appendix, Ex. D (RCW Vol. 1 (1949)). In the

process, the reference to the supreme court was deleted and the statute stated the Attorney General was authorized to “appear for and represent the state before the courts in all cases in which the state is interested.” (emphasis added). *Id.* at 43-21. In 1965 – three years after the *Taylor* decision – the error was corrected, and the limiting reference to the “supreme court” was reinserted. Appendix, Ex. E (Laws of 1965 (notes for changes to 43.10.030(1): “‘courts’ to ‘supreme court’ in subdivision 1 to restore session law language.”) (emphasis added)).

The erroneous wording was central to the Court’s decision in *Taylor*. 58 Wn.2d at 255. The question in that case was whether the Attorney General had authority to enforce charitable trusts. Such authority was not expressly granted in any statute. The erroneous statutory language seemed to authorize the Attorney General to appear in all state courts in all cases in which the state is interested, which could easily be construed to include cases to enforce charitable trusts. The *Taylor* court did not know that the statute only granted authority to appear before the supreme court.

Another indication that the *Taylor* decision was wrongly decided is that statutes granting the Attorney General authority to enforce charitable trusts were enacted a few years later. RCW 11.110.100-130 (1967). If the Attorney General already had authority to do so, there would have been no need to enact these statutes.

Since the decision in *Taylor* was based upon an erroneous version of the statute, it is not reliable authority. *Young Americans* is suspect also to the extent it relied on *Taylor*.

Following establishment of the Washington Court of Appeals in 1969, many statutes, including RCW 43.10.030(1), were amended to add references to the court of appeals. The revised version authorized the Attorney General to “[a]pppear for and represent the state before the supreme court and court of appeals in all cases in which the state is interested.” Appendix, Ex. F (Laws of 1971 at 250 (emphasis added)). Notably, the amended statute still did not authorize the Attorney General to appear in trial courts.

Further, the circumstances in *Young Americans* differ significantly from the present case. In *Young Americans*, the Attorney General had a client, the Regents of the University of Washington, and was acting on the client’s behalf. See Appendix, Ex. G (Amicus Brief). The Attorney General was defending the policy choice made by the executive branch and implemented by his client. In this case, the Attorney General is opposing the policy choice made by the executive branch and he has no client.

In *Young Americans*, the Attorney General filed an amicus brief, which carries far different legal ramifications than making the State a plaintiff. Whatever a court ultimately decides has no direct effect on a party

filing an amicus brief. When the State is a plaintiff the court's rulings are binding on it and the doctrines of judicial estoppel, res judicata, and collateral estoppel may bar the State from taking a different position in another case.

Further, states generally have sovereign immunity from federal claims brought by citizens. However, by making the State a plaintiff in a federal case, the Attorney General may waive sovereign immunity, potentially exposing the State to counter-claims. *Clark v. Barnard*, 108 U.S. 436, 2 S. Ct. 878, 27 L.Ed. 780 (1883) (voluntary appearance by a state in federal court is a waiver of sovereign immunity); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219, 144 L.Ed.2d 605 (1999) ("a State may waive its sovereign immunity by consenting to suit"). The authority espoused by Attorney General McKenna has far wider application than the Florida case and has potentially significant consequences.

Yet another distinction between *Young Americans* and this case is that the plaintiffs in *Young Americans* were seeking monetary damages from the Attorney General and an assistant attorney general in their individual capacities. Petitioner in this case seeks only a writ of mandamus to compel the Attorney General to cease acting outside his authority.

Other cases cited by the Attorney General in briefing to the commissioner also are readily distinguished. In *State v. Asotin County*, 79 Wash. 634, 638, 140 P.2d 914 (1914), the Legislature had enacted a law requiring counties to pay the state for horticultural inspections. The statute also instructed the Attorney General to sue any county that failed to pay, which he did. *Id.* The County argued the case should be dismissed on the ground that the statute did not say suits could be brought in the name of the State. This Court disagreed, explaining:

When the Legislature directed [the attorney general] to bring an action . . . it was certainly contemplated that such action would be instituted in the name of the state, whose representative and counselor the Attorney General is.

*Id.* at 638. There is no similarity whatsoever between the issue in the *Asotin County* case and this one. In *Asotin County* the Legislature had not only authorized the Attorney General to act, it had directed him to act in precisely the manner he did. In this case there is no statute directing or authorizing the action taken by Respondent.

The Attorney General further relies upon dicta in a federal case. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 747 F.2d 1303 (9<sup>th</sup> Cir. 1984). In that case, the State, represented by Attorney General Eikenberry, brought an antitrust action against several oil companies. When the trial court held him in contempt for discovery

violations, he sought an interlocutory appeal on the ground that he was not a party to the case. The Ninth Circuit held there was a “congruence of interests” between Eikenberry and the state, therefore appeal of the discovery order could not be severed from the primary action. The court found it significant that the State, not Eikenberry, would pay the sanctions and that he faced no personal risk. *Id.* at 1306.

In the opinion, the Ninth Circuit stated that the Attorney General is “the state official in charge of initiating and conducting the course of litigation. The determination whether to bring an action rests within the sole discretion of the Attorney General.” *Id.* However, the Ninth Circuit was not determining whether Eikenberry had authority to initiate the case, but rather whether, having done so, he should be granted an interlocutory appeal for discovery sanctions.

**E. Being “independently elected” does not confer extra-statutory powers on the Attorney General.**

Respondent asserts that being “independently elected” somehow confers extra-statutory powers on him. Agreed Statement of Facts, Attachment 6, p.2. A similar argument was rejected by this Court in *Osborn v. Grant County*, 130 Wn.2d 615, 926 P.2d 911 (1996). In *Osborn*, the Court ruled that the county’s prosecuting attorney lacked authority to sue county officials: “Even though prosecuting attorneys are

independently elected county officers, RCW 36.16.030, their powers are limited to those expressly granted by statute.” *Id.* at 626.

Nor does being a “constitutional officer” clothe the Attorney General in authority beyond what has been granted in statutes. In the *Winston* case, the Court explained:

The constitution provides for the creation of the office of prosecuting attorney, and this officer is as much a constitutional officer as the attorney general. . . . The powers of both are created and limited, not by the common law, but by the law enacted by the people, either in their constitutional declarations or through legislative declarations in pursuance of constitutional provisions.

28 Wash. 489-500. Given that the Washington constitution provides that the Attorney General’s powers shall be “prescribed by law,” he has only the authority expressed in statutes. *Yelle*, 55 Wn.2d at 295-96.

**F. When the Attorney General lacks express statutory authority, he cannot act unilaterally.**

The Washington Constitution provides that “[t]he supreme executive power of this state shall be vested in a governor.” Const. art. III, §2. The phrase “supreme executive authority” means “the highest executive authority in the state, all other powers being inferior thereto.” *State ex rel. Hartley v. Clausen*, 146 Wash. 588, 592, 264 P. 403 (1928).

The constitution also provides that:

The Governor may require information in writing from the officers of the state upon any subject relating to the duties

of their respective offices, and shall see that the laws are faithfully executed.

Const. art. III, §5 (emphasis added). In *Clausen*, the Court concluded that:

As the final right to determine the true intent and purpose of all laws is lodged in the Supreme Court of this state, so is the final determination as to their enforcement and execution lodged in the Governor.

146 Wash., at 592.

It would make no sense, given this constitutional framework, for the Attorney General to be able to act without statutory authority in spite of objections by the “supreme” executive officer, who is the only constitutional officer charged with seeing “that the laws are faithfully executed.” As the Governor explained in her request to file an amicus brief in the Florida case, she has supervisory control of state health programs and knows the actual costs and benefits of the Medicaid partnership with the federal government. Agreed Statement of Facts, Attachment 11, p. 3-4. The Governor, not the Attorney General, can determine whether the state will actually be harmed by the federal Patient Protection and Affordable Care Act.

The Attorney General’s interpretation of the constitution also makes no practical sense. In his letter to the Governor, Respondent suggested that both of them could represent the State on opposite sides of the case. Agreed Statement of Facts, Attachment 6. If the Governor did bring the

State into the case on the defense side, the State might be contesting facts it has also averred. Respondent's proposal also ignores the uncertain effect of rulings in a case in which a party is on both sides,<sup>9</sup> and the complexities of discovery when the same party is issuing and answering opposing interrogatories, taking and defending depositions of the same people, and so on. Washington's founders surely did not intend the State to be divided against itself in this way.

**G. Mandamus is appropriate to compel a public official to undo an unauthorized act.**

Petitioner seeks a writ to compel the Attorney General to withdraw the State of Washington from the Florida case because he exceeded his authority in making the State a plaintiff in the first place. Public officials do not have discretion to act outside of their authority. *State ex rel. Strecker v. Listman*, 156 Wash. 562, 287 P. 663 (1930) (no exercise of discretion when commission disregarded its own rule); *State ex rel. Mason v. Board of Comm'rs of King County*, 146 Wash. 449, 263 P. 735 (1928) (no discretion to ignore statutory criteria for redistricting). Mandamus is an appropriate means to stop a state officer from acting outside his authority and to compel him to undo unauthorized acts.<sup>10</sup> *State ex rel. Burlington*

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<sup>9</sup> State agencies or officers with opposing interests are sometimes plaintiff and defendant, but here the exact same entity – the sovereign State – would be on both sides.

<sup>10</sup> See also 17 McQuillan, *Municipal Corporations* §51:13 (3<sup>rd</sup> ed. 2004), at 777 (“The writ [of mandamus] will be granted to compel the undoing of things illegally done”).

*Northern v. Wash. State Util. & Transp. Comm'n (WUTC)*, 93 Wn.2d 398, 410, 609 P.2d 1375 (1980) (state must repay fees used illegally); *Strecker*, 156 Wash. at 563 (writ required rescission of revised test scores); *Mason*, 146 Wash. at 451 (writ compelled rescission of illegal order).

In *Burlington Northern*, the Court issued a writ of mandamus to compel the WUTC to cease using regulatory fees to pay legal expenses and to reimburse fees already expended. See 93 Wn.2d at 410. The Supreme Court considered case law to determine whether the WUTC had authority to use regulatory fees for legal expenses. The Court then construed the statutes regarding the WUTC, and concluded that no statute required the disputed use of regulatory fees. Since the WUTC had exceeded its authority, mandamus was issued to require the unauthorized act to be undone.

In *Mason*, the Court examined the statutes regarding redrawing of county voting districts and concluded the King County Board of Commissioners had acted illegally when it created districts with vastly different population sizes. The Court rejected the argument that mandamus should not issue because the commissioners were exercising discretion. Since the statutory criteria for voting districts had been violated "there has been no exercise of the discretionary power." 146 Wash. at 463.

Mandamus was issued compelling the Commission to rescind its redistricting order.

Likewise, the Attorney General lacked authority and therefore lacked discretion to make the State a plaintiff in the Florida case. Mandamus is appropriate to compel him to undo the unauthorized act by withdrawing the State from the case. When a prior Attorney General was asked the appropriate remedy to stop a County Treasurer from acting outside his statutory authority, he recommended a writ of mandamus:

The people whom we all serve have a right to good government.  
That right is never without a remedy.

Appendix, Ex. H (Wash. AGO 1953-55 No. 94).

**H. The writ should issue to resolve a matter of significant public interest.**

The questions presented in this case regarding the Attorney General's authority are so fundamental and the implications so far-reaching, that they touch every person in the state. "The recognition of taxpayer standing has been given freely in the interest of providing a judicial forum when this state's citizens contest the legality of official acts of their government." *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985) (taxpayer could challenge prison work release program).

“It is well settled that taxpayers, in order to obtain standing to challenge the act of a public official, need allege no direct, special or pecuniary interest in the outcome of their action.” *City of Tacoma v. O’Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975). A taxpayer can have standing even if no public money has been spent. *Boyles*, 103 Wn.2d at 613.

The same criteria for standing apply regardless of whether the plaintiff is an individual or a governmental entity. *City of Tacoma*, 85 Wn.2d at 269. The plaintiffs in *City of Tacoma* were two cities, a county, and an individual. They sought a writ of mandamus to prohibit the State Treasurer from disbursing funds under a statute they claimed was unconstitutional. *Id.* at 268. Respondent moved to dismiss the petition for lack of standing. After reiterating the basis for the individual to have standing, the Court stated, “we perceive no justifiable reason to apply a different standard where a county or municipality brings the action.” *Id.* at 269.

In *City of Seattle v. State*, 103 Wn.2d 663, 646, 694 P.2d 641 (1985), this Court held that the City of Seattle had standing to assert a state statute violated the equal protection rights of people who might become city residents if an annexation vote were taken. Since the residents of the area proposed for annexation could make the claim, the City could make it on their behalf. *Id.* Individual residents in Seattle could bring the

present Petition in order to require a State officer to stop exceeding his authority, therefore the City may bring it on their behalf.

Further, “this court has recognized that standing questions should be analyzed in terms of the public interests presented.” *Farris*, 99 Wn.2d at 330; see also *Washington Natural Gas Co. v. PUD No. 1 of Snohomish County*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969) (controversy “affects substantial segments of the population”); *Ordell v. Gaddis*, 99 Wn.2d 409, 662 P.2d 49 (1983) (plaintiffs raised issues of “serious public importance”). In *Farris*, the plaintiff failed to ask the Attorney General to challenge the constitutionality of the state lottery before bringing suit himself.<sup>11</sup> The Court reviewed cases in which, in spite of defects such as mootness or failure to join an indispensable party, the Court had ruled on the substantive issue because it was “a matter of continuing and substantial interest, it presents a question of a public nature which is likely to recur, and it is desirable to provide an authoritative determination for the future guidance of public officials.” *Id.* (quoting *Cathcart-Maltby-clearview Community Council v.*

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<sup>11</sup> Before bringing suit, a taxpayer must usually ask the Attorney General to sue the public official whose actions are at issue. *Reiter v. Walgren*, 28 Wn.2d 872, 876-77, 184 P.2d 571 (1947). This step is not required when such a demand would have been useless. *Farris*, 99 Wn.2d at 329-30. Here, Respondent refused the Governor’s request that he cease purporting to represent the State. Agreed Statement of Facts, Attachment 6. It would have been useless for the City to make the same request and it would be absurd to ask the Attorney General to seek a writ against himself.

*Snohomish Cy.*, 96 Wn.2d 201, 208, 634 P.2d 853 (1981)). The Court then proceeded to rule on the substantive issue in *Farris*.

In another mandamus case, the Court decided to reach the merits of the substantive issue, explaining:

Where the question is one of great public interest and has been brought to the court's attention in the action where it is adequately briefed and argued, and where it appears that an opinion of the court would be beneficial to the public and to the other branches of the government, the court may exercise its discretion and render a declaratory judgment to resolve a question of constitutional interpretation.

*E.g.*, *State ex rel. Distilled Spirits Institute v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972). In the present case, the public deserves to know whether or not the Attorney General can involve the State in litigation whenever he deems it necessary.

## V. CONCLUSION

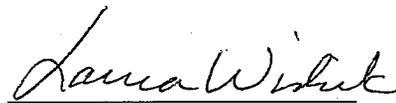
This case presents fundamental issues regarding the nature and scope of the Attorney General's authority. The Court should confirm the rulings in *Winston* and *Yelle* that the Attorney General in this state has no common-law powers. The Legislature must grant him authority before he can unilaterally join the State as a plaintiff in a federal case. Since the Legislature has not done so, the writ should issue directing him to undo his unauthorized act.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of August, 2010.

Peter S. Holmes  
Seattle City Attorney

By:

  
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Appendix to Petitioner's  
Opening Brief  
No. 84483-6

RCW 43.10.030  
(current version)

**Exhibit A**

43.10.010

STATE GOVERNMENT—EXECUTIVE

oath of office as required by law; take, subscribe, and file with the secretary of state an oath to comply with the provisions of RCW 43.10.015; and execute and file with the secretary of state, a bond to the state, in the sum of five thousand dollars, with sureties to be approved by the governor, conditioned for the faithful performance of his or her duties and the paying over of all moneys, as provided by law.

[2009 c 549 § 5046, eff. July 26, 2009; 1973 c 43 § 1; 1965 c 8 § 43.10.010. Prior: 1929 c 92 § 1, part; RRS § 11030, part; prior: 1921 c 119 § 1; 1888 p 7 § 4.]

43.10.020. Additional bond—Penalty for failure to furnish

If the governor deems any bond filed by the attorney general insufficient, he or she may require an additional bond for any amount not exceeding five thousand dollars.

If any attorney general fails to give such additional bond as required by the governor within twenty days after notice in writing of such requirement, his or her office may be declared vacant by the governor and filled as provided by law.

[2009 c 549 § 5047, eff. July 26, 2009; 1965 c 8 § 43.10.020. Prior: (i) 1929 c 92 § 1, part; RRS § 11030, part. (ii) 1929 c 92 § 2; RRS § 11031; prior: 1921 c 119 § 1; 1888 p 7 §§ 4, 5.]

43.10.030. General powers and duties

The attorney general shall:

(1) Appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested;

(2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer;

(3) Defend all actions and proceedings against any state officer or employee acting in his or her official capacity, in any of the courts of this state or the United States;

(4) Consult with and advise the several prosecuting attorneys in matters relating to the duties of their office, and when the interests of the state require, he or she shall attend the trial of any person accused of a crime, and assist in the prosecution;

(5) Consult with and advise the governor, members of the legislature, and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties of such officers;

(6) Prepare proper drafts of contracts and other instruments relating to subjects in which the state is interested;

(7) Give written opinions, when requested by either branch of the legislature, or any committee thereof, upon constitutional or legal questions:

STATE GOVERNMENT—EXECUTIVE

43.10.040

(8) Enforce the proper application of funds appropriated for the public institutions of the state, and prosecute corporations for failure or refusal to make the reports required by law;

(9) Keep in proper books a record of all cases prosecuted or defended by him or her, on behalf of the state or its officers, and of all proceedings had in relation thereto, and deliver the same to his or her successor in office;

(10) Keep books in which he or she shall record all the official opinions given by him or her during his or her term of office, and deliver the same to his or her successor in office;

(11) Pay into the state treasury all moneys received by him or her for the use of the state.

[2009 c 549 § 5048, eff. July 26, 2009; 1975 c 40 § 5; 1971 c 81 § 109; 1965 c 8 § 43.10.030. Prior: (i) 1929 c 92 § 3; RRS § 112. (ii) 1929 c 92 § 4; RRS § 11032; prior: 1921 c 55 § 2; 1888 p 8 § 6.]

Research References

ALR Library

Treatises and Practice Aids

137 ALR 318, Right of Attorney General to Represent or Serve

23 Wash. Prac. Series § 1.4, Legal

Administrative Officer or Body

Representation for Agencies.

to Exclusion of Attorney Employed by Such Officer or Body.

Notes of Decisions

1. Construction and application of Statute requiring state Attorney General to defend all actions and proceedings against any state officer or employee acting in his official capacity in state and federal courts did not apply to requested representation of state Supreme Court justice in disciplinary proceeding before Commission on Judicial Conduct; proceeding did not occur in state or federal court. *Sanders v. State* (2009) 166 Wash.2d 164, 207 P.3d 1246. Attorney General ⇐ 6; Judges ⇐ 11(6.1).

to decline to represent a judge, at public expense, in judicial disciplinary proceedings before the Commission on Judicial Conduct subject to state's duty to reimburse the judge for defense costs if the Commission later dismisses the disciplinary charges or exonerates the judge of all violations of the Canons of Judicial Conduct. *Sanders v. State* (2007) 139 Wash. App. 200, 159 P.3d 479, affirmed 168 Wash.2d 164, 207 P.3d 1246. Attorney General ⇐ 6; Judges ⇐ 11(6.1).

20. Discretion

Under the Ethics in Public Service Act, Attorney General has discretion

43.10.040. Representation of boards, commissions and agencies

Laws of 1941, Ch. 50

**Exhibit B**

# Senate Bill No. 102

STATE OF WASHINGTON, TWENTY-SEVENTH REGULAR SESSION.

January 29, 1941, read first and second time, ordered printed and referred to  
Judiciary Committee.

## AN ACT

Relating to the powers and duties of the attorney general; providing for the legal representation of the state of Washington and all departments, commissions, boards, agencies, and administrative tribunals thereof and providing for the appointment of certain personnel

### SENATE COMMITTEE AMENDMENTS TO SENATE BILL NO. 102 (By a Majority of Judiciary Committee)

Amend the title, line 3 of the original bill, the same being line 2 of the title of the printed bill, by striking the word "all"

Amend the title, line 5 of the original bill, the same being line 4 of the printed bill, after the word "therein" and before the semi-colon (;) insert the following: ", excepting certain state agencies"

Amend Section 1, line 11 of the original bill, the same being Section 1, line 3 of the printed bill, by striking the word "or" and inserting in lieu thereof the word "and"

Amend Section 1, line 21 of the original bill, the same being Section 1, line 11 of the printed bill, by inserting after the word "officials" and before the word "and" the following: ", boards, commissions"

Amend Section 1, line 29 of the original bill, the same being Section 1, line 17 of the printed bill, by striking the period (.) and inserting in lieu thereof the following: ", not exceeding the funds made available to the department by law for legal services."

Amend Sec. 2, page 1 of the original bill, the same being Sec. 2, page 1 of the printed bill, by striking the whole thereof and renumbering subsequent sections consecutively.

ADOPTED

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tain in employment any attorney for any administrative body, department, commission, agency, or tribunal or any other person to act as attorney in any legal or quasi legal capacity in the exercise of any of the powers or performance of any of the duties set forth in this act, except where it is provided by law to be the duty of the judge of any court or the prosecuting attorney of any county to employ or appoint such persons.

Sec. 4. The attorney general shall have the power to employ from time to time such skilled experts, scientists, technicians or other specially qualified persons as he may deem necessary to aid him in preparing for the trial of actions.

Sec. 5. All acts or parts of acts in conflict herewith are hereby repealed.

Sec. 6. If any section, clause, sentence or phrase of this act is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act, and the legislature hereby declares it would have enacted this act if such section, clause, sentence or phrase were omitted.

Sec. 7. This act is necessary for the immediate support of the state government and its existing public institutions, and shall take effect immediately.

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Rem. Revised Statutes Ch. 9 §112(1)

**Exhibit C**

REMINGTON'S  
REVISED STATUTES  
OF WASHINGTON

ANNOTATED

SHOWING ALL

STATUTES IN FORCE TO AND INCLUDING  
THE SESSION LAWS OF 1931

BY  
HON. ARTHUR REMINGTON

Reporter of the Supreme Court of the State of Washington, Author of  
"Notes on Washington Reports," "Remington's Washington Digest,"  
"Remington's Compiled Statutes of Washington," etc.

VOLUME II

CODES OF PROCEDURE

- TITLE I—COURTS
- TITLE II—PROCEDURE IN COURTS OF RECORD
- TITLE III—ISSUES, TRIAL AND JUDGMENT
- TITLE IV—ENFORCEMENT OF JUDGMENTS
- TITLE V—PROVISIONAL REMEDIES

SAN FRANCISCO  
BANCROFT-WHITNEY COMPANY  
1932

on account of death in his family, or of illness in his family of such character that he is required to be in attendance thereupon, when his business interests would be seriously prejudiced by such service. No person, however, shall be excused from service as a juror on account of business reasons unless his service as such would lead to the waste or destruction of his property; and unless it shall appear that after having been summoned as a juror he had made every reasonable effort to permit of his serving as a juror without causing waste or destruction of his property. When excused for any of the foregoing reasons, or for any reason deemed sufficient by the court, the name of the juror so excused shall remain upon the jury list from which jurors are drawn, and his name returned to the jury box from which it was drawn. Any person applying to be excused from jury service for any of the causes herein specified, may be placed upon oath or affirmation to testify truly in all respects as to the cause of such excuse, and that he will answer truly any question put to him by the judge with respect thereto. [L. '11, p. 317, § 7.]

§ 101. Separation of jury. In no action or proceeding whatever, except felony cases shall the jury sworn to try the issue therein be kept together and in the custody of the officers of the court, save during the actual progress of the trial, until the case shall have been finally submitted to them for their decision. Whenever the jury are kept together in the custody of the officers while the trial is not in progress, they shall be supplied with meals in regular hours, and with comfortable sleeping and toilet accommodations. [L. '11, p. 317, § 8. Cf. 1 Rem. & Bal. Code, § 346, repealed by this act.]

Separation of jury in criminal cases. 34 A.L.R. 1115.

Separation of mixed jury of men and women. 71 A.L.R. 68.

§§ 102-111. Jurors—Qualifications—Exemptions—Drawings—Etc. Repealed: L. '25, Ex. Sess., p. 17, § 1.

CHAPTER 9

ATTORNEY GENERAL AND PROSECUTING ATTYS.

Duties of attorney general: See "State Officers," § 11030 et seq., infra. Duties of prosecutors: See "Counties," § 4127 et seq., infra.

§ 112.\* Powers and duties of attorney general. [Repealed L. '29, p. 179, § 9, and re-enacted, p. 178, § 3.] The attorney general shall have the power and it shall be his duty:—

ATTORNEY GENERAL AND PROSECUTING ATTYS. § 113

appear for and represent the state before the supreme court in cases in which the state is interested; to institute and prosecute all actions and proceedings for the use of the state which may be necessary in the execution of the duties of any state officer; to defend all actions and proceedings against any state officer in official capacity, in any of the courts of this state or the States; to consult with and advise the several prosecuting attorneys relating to the duties of their office, and when, in his opinion, the interests of the state require, he shall attend the trial of any person accused of a crime, and assist in the prosecution. [L. '91, p. 95, § 2; 2 H. C., § 84.]

Address of Act of 1929: See §§ 11030 et seq., infra.  
 Dunbar v. State Board of Equalization, 140 Wash. 433, 249 Pac. 906.  
 Subdivision 3 of this section does not relieve him of the duty to institute proceedings against state officers returned to their trusts, to compel them to perform their duties: State ex rel. Dunbar v. State Board of Equalization, 140 Wash. 433, 249 Pac. 906.

For text treatment of "Attorney General," see 2 H. C. L. 915.  
 Dismissal of criminal proceedings on motion of, 68 A.L.R. 1378.  
 Quo warranto to determine right of corporation to practice law. 73 A.L.R. 1350.  
 Right of attorney general to intervene in divorce suit. 22 A.L.R. 1112.  
 Suit by attorney general to enforce or administrator charitable trust. 62 A.L.R. 882.  
 Waiver by attorney general of state's immunity from suit. 42 A.L.R. 1384.

§ 113. Prosecuting attorneys defined. Prosecuting attorneys are attorneys authorized by law to appear for and represent the state and the counties thereof in actions and proceedings before the courts and judicial officers. [L. '91, p. 95, § 3; 2 H. C., § 85.]  
 For text treatment of "Prosecuting Attorneys," see 22 H. C. L. 80.

RCW Vol. 1

**Exhibit D**

*Stephen S. Beardsley*

**REVISED CODE  
OF  
WASHINGTON**

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**VOLUME 1**

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**TITLES 1 TO 45**

**As Prepared by  
STATE CODE COMMITTEE**

AN ACT revising, consolidating and codifying all the laws of the State of Washington of a general and permanent nature and to set them forth under title, chapter, and section headings and numbers and enacting the whole as the "Revised Code of Washington," and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. The ninety-one titles with the chapters, sections, and numbering system hereinafter set forth are hereby enacted and designated as the "Revised Code of Washington." This code is intended to embrace in a revised, consolidated, and codified form and arrangement all the laws of the state of a general and permanent nature.

SEC. 2. The contents of this code shall establish prima facie the laws of this state of a general and permanent nature in effect on January 1, 1949, but nothing herein shall be construed as changing the meaning of any such laws. In case of any omissions, or any inconsistency between any of the provisions of this code and the laws existing immediately preceding this enactment, the previously existing laws shall control.

SEC. 3. All laws of a general and permanent nature enacted after January 1, 1949 shall, from time to time, be incorporated into and become a part of this code.

SEC. 4. Until such time as this code is published and made available the several codes existing immediately prior to this enactment may be officially cited.

SEC. 5. This code may be cited by the abbreviation " R.C.W. "

SEC. 6. The Secretary of State shall cause to be printed for temporary use and as a part of the published session laws only the first seven sections of this act omitting the printing of the code proper.

SEC. 7. This act is necessary for the immediate preservation of the public peace, health and safety and for the immediate support of the state government and its existing public institutions and shall take effect immediately.

the sum of five thousand dollars, with sureties to be approved by the governor, conditioned for the faithful performance of his duties and the paying over all moneys, as provided by law.

43.07.02 If the governor deems any bond filed by the attorney general insufficient, he may require an additional bond for any amount not exceeding five thousand dollars.

If any attorney general fails to give such additional bond as required by the governor within twenty days after notice in writing of such requirement, his office may be declared vacant by the governor and filled as provided by law.

43.07.03 The attorney general shall:

- (1) Appear for and represent the state before the courts in all cases in which the state is interested;
- (2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer;
- (3) Defend all actions and proceedings against any state officer in his official capacity, in any of the courts of this state or the United States;
- (4) Consult with and advise the several prosecuting attorneys in matters relating to the duties of their office, and when the interests of the state require, shall attend the trial of any person accused of a crime, and assist in the prosecution;
- (5) Consult with and advise the governor, members of the legislature and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties of such officers;
- (6) Prepare proper drafts of contracts and other instruments relating to subjects in which the state is interested;
- (7) Give written opinions, when requested by either branch of the legislature, or any committee thereof, upon constitutional or legal questions;
- (8) Enforce the proper application of funds appropriated for the public institutions of the state, and prosecute corporations for failure or refusal to make the reports required by law;
- (9) Keep in proper books a record of all cases prosecuted or defended by him, on behalf of the state or its officers, and of all proceedings had in relation thereto, and deliver the same to his successor in office;
- (10) Keep books in which he shall record all the official opinions given by him during his term of office, and deliver the same to his successor in office;
- (11) Pay into the state treasury all moneys received by him for the use of the state.

43.07.04 The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions, except those declared by law to be the duty of the prosecuting attorney of any county.

43.07.05 The attorney general may execute, on behalf of the state, any appeal or other bond required to be given by the state in any judicial proceeding to which it is a party in any court, and procure sureties thereon.

43.07.06 The attorney general may appoint necessary assistants, who shall hold office at his pleasure, and who shall have the power to perform any act which

# Laws of 1965

## **Exhibit E**

If any audit discloses malfeasance, misfeasance, or nonfeasance in office on the part of any public officer, the auditor shall, within thirty days from the receipt of his copy of the report of the general auditor, institute and prosecute in the proper court any private legal action to carry into effect the findings of the audit. It shall be unlawful for any state department, or any officer or employee thereof, to make a settlement or compromise of any claim arising out of such malfeasance, misfeasance, or nonfeasance, or any action commenced thereafter, or for any contract, or any compromise or settlement of such action, without the approval and consent of the attorney general and the board of accountancy.

43.09.340 Audit of books of state auditor. The general auditor, from time to time, provide for a post-audit of the books, records and records of the state auditor, and the funds, and the records to be made either by independent qualified public accountants or by the director of budget, as he may determine. The expenses of such audit shall be paid from appropriations, and not from the general fund.

43.09.350 Record of state property. The state auditor shall and maintain in his office on forms to be furnished by the director of budget, and in accordance with classifications prescribed by that officer, a controlling ledger in which shall be entered valuations of all property, real, personal, and mixed, owned by the state, and keep such ledger continually posted, and reports thereon are made by the various officers, institutions, and departments of the state government, and once each year enter thereon the amount of such depreciation as may be required by uniformity, and such depreciation as may be required by the director of budget.

Chapter 43.10  
ATTORNEY GENERAL.

43.10.010 Qualifications—Oath—Bond. No person shall be eligible to be attorney general unless he is a qualified practitioner of the supreme court of this state.

Before entering upon the duties of his office, any person appointed or appointed attorney general shall take, subscribe, and file with the secretary of state, a bond to the state, in the sum of one hundred thousand dollars, with sureties to be approved by the governor, for the faithful performance of his duties and the proper disbursement of all moneys, as provided by law.

43.10.020 Additional bond—Penalty for failure to file. If the governor deems any bond filed by the attorney general

Require an additional bond for any amount not exceeding one thousand dollars. If the attorney general fails to give such additional bond as required by the governor within twenty days after notice in writing, his office may be declared vacant by the board of accountancy, provided by law.

43.10.030 Powers and duties. The attorney general shall: (a) represent the state before the supreme court in any case in which the state is interested; (b) institute and prosecute all actions and proceedings for, or against, the state, which may be necessary in the execution of his duties as attorney general; (c) represent the state in any of the courts of this state or the United States; and (d) advise the several prosecuting attorneys of the state, and when the interests of the state require, he shall attend the trial of any person accused of a crime, and assist in the prosecution;

(e) with written and advise the governor, members of the legislature, and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties of such officers; (f) prepare proper drafts of contracts and other instruments which the state is interested in; (g) receive and file all writs, when requested by either branch of the legislature, or any committee thereof, upon constitutional or legal questions; (h) receive the proper application of funds appropriated for the institutions of the state, and prosecute corporations for the same; (i) make the reports required by law; (j) keep a proper books a record of all cases prosecuted or defended by him, on behalf of the state or its officers, and of all cases in which he is engaged in relation thereto, and deliver the same to his successors in office.

43.10.040 Books in which he shall record all the official opinions and reports in his term of office, and deliver the same to his successor in office. The state treasury all moneys received by him for the state.

43.10.050 Representation of boards, commissions and agencies. The attorney general shall also represent the state and all officials, boards, commissions and agencies of the state in the hearing of all administrative tribunals or bodies of any kind, or quasi legal matters, hearings, or proceedings, in which the state is interested.

43.10.060 Representation of boards, commissions and agencies. The attorney general shall also represent the state and all officials, boards, commissions and agencies of the state in the hearing of all administrative tribunals or bodies of any kind, or quasi legal matters, hearings, or proceedings, in which the state is interested.

and advise all officials, departments, boards, commissions and the state in all matters involving legal questions, except those declared by law to be the duty of the attorney of any county.

43.10.050 Authority to execute appeal and to file bonds. The attorney general may execute, on behalf of the state, and on or other bond required to be given by the state, and proceeding to which it is a party in any court, and proceeding thereon.

43.10.060 Appointment and authority of assistants. The general may appoint necessary assistants, who shall hold his pleasure, and who shall have the power to perform which the attorney general is authorized by law to perform.

43.10.065 Employment of attorneys and employees in the state's legal business. The attorney general may employ charge attorneys and employees to transact for the state, and agencies, boards, commissions, and agencies, all public, a legal or quasi legal nature, except those declared by law the duty of the judge of any court, or the prosecuting attorney of any county.

43.10.067 Employment of attorneys by others. The attorney general, director, administrative agency, board, or commission of the state, other than the attorney general, shall employ or retain in employment any attorney for any administrative department, commission, agency, or tribunal or any other act as attorney in any legal or quasi legal capacity in the act of any of the powers or performance of any of the duties by law to be performed by the attorney general, except as is provided by law to be the duty of the judge of any court, prosecuting attorney of any county to employ for any person: Provided, That RCW 43.10.040, and RCW 43.10.041, 43.10.080 shall not apply to the administration of the judicial, the state law library, the law school of the state university, the administration of the state bar act by the state Bar Association.

The authority granted by chapter 1.08 RCW, RCW 44.28.140 shall not be affected hereby.

43.10.070 Compensation of assistants, attorneys and attorneys, and employees, and in the event they are any department, board, or commission, such department commission shall pay the compensation as fixed by law.

and the amount made available to the attorney general for legal services.

The attorney general may employ such skilled experts, scientists, technicians, or other persons as he deems necessary to aid him in the performance of his duties.

43.10.075 General investigations—Supervision. Upon the written request of the governor the attorney general shall investigate or cause to be investigated any matter within this state.

43.10.080 General investigations—Supervision. Upon the written request of the governor the attorney general shall investigate or cause to be investigated any matter within this state. If the attorney general believes that the county has failed or neglected to prosecute violations of such criminal laws, either general or specific, to a specific offense or class of offenses, the attorney general shall direct the prosecuting attorney to take such action in connection with any prosecution as the attorney general may deem necessary and proper.

43.10.085 General investigations—Supervision. Upon the written request of the governor, the attorney general shall investigate or cause to be investigated any matter within this state. If the attorney general believes that the county has failed or neglected to prosecute violations of such criminal laws, either general or specific, to a specific offense or class of offenses, the attorney general shall direct the prosecuting attorney to take such action in connection with any prosecution as the attorney general may deem necessary and proper.

43.10.090 Bimennial report. The attorney general shall prepare and submit to the governor and the legislature, at or before the commencement of each biennial session, a concise statement of all matters under his official duties, making such suggestions for lessening expenses and promoting frugality in the public offices as he may deem prudent and proper.

43.10.095 Other powers and duties. The attorney general shall perform such other duties as may be required of him by law. The attorney general shall be his duty to perform any other duties which may be required of him by law.

Chapter 43.12

COMMISSIONER OF PUBLIC LANDS

43.12.010 Powers and duties—Generally. The commissioner of public lands shall exercise such powers and perform such duties as may be required of him by law.



Laws of 1971

**Exhibit F**

of appeals, or judge of the superior court shall be charged for any search relative to matters pertaining to the duties of his office; nor may he be charged for a certified copy of any law or resolution passed by the legislature relative to his official duties, if such law has not been published as a state law.

All fees herein enumerated must be collected in advance.

Sec. 108. Section 43.08.020, chapter 8, Laws of 1965 and RCW 43.08.020 are each amended to read as follows:

The state treasurer shall reside and keep his office at the seat of government. Before entering upon his duties, he shall execute and deliver to the secretary of state a bond to the state in the sum of two hundred and fifty thousand dollars, to be approved by the secretary of state and one of the ((judges)) justices of the supreme court, conditioned to pay all moneys at such times as required by law, and for the faithful performance of all duties required of him by law. He shall take an oath of office, to be indorsed on his commission, and file a copy thereof, together with the bond, in the office of the secretary of state.

Sec. 109. Section 43.10.030, chapter 8, Laws of 1965 and RCW 43.10.030 are each amended to read as follows:

The attorney general shall:

(1) Appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested;

(2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer;

(3) Defend all actions and proceedings against any state officer in his official capacity, in any of the courts of this state or the United States;

(4) Consult with and advise the several prosecuting attorneys in matters relating to the duties of their office, and when the interests of the state require, he shall attend the trial of any person accused of a crime, and assist in the prosecution;

(5) Consult with and advise the governor, members of the legislature and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties of such officers;

(6) Prepare proper drafts of contracts and other instruments relating to subjects in which the state is interested;

(7) Give written opinions, when requested by either branch of the legislature, or any committee thereof, upon constitutional or legal questions;

(8) Enforce the proper application of funds appropriated for the public institutions of the state, and prosecute corporations for

# Amicus Brief

**Exhibit G**

For Opinion See 98 S.Ct. 2733

Supreme Court of the United States.  
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Petitioner,  
v.  
Allan BAKKE, Respondent.  
No. 76-811.  
October Term, 1976.  
June 7, 1977.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Brief of The State of Washington and The University of Washington As Amicus Curiae

Slade Gorton, Attorney General, State of Washington,  
By: James B. Wilson, Senior Assistant, Attorney General, State of Washington, Attorneys for Amicus Curiae, 112 Administration Building, University of Washington, Seattle, Washington.

\*i TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE ... 1

QUESTIONS PRESENTED ... 6

SUMMARY OF ARGUMENT ... 8

ARGUMENT ... 9

I. Introduction ... 9

II. The Fourteenth Amendment does not prohibit a state institution of higher education from considering the race of under-represented minority applicants where the purpose and effect is to increase their number in its education programs ... 8, 11

A. Where the purpose and effect of the racial classification is not to discriminate against persons on the basis of their race, the classifications will be sustained if they are rationally related to a legitimate state purpose ... 13

B. The California Supreme Court erred when it purported to subject the medical school's admissions policies to "close judicial scrutiny." ... 21

C. The California court erred in requiring a showing of past discrimination as necessary to justify a voluntary preferential program designed to remedy the effects of historical discrimination ... 25

III. Affirmance of the Court below would deny state educational authorities the discretion they require to formulate and implement education programs designed to benefit all of their students ... 26

CONCLUSION ... 27

\*ii TABLE OF AUTHORITIES

Cases

Bakke v. Board of Regents, 18 C.3rd 34, 132 C.R.680, 553 P.2d 1152 (1976) ... 6, 13, 20, 24

Brown v. Board of Education, 347 U.S. 485 (1954) ... 12

Civil Rights Cases, The, 109 U.S. 3 (1883) ... 11, 12

DeFunis v. Odegaard, 82 Wn.2d 11, 507 P.2d 1169, 84 Wn.2d 617, 529 P.2d 438 (1974), 416 U.S. 312 ... 2, 4, 6, 9, 10, 13, 17, 18, 22

Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S.Ct. 1251 (1976) ... 15, 19

German v. Kipp, \_\_\_\_\_ F.Supp. \_\_\_\_\_, U.S.D.C. W.Mo. (April 7, 1977) ... 25

Griggs v. Duke Power Co., 401 U.S. 424 (1971) ... 17

Hirabayashi v. United States, 320 U.S. 80 (1943) ... 22

Kahn v. Shevin, 416 U.S. 461 (1974) ... 23, 24

Korematsu v. United States, 304 U.S. 144 ... 22

Lindsay v. Seattle, 86 Wn.2d 698, 548 P.2d 320 (April 1976) ... 4

Morton v. Mancari, 417 U.S. 535 (1974) ... 24

Plessy v. Ferguson, 163 U.S. 537 ... 11, 12, 13

Rodriguez v. San Antonio School District, 411 U.S. 1 (1972) ... 19

State Employees v. Higher Education Personnel Board, 87 Wn.2d 823, 557 P.2d 302 (Dec. 16, 1976) ... 4

Swann v. Charlotte-Mecklenburg Board of Education, 401 U.S. 1 ... 15, 16, 26

Strauder v. West Virginia, 100 U.S. 303 (1880) ... 11

United Jewish Organization v. Carey, 430 U.S. 144, 97 S.Ct. 996 (1977) ... 14, 15, 16

United States v. Carolene Products Co., 304 U.S. 144 ... 22

United States v. Montgomery Board of Education 395 U.S. 225 (1969) ... 15

\*iii Washington v. Davis, U.S. 229 (1976) ... 15

#### *Constitutional Provisions*

United States Constitution

Fifth Amendment ... 6

Fourteenth Amendment ... 8

Fifteenth Amendment ... 16

#### *Statutes*

Title VII, Civil Rights Act of 1974 ... 4

#### *Other Authorities*

DeFunis v. Odegaard and the University of Washington: University Admissions Case, The Record (Oceana Press, 1974) Ann Fagan Ginger, Ed ... 9

Odegaard, Minorities in Medicine, Josiah Macy, Jr., Foundation (1977) ... 18

#### \*1 INTEREST OF AMICUS CURIAE

The State of Washington, and its University of Washington, as amicus curiae seek to preserve the right of the University to serve the interests of all of its students in education for life and careers in a pluralistic, multi-racial society; to alleviate gross under-representation of minority races in professions for which the University provides education; to contribute to overcoming pervasive and invidious racial discrimination which, but for \*2 preferential admissions programs, could make the University and its schools and departments segregated, tax-supported purveyors of education for the white majority race, in fact if not in law.

The State of Washington operates a system of higher education which includes two state universities, four statewide colleges and some 28 community colleges. Its largest university is the University of Washington, founded in 1861. The University is governed by a Board of Regents of seven members appointed by the Governor and confirmed by the state Senate. The University has more than 35,000 students, nearly a fourth of them enrolled in graduate or professional programs. Included are programs leading to professional degrees in law, medicine, dentistry, nursing, public affairs and social work, and graduate programs leading to the Ph.D. degree in most of the academic disciplines.

While the Board of Regents has the responsibility for admissions policies for its schools and departments, implementation of policy decisions is delegated to the deans and faculty of the various schools and colleges. The Board has directed the graduate and professional schools to "continue to recognize the need for greater representation of minority groups which are under-represented in their professions and/or academic ranks by developing, enunciating and implementing admissions policies which are consistent with the fulfillment of this need."<sup>[FN1]</sup>

FN1. Resolution of the Board of Regents

adopted June 13, 1975. appended as Appendix A to this amicus brief.

Each of the schools and colleges has its own admissions program. Each seeks to increase the numbers of qualified but under-represented\*3 minorities among its students and in the profession it serves. None of the admissions programs sets aside a fixed number of seats for qualified minority applicants, as the University of California-Davis medical school does, but all of them consider favorably the minority race of applicants when determining who, among more qualified applicants than can be admitted, shall be admitted to the limited number of places available.

The University of Washington law school's program was the first such program challenged by a disappointed applicant who contended that he had been unconstitutionally discriminated against on the basis of his Caucasian race. Marco DeFunis, Jr. was that plaintiff. He persuaded the trial court that he had been discriminated against because the Constitution is "color blind," but the Supreme Court of the State of Washington reversed, stating in part:

"The state has an overriding interest in promoting integration in public education. In light of the serious under-representation of minority groups in the law schools, and considering that minority groups participate on an equal basis in tax support of the law school, we find the state interest in eliminating racial imbalance within public legal education to be compelling."<sup>[FN2]</sup>

FN2. *DeFunis v. Odegaard*, 82 Wn.2d at 33, 507 P.2d 1169 (1973).

The court further held that:

"The consideration of race in the law school's admissions policy meets the test of necessity here because racial imbalance in the law school and the legal profession is the evil to be corrected, and it can only be corrected by providing legal education to those minority groups which have been previously deprived."<sup>[FN3]</sup>

FN3. *Id.*, at 35.

\*4 This Court granted certiorari and heard arguments, but decided that the case was moot because of the impending graduation of the plaintiff.<sup>[FN4]</sup> This Court vacated the judgment and remanded the case to the

state court for such action "as it may deem appropriate." On remand, four of the Washington Justices would have reinstated the previous judgment of the State Supreme Court, three Justices declined to vote for reinstatement for varying reasons, none of which involved the merits of the previous decision of the court, and the two original dissenters remained in dissent.<sup>[FN5]</sup> The Supreme Court of the State of Washington has only recently reaffirmed its position taken in its original *DeFunis* decision in a unanimous decision in *State Employees v. Higher Education Personnel Board*.<sup>[FN6]</sup> Furthermore, it has cited its original *DeFunis* decision to support its conclusion that selective certification (preferential treatment for under-represented minorities in hiring) was necessary in order for the city of Seattle to comply with Title VII of the Civil Rights Act of 1964 and achieve "a fair approximation of minority representation in city employment."<sup>[FN7]</sup>

FN4. *DeFunis v. Odegaard*, 416 U.S. 312.

FN5. *DeFunis v. Odegaard*, 84 Wn.2d 617, 529 P.2d 438 (1974).

FN6. 87 Wn.2d 823, 557 P.2d 302 (Dec. 16, 1976).

FN7. *Lindsay v. Seattle*, 86 Wn.2d 698, 548 P.2d 320 (April 1976).

The University of Washington's medical school also seeks to increase the number of certain minorities within its classes. They have chosen a different approach from the law school (and the University of California-Davis) because their admissions program generally has different goals. Seriously considered candidates for the limited places available are with certain exceptions limited to residents of Washington, Alaska, Montana and Idaho. Fixed numbers of seats are set aside for residents of Idaho, Alaska and Montana in accordance with \*5 agreements between those states and the State of Washington in recognition of the inability of those states to provide medical education at their own universities because of limited resources. In order to assure that Blacks, Chicanos and American Indians are represented within the student body, their applications are seriously considered regardless of place of residence. In the view of the medical school admissions authorities this gives the school the best chance of having qualified minorities

within the class ranks and ultimately within the profession.

Other graduate and professional schools at the University of Washington approach the need in ways that best serve their overall educational needs and public purposes. But all of them approach it, and seek solutions within their admissions policies and in accordance with the regents' mandate.

Other state and local agencies of Washington have been vigorous in taking and supporting affirmative action to correct the effects of past racial discrimination in both employment and education. Most of these steps have not been taken because of court orders or compulsion by federal agencies in order to comply with federal civil rights laws or executive orders. They have been undertaken voluntarily by the agencies to meet the perceived and acknowledged need to correct the effects of slavery, segregation and discrimination against certain insular minorities within our society who by the very fact of past racially-biased, legally-sanctioned discrimination would still be denied equal opportunity to the educational and employment opportunities available in the state of Washington without such programs.

\*6 If this Court were to affirm the decision of the Supreme Court of California in *Bakke v. Board of Regents*,<sup>[FN8]</sup> the programs that the Washington Supreme Court has found necessary to further the compelling interests of the state could be destroyed or crippled. For that reason, the State of Washington as amicus curiae urges the reversal of the decision of the Supreme Court of California.

FN8. 18 C 3rd 34. 132 CA R 680, 553 P.2d 1152 (1976).

#### QUESTION PRESENTED

While the question presented could be stated in the narrowest form, because of the broad sweep of the lower court's decision we believe, for the purposes of this brief, it must be stated as follows:

Does the United States Constitution preclude a state-supported university from considering minority race as an affirmative factor in its selection from among qualified applications for admission to a limited number of places within its student body?

A bewildering array of subsidiary questions might be stated, primarily because through history, prior to *DeFunis v. Odegaard*, from the creation of the Freedman's Bureau after the Civil War to the most recent implementation of affirmative action programs by the United States government, discrimination by any minority race against the majority race has been (as we think it largely remains) a non-problem. Some of those questions:

1. Does the same strict scrutiny standard apply when the purpose and effect of the allegedly discriminatory program are to benefit a minority, as in a program where the motive is neutral or malign?
2. If a compelling state interest is required, either absolute or on a relative scale, what weights are to be attached to factors such as the following:
  - a. Gross under-representation of minority race in the profession for which a school educates.
  - b. Former participation by the institution challenged in invidious discrimination for which the program is remedial and compensatory.
  - c. Absence of workable surrogate qualifications like "culturally deprived," "impoverished," "educationally handicapped," or "disadvantaged" to identify members of minority races without saying so, or in a "racially neutral" way.
  - d. The educational judgment of the faculties and administrators that the ends of education for all students are importantly served by a student body which is not monolithic in racial composition.
3. Must there be a showing of past discrimination by an agency in order to justify its ameliorative program?
4. Is a fixed number (or fixed percentage) of minority admittees in the University of California-Davis program, which differentiates it from the greater flexibility of other programs, a negative or a positive factor? In determining this, what weight should be given to invidiousness of discrimination, the compelling quality of the state interest, and scrutiny of race as a suspect category?

Wash. AGO 1953-55, No. 94

**Exhibit H**

Wash. AGO 1953-55 NO. 94  
Wash. AGO 1953-55 NO. 94, 1953 WL 45096 (Wash.A.G.)  
(Cite as: 1953 WL 45096 (Wash.A.G.))

Office of the Attorney General  
State of Washington

\*1 AGO 53-55 No. 94  
July 16, 1953

COUNTY TREASURER: DUTY TO DISTRAIN FOR PERSONAL PROPERTY TAX: AUTHORITY TO CHARGE REALTY FOR PERSONAL PROPERTY TAX: LIABILITY FOR PENALTY AND LOSS THROUGH NON-FEASANCE [[NONFEASANCE]]: REMEDIES FOR LOSS, PENALTY OR NON-FEASANCE [[NONFEASANCE]].

Treasurer:

1. Cannot refuse to distrain where facts require;
2. May charge realty in addition but not as alternative;
3. Is subject to penalty for non-feasance [[nonfeasance]] on statutory complaint;
4. Is personally liable in addition for loss to county through his non-feasance [[nonfeasance]] in civil action by prosecuting attorney;
5. May be compelled to perform duty by mandamus after demand and refusal, by prosecutor, citizen, or in extreme case by attorney general or governor.

Honorable Don G. Abel  
Prosecuting Attorney  
Becker Building  
Aberdeen, Washington

Dear Sir:

You request our opinion whether

- (1) the County Treasurer may refuse to distrain for personal property taxes and in lieu thereof charge the personal property tax against real property.
- (2) If not, what civil liabilities has the County Treasurer incurred, particularly if loss to the County has occurred.
- (3) What various remedies exist.

We conclude:

- (1) The Treasurer has no such discretion; and
- (2) depending upon the facts, the Treasurer is liable:
  - (a) for statutory nonfeasance penalties, and
  - (b) personally, for loss to the taxing bodies.
- (3) Various remedies are:
  - (a) Statutory complaint for the penalty;
  - (b) a civil action by the prosecuting attorney for the loss (or in extreme instances the Attorney General); and
  - (c) a writ of mandamus
    - (i) by the prosecutor;
    - (ii) by a citizen after a demand and refusal of action by the prosecutor;
    - (iii) or in extreme instances by the Attorney General.

ANALYSIS

I. AUTHORITY TO DELAY DISTRAINT

(a) Necessity of Immediate Distraint:

Relative to the collection of personal property taxes RCW 84.56.070 (PTC sec. 252) provides:

"On the fifteenth day of February, succeeding the levy of taxes, the county treasurer shall proceed to collect all personal property taxes. He shall give notice by mail to all persons charged with personal property taxes, and if such taxes are not paid before they become delinquent, he shall forthwith proceed to collect them. If he is unable to collect them when due he shall prepare papers in distraint \* \* \* and he shall without demand or notice distraint sufficient goods and chattels belonging to the person charged with such taxes to pay them, with interest at the rate provided by law from the date of delinquency, together with all accruing costs." (Emphasis supplied)

Such taxes become delinquent after

"the thirtieth day of April in each year." (RCW 84.56.020 - PTC sec. 248)

The duty can hardly be more specific to "forthwith" collect personal property taxes when due. "Forthwith" means "immediately" or "without delay," Webster's New Inter. Dict. (2d Ed., 1939) 994.

\*2 We fully agree with and advise you that the Treasurer must forthwith distraint and sell sufficient personal property to pay the personalty taxes. He has no authority to grant an extension of time since the statute itself makes the tax due and payable on a date certain. However, the Treasurer does and must have a reasonable period of time for the carrying out of the distraint process particularly when a large number of delinquencies exist. A period of time necessary to a bona fide effort to distraint is of course valid.

(b) Charging the Realty:

Pursuant to RCW 84.60.040 (PTC sec. 293) the county treasurer, when "in his opinion" it is "necessary," may charge the personalty tax against real property. This is in no sense a substitute manner of collection. Rather, it provides additional protection to the county. It is not a method by which the Treasurer, in his discretion, may extend the time for payment of personal taxes. Thus, even though the realty of the taxpayer is charged with the tax, the Treasurer is still charged with the duty to "forthwith" collect and must in good faith attempt to distraint.

The reason is clear. If the collection of personalty taxes must pend the tax collection procedures applicable to real property, the tax, instead of being collected forthwith, will remain uncollected for up to five years, RCW 84.64.030 and 84.64.040.

Taxation is but the proportional contribution of citizens to the support of their government. If some pay less, others must pay more. Oklahoma Tax Commission v. United States, 319 U.S. 598, 609 (1943). The budgeted expenses and obligations of counties,

municipalities, and other taxing districts are based upon the tax revenues that will be collected. Even as you and I, they may not meet their obligations with uncollected moneys.

Such delayed collection as you mention not only can result in a loss but a basic unfairness. Taxpayers who have real property obtain an extension of time to pay their personal property tax not accorded to others. Such is contemplated neither by constitution nor statute.

CIVIL LIABILITY OF COUNTY TREASURER

(a) Statutory Nonfeasance Penalties:

RCW 84.56.410 (PTC sec. 286) provides

"Every \* \* \* county treasurer who in any case refuses or knowingly neglects to perform any duty enjoined on him with respect to taxation, \* \* \* shall, for every such neglect, \* \* \* pay to the state not less than two hundred nor more than one thousand dollars, at the discretion of the court, \* \* \*" (Emphasis supplied)

This penalty shall be recovered in any court of competent jurisdiction upon the complaint of

"any citizen who is a taxpayer;"

and

"the prosecuting attorney shall prosecute such suit to judgment and execution."  
(Emphasis supplied)

The penalties apply whether or not the county has actually suffered loss. Thus the penalties apply if personalty taxes are not forthwith collected, by distraint if necessary, unless legal justification for non-action [[nonaction]] exists.

\*3 The presumption which we all do and should indulge, until the contrary is shown, is that public officials perform their duty, 3 Cooley, Taxation, (4th Ed. 1924) sec. 1011.

(b) Civil Liability:

If the county suffers a loss by virtue of the treasurer's failure to perform his duty, he is personally liable for such loss. Pierce County v. Newman, (treasurer) 26 Wn. (2d) 63 at 66, 173 P. (2d) 127 (1946):

"Upon the broad ground of public policy, persons charged with handling funds should be held to strict accountability for such funds irrespective of the cause of their loss, hence it was unimportant that respondent treasurer is not charged with personal conversion of the funds lost by the county."

The court further states:

"\* \* \* If the county treasurer refuses or neglects to collect any taxes assessed upon personal property where same is collectible, or to file, as required by the statute, the delinquent list and affidavit with the auditor when unable to collect personalty taxes, the treasurer shall be liable for the whole amount of such taxes uncollected."  
(Emphasis supplied)

Such public officers, dealing as they do with public funds, are held to a high degree of accountability. See also Spokane County v. Prescott, (treasurer) 19 Wash. 418, 53 Pac. 661 (1898); Skagit County v. American Bonding Co., (auditor) 59 Wash. 1, 109 Pac. 197 (1910); Hillyard ex rel. Tanner v. Carabin, (city treasurer, engineer and clerk) 96 Wash. 366, 165 Pac. 381 (1917). The bond is only collateral security to the personal liability of the Treasurer.

On similar tax problems see Pacific National Bank v. Bremerton Bridge Co., 2 Wn. (2d) 52 at 60-61, 97 P. (2d) 162 (1939); Monroe Logging Co. v. Department of Labor and Industries, 21 Wn. (2d) 800 at 803, 153 P. (2d) 511 (1944); and In re Elvigen's Estate, 191 Wash. 614 at 622, 71 P. (2d) 672 (1937).

#### REMEDIES

Upon the complaint of any taxpayer, the prosecuting attorney should investigate. If the complaint is accurate, he "shall" prosecute the suit to judgment and execution. RCW 84.56.410 (PTC § 286). Upon demand and refusal of the prosecutor to act, a proper suit may lie to require him to bring the action. State ex rel. Evans v. B. O. F., en banc, 141 Wash. Dec. 120 [[41 Wn.2d 133]] (Sept. 2, 1952). Such an action by a private citizen is but the general duty of his citizenship --in no sense can he be considered an intermeddler. The presumption of proper performance of duty applies also to the prosecuting attorney.

If, in an extreme case, the Attorney General learns of a failure of duty not only on the part of the Treasurer but of the prosecuting attorney, we cannot conceive it other than less than our duty, if this office did not institute proper steps.

#### The Attorney General's

"paramount duty is made the protection of the interest of the people of the state" State ex rel. Dunbar v. State Board of Equalization, 140 Wash. 433 at 440. 249 Pac. 996 (1926).

\*4 See also State ex rel. Clithero v. Showalter, 159 Wash. 519 at 521- 522, 293 Pac. 1000 (1930); Sasse v. King County, 196 Wash. 242 at 250, 82 P. (2d) 536 (1938); State v. Gattavara, 182 Wash. 325 at 329, 47 P. (2d) 18 (1935) and Reiter v. Wallgren, 28 Wn. (2d) 872, 184 P. (2d) 571 (1947).

There may even be situations arising where the Governor may act. State ex rel. Hartley v. Clausen, 146 Wash. 588, 264 Pac. 403 (1928).

#### CONCLUSION

(1) The county treasurer may not substitute a charge against the realty for his duty to collect personal property taxes immediately by distraint if necessary; (2) In his discretion, where necessary in order to secure payment of the tax, he should charge the realty. However, this is an additional, not a substitute protection to the county; (3) If the facts of a particular situation disclose that he has failed to do his duty, he is liable to the penalty provided by RCW 84.56.410, whether or not loss occurs to the county; (4) If the county does sustain loss, he is also personally liable for the amount of the loss. His bond is but collateral security to his own personal liability; (5) The first and primary obligation to insure proper performance of the Treasurer's duty is imposed upon the Prosecuting Attorney; and (6) In the event of his failure, others may either bring the action themselves or force him to do so.

Wash. AGO 1953-55 NO. 94  
Wash. AGO 1953-55 NO. 94, 1953 WL 45096 (Wash.A.G.)  
(Cite as: 1953 WL 45096 (Wash.A.G.))

Page 5

The people whom we all serve have a right to good government. That right is never without a remedy.

Very truly yours,

Don Eastvold

Attorney General

Jennings P. Felix

Assistant Attorney General

Wash. AGO 1953-55 NO. 94, 1953 WL 45096 (Wash.A.G.)

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