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SUPREME COURT
OF THE STATE OF WASHINGTON

In re:

BOND ISSUANCE OF GREATER WENATCHEE
REGIONAL EVENTS CENTER PUBLIC FACILITIES DISTRICT

* * * * *

GREATER WENATCHEE REGIONAL EVENTS CENTER PUBLIC
FACILITIES DISTRICT,

Appellant,

v.

CITY OF WENATCHEE, WASHINGTON,

Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT2

A. Standard of Review.2

B. “Debt” Requires Borrowing.3

 1. *There Is No Distinction Between “Debt” Under Art. VIII, § 1, and “Indebtedness” Under Art. VIII, § 6.*.....4

 2. *Washington Law Is Clear That “Debt” Does Not Include Ordinary Contract Obligations.* 7

 3. *Washington Does Not Accept “Risk of Loss” Theory.* 10

 4. *The Constitution Does Not Limit Lending Between Public Agencies.* 12

 5. *The Authorities Relied Upon By Respondents Are Inapposite, No Longer Good Law, or Both.* 14

 6. *There Is No Evidence of Subterfuge.* 17

C. The City’s Contingent Obligation To Make Loans Is Not “Debt”. 19

D. There Is No City “Debt” Because The City’s Future Tax Revenues Are Not Pledged to Repayment of Bonds.25

E. The Trial Court Erred In Concluding That The Entire Amount of the *District’s* Debt Should Be Counted Against the *City’s* Debt Limitation.27

F. For Municipalities, Only Principal, and Not Unearned Interest, Is Counted Against Debt Limitations.28

G. The Trial Court Erred In Concluding That The Contingent Loan Agreement Requires The City To Pledge Its Full Faith and Credit.29

H.	The Trial Court Erred in Considering the Piper Jaffray Document and Related References in the McDaniel Declaration, and the Smith Declaration and Exhibit 1 Thereo.....	29
III.	CONCLUSION	33

TABLE OF AUTHORITIES

Cases

Bd. of Supervisors of Fairfax County v. Massey, 210 Va. 253, 169 S.E.2d 556 (Va. Sup. Ct. 1969);.....24

Berglund v. City of Tacoma, 70 Wn.2d 475, 423 P.2d 922 (1967).....24

Button v. Day, 205 Va. 629, 139 S.E.2d 91 (Va. Sup. Ct. 1964).....24

Chemical Bank v. Wash. Public Power Supply Sys., 99 Wn.2d 772, P.2d 329 (1983).....17

Chemical Bank v. Wash. Public Power Supply Sys., 102 Wn.2d 874, 691 P.2d 524 (1984)17

City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1 (1898).....24

Comfort v. City of Tacoma, 142 Wash. 249, 252 P. 929 (1927).....passim

Department of Ecology v. State Finance Commission, 116 Wn.2d 246, 804 P.2d 1241 (1991)passim

Dykes v. Northern Virginia Transportation District Commission, 242 Va. 357, 411 S.E.2d 1 (Va. Sup. Ct. 1991)24

Frederickson v. Bertolino’s Tacoma, Inc., 131 Wn.App. 183, 127 P.3d 5 (2005).....17

Griffin v. Tacoma, 49 Wash. 524, 95 P. 1107 (1908)13, 14

Gruen v. State Tax Commission, 35 Wn.2d 1, 211 P.2d 651 (1949)14

In Re Audett, 158 Wn.2d 712, 147 P.3d 982 (2006).....30

Municipality of Metro. Seattle v. City of Seattle, 57 Wn.2d 446, 357 P.2d 863 (1960).....18

Nelson v. Wilson, 81 Mont. 560, 264 P.2d 679 (1928).....10

Paine v. Port of Seattle, 70 Wash. 294, 126 P. 628 (1912)18

Pierce County v. State, 159 Wn.2d 16, 148 P.3d 1002 (2006).....	12
Raynor v. King County, 2 Wn.2d 199, 97 P.2d 696 (1940).....	9
Seymour v. City of Ellensburg, 81 Wash. 365, 142 P. 875 (1914)	13
Stanley v. McGeorge, 17 Wash. 8, 48 P. 736 (1897).....	9
State Capitol Commission v. State Board of Finance, 74 Wn. 15, 132 P. 861 (1913).....	23, 24
State ex rel. Banker v. Yelle, 183 Wash. 380, 48 P.2d 573 (1935).....	14
State ex rel. State Capitol Commission v. Lister, 91 Wash. 9, 156 P. 858 (1916).....	15, 16, 29
State ex rel. Washington State Finance Comm. v. Martin, 62 Wn.2d 645, 384 P.2d 833 (1963)	14
State ex rel. Washington Toll Bridge Authority v. Yelle, 61 Wn.2d 28, 377 P.2d 466 (1962)	14
State ex. rel Washington Building Financing Authority v. Yelle, 47 Wn.2d 705, 289 P.2d 355 (1955)	18
State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997)	30
State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988)	30
Tucson Transit Authority, Inc. v. Nelson, 107 Ariz. 246, 485 P.2d 816 (1971).....	25
Von Herberg v. City of Seattle, 157 Wn. 141, 288 P. 646 (1930)	13, 14
Winston v. City of Spokane, 12 Wash. 524, 41 P. 888 (1895).....	6

Other Authorities

1952 Washington Attorney General Letter Opinion No. 345	9
1965-66 Washington Attorney General Opinion No. 13.....	10
1971 Washington Attorney General Letter Opinion No. 49	9

1982 Washington Attorney General Letter Opinion No. 7	7, 9
1988 Washington Attorney General Opinion No. 26	28
Beverly Paulik Rosenow, ed., Journal of the Washington State Constitutional Convention (1999) (analytical index by Quentin Shipley Smith)	5
Black’s Law Dictionary (9th ed. 2009)	5
Bryan A. Garner, A Dictionary of Modern Legal Usage (2nd ed. 1995)	4
E. McQuillin, The Law of Municipal Corporations (3rd ed. 2005)	10, 24
Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide (2002).....	7, 23

Rules

Civil Rule 56.....	30, 31
Evidence Rule 803(a)(8).....	31
RCW 39.36	18, 32
RCW 5.44.040	31

Constitutional Provisions

Art. VII	9
Art. VIII, Sec. 1	passim
Art. VIII, Sec. 6	passim
Art. VIII, Sec. 7	1, 3, 24

I. INTRODUCTION

The arguments of the City of Wenatchee (“City”) and Taxpayer Representative (collectively, “Respondents”) are most telling for what they do *not* say. For example, Respondents provide no evidence that the drafters of Washington’s Constitution intended the debt limitations of Art. VIII to restrict any activity other than borrowing, and Respondents do not even attempt to address the history of Art. VIII, Sec. 6, set forth by Greater Wenatchee Regional Events Center Public Facilities District (“District”). *See* Brief of Appellant (“App. Br.”) at 23-24, 28-29. Similarly, Respondents offer nothing in response the District’s analysis of Art. VIII, Sec. 7, where the drafters specifically considered limits on municipal lending and concluded that lending should be restricted only to private parties, not to other public entities.

Furthermore, Respondents cite no evidence in the record demonstrating that the Contingent Loan Agreement is anything other than it what it purports to be -- an agreement for the City to make loans to the District, subject to the obligation to repay those loans with interest, if certain contingencies arise. And Respondents do not dispute that the wisdom of entering into such inter-governmental loans is a matter left to the discretion of elected officials, and is not second-guessed by the courts.

In addition, Respondents conceded below that neither the amount nor timing of any loans that may be required can be determined at this time, making the loans contingent, and not “debt.” And Respondents concede that no City “debt” is created where the City has not pledged its

future tax revenues to repayment of the debt. Since all relevant documents are unequivocal that the City has made no such pledge here, the District's bonds are not a debt of the City subject to constitutional or statutory limitations.

In short, none of the recognized requirements for "debt" is met here, and this Court should, therefore, reverse the trial court's decision.

II. ARGUMENT

A. Standard of Review.

All parties agree that the standard of review in this case is *de novo*. App. Br. at 20; Brief of Respondent City ("City Br.") at 10; Response Brief of Taxpayer Representative ("TR Br.") at 9.¹ In addition, a party challenging a municipal corporation's legislative action bears the burden of proving the act is unconstitutional. App. Br. at 20-21. The Taxpayer Representative (Br. at 10) argues that a lesser burden applies, but the case it relies on, *Department of Ecology v. State Finance Commission*, 116 Wn.2d 246, 804 P.2d 1241 (1991), holds that "the challenging party has the burden of establishing beyond a reasonable doubt" that the challenged action is unconstitutional, and the action is to be upheld unless it "clearly conflicts" with the Constitution, 116 Wn.2d at 253-54. Respondents fail

¹ The District agrees that the standard of review for the evidentiary issues in this appeal is abuse of discretion.

to meet this burden, and the trial court's ruling should, therefore, be reversed.

B. "Debt" Requires Borrowing.

The District has demonstrated that:

(1) This Court has for decades defined "debt" under the Constitution to mean borrowing, not lending (App. Br. 21-22);

(2) The history of the Constitution demonstrates that the drafters intended debt restrictions under the Constitution to limit borrowing, not other kinds of transactions (*id.* at 23-24);

(3) The drafters explicitly considered *lending* by municipalities and limited lending to *private* entities only, not to other public entities (*id.* at 31-32); and

(4) The Contingent Loan Agreement, by its plain terms, requires the City to *lend* money, *not to borrow money*. (*Id.* at 25-26).

The trial court, therefore, erred in concluding that the City's obligations are subject to constitutional and statutory debt limitations.

Respondents do not cite a single case holding that "debt" includes anything other than borrowing. Neither Respondent cites any constitutional history indicating that the founders intended debt limits to restrict any activity other than borrowing money. Neither Respondent attempts to explain why this Court should disregard Art. VIII, § 7, where

the founders explicitly considered the limits that should be applied to municipal lending, and restricted lending only to private entities, but not to other public entities. Nor does either Respondent contest the fundamental purpose of the Contingent Loan Agreement, which is to require the City to *lend* money, not to *borrow* money, if certain contingencies come about.

1. There Is No Distinction Between "Debt" Under Art. VIII, § 1, and "Indebtedness" Under Art. VIII, § 6.

Respondents concede Art. VIII, § 1, which limits the state's authority to "contract debt," applies only to borrowing. They assert, however, that by using the phrase "become indebted" in Art. VIII, § 6, the framers intended to limit any municipal obligation payable from taxes, even if no borrowing is involved. (City Br. 10-11; TR Br. 13-15).

Respondents cite no authority or constitutional history to support their claim, but instead rely solely on the use of the word "debt" versus the word "indebtedness" in Art. VIII, §§ 1 and 6. But this is a false distinction. First, to "become indebted" and to "contract debt" are the same thing. See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 436 (2nd ed. 1995) ("*Indebtedness* is frequently used where the simpler word *debt* would be preferable In this sense, *indebtedness* is a NEEDLESS VARIANT of *debt*, although in some contexts one can hardly discern what is being referred to: the state of being indebted or the

actual debt” (italics & capitals in original)).² In fact, the authority relied upon by the Taxpayer Representative (TR Br. 14) defines “indebtedness” as a synonym for “debt.” See BLACK’S LAW DICTIONARY 836 (9th ed. 2009) (“indebtedness” means “Something owed; *a debt.*” (emphasis added)).³

The history of Article VIII also shows that “debt” and “indebtedness” were intended to mean the same thing. Art. VIII, § 6 was adopted to address concerns about municipal *borrowing* (see App. Br. 23-24), the same concern that drove adoption of Art. VIII, § 1, which limits state borrowing. See Beverly Paulik Rosenow, ed., JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 667-71 (1999) (analytical index by Quentin Shipley Smith).⁴ Indeed, the title of Article VIII -- “State, County, and Municipal *Indebtedness*” -- demonstrates that the drafters used “debt” and “indebtedness” interchangeably. Similarly, in Art. VIII, § 3, the drafters used “indebtedness” and “debt” as synonyms. That section allows the state to incur “special *indebtedness*” in certain circumstances, notwithstanding the \$400,000 limitation on “debt” in the original Art. VIII, § 1.

² Attached as Reply App. A.

³ Attached as Reply App. B.

⁴ Attached as Reply App. C.

And when Art. VIII, § 1 was amended in 1972, the terms “debt” and “indebtedness” were again used as synonyms referring to “borrowed money.” Thus, Art. VIII, § 1(d), cited by Respondents, encapsulated the cases decided prior to 1972 defining “debt” to mean “*borrowed money* represented by bonds, notes, or other evidences of *indebtedness*.” (emphasis added). Because the 1972 amendment addressed state debt only, the definition in § 1(d) covers only state debt, but there is no basis for concluding that the 1972 amendment intended to alter the well-established judicial understanding that “indebtedness” under § 6 refers to borrowed money since the 1972 amendment did not change the restrictions on municipal borrowing. *See* App. Br. 21-22 (discussing cases defining “debt” under Art. VIII).

Respondents argue that this Court has not defined “indebtedness” as it applies to municipalities. (City Br. 13; TR Br. 18). This is not so. In *State ex rel. Wittler v. Yelle*, 65 Wn.2d 660, 399 P.2d 319 (1965), this Court took a “panoramic view of our cases affecting constitutional debt limitations,” and concluded that “debt” means “borrowed money, debts created by the issuance of bonds.” 65 Wn.2d at 669-70. In reaching this conclusion, the Court relied in part on *Winston v. City of Spokane*, 12 Wash. 524, 41 P. 888 (1895), and *Comfort v. City of Tacoma*, 142 Wash. 249, 252 P. 929 (1927), both of which interpreted municipal

“indebtedness” in the context of Art. VIII, § 6. *See* 65 Wn.2d at 669-70. *Accord*, 1982 Wash. Att’y Gen’l Letter Op. No. 7 at 2-3 & n.1 (applying *Wittler* to Art. VIII, § 6).

Accordingly, this Court’s jurisprudence defining “debt” as “borrowed money” encompasses both municipal and state debt. As a result, the leading experts on the meaning of the Washington Constitution treat the cases defining “debt” to mean “borrowed money” to apply equally to all sections of Article VIII, including § 6. *See* Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide*, at 145 (2002) (CP 478) (“As with state obligations, debt [under Art. VIII, Sec. 6] is defined as borrowed money payable from taxes”). Respondents do not attempt to discredit the conclusions of these respected commentators.

2. *Washington Law Is Clear That “Debt” Does Not Include Ordinary Contract Obligations.*

Washington law interpreting Article VIII is unequivocal in distinguishing between “debt,” which requires borrowing, and ordinary contract obligations paid out of current-year taxes. (App. Br. 26-28). Respondents’ assertions that “debt” includes any obligation involving payment of money (TR Br. 20) is incorrect, and their repeated claims that the Contingent Loan Agreement is a “binding contract” (TR Br. 21), while true, is irrelevant. Further, the broad definition of “debt” espoused by the

Taxpayer Representative would impose restrictions on local governments far beyond those intended by the framers. *See* App. Br. at 28-29. Neither Respondent addresses this point.

As this Court noted in *Comfort v. City of Tacoma*, “[i]t is well recognized legal principle that those obligations which, as soon as they become such, are provided for by taxation for the current year, are not to be included in the debts that are taken into consideration in determining . . . the constitutional limit.” 142 Wash. at 257. The Taxpayer Representative (TR Br. 30) argues that *Comfort* did not involve Art. VIII, § 6, but this is incorrect. In fact, the “main and serious question” in that case was whether “debt of the city” subject to statutory and constitutional limits was involved. *Comfort*, 142 Wash. at 253.

The Taxpayer Representative’s claim (Br. 29) that *Wittler* does not support the distinction between ordinary contract obligations and borrowing is also incorrect. This Court in *Wittler* held that “the framers of the Constitution had in mind two types of obligations, those for current expenses and those for the repayment of borrowed money, and . . . the word ‘debt’ as used in Art. VIII, §§ 1, 2 and 3 . . . had reference only to the second type of obligation.” 65 Wn.2d at 669 (*quoting State ex rel. Troy v. Yelle*, 36 Wn.2d 192, 195, 217 P.2d 337 (1950)).

Similarly, the Taxpayer Representative (TR Br. 29-30) suggests that *Troy* turned on language in Art. VII rather than Art. VIII. This, too, is incorrect. *Troy* held broadly that “when the men who drafted the constitution used the word ‘debt,’ they were thinking solely in terms of borrowed money,” a conclusion based upon the history of Art. VIII, reached without reference to Art. VII. 36 Wn.2d at 197-98. Only the Court’s conclusion that warrants issued by the state are not “debt” relies on Art. VII. *See* 36 Wn.2d at 194-96.

For similar reasons, the 1952 Attorney General Opinion cited by Respondents (City Br. 12; TR Br. 19) is inapposite. That AGO counseled caution because of an apparent inconsistency between *Troy*, which held that *state* warrants are not counted against the state’s indebtedness limit, and earlier cases -- *Stanley v. McGeorge*, 17 Wash. 8, 48 P. 736 (1897), and *Raynor v. King County*, 2 Wn.2d 199, 97 P.2d 696 (1940) – which suggested that *municipal* warrants must be counted against the municipality’s debt limit. 1952 Wash. Att’y Gen’l Op. No. 345 at 2-4. But nothing in that AGO suggests that “indebtedness” under Art. VIII, § 6 is defined as something other than borrowed money. In fact, subsequent Attorney General Opinions have treated “debt” under § 1 of Art. VIII, and “indebtedness” under § 6 as synonymous. *See* 1982 Wash. Att’y Gen’l Letter Op. No. 7 at 2-3 and n.1; 1971 Wash. Att’y Gen’l Letter Op. No. 49

at 4 (relying on “comparable provisions” of Art. VIII, § 6, to construe Art. VIII, §§ Secs. 1-3); 1965-66 Wash. Att’y Gen’l. Op. No. 13 (relying on cases defining “debt” under Art. VIII, §§ 1-3 to define “debt” under Art. VIII, §6).

The Taxpayer Representative (TR Br. 20) also relies on McQuillin. But McQuillin makes clear that that “debt” in the constitutional sense is much narrower than an “obligation to pay money.” *See, e.g.*, 15 E. McQuillin, *Municipal Corporations* at § 41:17 at 464 (3rd ed. 2005) (“in most jurisdictions the word ‘debt’ or ‘indebtedness,’ as used in the limitation placed upon municipal power, is given a meaning much less broad and comprehensive than it bears in general usage”); and § 41:19 at 472-73 (“if when a city makes a contract . . . it has on hand funds available, that is, sufficient in amount to meet its obligations under the contract as they mature, obviously no indebtedness is created”).⁵

3. *Washington Does Not Accept “Risk of Loss” Theory.*

Both Respondents assert that, based on “risk of loss” theory, the City’s contingent obligation to make loans should be classified as “debt.” (TR Br. 26-27; City Br. 14). But, as the District demonstrated (App. Br. 32-33), under Washington law, weighing the risk of loss is a matter left to

⁵ The Taxpayer Representative (Br. 20-21) also relies on *Nelson v. Wilson*, 81 Mont. 560, 264 P.2d 679 (1928), but that case involved a fraudulent transfer of private property, not constitutional limitations on public debt.

elected representatives and is not considered by the courts in reviewing the legality of transactions between government entities. Neither Respondent challenges this proposition in any way.

This case demonstrates the wisdom of this doctrine. The City in 2006 and again in 2008 committed itself to provide loans to the District if necessary to help service debt on the Regional Center, which provides what elected officials anticipated to be substantial benefits to the citizens of Wenatchee and the surrounding region. Only in 2011, after the City was called upon to make good on its commitments, did the City question the constitutionality of those commitments. CP 838. It makes little sense to construe the Constitution as a “get out of jail free” card that would allow municipalities to undo transactions whenever the results do not live up to expectations.

Respondents’ arguments fail because they are grounded in second-guessing the allocation of risks agreed to by the City and the District. Respondents criticize various aspects of the Contingent Loan Agreement (TR Br. 15-16; City Br. 16-17), but this Court should reject these attempts to rewrite contract details already agreed to by the City. For similar reasons, Respondents’ arguments (City Br. 17; TR Br. 25) concerning the 2031 expiration of the District’s taxing authority fail. The City was fully aware of this limitation when it agreed to provide loans to support District

debt repayment. Because, as the City concedes, the City is required only to lend money, not to borrow money (City Br. 2 (“The City’s obligation would be to make loans to the District”)), the Agreement falls outside statutory and constitutional debt restrictions. Respondents cannot demonstrate that the Contingent Loan Agreement is anything other than what it purports to be -- an agreement by the City to *lend*, not *borrow*.⁶

4. *The Constitution Does Not Limit Lending Between Public Agencies.*

This Court has repeatedly made clear that loans between government agencies are permissible, and that, by making a loan, the lending entity does not assume the debt of the borrowing entity. *See* App. Br. 29-31. Respondents fail to cite any authority to support the claim that the debt of one municipality becomes the debt of another, separate municipality merely because the second municipality has agreed to provide loans to the first. *See Pierce County v. State*, 159 Wn.2d 16, 43 n.14, 148 P.3d 1002 (2006) (under plain language of Art. VIII, § 6, debts of one municipal corporation are separate from debts of another).

On the contrary, Respondents insist, without explanation or authority, that the *District’s* anticipated obligations are equivalent to the *City’s* debt. (TR Br. 8, City Br. 7). But both this Court’s rulings and the

⁶ Both Respondents (TR Br. 7; City Br. 5) attach significance to the fact that the 2008 Contingent Loan Agreement contains language limiting the City’s obligation to provide loans to the District if it is not permitted under the City’s non-voted debt capacity, while the proposed 2011 Contingent Loan Agreement does not contain that language. The 2008 Contingent Loan Agreement, however, has not been challenged here, and it is clear that, because the City’s obligations are not “debt” in the relevant sense, the language in the 2008 Agreement is unnecessary.

plain language of the Contingent Loan Agreement make clear this is not so. The debts incurred by the District will remain the District's alone. *See* App. Br. 7-8, 30, 39-40. Further, because the District must repay all loans to the City with interest, all debts remain the District's debts. *See id.* at 30-31.

Relying on inapposite cases decided in 1908 and 1914, the City (Br. 16) argues that it is authorized to make loans only if there is an "assured and certain" source of repayment under the City's "control." But *Seymour v. City of Ellensburg*, 81 Wash. 365, 142 P. 875 (1914), involved an accounting question, whether the amounts due on intergovernmental loans are "equivalent to cash" and therefore can be counted as assets of the lending city when calculating that city's debt limitations. *See* 81 Wash. at 366. And *Griffin v. Tacoma*, 49 Wash. 524, 95 P. 1107 (1908), considered whether an inter-fund loan violated a city charter provision prohibiting diversion of funds from their intended purposes. 49 Wash. at 528-29.

Where the risk of non-payment associated with inter-governmental loans is directly at issue, Washington authority makes clear that "courts are slow to interfere with [municipal] officers in the exercise of their judgment in dealing with the numerous difficult municipal problems which present themselves for solution." *Von Herberg v. City of Seattle*, 157 Wn. 141, 149, 288 P. 646 (1930). *See also* App. Br. 32-33. Thus, this Court has approved intergovernmental loans in many situations where the entity receiving the loan faced uncertain prospects. *See, e.g., State ex rel. Washington Toll Bridge Authority v. Yelle*, 61 Wn.2d 28, 37, 377 P.2d 466

(1962) (approving inter-governmental loan where repayment of bonds of borrowing agency was “frequently in jeopardy”); *State ex rel. Banker v. Yelle*, 183 Wash. 380, 383, 48 P.2d 573 (1935) (approving state loans to reclamation districts in “deplorable” financial condition); *Von Herberg*, 157 Wash. at 148-51 (finding *Griffin* “not determinative” and approving interfund loans as long as *creditor* fund is not threatened with insolvency).

In any event, as the record demonstrates, the Contingent Loan Agreement provides the City with a number of protections that help assure repayment of all loans and allow the City to obtain title to the Regional Center if the loans cannot be repaid. *See* App. Br. at 13-14.

5. *The Authorities Relied Upon By Respondents Are Inapposite, No Longer Good Law, or Both.*

Respondents base their arguments on several cases that are not relevant or are no longer good law.

The Taxpayer Representative (Br. 19-20), like the trial court, relies on *State ex rel. Washington State Finance Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963), but fails to heed this Court’s warning that *Martin* must be confined to its peculiar facts. *Wittler*, 65 Wn.2d at 670. *Martin* addressed the source of repayment for borrowing, not the definition of “debt” under Article VIII. Specifically, *Martin* overturned this Court’s earlier decision in *Gruen v. State Tax Commission*, 35 Wn.2d 1, 211 P.2d 651 (1949), which held that Article VIII limited debt only if it

was to be repaid from *ad valorem* taxes. *Martin* determined that, if the source of repayment of the bonds included general taxes, then the bonds constituted “debt” subject to Article VIII, whether or not *ad valorem* taxes were involved. When read in its proper context, *Martin*’s statement that “debt” includes “[a]ny obligation which must in law be paid from *any taxes levied generally*,” not just *ad valorem* taxes, 62 Wn.2d at 661 (emphasis added), is not in conflict with this Court’s lengthy jurisprudence holding that “debt” under Article VIII means “borrowed money.”

Respondents also rely heavily on a 1916 case, *State ex rel. State Capitol Commission v. Lister*, 91 Wash. 9, 156 P. 858 (1916) (TR Br. 11-12, 24-25; City Br. 15 n.3, 16). But *Lister* involved a purported loan from one fund derived from general state revenues to another fund also derived from general state revenues. *See* 91 Wash. at 17 (“the source of the income of the capitol building interest fund and the general funds of the state are the same”). Here, by contrast, loans, if required, would be made by the City to a legally distinct entity,⁷ the District, and every relevant document makes clear that the debt is the District’s, not the City’s. *See* App. Br. 7, 10, 39-40. Accordingly, any loans made by the City to the

⁷ As noted above, Respondents cite no Washington cases treating the debt of one municipal corporation as the debt of another municipal corporation.

District are, in substance and reality, loans, and not the churning of general tax revenues from a single source, as in *Lister*.

In any event, most of *Lister*'s holdings are no longer good law. The City (City Br. 16) reads *Lister* to disallow inter-governmental loans in the absence of assured repayment, but, as demonstrated in the previous section, even if *Lister* could be read that way, the case is no longer good law. Further, each of the dissenting opinions in *Lister* has subsequently been adopted by this Court as the law of this state. Compare *Lister*, 91 Wn. at 18 (Parker, J., dissenting) (because the legislation did not irrevocably pledge the credit of the state to repayment of the bonds and bind future legislatures, no "debt" is created) with *Department of Ecology*, 116 Wn.2d at 254 (concluding that no "debt" is created where credit of state is not pledged and future legislatures are not bound by the repayment obligation); compare *Lister*, 91 Wn. at 19 (Morris, J., dissenting) (the obligation "does not constitute the contracting of a debt" where it would be paid out of current-year taxes) with, e.g., *Wittler*, 65 Wn.2d at 668-71 (pension obligations to teachers payable from current-year tax revenues rather than financed through borrowing are not "debt" within the meaning of Art. VIII).

The Taxpayer Representative (TR Br. 12, 23, 40-41) also repeatedly cites the "WPPSS" cases, *Chemical Bank v. Wash. Public*

Power Supply Sys., 99 Wn.2d 772, 666 P.2d 329 (1983) (“*WPPSS I*”), and 102 Wn.2d 874, 691 P.2d 524 (1984) (“*WPPSS II*”). But *WPPSS* turned on statutory questions wholly irrelevant to the debt limitation questions at issue here.⁸

6. *There Is No Evidence of Subterfuge.*

The Taxpayer Representative repeatedly accuses the District of “subterfuge,” scheming, and attempting to evade relevant debt limits. (TR Br. 11, 19, 22-23, 39). But there is no evidence of bad faith. On the contrary, throughout each of the relevant transactions, both the District and the City acted in good faith, relying on advice and opinions from Washington’s leading experts on the meaning of the Washington Constitution and in municipal finance law. Those experts concluded when the District and the City entered into the September 2006 Interlocal Agreement, when the Bond Anticipation Notes were issued in 2008, and again in anticipation of the 2011 Bonds, that both the City and the District were operating within their constitutional and statutory authority, and that

⁸ Only Justice’s Dore’s single-judge concurrence in *WPPSS I* touched on debt limits, 99 Wn.2d at 800-01, and that concurrence is without precedential value. *Frederickson v. Bertolino’s Tacoma, Inc.*, 131 Wn.App. 183, 193, 127 P.3d 5, 10 (2005) (“it is well established that an opinion that expresses the views of less than a majority of the court is not precedent” (citation omitted)). Nonetheless, it is noteworthy that, while the *WPPSS II* majority did not address debt limitations, the three-justice dissent in *WPPSS II* considered and rejected Justice Dore’s conclusion on “debt,” holding that “[t]his court has defined ‘debt’ in the context of article 8 to mean ‘borrowed money; it denotes an obligation created by the loan of money, usually evidenced by bonds’” 102 Wn.2d at 924 (quoting *Wittler*, 65 Wash. at 668-69).

the City's contingent obligations to make loans are not "debt" subject to either Art. VIII, § 6 or RCW 39.36. *See* App. Br. 22-23; CP 625-49.

The Taxpayer Representative (Br. 23-24) relies on *State ex. rel Washington Building Financing Authority v. Yelle*, 47 Wn.2d 705, 289 P.2d 355 (1955), to support its "subterfuge" claim. But the decisive fact in *Yelle* was that the state had pledged its future tax revenues to pay for the leasing structure there at issue. 47 Wn.2d at 714. Where the state did not pledge its future tax revenues to payment of leases, this Court in *Ecology* concluded that no debt was created, 116 Wn.2d at 255-56, and three concurring justices found that, in the absence of such pledge, there was no "subterfuge to avoid the constitution's debt limitation." 116 Wn.2d at 261 (Guy, J., concurring). Here, because the City has explicitly disclaimed any pledge of future revenues, no City "debt" is created, by subterfuge or otherwise. *See also Municipality of Metro. Seattle v. City of Seattle*, 57 Wn.2d 446, 458-59, 357 P.2d 863 (1960) (rejecting argument that "[t]he City is in form the guarantor of Metro's debts but in truth itself the debtor"); *Paine v. Port of Seattle*, 70 Wash. 294, 126 P. 628 (1912) (rejecting argument that creating of Port District with same boundaries as City of Seattle is "subterfuge" to evade Seattle's debt limits).

C. The City's Contingent Obligation To Make Loans Is Not "Debt".

This Court has long recognized a clear "distinction between a debt and a contingent liability," and a mere contingent liability is not "debt." *Comfort*, 142 Wash. 249 at 255-56; App. Br. 33-39. Respondents assert (City Br. 1, 21-23; TR Br. 35-36) that, when this Court in *Comfort* stated that "we will assume that the results anticipated will be realized until the contrary clearly appears," 142 Wash. at 259, it intended to back away from the clear distinction between contingent and non-contingent debt, and to require consideration of "how contingent that debt must be." (City Br. 1). But contingency is not a matter of degree. Either a contingency has been triggered, making the debt absolute, or it is has not, meaning it is still contingent. The City's argument should be rejected because it threatens to introduce uncertainty and unpredictability into an area of Washington law that has been, up until now, clear and easily applied.

In fact, *Comfort* itself makes clear that a contingent liability remains contingent until the specified contingency occurs: "in that event, the contingent liability has ripened and the debt is absolute But until that time arrives" no debt is owed. 142 Wash at 256. Further, *Comfort* makes clear that, even if the liability accrues, no "debt" is created unless and until a city elects to fund its obligations through the issuance of new debt rather than from current tax receipts. *Id.* at 257.

Neither Respondent cites a single Washington case deviating from these clear distinctions between “debt” and contingent liabilities, and between “debt” and current-year spending. Further, Respondents concede that the amount and timing of any loans that may be required under the Contingent Loan Agreement cannot be ascertained with certainty at this time. (CP 751 n. 32; TR Br. 34). These concessions alone should dispose of this case. Because the City’s liability is not certain either as to timing or amount at this time, it remains contingent and is therefore not a “debt.” The contingent liability will not become a “debt” unless and until the future contingencies are triggered and the City then elects to meet its obligations by issuing its own debt instruments.

Respondents cannot demonstrate that the relevant contingencies have been triggered and that the City now faces a definite and certain liability that it will pay for through new borrowing. The most that Respondents argue is that, based on the Regional Center’s early performance, there is an expectation that future loans will be made in amounts unknown. (City Br. 1, 15, 19, 29 (claiming a “*possibility*” of having to loan the full amount of 2011 Bonds to the District) (emphasis added); TR Br. 5 (“The City *expects* to make future payments” (emphasis added), 34). But, as the record shows (App. Br. 37-38; CP 545-46), the results achieved by the Regional Center have steadily improved, so there

is no reason to believe that past conditions will prevail indefinitely into the future.

Nor have Respondents demonstrated that the City will issue new bonds to pay for any loan obligations, rather than relying on current-year tax receipts or, as the City has to date, paying from reserves. CP 731. Respondents' claims amount to speculation about future events and this fails to demonstrate that the Contingent Loan Agreement "clearly conflicts" with the Constitution "beyond a reasonable doubt," as must be shown to prevail in this appeal. *See Department of Ecology*, 116 Wn.2d at 253-54.

And the fact that the City has been required to make loans larger than it originally anticipated when it agreed, in the September 2006 Interlocal Agreement, to provide loans to the District if needed, *see* App. Br. at 7-8, does not change the contingent nature of the City's obligations. As events unfolded, the District was required to seek financing, and the Regional Center opened, in late 2008, a time of extraordinary turmoil in the financial markets and severe contraction in Washington's economy. *See id.* at 6, 8-10; CP 94. But the 2006 Interlocal Agreement was put in place to help ensure the Regional Center's financial footing even if such difficult circumstances arose. The Constitution should not be read to

prevent the City from aiding the District precisely when the need for loans arises because of such extraordinary circumstances.

Respondents repeatedly point to language in the Contingent Loan Agreement stating that the City's obligation to make loans would be "unconditional and absolute." (City Br. 6, 18, 27; TR Br. 34). But the Contingent Loan Agreement is unequivocal that "[t]he City's obligation to make Loans to the District hereunder is contingent on the amount of Regional Center Revenue and District Tax Revenue received by the District and available to pay debt service as it comes due on the Bonds." CP 455 (App. A § 1.01(f)). Specifically, the City's obligation to make loans arise *only* if, at future semi-annual intervals, "the District has insufficient amounts available from sales taxes . . . and from Regional Center Revenue, to provide for the timely payment of principal of and interest on the Revenue and Sales Tax Bonds." CP 454 (App. A § 1.01).⁹ Further, the amount of any loan is also contingent because it cannot be ascertained until each semi-annual debt service payment date arrives, when the District determines the difference between funds available to it to pay the next semi-annual debt service payment and the amount of the payment then due. (*Id.* at § 1.01(b)) The plain language of the Contingent

⁹ The Taxpayer Representative's claim (Br. 34) that the Contingent Loan Agreement would require the City to make "immediate payments" is therefore incorrect.

Loan Agreement makes clear that the City's obligations do not become "unconditional and absolute" until these contingencies occur. (*Id.* at § 1.01(f) ("The City's obligation to make Loans to the District *in the amounts, at the times and in the manner described herein* shall be absolute and unconditional" (emphasis added)).

Respondents also place heavy reliance on a clause stating that the City will remain obligated to make loans even if the Regional Center is not operating. (TR Br. 7, 16, 27, 34; City Br. 15). But there is no evidence that the Regional Center will close. Hence, there is no evidence this contingency will ever arise. In short, Respondents cannot demonstrate that the City's obligations constitute "debt," as opposed to a future contingent liability.

Respondents (City Br. 20-21; TR Br. 35) rely on inapposite authority, primarily *State Capitol Commission v. State Board of Finance*, 74 Wash. 15, 132 P. 861 (1913). But that case involved a definite commitment of funds, not a contingent commitment, because the Board of Finance there had entered into a contract, accepted by the Capitol Commission, to invest \$500,000 in the capitol building fund. 74 Wn. at 15-16. Further, that case turned on a constitutional provision (since

repealed¹⁰) prohibiting investment from the permanent school fund in bonds issued by the Capitol Commission “unless the credit of the state is lawfully pledged for their payment.” 74 Wn. at 18. This Court rejected the investment of school funds because the state could not pledge its credit to repayment of the capitol building fund. 74 Wn. at 19, 26. The case is therefore inapposite.¹¹

Respondents also rely on authorities from other jurisdictions, but these jurisdictions, unlike the Washington courts, do not follow the majority rule that “incurring a contingent future liability does not create an indebtedness.” See 15 McQuillin § 41.22; *Id.* at nn. 1 & 4 (noting that Washington follows majority rule but Virginia does not).¹² In any event, under much more recent Virginia precedent, it is clear that the Contingent Loan Agreement would not be a considered debt of the City. In *Dykes v. Northern Virginia Transportation District Commission*, 242 Va. 370, 411

¹⁰ When *State Capitol Commission* was decided, Art. XVI, Sec. 5 of the Washington constitution allowed the permanent school fund to be invested only in publicly-issued bonds. See Robert F. Utter & Hugh Spitzer, *The Washington State Constitution: A Reference Guide*, at 210-11 (2002).

¹¹ The City also cites *Berglund v. City of Tacoma*, 70 Wn.2d 475, 423 P.2d 922 (1967), but that case turned on the tax uniformity provision of Art. VII, § 1, and the prohibition on gifts of public funds in Art. VIII, § 7, and its therefore irrelevant. See 70 Wn.2d at 477, 481.

¹² Thus, *Button v. Day*, 205 Va. 629, 139 S.E.2d 91, 101 (Va. Sup. Ct. 1964), cites *City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1 (1898), as authority contrary to its holding. But this Court in *Comfort* followed *Walla Walla*. 142 Wash. at 256. The Virginia cases cited by Respondents are, therefore, not controlling here. Further, both Virginia cases cited by Respondents involved an irrevocable guarantee, not a loan of funds with a reciprocal obligation for the borrowing agency to repay the loan, as in this case. See *Bd. of Supervisors of Fairfax County v. Massey*, 210 Va. 253, 169 S.E.2d 556, 558 (Va. Sup. Ct. 1969); *Button*, 139 S.E.2d at 94-96.

S.E.2d 8 (Va. Sup. Ct. 1991) (order on rehearing), the Virginia Supreme Court upheld an arrangement in which an independent transportation authority would issue bonds to improve a highway, and would collect revenues from participating cities and counties. As here, the bonds made clear that bondholders had no recourse against the general taxing authority of the relevant cities and counties, and could seek collection only against the funds provided by the cities and counties to the authority. 411 S.E.2d at 2-3. The court concluded that this arrangement did not constitute a “debt” of those cities and counties subject to constitutional limits, finding that “[o]bligations which ‘are not secured by the general credit of the State or the issuing agency’ do not constitute a debt with the constitutional limitation.” *Id.* at 10.¹³

D. There Is No City “Debt” Because The City’s Future Tax Revenues Are Not Pledged to Repayment of Bonds.

Washington law is clear that no “debt” of the City is created if the City does not pledge its future tax revenues to repayment of a borrowing. *See* App. Br. 40-41. The Contingent Loan Agreement is unequivocal in stating that any debts created by the District are the District’s alone, that none of the City’s assets or tax revenues are pledged to repayment of the

¹³ For the same reason, *Tuscon Transit Authority, Inc. v. Nelson*, 107 Ariz. 246, 485 P.2d 816 (1971), is inapposite. *Tuscon* there pledged its general taxing authority to cover any deficits of its transit agency, 485 P.2d at 819, whereas the City here would not pledge its general taxing authority.

District's Bonds, and that the District's creditors have no recourse against the City. *See id.* at 39-40. Neither Respondent challenges either proposition. For this independent reason, no "debt" of the City would be created by the Contingent Loan Agreement, and the trial court's contrary conclusion should be reversed.

While conceding that the City has not pledged any assets to repayment of the City's debts, Respondents assert that the District's bondholders, as third-party beneficiaries of the Contingent Loan Agreement, could overcome the contractual barriers protecting the City. (City Br. 8-9, 15; TR Br. 7). But this is incorrect because, under Washington law, third-party beneficiaries are bound to the contract to the same extent as principals, App. Br. 41, a proposition neither Respondent challenges. And every relevant document unequivocally bars the District's creditors from seeking recourse against the City or any of its assets.

Respondents nonetheless argue (City Br. 9, 15; TR Br. 28) that the District's bondholders could use the Contingent Loan Agreement as a pretext to sue the City directly. But the Contingent Loan Agreement unequivocally states: "Neither a Registered Owner of the [District's] Bonds nor any other person shall have any right of action against or recourse to the City, its assets, or services, on account of the Bonds or any

other debts. . . of the District.” CP 455 (App. A § 1,01(f)). *Accord* CP 465 (App. A § 6.09). The Agreement by its plain terms bars District creditors from suing or otherwise seeking recourse against the City, whether in their own capacity or in their capacity as third-party beneficiaries of the Contingent Loan Agreement.

* * * * *

A finding in the District’s favor on any one of the three arguments discussed above means that the City’s contingent obligation to make loans is not “debt.” If the Court agrees with any one or more of these arguments, the trial court’s order should be reversed, and there is no need to address the remaining issues in this case. In any event, the Taxpayer Representative does not even attempt to rebut the remaining arguments, and the City’s responses do not convincingly rebut the District’s position.

E. The Trial Court Erred In Concluding That The Entire Amount of the *District’s* Debt Should Be Counted Against the *City’s* Debt Limitation.

As the District demonstrated (App. Br. 43-44), the trial court erred in requiring the entire amount the City might be obligated to loan the District over the twenty- to thirty-year life of the 2011 Bonds to be counted against the City’s debt limitations at the outset of the Contingent Loan Agreement.

The City (City Br. 29-32) asserts that there is some ambiguity in Washington jurisprudence on this issue, but, as the District has

demonstrated, Washington recognizes a clear distinction between debts that have matured and liabilities that are contingent only. Here, the City would incur “debt” only if, at future semi-annual intervals during the two- to three-decade life of the 2011 Bonds, it were called upon to make loans to the District to cover semi-annual debt service payments. As the Attorney General Opinion cited by the City itself makes clear, in such a situation, where the City is effectively acting as the lender in a line-of-credit transaction, the obligation for the lender to make a loan is contingent until the lender is actually called upon to make the loan. 1988 Wash. Att’y Gen’l Op. No. 26. Even then, as *Comfort* makes clear, no “debt” would be created unless the City elected to fund the loans by borrowing new funds rather than funding the loans from current-year tax receipts or reserves. 142 Wash. at 257.

Furthermore, adopting the construct suggested by the City would place government entities in Washington in the impossible position of having to count contingent future liabilities against their debt limits at a time when the amount of those future liabilities cannot be known. *See* App. Br. 44.

F. For Municipalities, Only Principal, and Not Unearned Interest, Is Counted Against Debt Limitations.

State Capitol Commission v. Lister held that only the principal owed by municipalities, and not unearned interest, is counted against municipal debt limits. App. Br. 45. This makes sense because, among

other things, if the debtor pays off the bonds early, its obligation to pay interest stops. While *Lister's* other holdings have been overtaken by subsequent developments, *Lister* remains the only Washington case to address whether interest is counted against municipal debt limits, and it remains good law on this point. The City (Br. 27-29) suggests there is competing authority on this question but identifies none from Washington.¹⁴

G. The Trial Court Erred In Concluding That The Contingent Loan Agreement Requires The City To Pledge Its Full Faith and Credit.

Nothing in the Contingent Loan Agreement requires the City to pledge its full faith and credit. App. Br. 45-46. Respondents concede this is so. (TR Br. 7, 42). The trial court's ruling on this issue was therefore without basis and error.

H. The Trial Court Erred in Considering the Piper Jaffray Document and Related References in the McDaniel Declaration, and the Smith Declaration and Exhibit 1 Thereto.

The trial court included the substance of the Piper Jaffray document and associated references in the Declaration of Deanne McDaniel in its "findings to support the Court's decision" and its written

¹⁴ As the City acknowledges, the definition of "debt" added to Art. VIII, § 1(d) in 1972, by its terms, purported only to codify the existing case law defining state debt. It did not purport to alter the judicial understanding of "indebtedness" for municipalities under Art. VIII, § 6, which included *Lister's* holding that only principal borrowed by municipalities counts against their debt limitations, but not unearned interest.

Order. RP 58-59; CP 668, ¶ 1. The same is true of the information in the Declaration of Steve Smith and Exhibit 1 thereto. RP 60; CP 664, ¶ 6. The inadmissibility of these documents was raised below. The Court, nevertheless, considered them. That was error.

In the trial court, the District stated:

There is serious question whether Exhibit 1 (and references thereto in Ms. McDaniel's declaration and the City's motion) is proper for consideration under Civil Rule 56(e) because the exhibit is not made on Ms. McDaniel's personal knowledge, but instead is based on the knowledge of Piper Jaffray and the Exhibit therefore would be inadmissible hearsay.

CP 530, n. 5. Therefore, the District raised the inadmissibility of these documents below.

RAP 2.5(a) contains no requirement of making a formal motion to strike. The cases Respondents cite¹⁵ involved situations where error was never even alluded to in the trial court. Here, the District did "point out" below an error the trial court might have been able to correct. *State v. Scott*, 110 Wn.2d at 685. Furthermore, "the application of RAP 2.5(a) is ultimately a matter of the reviewing court's discretion." *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990) (citing *Obert v. Environmental Research and Dev. Corp.*, 112 Wn.2d 323, 333, 771 P.2d 340 (1989) (noting that the word "may" in RAP 2.5(a) reflects the discretionary, not

¹⁵ *State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1997); *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988); *In Re Audett*, 158 Wn.2d 712, 147 P.3d 982 (2006).

mandatory, nature of this Rule)). Thus, the error with respect to the Piper Jaffray document and Ms. McDaniel's references thereto was raised below and, even if that were not the case, this Court should, nevertheless, consider this assignment of error.

The Taxpayer Representative (TR Br. 44) concedes that the District raised a Civil Rule 56(e) argument, but argues it did not raise a hearsay argument. CR 56(e), however, requires that affidavits be made on personal knowledge and set forth facts that would be admissible in evidence. The information in the Piper Jaffray document, and Ms. McDaniel's recounting of it in her declaration, was not based on her personal knowledge, was not properly authenticated, and is irrelevant because, as shown in the District's briefing, the Constitution, statutes, case law, and other authorities do not view every long-term obligation as the same thing as debt, to say nothing of using the total potential amount that might possibly be incurred as the relevant figure if it were considered debt. The Court should also reject Respondents' arguments that the Piper Jaffray projections were not hearsay because they were not offered for the truth of the matters asserted, when they clearly were used in substantive calculations and scenarios in support of arguments that the City would exceed its debt limitations.

With respect to the Smith Declaration and Exhibit 1 thereto, the City claimed there was no hearsay because of the public record exception. But that exception, among other things, requires certification under seal by a public officer having legal custody of the documents. Evidence Rule 803(a)(8); RCW 5.44.040. The email string was double or triple hearsay, unauthenticated, and irrelevant to the issues being considered. The City again argues there is no hearsay because the email string was not offered for the truth of the matter asserted, but simply to show the impacts it had on the City, but that falls far short of persuasive since it was only the substance of the information purportedly being conveyed by someone from the Office of the State Auditor, to an Assistant Attorney General, to the City Attorney, and then to the trial court, that provided the basis for whatever the City intended in submitting it.

The trial court relied on the Piper Jaffray document and Ms. McDaniel's references to it, as well as the Smith Declaration and Exhibit 1 thereto, as shown in its Order and its oral findings. That was error.

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III. CONCLUSION

Based upon multiple legal grounds, the City's obligations under the 2011 Contingent Loan Agreement are not "debt" under Art. VIII, § 6 or RCW 39.36. The Constitution should not be construed as an escape hatch for municipalities that have committed to a particular course of action whenever it appears that anticipated financial results might not be achieved.

This Court should reverse the trial court decision and enter judgment for the District.

RESPECTFULLY SUBMITTED this 15th day of December, 2011.

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APPENDICES

BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 436 (2nd ed. 1995).....	Appendix A
Black's Law Dictionary (9th ed. 2009).....	Appendix B
Beverly Paulik Rosenow, ed., JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889 (analytical index by Quentin Shipley Smith) (1999)....	Appendix C

Appendix A

A DICTIONARY OF
MODERN
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erroneously assumed, with the concurrence of the other (including Scottish) peers, that the law of the two countries was the same. *Quaere*, whether this was *incuria*; or is *incuria* unthinkable in the House of Lords?" Carleton K. Allen, *Law in the Making* 257 (7th ed. 1964). See *per incuriam*.

incurrence; incurment. The latter is a NEEDLESS VARIANT of the noun corresponding to the verb *to incur* (= [1] to run into (some undesirable consequence), or [2] to bring upon oneself). E.g., "The fault in the *incurrence* of the danger does not free the defendant from liability." "When a 'loss contingency' exists, the likelihood that the future event will confirm the loss or impairment of an asset or the *incurrence* of a liability can range from probable to remote." *Incurrence* is sometimes misspelled *incurrence*.

indebitatus assumpsit. See *assumpsit, implied contract & quasi-contract*.

indebtedness = the state or fact of being indebted. E.g., "For purposes of 12 U.S.C. § 82, a national bank's *indebtedness* or liability does not include Federal Funds Purchased or obligations to repurchase securities sold."

Indebtedness is frequently used where the simpler word *debt* would be preferable: "The petitioner elected to declare the entire *indebtedness* [better: *debt*] to be immediately due and payable." "The *indebtedness* [better: *debt*] has not been paid." In this sense, *indebtedness* is a NEEDLESS VARIANT of *debt*, although in some contexts one can hardly discern what is being referred to: the state of being indebted or the actual debt. See *debt & indebtedment*.

indebtment, a NEEDLESS VARIANT of *indebtedness* or *debt*, was much more common up to the mid-20th century than it is today. E.g., "The transfer from Godfrey was a simple collateral security, taken as additional security for the old *indebtment* [read *debt*] . . ." *People's Sav. Bank v. Bates*, 120 U.S. 556, 565 (1887). A few latter-day examples persist: "[T]he . . . amount due under an absolute *indebtment* [read *debt* or *indebtedness*] may be unascertained . . ." *Loyal Erectors Inc. v. Hamilton & Son, Inc.*, 312 A.2d 748, 752 (Me. 1973). See *indebtedness & debt*.

indecentcy. See *obscenity* (B).

indecent assault is the BrE phrase denoting a statutory crime that includes all forms of sexual assault other than rape, buggery (q.v.), and attempts to commit either of those crimes. The

nearest AmE equivalent is *sexual assault*. See *rape* (c).

INDEFINITE ANTECEDENT. See *ANTECEDENTS, FALSE*.

indemnifiable; indemnitable. The former is better.

indemnificate, a BACK-FORMATION from *indemnification*, is a NEEDLESS VARIANT of *indemnify*, q.v.

indemnification. See *indemnity*.

indemnificatory; indemnitory. Both mean "of, relating to, or constituting an indemnity." The standard term is *indemnificatory*. The other term, *indemnitory*, is a NEEDLESS VARIANT not recorded in the major unabridged dictionaries, but it occurs occasionally in American legal writing. "Among these problems are those arising from the possibility of multiple subrogation claims [and from] determining what types or lines of insurance are *indemnitory* [read *indemnificatory*]." *Shelby Mut. Ins. Co. v. Birch*, 196 So. 2d 482, 485 (Fla. Dist. Ct. App. 1967) (Andrews, J., dissenting). "[N]o decision is necessary at this time on whether the *indemnitory* [read *indemnificatory*] theory should be limited only to owners of premises." *Waller v. J.E. Brenneman Co.*, 307 A.2d 550, 553 (Del. Super. Ct. 1973).

indemnifier. See *indemnitor*.

indemnify. A. And *hold harmless*. *Indemnify* = (1) to make good a loss that someone has suffered because of another's act or default; (2) to promise to make good such a loss; or (3) to give security against such a loss.

Etymologically, the word derives from *indemniss* (= harmless) combined with *facere* (= to make). Thus, *indemnify* has long been held to be perfectly synonymous with *hold harmless* and *save harmless*. See *Brentnal v. Holmes*, 1 Root (Conn.) 291, 1 Am. Dec. 44 (1791).

That being so, the common DOUBLET *indemnify and hold harmless* (sometimes written *indemnify and save harmless*) is stylistically and substantively indefensible. But it is so common today that lawyers routinely use it without asking themselves what distinction, if any, exists between the two parts of the doublet. See *DOUBLETS, TRIPLETS, AND SYNONYM-STRINGS*.

B. **Intransitive and Transitive Uses.** *Indemnify* takes the preposition *from*, *against*, or *for*. E.g., "Based on this finding, the district court

Appendix B

Black's Law Dictionary®

Ninth Edition

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incroach, *vb.* Archaic. See ENCROACH.

incroachment. Archaic. See ENCROACHMENT.

in cuius rei testimonium (in kyoo-jəs ree-i tes-tə-moh-nee-əm). [Law Latin] *Hist.* In witness whereof. • These words were used to conclude deeds. The modern phrasing of the testimonium clause in deeds and other instruments — beginning with *in witness whereof* — is a loan translation of the Latin.

inculpatæ tutelæ moderatio. See MIDERAMEN INCULPATÆ TUTELÆ.

inculpate (in-kəl-payt or in-kəl-payt), *vb.* (18c) 1. To accuse. 2. To implicate (oneself or another) in a crime or other wrongdoing; INCRIMINATE. — **inculpation**, *n.* — **inculpatory** (in-kəl-pə-tor-ee), *adj.*

inculpatory evidence. See EVIDENCE.

incumbent (in-kəm-bənt), *n.* (15c) One who holds an official post, esp. a political one. — **incumbency**, *n.* — **incumbent**, *adj.*

incumbrance. See ENCUMBRANCE.

incur, *vb.* (15c) To suffer or bring on oneself (a liability or expense). — **incurrence**, *n.* — **incurable**, *adj.*

incurramentum (in-kə-rə-men-təm). [fr. Latin *in* "upon" + *currere* "to run"] *Hist.* The incurring of a fine or penalty.

incurred risk. See ASSUMPTION OF THE RISK (2).

in cursu diligentiae (in kər-s[y]oo dil-ə-jen-shee-ee). [Law Latin] *Hist.* In the course of doing diligence — i.e., executing a judgment.

in cursu rebellionis (in kər-s[y]oo ri-bel-ee-oh-nis). [Law Latin] *Hist.* In the course of rebellion.

"In cursu rebellionis . . . All persons were formerly regarded as in rebellion against the Crown who had been put to the horn for non-fulfilment of a civil obligation; their whole moveable estate fell to the Crown as escheat; they might be put to death with impunity; and lost all their legal privileges. If the denunciation remained unrelaxed for year and day (which was the time known as the *cursus rebellionis*), the rebel was esteemed *civiliter mortuus*, and his heritage reverted to the superior . . . Denunciation for civil obligation and its consequences were in effect abolished by the Act 20 Geo. II. c. 50." John Trayner, *Trayner's Latin Maxims* 257 (4th ed. 1894).

in custodia legis (in kə-stoh-dee-ə lee-jis). [Latin] In the custody of the law <the debtor's automobile was *in custodia legis* after being seized by the sheriff>. • The phrase is traditionally used in reference to property taken into the court's charge during pending litigation over it. — Also termed *in legal custody*. [Cases: Attachment ↻64; Execution ↻55; Garnishment ↻58.]

in damno vitando (in dam-noh vi-tan-doh). [Latin] *Hist.* In endeavoring to avoid damage (or injury).

inde (in-dee), *adv.* [Latin] *Hist.* Thence; thereof. • This word appeared in several Latin phrases, such as *quod eat inde sine die* ("that he go thence without day").

indebitatus (in-deb-i-tay-təs), *p.pl.* [Law Latin] Indebted. See NUNQUAM INDEBITATUS.

indebitatus assumpsit (in-deb-i-tay-təs ə-səm[p]-sit). See ASSUMPSIT.

indebiti solutio (in-deb-i-ti sə-l[y]oo-shee-oh). [Latin] *Roman & Scots law.* Payment of what is not owed. • Money paid under the mistaken belief that it was owed could be recovered by *condictio indebiti*. See *condictio indebiti* under CONDICTIO.

"*Indebiti Solutio* — When a person has paid in error what he was not bound to pay the law lays upon the person who has received payment a duty of restitution. . . . Payment (solutio) includes any performance whereby one person has been enriched at the expense of another. Usually it will be the handing over of money or of some other thing, but it may also consist in undertaking a new liability or in discharging an existing liability." R.W. Lee, *The Elements of Roman Law* 373-74 (4th ed. 1956).

indebitum (in-deb-i-təm), *n.* & *adj.* *Roman law.* A debt that in fact is not owed. • Money paid for a nonexistent debt could be recovered by the action *condictio indebiti*. Cf. DEBITUM.

"A conditional debt if paid could be recovered as an *indebitum*, so long as the condition was outstanding." W.W. Buckland, *A Manual of Roman Private Law* 255 (2d ed. 1939).

indebtedness (in-det-id-nis). (17c) 1. The condition or state of owing money. 2. Something owed; a debt.

indecenty, *n.* (16c) The state or condition of being outrageously offensive, esp. in a vulgar or sexual way. • Unlike obscene material, indecent speech is protected under the First Amendment. Cf. OBSCENITY. [Cases: Obscenity ↻1.] — **indecent**, *adj.*

"*Obscenity* is that which is offensive to chastity. *Indecency* is often used with the same meaning, but may also include anything which is outrageously disgusting. These were not the names of common-law crimes, but were words used in describing or identifying certain deeds which were." Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 471 (3d ed. 1982).

indecent advertising. 1. Signs, broadcasts, or other forms of communication that use grossly objectionable words, symbols, pictures, or the like to sell or promote goods, services, events, etc. 2. Archaic. In some jurisdictions, the statutory offense of advertising the sale of abortifacients and (formerly) contraceptives.

indecent assault. See *sexual assault* (2) under ASSAULT.

indecent assault by contact. See *sexual assault* (2) under ASSAULT.

indecent assault by exposure. See INDECENT EXPOSURE.

indecent exhibition. The act of publicly displaying or offering for sale something (such as a photograph of book) that is outrageously offensive, esp. in a vulgar or sexual way. [Cases: Obscenity ↻6, 7.]

indecent exposure. (1828) An offensive display of one's body in public, esp. of the genitals. — Also termed *indecent assault by exposure*; *exposure of person*. Cf. LEWDNESS; OBSCENITY. [Cases: Obscenity ↻3.]

"*Indecent exposure* of the person to public view is also a common-law misdemeanor. Blackstone did not deal with it separately. 'The last offense which I shall mention,' he said 'more immediately against religion and morality, and cognizable by the temporal courts, is that of open and notorious

Appendix C

**THE JOURNAL OF THE
WASHINGTON STATE
CONSTITUTIONAL CONVENTION
1889**

with Analytical Index

by

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Edited by

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ARTICLE VIII

STATE, COUNTY AND MUNICIPAL INDEBTEDNESS

Few delegates wanted to allow the state unlimited indebtedness, fearing the effect on future prosperity. Although some favored a limit based on a percentage of taxable property, those who preferred limiting by a definite amount triumphed with a four hundred thousand dollar ceiling. An attempt to allow the Legislature to incur special debts without the consent of the voters was unsuccessful.

Because of disastrous fires in Seattle, Ellensburg, and Spokane, delegates from these areas were anxious that any limitation of county or city indebtedness allow for rebuilding public facilities. Men sent by the Seattle City Council described the needs of a growing city to the committee on indebtedness.¹ Their mission was heartily approved of by the *Vancouver Independent*.² Two newspapers said the Convention had no right to limit municipal indebtedness³ and another sharply criticized this sixth section of the committee's report.⁴

Finally, a debt of up to one and one half per cent of the taxable property was allowed without a vote of the people. With the consent of three-fifths of the voters a debt of up to five per cent of the taxable property could be incurred. An editorial in the *Seattle Post Intelligencer* expressed satisfaction with the final clause.⁵ Caustic editorial disapproval was expressed in the *Spokane Falls Review*.⁶

Walla Walla's desire to aid in the construction of a branch line railroad caused its delegates, supported by some others from eastern Washington, to demand that counties be allowed to grant subsidies to corporations. The *Yakima Herald* said the present population should not bear the full burden of improvements which future generations would enjoy.⁷

The battle over the Walla Walla subsidy scheme was one of

1. *Seattle Post Intelligencer*, July 12, 17, 1889.

2. *Vancouver Independent* [Vancouver, Wash.], July 17, 1889.

3. *Post Intelligencer*, July 12; *Tacoma Daily Ledger*, July 18, 1889.

4. *Seattle Times*, July 12, 1889.

5. *Post Intelligencer*, August 1, 1889.

6. *Spokane Falls Review*, July 23, 1889.

7. *Yakima Herald*, July 18, 25, 1889.

the most bitter of the Convention. It has been suggested that the origin of the problem was in the rivalry between the Union Pacific and the Great Northern railroads in Washington Territory, although this was not brought out in the Convention.⁸

The delegates who feared government partnership with private corporations saw to it that counties and municipalities were forbidden to loan their credit. Walla Walla County rejected the Constitution, undoubtedly for this reason.

Stiles later bemoaned the fact that a definition of indebtedness had been neither included in the Constitution nor provided by the Legislature. He said reckless assessments in early years had encouraged extravagances, forcing the spirit of the section to bend to expediencies.⁹

The Committee for State, County, and Municipal Indebtedness was appointed July 9. (p. 19)

Members: Browne, chairman; Blalock, J. M. Reed, Durie, Coey, Hungate, Sturdevant, Fairweather, and Fay.

Section 1

Present Language of the Constitution:

LIMITATION OF STATE DEBT. The state may to meet casual deficits or failure in revenues, or for expenses not provided for, contract debts, but such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed four hundred thousand dollars (\$400,000), and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained or to repay the debts so contracted, and to no other purpose whatever.

Original language same as present.¹⁰

8. James L. Fitts, "The Washington Constitutional Convention of 1889" (unpublished Master's thesis, University of Washington, Seattle, 1951), 65-75; Wilfred J. Airey, "A History of the Constitution and Government of Washington Territory" (unpublished Ph.D. dissertation, University of Washington, Seattle, 1945), 481-7.

9. Theodore L. Stiles, "The Constitution of the State and Its Effects upon Public Interests," *Washington Historical Quarterly*, IV (October, 1913), 284.

10. *State Indebtedness Limited: Ia., Const. (1857), Art. 7, sec. 2.* [Identical except for slight word change.] *Hill, Prop. Wash. Const., Art. 7, sec. 2.* [Similar.]

Text as given in report of committee, July 25:

Same as final except that it did not include the words "or failures" in the first sentence. (p. 150)

Consideration by committee of the whole, July 31:¹¹

Motion: Cosgrove moved to strike "but such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed four hundred thousand dollars."

Motion: Turner moved to further amend by striking the entire section.

Action: Both motions lost.

Discussion as follows:

For: Turner was opposed to any limitation because he did not wish to have the people vote every time special expenses arose. Cosgrove argued that the result of adopting such a section would be that bonds would never be floated at par. He pointed out that the great needs of a new state as reason for refusing a limitation. Stiles wished to leave it to the Legislature.

Against: Browne thought it necessary to have a limitation. He pointed to Section 3 as authorizing special expenditures by the people, and cited California and New York as examples of states which had specific debt limits. J. Z. Moore and T. M. Reed endorsed Browne's views. Sturdevant thought four hundred thousand dollars was enough, and Blalock said the committee report struck a safe spot between two extremes. Lillis feared the danger from allowing unlimited indebtedness and wanted the state to set a good example for cities and counties. Minor opposed the amendments because he thought this was a necessary limitation on the Legislature. J. M. Reed believed that with the large land grants given to the state there should be no need to contract a debt larger than the amount provided. Kinneear was opposed to unlimited debts. Durie said that with the limitation, bonds could be floated at a much lower rate of interest than otherwise.

¹¹ Times, July 31; Review, Ledger, Tacoma Morning Globe, August 1; Washington Standard [Olympia, Wash.], August 2, 1889.

Weir thought there should be a limitation, but one which was a per centum upon the assessed value of the property. Stiles agreed with Weir and added that he did not believe that the people should have to be consulted every time a public building was needed.

Motion: Minor offered as an amendment the following substitute: "No debts shall hereafter be contracted by, or on behalf of this state, unless such a debt shall be authorized by law for some single work or object to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty years of the contracting thereof." Then Section 1 follows preceded by the word "provided."

Action: Ruled out of order. The Convention had adopted the Cushing Manual as a parliamentary guide and the manual stated that only one amendment to an amendment was in order. Cosgrove's and Turner's amendments had not yet been voted on. Both were then voted on and lost. Minor again put his motion and it also lost.

Discussion as follows:

For: Griffiths preferred this amendment since it provided for limited indebtedness.

Against: Turner believed in limiting counties or municipalities to debts for specified purposes, but thought that on the state level such a limitation could restrict various departments. Stiles agreed; he believed in leaving the subject to the control of the Legislature after inserting some limitation in the Constitution.

Motion: Weir moved to limit indebtedness to three per cent for general purposes.

Action: Motion lost.

Motion: Weir moved to strike "four hundred thousand dollars" and substitute "one per cent of the taxable property."

Action: Motion lost.

Motion: Lillis moved to strike "four hundred thousand dollars" and substitute "eight hundred thousand dollars."

Action: Motion lost.

Motion: Stiles moved to make it one half of one per cent of the taxable property.

Action: Motion lost.

Section was accepted as reported by the committee.

Final action by Convention, August 1:

Motion: Weir moved to strike "four hundred thousand dollars" and insert in lieu thereof "one half of one per cent of its taxable wealth."

Motion: P. C. Sullivan moved to amend by striking out "one half of one" and inserting "one."

Action: Weir accepted the amendment; a vote taken on the motion as amended lost 51 to 23. (p. 209)

Voting for: Blalock, Bowen, Comegys, Crowley, Dickey, Dunbar, Eldridge, Eshelman, Glascock, Jamieson, Jones, Joy, Kellogg, Mires, Prosser, Sohns, Stiles, Suksdorf, P. C. Sullivan, Tibbetts, Van Name, Weir, and Winsor. On leave: Gowey.

Section 2

Present Language of the Constitution:

POWERS EXTENDED IN CERTAIN CASES. In addition to the above limited power to contract debts the state may contract debts to repel invasion, suppress insurrection, or to defend the state in war, but the money arising from the contracting of such debts shall be applied to the purpose for which is was raised and to no other purpose whatever.

Original language same as present.¹²

Text as given in report of committee, July 25:

Same as final. (p. 151)

¹² Exceptions to Limitation: Ia., Const. (1857), Art. 7, sec. 4. [Identical except for slight word change.]