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Washington State Court of Appeals
Division I

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Docket No. 64415-7-I

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

NORTHWEST ANIMAL RIGHTS NETWORK, et al.,

Plaintiffs-Petitioners,

-against-

STATE OF WASHINGTON, et al.,

Defendants-Respondents.

APPELLANTS' BRIEF

ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. Did the trial court err by finding lack of standing under taxpayer suit principles (CP 144, ¶ 6; CP 156-157)?
2. Did the trial court err by finding lack of standing under the UDJA (CP 144, ¶ 5; CP 156-157)?
3. Did the trial court err by finding lack of justiciability (CP 143, ¶ 3; CP 156-157)?
4. Did the trial court err by finding lack of subject matter jurisdiction based on standing and justiciability (CP 144, ¶ 7; CP 156-157)?
5. Did the trial court err by refusing to permit leave to amend the complaint a second time (CP 144, Order ¶ 7; CP 156-157)?

II. STATEMENT OF THE CASE

This action seeks to declare unconstitutional statutory limitations, exemptions, and exclusions to prosecution for animal cruelty as codified within Ch. 16.52 RCW and municipal codes incorporating same, such as King County §§ 11.04.530 and 11.28.110. On or before Dec. 8, 2008, Mr. Karp, on behalf of the named plaintiffs and taxpayers for whom they serve as relators, petitioned the Washington State Attorney General's office to take steps to render these statutory exclusions unconstitutional, detailing the grounds therefore. CP 33-43. On Dec. 22, 2008, Senior Counsel Jerri

146-155), which was denied on Oct. 7, 2009. **CP 156-157**. Plaintiffs timely appealed (**CP 158-159**). No defendants cross-appealed.

III. ARGUMENT

Plaintiffs challenge the trial court's conclusions, irrespective of the proposed second amended complaint, that they lacked standing under the UDJA and taxpayer derivative suit common law doctrine, that their claims were nonjusticiable, and for that reason did not bestow upon the court subject matter jurisdiction. This court reviews a trial court's ruling on a CR 12(c) motion de novo, taking the facts alleged in the complaint, as well as consistent hypothetical facts in the light most favorable to the nonmoving party. *Davenport v. Washington Educ. Ass'n*, 147 Wash.App. 704, 715 (II, 2008). Akin to CR 12(b)(6) motions, courts should dismiss under CR 12(c) only when it appears beyond doubt that no facts justifying recovery exist. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 214 (2005). While a CR 15(a) motion to amend is reviewed for abuse of discretion, here, the trial court considered the proposed amended complaint in its decision to grant Defendants' CR 12(c) motion. *Wilson v. Horsley*, 137 Wn.2d 500, 505 (1999). Thus, in the spirit of CR 1, Plaintiffs submit that all questions raised as to standing and justiciability should be reviewed de

claims were ripe.

novo against the *Second Amended Complaint*. CP 144, Order ¶ 7 (“Motion to Amend the Complaint is denied, as the proposed amendments will not cure the legal deficiencies identified in this Order.”).

A. Taxpayer Standing.

1. *No Special Injury Required.*

Over a half-century long line of Washington Supreme Court precedent requires no personal stake or injury to challenge illegal acts of government, so long as the condition precedent of Attorney General declination is met. *See Reiter v. Wallgren*, 28 Wn.2d 872 (1947). The Supreme Court described the prerequisite as follows:

As to the issue of Boyles’ standing to raise the constitutional questions, her connection to the alleged injury is attenuated. She alleges no direct impact as a present or past offender in the County or City jail. Instead, she brings action as a taxpayer alleging that official government acts amount to an unconstitutional support of religion.

This court recognizes litigant standing to challenge governmental acts on the basis of status as a taxpayer. ... Generally, we have required that a taxpayer first request action by the Attorney General and refusal of that request before action is begun by the taxpayer. ... We have recognized however that even that requirement may be waived when “such a request would have been useless.”

State ex rel. Boyles v. Whatcom Cy., 103 Wn.2d 610, 613-14 (1985)(citations omitted).² Divisions I (*Robinson*) and II (*Kightlinger*) have reaffirmed this holding. *Robinson v. City of Seattle*, 102 Wash.App. 795 (Div.1,2000); *Kightlinger v. PUD No. 1 of Clark Cy.*, 119 Wash.App. 501 (Div.2,2003), *rev. granted*, 152 Wn.2d 1001 (2004).

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**, there being only a condition precedent to such standing that the Attorney General first decline a request to institute the action.

City of Tacoma v. O'Brien, 85 Wn.2d 266, 269 (1975)(emphasis added).³

Aside from obtaining a decline letter from the Attorney General, the only remaining prerequisite for maintaining such an action is to prove taxpayer status. Arguably, any citizen who pays local sales tax of King County, sales tax to the State of Washington, gasoline taxes, property taxes, employment taxes, B & O taxes, business license taxes, and/or driver's license tabs has standing to challenge the actions of the County and State since, ostensibly, any and all of these revenue sources finance the operations of the legislative and executive branches of local and state government.

² See also *Walker v. Munro*, 124 Wn.2d 402 (1994).

³ See also *Tabor v. Moore*, 81 Wn.2d 613, 617+ (1972) and *Farris v. Munro*, 99 Wn.2d

The case of *Robinson v. City of Seattle*, 102 Wash.App. 795 (2000) is on point. In *Robinson*, eight residents of the City of Seattle and a non-profit corporation who paid local sales and use taxes brought a Fourth Amendment and Art. I, § 7 (Washington Constitution) challenge to a Seattle ordinance requiring a preemployment urinalysis drug test for about half the vacancies filled by the City. *Id.*, at 800-804. None of the taxpayer plaintiffs applied for a job with the City of Seattle. *Id.*, at 804. The *Robinson* court found that the taxpayers had standing under the same doctrine that permits standing for the taxpayers in the present case. *Id.*, at 805. The City of Seattle in *Robinson* pled lack of standing as an affirmative defense, as the Defendants do here:

Washington recognizes “litigant standing to challenge governmental acts on the basis of status as a taxpayer.”^{FN8} Under the doctrine of taxpayer standing, “a taxpayer need not allege a personal stake in the matter, but may bring a claim on behalf of all taxpayers [.]”^{FN9} Taxpayers need not allege a direct, special, or pecuniary interest in the outcome of the suit, but must demonstrate that their demand to the Attorney General to institute the action was refused, unless such a request would have been useless.^{FN10}

FN8. *State ex rel. Boyles v. Whatcom County Super. Ct.*, 103 Wash.2d 610, 614, 694 P.2d 27 (1985).

FN9. *Walker v. Munro*, 124 Wash.2d 402, 419-20, 879 P.2d 920 (1994); see also Kenneth R. Bjorge, *Standing to Sue in the Public Interest: The Requirements to Challenge*

Statutes and Acts of Administrative Agencies in the State of Washington, 14 Gonzaga L.Rev. 141, 155-61 (1978).

FN10. *City of Tacoma v. O'Brien*, 85 Wash.2d 266, 269, 534 P.2d 114 (1975).

The Taxpayers assert their standing under this doctrine, and the City makes no argument to the contrary.^{FN11} We agree that the Taxpayers have standing.^{FN12}

FN11. Although the City listed lack of standing as an affirmative defense in its answer, the City did not argue lack of standing in its motion for summary judgment or in its brief on appeal.

Id., at 804-805.

Where the fundamental legality of the action or inaction is called into question, and the thrust of the lawsuit is to enforce the law, “a taxpayer need not allege a personal stake in the matter, but may bring a claim on behalf of all taxpayers[.]” *Walker v. Munro*, 124 Wn.2d 402, 419-20 (1994) (citation omitted).⁴ In *Walker*, taxpayers facially challenged the constitutionality of a pending tax initiative, but because the terms of the initiative were not yet in effect, the matter remained nonjusticiable. Here, however, Ch. 16.52 RCW’s exemptions have been in effect for years. Whether the acts, even if illegal, create a tax burden, is irrelevant and such showing is not required. *See State ex rel. Lemon v. Langlie*, 45

⁴ *See also Times Publ’g Co. v. City of Everett*, 9 Wash. 518 (1894) (forcing City of Everett to abide by city code).

Wn.2d 82, 95 (1954) (permitting taxpayer suit even though no monetary loss to taxpayer alleged). Indeed, in California, even if illegal conduct results in a *savings* to the taxpayer, the action may nonetheless commence.⁵

NARN's very mission, and Ms. Bjork's personal commitment, to protect animals from unnecessary pain and suffering fit squarely within the zone of interests to be protected by what should be an unadulterated (i.e., unfettered by unconstitutional limitations) Ch. 16.52 RCW. Defendants may argue that this taxpayer challenge pertains to *discretionary* acts of government for which special injury to the taxpayer must be demonstrated. However, the Plaintiffs are not challenging discretionary decisions by government simply because they have a different political or ethical view. Rather, they are seeking to declare facially unconstitutional those official government acts that amount, *inter alia*, to an unconstitutional delegation, violation of the equal protection clause, violation of the privileges and immunities clause, vague, and

⁵ *Wirin v. Parker*, 313 P.2d 844, 894-95 (Cal. 1957)(stating that a "plaintiff may maintain an action to restrain the expenditure of public funds for illegal purposes. It is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving of tax funds It is elementary that public officials must themselves obey the law.") See also *E. Mo. Laborers Dist. Council v. St. Louis Cy.*, 781 S.W.2d 43, 46 (Mo. 1989)(holding that a taxpayer need not prove their taxes will increase because of the alleged expenditure, since the impact is presumed).

underbroad pronouncement that exempts from prosecution entire classes of ill-defined individuals.

The cruelty to animals chapter, read as a whole, as enacted by the Washington State and King County legislatures, and enforced by the executive branches of each entity – using taxpayer dollars – suffers from serious constitutional infirmities. Such a challenge as the one brought here is not relevantly dissimilar to challenging the facial constitutionality of a law that excuses a suspect class (e.g., members of a racial, religious, or sexual minority) from prosecution for the same conduct of those not belonging to that class.⁶ Again, the plaintiffs are not seeking to challenge a specific, presumably *lawful* charging decision, predicated on enforcement of a *lawful* law, by the King County Prosecuting Attorney's Office. Instead, they are attacking the very *lawfulness* of the legislative enactment that enables the prosecutor to charge a person for stabbing a kitten to death but which prevents her from charging a veal farmer for confining

⁶ A legislative classification will not violate article I, section 12 if the legislation applies alike to all persons within a designated class and there is a reasonable ground for distinguishing between those who fall within the class and those who do not. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 731 (2002)(citing *United Parcel Serv., Inc. v. Dep't of Revenue*, 102 Wash.2d 355, 367, 687 P.2d 186 (1984)). However, it is settled law that a statute prescribing different punishments or different degrees of punishment for the same act under the same circumstances by persons in like situations violates both the privileges and immunities clause of the state constitution and the federal constitution's equal protection clause. *Olsen v. Delmore*, 48 Wn.2d 545, 550 (1956); *State v. Mason*, 34 Wash.App. 514, 516-517 (1983)(accord).

male calves in crates, or a pork farmer from castrating, tooth cutting, and tail-cropping a piglet without anesthesia. In other words, the plaintiffs challenge the *legality and validity* of the state and county laws that authorize this discriminatory enforcement. The thrust of this suit is, therefore, to compel the State and County to follow the federal and state constitutions. Otherwise, they risk engaging in official, unlawful acts in contravention of the constitutions, acts that should not be funded with taxpayer monies.

In this respect, the Supreme Court decision of *Boyles*, cited above, is judicious, for it permits a taxpayer to challenge the decision of Whatcom County to assign county prisoners to a work release program conduct by the church-supported Lighthouse Mission, Inc. because that decision violates the establishment clause. *Boyles*, at 615 (finding that though “alleged injury is generalized, we recognize [Boyles’s] standing to sue on the basis of taxpayer status.”). The Court of Appeals’s decision in *Kightlinger* is also in concordance, as it finds that the Taxpayers’ challenge to the lawfulness of the PUD’s authority to operate an appliance repair business did not require proof of special injury, citing *Boyles*. Further, the Court of Appeals’s decision in *Robinson* bolsters this position, as that court found taxpayers had standing to facially challenge the

validity of Seattle's mandatory drug testing law, even though the inquiry "is not whether application of the challenged enactment violates a particular individual's rights, but whether the government has acted unlawfully."

Moreover, in *Farris v. Munro*, 99 Wn.2d 326 (1983)(en banc), a constitutional challenge was brought to the recently established state lottery seeking to declare the law unconstitutional. The act in that case was the passing of the legislation itself. The court addressed the issue of standing by questioning whether the petitioner could facially challenge the constitutionality of the State Lottery Act. The court stated that "a taxpayer does not have standing to challenge the legality of the acts of public officers unless he first requests or demands that a proper public official bring suit on behalf of all taxpayers." *Id.*, at 329. It added, "Once such a request is refused, the taxpayer has standing to bring the suit." *Id.* Only because the plaintiff "failed to make a request upon the Attorney General to bring suit, and [did] not allege any facts indicating that such a request would have been useless[,]" standing was not found. *Id.* Still, the court reached the merits because the petitioner presented issues of significant public interest. *Id.*, at 330.

As to whether the illegal acts of the State and County cause any injury related to the challenged exemptions, the answer seems obvious. The tens of thousands of animals who are suffering what would otherwise constitute felony animal cruelty, and those individuals who are escaping prosecution while others who engage in similar activities are prosecuted, are directly caused by the unconstitutional exemptions. Besides, the only injury that need be shown is that tax dollars are being used to finance the enactment and enforcement of unconstitutional laws.

On the issue of whether nonprofit organizations and concerned individuals may serve as spokespersons for the harmed animals – who otherwise might not have standing as juridical persons but are the real parties in interest – consider *Farm Sanctuary v. Department of Food and Agriculture*, 63 Cal.App.4th 495, 74 Cal.Rptr.2d 75 (1998). When faced with a challenge by Farm Sanctuary to California’s humane slaughter law, the California Court of Appeals concluded that the controversy was ripe. It noted:

In this case, the ripeness test is satisfied. As to the first prong, the question before us is not so abstract or hypothetical that we should await a better factual scenario. Farm Sanctuary contends that the ritualistic slaughter regulation is invalid *on its face* because it is inconsistent with the HSL. “[T]he issue tendered is a purely legal one: whether the statute was properly construed by the [department]” (*Abbott Laboratories v. Gardner* (1967))

387 U.S. 136, 149 [87 S.Ct. 1507, 1515, 18 L.Ed.2d 681], followed in *Pacific Legal Foundation, supra*, 33 Cal.3d at pp. 171-173.) In addition, “[t]he regulation challenged here, promulgated in a formal manner after announcement ... and [after] consideration of comments by interested parties[,] is quite clearly definitive[, i.e., final].” (*Abbott Laboratories v. Gardner, supra*, 387 U.S. at p. 151 [87 S.Ct. at p. 1517], fn. omitted.)

As to the second prong, a significant and imminent injury is inherent in further delay. **If, as Farm Sanctuary contends, the ritualistic slaughter regulation authorizes a wholesale exemption from the HSL, poultry may be slaughtered through *inhumane* methods. By delaying a decision on the merits, we run the risk of allowing the needless suffering of animals—the evil that the HSL was intended to prevent. *503**

We realize that Farm Sanctuary and its members might not face any hardship if we decline to reach the merits of the case. The HSL was enacted for the benefit of *animals*. If the ritualistic slaughter regulation is invalid, it will result in an unlawful injury to poultry, not humans. In essence, the affected animals in this case are the real parties in interest. In these unique circumstances, we should focus on the potential harm to the beneficiaries of the statute.

Further, as a practical matter, Farm Sanctuary should be allowed to challenge the ritualistic slaughter regulation. Assuming that the regulation authorizes an exemption from the HSL's humane slaughter requirement, someone who is granted an exemption is not about to challenge the regulation. By the same token, someone who is denied an exemption might seek to overturn the denial but would not attack the regulation's creation of an exemption. Thus, unless an organization like Farm Sanctuary is permitted to challenge the department's rulemaking authority, the ritualistic slaughter regulation will be immune from

judicial review. (See *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100 [162 P.2d 627] [state board could pursue litigation on behalf of individuals who were not financially or physically able to seek relief]; *Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist.* (1992) 11 Cal.App.4th 1513, 1519 [14 Cal.Rptr.2d 908] [association had standing to seek relief for third persons, in part because lack of standing would prevent judicial review of challenged conduct]; *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 24 [61 Cal.Rptr. 618] [declaratory relief action may raise justiciable issue if other means of testing validity of government's decision are not available].) As one court has observed: “Where [a statute] is expressly motivated by considerations of humaneness toward animals, who are uniquely incapable of defending their own interests in court, it strikes us as eminently logical to allow groups specifically concerned with animal welfare to invoke the aid of the courts in enforcing the statute.” (*Animal Welfare Institute v. Kreps* (D.C. Cir. 1977) 561 F.2d 1002, 1007 [183 App.D.C. 109] [dictum].)^{FN6}

Id., at 502-503 (emphasis added). “We think it clear that the slaughtering of animals through humane methods, as required by the HSL, is a matter of public importance.” *Id.*, at 504.

2. *Government Action through Making and Enforcing Unconstitutional Laws.*

It seems obvious that the mere existence of the challenged laws constitutes government action. Plaintiffs believed that the *Amended Complaint* put the Defendants on sufficient notice as to the nature of the challenge, which spanned all branches of government across all

Washington jurisdictions, but supplemented as noted below and even sought leave to amend the complaint to conform to the following:

1. The State of Washington Legislature's passage of the challenged exemptions, exclusions, and limitations.
2. The Washington State Governors' (past and present) signing into law the challenged exemptions, exclusions, and limitations.
3. The Washington State Attorneys General's (past and present) failure to take steps to declare unconstitutional and rescind the challenged exemptions, exclusions, and limitations.
4. The Washington State Attorneys General's (past and present) selective (non)enforcement of various iterations of Ch. 16.52 RCW over the course of its amendments to include the challenged exemptions, exclusions, and limitations.
5. The Washington State Patrol's (past and present) selective (non)enforcement of various iterations of Ch. 16.52 RCW over the course of its amendments to include the challenged exemptions, exclusions, and limitations.
6. The King County Prosecuting Attorneys' (past and present) selective (non)enforcement of various iterations of Ch. 16.52 RCW, Ch. 11.04 KCC, and Ch. 11.28 KCC over the course of those chapters' amendments to include the challenged exemptions, exclusions, and limitations.
7. The King County Sheriff's Office's (past and present) selective (non)enforcement of various iterations of Ch. 16.52 RCW, Ch. 11.04 KCC, and Ch. 11.28 KCC over the course of those chapters' amendments to include the challenged exemptions, exclusions, and limitations.
8. The King County Legislature's passage of the challenged county code exemptions, exclusions, and limitations.

9. The King County Executive's (past and present) signing into law the challenged county code exemptions, exclusions, and limitations.
10. The King County Prosecuting Attorneys' (past and present) failure to take steps to declare unconstitutional and rescind the challenged county code exemptions, exclusions, and limitations.
11. King County Superior Court Judges' (past and present) selective (non)enforcement of various iterations of Ch. 16.52 RCW, Ch. 11.04 KCC, and Ch. 11.28 KCC over the course of those chapters' amendments to include the challenged exemptions, exclusions, and limitations.
12. All Washington District and Superior Court Judges' (past and present) selective (non)enforcement of various iterations of Ch. 16.52 RCW over the course of its amendments to include the challenged exemptions, exclusions, and limitations.

No case was ever cited by Defendants stating that legislative acts, *per se*, are not susceptible to taxpayer challenge absent special injury. Nor had they cited a case stating, alternatively, that a challenge to a legislative act must be accompanied by an executive act (e.g., issuing a permit, teaching a class, implementing a work release program) conducted pursuant to the legislative act. The Supreme Court has never made such a distinction but, instead, has broadly addressed all "acts" that are purported to be invalid or illegal. In other words, the test of taxpayer standing is **dictated by the nature of the challenge by the taxpayer** – i.e., what is said by the plaintiff about the act. Merely disagreeing with a government action is not the same as challenging it for being invalid and illegal, as

here. If the act is challenged as “illegal” or “invalid,” then no special injury is required. But if the act is challenged for any other reason, then traditional standing principles apply.

Furthermore, it makes no sense to limit a generalized-injury taxpayer action to circumstances where a non-legislative act implementing a suspect statute or ordinance can be identified. After all, if a secondary act (i.e., “implementation and enforcement of a bad law”) committed pursuant to a primary act (i.e., “making and enacting a bad law”) is ripe for challenge, then why is not the challenge to the primary act? Are only acts of the executive branch capable of being challenged? If so, where does authorization for this bias in favor of one branch over the other exist? And should the Defendants claim that the Plaintiffs are really just taking issue with legislative “functions,” not “acts,” the court should see through the semantics. Government has functions, to be sure, but it performs those functions through acts.

Unless the primary act is inert, as in a dead law that is ignored as a matter of universal operating procedure, then, passing a law and putting it into effect (even if the effect is incomplete) is an act ripe for review. *Buono v. Kempthorne*, 502 F.3d 1069 fn. 6 (9th Cir.(Cal.)2007). Further, the Supreme Court has acknowledged that taxpayer actions challenging

the expenditure of taxes for unconstitutional purposes are traditional examples of ripe disputes. *Flast v. Cohen*, 392 U.S. 83, 106 (1968)(evaluating First Amendment federal taxpayer claim). Facial challenges to regulations are normally ripe the moment challenged. *Suitum v. Tahoe Reg. Planning Agency*, 520 U.S. 725, 736 n. 10 (1997). And the trial court agreed, having denied Defendants' request to deem the challenge unripe.

Ch. 16.52 RCW and the city and county ordinances incorporated same by reference are not dead laws. In their daily enforcement by police officers, animal control officers, and prosecutors statewide, a multitude of secondary executive acts are performed pursuant to these laws' exceptions, exclusions, and limitations. In addition to the challenged invalidity and illegality of making an unconstitutional law, other acts include:

1. **Imposing a restraint** on prosecution through the enactment of an unconstitutional preference. The placing of the restraint (through the challenged exclusions) on prosecutorial and police action is an act of commission challenged as illegal.
2. **Delegating legislative acts** to non-governmental actors, who are engaging in practices which they solely define as "customary," "normal," and "usual." In essence, the legislature has mandated third parties to create regulations (so to speak) to assist in implementation of the law. Thus, the court may wish to distinguish between challenges to the constitutionality of laws based on, say, equal protection, and those based on nondelegation.

3. This act of delegating to third parties, who then engage in acts Plaintiffs claim are otherwise criminal, also permits **imputation of illegal action** (i.e., causing nonhuman animals to endure what would otherwise be considered animal cruelty) by third party agents to the government as principal.
4. **Acquiescing to illegal conduct by third parties** (i.e., legally permitting, either expressly or implicitly, acts involving animal cruelty) is an act of omission where it has an independent legal duty to act. While the government has no obligation to pass a law, once it undertakes the task of lawmaking, affirmative constitutional duties apply and its laws must be enacted in obedience to those mandates. When laws codify favoritism through illegal delegation, and excuse certain individuals from being prosecuted for felonies, the legislature is aiding, abetting, if not soliciting and participating in, criminal activity by third party actors.

Taxpayers are entitled to nonselective and uniform enforcement of anticruelty laws without the legislature delegating, absent any guidelines, what amount to substantive decisions pertaining to what is and what is not criminal behavior, and letting those individuals (to whom the taxpayers have no recourse, as they would a legislator – i.e., by meeting with same, lobbying same, or voting same out of office) dictate who is and who is not engaging in a crime. Whether the government acts by *omission* or *commission* is beside the point, for in enacting a law challenged by the plaintiff-taxpayers as illegal and invalid, passing and enforcing the law itself is an act.

Each exclusion is equally an act of commission as is each

inclusion. The former imposes a restraint on enforcement while the latter an obligation on enforcement. The “policy” or “program,” if one must identify such in order to maintain standing, is presumed by the passage of any law – i.e., it becomes “effective” on a date certain, constituting actual and constructive notice, binding all citizen-taxpayers, and against whom the law will be enforced by government. As they say, *ignorantia juris non excusat*. Thus, if the government is to benefit from this doctrine, it should also be burdened by same (i.e., by construing the existence of a law as tantamount to a policy or program and, hence, a government action).

Defendants’ highly restrictive interpretation of taxpayer actions should be rejected, for Washington has acknowledged taxpayer standing in two regards: (**Category 1**): when challenging government acts that are illegal or invalid; and (**Category 2**): when challenging *otherwise legal and valid* government acts.

Category 1 requires no direct, special, or pecuniary interest in the outcome of the action, while Category 2 does. It should be noted at the outset that, unless compelled to act, every task undertaken by government is discretionary in nature, so that Category 1 relates to “discretionary but illegal” acts and Category 2 to “discretionary but legal” acts. The subtext to the distinction, apparently, is that the government has no discretion to

engage in illegal or unconstitutional conduct. That said, the action itself, at the time of being committed by government, was pursuant to discretion, not a ministerial duty. For example, if the City Council and Mayor of Seattle entered into a contract with a hitman to kill the Mayor of Redmond, such government action would be discretionary in the sense that no law compels such a contract to be created, however the contract itself is illegal and invalid and properly subject to Category 1 taxpayer challenge.

Another example relates to the Washington State Legislature passing a law requiring all people of a particular race or religion to be either arrested or shot on sight after curfew. Such a legislative decision would be discretionary in that it was the product of a vote by the majorities of the House and Senate leadership followed by signature into law by the Governor, yet it would also be highly illegal and invalid and subject to Category 1 taxpayer challenge. If law enforcement were to then enforce this unconstitutional law, using tax dollars, a separate government action would arise allowing for Category 1 taxpayer standing. And if a prosecuting attorney were to charge the arrestee (who is a member of the prohibited class with violating this law, but not a person who is not a member of the prohibited class) for staying out after curfew, yet another

government action would exist giving rise to Category 1 taxpayer standing – since the passing of the law, enforcement of the law by police, and prosecution of the law by the district attorney would all involve highly unconstitutional actions.

The same type of challenge is raised here, and the *Amended Complaint* (and proposed *Second Amended Complaint*) sought to capture those nuances, even though the very existence of this unconstitutional law seems to be proof enough of government action. The Washington Supreme Court has repeatedly allowed taxpayers to assert Category 1 standing to facial challenges to otherwise illegal government activity:

- *Calvary Bible Presbyterian Church of Seattle v. Board of Regents*, 72 Wn.2d 912 (1968) (finding Category 1 taxpayer standing to challenge tax-supported university teaching course dealing with historical, biographical, narrative or literary features of the Bible in violation of the First Amendment and Wash. Const. art. 1, § 11);
- *City of Tacoma v. O'Brien*, 85 Wn.2d 266 (1975) (finding Category 1 taxpayer standing to facially challenge Laws of 1974, 1st Ex. Sess., ch. 194, and then declaring is unconstitutional for violating separation of powers);
- *Kightlinger v. PUD No. 1 of Clark Cy.*, 119 Wash.App. 501, 506 (II, 2003) (finding Category 1 taxpayer standing to challenge PUD's appliance repair business on basis that activity was illegal and lacked statutory authorization);
- *Robinson v. City of Seattle*, 102 Wash.App. 795 (I, 2000) (finding Category 1 taxpayer standing to challenge constitutionality of Ord. 119278);

- *State ex rel. Boyles v. Whatcom Cy. Sup. Ct.*, 103 Wn.2d 610 (1985) (finding Category 1 taxpayer standing to challenge county jail's work release program for violating First Amendment and Wash. Const. art. 1, § 11);
- *Farris v. Munro*, 99 Wn.2d 326 (1983)(en banc) (finding Category 1 taxpayer standing to facially declare State Lottery Act unconstitutional exists provided Attorney General declines petitioner's solicitation to cure).
- *Walker v. Munro*, 124 Wn.2d 402 (1994) (finding that Category 1 taxpayer standing exists to challenge initiative that has gone into effect).

As with the above cited cases, the Washington legislature does not have the authority to enact unconstitutional laws. Nor do prosecuting attorneys and police departments have the right to enforce unconstitutional laws and grant unconstitutional exemptions. That much seems to be clear. As to whether enacting an unconstitutional law is illegal, one need look no further than the Washington and Federal Constitutions, the relevant excerpts of which are found in the Appendix to this motion. As there indicated, the State is restrained by the 14th Amendment from "mak[ing] or enforc[ing] any law" that violates the Privileges & Immunities Clause. Moreover, the State shall not violate the Due Process and Equal Protection Clauses. Enacting and enforcing laws that do precisely this injury are expressly rendered illegal. The Washington Constitution defers to the supremacy of the Federal Constitution. Wash.Const. Art. I, § 2. It then

adds further express prohibitions that “[n]o law shall be passed” granting special privileges and immunities. Wash.Const. Art. I, § 12. As with the Federal Constitution, Washington forbids deprivation of life, liberty, or property without due process of law and prevents the legislature from “excus[ing] acts of licentiousness or justify[ing] practices inconsistent with the peace and safety of the state.” Wash.Const. Art. I, §§ 3, 11. Further, the Washington Constitution echoes the First Amendment’s prohibition that “Congress shall make no law” establishing religion,⁷ but adds that “[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.” Wash.Const. Art. I, § 11. King County’s Charter is subject to the limitations of the Washington and Federal Constitutions, per Wash.Const. Art. XI, § 4.

Taxpayers fund legislative and executive branch activity. When those tax funds are used in a fashion that violates the explicit terms of the Washington and Federal Constitutions, illegal governmental activity has been identified. The Plaintiffs have alleged that the Exemptions to Ch. 16.52 RCW (and related county and city codes) do harm to our

⁷ The First Amendment applies to the states through the Due Process Clause of the 14th Amendment. *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 218 (1992).

constitutions – both in the “mak[ing]” and “enforc[ing]” of these laws, injustices inflicted through the use of taxpayer funds.

3. ***Pretended Immunity from Suit for Making Illegal Laws.***

In Defendants taking the rather astounding position that the legislature can engage in illegal and invalid acts (i.e., making unconstitutional laws) with impunity due to a pretended immunity, and adding that the Attorney General must presume laws passed by the Legislature are constitutional, this does not mean that the courts must refuse to consider a challenge to the “presumed” constitutionality of those laws. A presumption is, by definition, nonfinal and rebuttable. While deference may be enjoyed by the Defendants at the outset, deference is not impervious to challenge, for courts have historically refused to defer to agencies whose decisions are illegal. Yet this is precisely the interpretation the Defendants urge upon the court.

In so doing, they prevent taxpayers from ever proceeding beyond the initial pleading, turning a “presumption” and “deference” into absolute immunity and, thus, the complete obliteration of the doctrine of judicial review and disregard of what our country learned in the landmark decision of *Marbury v. Madison*, 5 U.S. (Cranch 1) 137, 1803 WL 893 (U.S. Dist. Col., 1803) (the first time the Supreme Court declared something

“unconstitutional” and established the concept of judicial review as a check and balance on other branches of government). Defendants cited to *U.S. v. Munoz-Flores*, 495 U.S. 385, 390-91 (1990). The entire paragraph should be read by the court, for far from barring judicial scrutiny due to a purported nonjusticiable political question, it obligates it:

The United States contends that “[t]he most persuasive factor suggesting nonjusticiability” is the concern that courts not express a “lack of ... respect” for the House of Representatives. Brief for United States 10. ^{FN3} In the Government's view, the House's passage of a bill conclusively establishes that the House has determined either that the bill is not a revenue bill or that it originated in the House. **Hence, the Government argues, a court's invalidation of a law on Origination Clause grounds would evince a lack of respect for the House's determination. The Government may be right that a judicial finding that Congress has passed an unconstitutional law might in some sense be said to entail a “lack of respect” for Congress' judgment. But disrespect, in the sense the Government uses the term, cannot be sufficient to create a political question. If it were, every judicial resolution of a constitutional challenge to a congressional enactment would be impermissible.** Congress often explicitly considers whether bills violate constitutional provisions. See, e.g., 135 Cong.Rec. 23121-23122 (1989) (remarks of Sen. Biden) (expressing the view that the Flag Protection Act of 1989, 103 Stat. 777, does not violate the First Amendment); 133 Cong.Rec. 30498-30499 (1987) (remarks of Sen. Hatch) (arguing that the independent counsel law, 28 U.S.C. § 591 et seq., was unconstitutional). **Because Congress is bound by the Constitution, its enactment of any law is predicated at least implicitly on a judgment that the law is constitutional.** Indeed, one could argue that Congress

explicitly determined that this bill originated in the House because it sent the bill to the President with an “H.J. Res.” designation. See *post*, at 1978 (SCALIA, J., concurring in judgment). **Yet such congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality. On the contrary, this Court has the duty to review the constitutionality of congressional enactments. As we have said in rejecting a claim identical to the one the Government makes here: “Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.” Powell v. McCormack, 395 U.S. 486, 549, 89 S.Ct. 1944, 1978, 23 L.Ed.2d 491 (1969).**^{FN4}

Id. (emphasis added).

Besides, the “burden of proof in establishing absolute immunity is on the individual asserting it[.]” *Kaahumanu v. Cy. of Maui*, 315 F.3d 1215, 1220 (9th Cir.2003), and such burden cannot be met merely by asserting it in opposition to a motion to amend. The Defendants also never raised immunity as an affirmative defense in their *Answers*. In sum, Defendants provide no pertinent authority that nullifies a state taxpayer suit for illegal government activity predicated upon legislative immunity.⁸

⁸ If Plaintiffs were bringing tort claims against individual state actors, the legislative immunity defense might arise, but even then, it would be in the context of the Supreme Court's recognition that it “has generally been quite sparing in its recognition of claims to absolute official immunity.” *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 969 (1998)(quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)). It would also be in

By the Supreme Court repeatedly permitting taxpayer suits where the attorney general refused to act to protect the public interest, in the absence of special injury, any alleged immunity from suit has been excised by judicial fiat. *See State ex rel. Tattersall v. Yelle*, 52 Wn.2d 856, 858-861 (“We adhere to the interpretation, in the cited cases, of the declaratory judgment act, and hold that the act authorizes the appellant, as a taxpayer of this state, to challenge the constitutionality of chapter 214, since the attorney general has refused to do so.”)

B. UDJA Standing.

Defendants attempt to convince the court that the UDJA imposes a special injury standing requirement any time a party seeks to invalidate a statute on grounds of it being unconstitutional. The court should resist this approach for two reasons. First, the Supreme Court stated the contrary in *State ex rel. Tattersall v. Yelle*, 52 Wn.2d 856, 861 (1958), rejecting the Defendant’s assertion that “since appellant has not alleged or proved that she has or will suffer special injury by the issuance of the warrants, she cannot maintain this action to enjoin the expenditure of state funds.” *Id.*, at 859.

the context of Ch. 4.96 RCW, where the State expressly waived sovereign immunity for the express purpose of exposing itself to tort liability.

Second, for the legislature to, in essence, abrogate decades-long Supreme Court precedent, providing for the right to challenge the legality or validity of government action without proof of special injury, it must state so explicitly. *Potter v. Washington State Patrol*, 165 Wn.2d 67, 76-77 (2008) (“[W]e are hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature’s intent to deviate from the common law.”) Abrogation occurs when “the provisions of a ... statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force.” *State ex rel. Madden v. PUD No. 1*, 83 Wn.2d 219, 222 (1973). Far from abrogating the common law, the UDJA extends the common law as it is “to be liberally construed and administered” for “remedial” purposes. RCW 7.24.120.

What Defendants do not address is that the *raison d’etre* of a taxpayer derivative action is to cease government activity by, first, declaring the action unconstitutional (hence, a declaratory judgment action) and, second, enjoining the government from continuing to engage in that activity (hence, injunctive relief). This is precisely the outcome in *Robinson* and *Kightlinger*. To assert that one must show a special injury in order to obtain declaratory judgment would eviscerate and overrule decades of Supreme Court precedent permitting otherwise. If there is

taxpayer standing, then justiciability typically follows, for the misuse of tax funds to finance unconstitutional government action presents a “direct and substantial,” as well as concrete and opposing matter ripe for judicial resolution.

As to the question of naming other parties under RCW 7.24.100, the Plaintiffs acknowledge that many other groups may be interested in the outcome of this litigation. However, it is precisely because of the constitutional deficiencies of the legislation that it is virtually impossible to know precisely whom should be named. Must the Plaintiffs name and serve every farmer, veterinarian, rancher, rodeo organizer, agricultural school, veterinary school, hunter, high school teacher, college instructor, Board of Regents, research institution, and furrier, as well as every organization and commission that might have some interest in those professions and industries? Plaintiffs assert that the Attorney General’s Office and King County Prosecuting Attorney’s Office may aptly represent those groups’ interests, that is, if those offices can identify – based on the vague language of the challenged exemptions and exclusions – precisely which individuals and entities must be included. Indeed, that is a primary thrust of this lawsuit and the nondelegation doctrine claim.

That said, the court has sound discretion to determine whether hypothetical parties are necessary to this action. A complete determination can be made without the presence of these parties but if the court wants to invite intervenors to join in this action so that it can be heard on the merits, the Plaintiffs will not object provided that if the intervenors prevail, they recover no costs or fees. *See Town of Ruston v. City of Tacoma*, 90 Wash.App. 75 (1998)(neither current lessee or land claimed by two municipalities in boundary dispute nor land's former owner were necessary parties to declaratory judgment action to determining boundary; residents of town and city were not necessary parties in town's declaratory judgment action against city to resolve boundary dispute).

C. Justiciability.

One of the strongest anticruelty laws in the nation, Ch. 16.52 RCW sadly appears to exclude several activities that – if inflicted upon a dog or cat – would undoubtedly constitute felony animal cruelty. The term “appears” best describes the limitations and exclusions because the legislature did not specifically identify which practices are exempt from prosecution. Instead, Ch. 16.52 RCW uses language that delegates what is and what is not animal cruelty to a vague, undefined group of individuals, without parameters or guidelines. In the end, this ill-defined group of

private citizens gets to decide who is exempt from prosecution for nonspecific “practices,” “uses,” and “rights.” No bounds are placed on such exemption terminology as:

- “**accepted** husbandry practices used in the commercial raising or slaughtering of livestock or poultry, or products thereof,” (RCW 16.52.185)
- “the use of animals in the **normal and usual** course of rodeo events,”(RCW 16.52.185)
- “the **customary** use or exhibiting of animals in **normal and usual** events at fairs as defined in RCW 15.76.120,” (RCW 16.52.185)
- “**accepted** animal husbandry practices” (RCW 16.52.205(6)), and
- “**accepted** veterinary medical practices by a licensed veterinarian or certified veterinary technician,” (RCW 16.52.205(6)).

These exclusions and limitations beg the following questions:

1. What is an “accepted animal husbandry practice,” “normal and usual” rodeo event, “customary use or exhibit[ion] of animals in normal and usual” fairs, and “accepted veterinary medical practice”?
2. Who decides what is “accepted”?
3. What geographical, philosophical, scientific, medical, or moral standard, if any, is applied in making such a decision?

By defining acceptable animal husbandry practices according to what the majority, or possibly the substantial minority of a group or industry, does, exemptions effectively abrogate the legislatures’ decision-making duties by deferring to the very individuals they mean to regulate.

Such a statutory structure allows industry to regulate itself. This arguably removes any objectivity from the governing process, ensuring a self-serving approach wherein the industry has great incentive to only further entrench any cost-saving practice, despite the cruelty involved. It also puts the industry in a position to increase the methods available to it by spreading new methods amongst farmers, until a critical mass embraces a given practice.

The Supreme Court of New Jersey recently recognized this concern in *New Jersey SPCA v. N.J. Dep't of Agriculture*, 196 N.J. 366 (2008). In 1996, the New Jersey Legislature amended its 1898 animal cruelty law to vest in the New Jersey Department of Agriculture (“NJDA”) the authority to establish “humane” standards for the treatment of domestic livestock. The NJDA was given six months to act, but it took seven years for the agency to publish proposed regulations for public comment. Ultimately enacted were regulations that, among other things, created an exemption for “routine husbandry practices.” The New Jersey Society for the Prevention of Cruelty to Animals (“NJSPCA”), the organization historically charged with enforcing the animal cruelty law, challenged the NJDA regulations as deficient in several respects, primarily

that they sanctioned cruelty to farmed animals. The appellate court approved all NJDA regulations, and the NJSPCA appealed.

In a 7-0 decision, the New Jersey Supreme Court reversed in part. The court expressly refused to evaluate whether specific practices were objectively inhumane but, instead, considered whether the NJDA's actions, given due deference for agency expertise, complied with the legislative mandate. In this respect, the court invalidated certain NJDA regulations that used "unworkable standards and an unacceptable delegation of authority to an ill-defined category of presumed experts."

NJSPCA prevailed in its argument that the agency's definition of "routine husbandry practices" and the phrase "performed in a sanitary manner by a knowledgeable individual and in such a way as to minimize pain" do not pass muster. NJSPCA also prevailed in asserting that tail docking is inhumane. Unlike New Jersey, Washington does not even attempt to delegate to anyone (much less an administrative body) the task of implementing regulations that define and place bounds on what is challenged in this lawsuit as vague, arbitrary, and fundamentally unfair to animals.

The issue presented in *Kightlinger v. PUD No. 1 of Clark Cy.*, 119 Wash.App. 501 (2003) bears striking similarity to the case at bar in that Plaintiffs have primarily sought declaratory and injunctive relief:

The PUD asserts that no justiciable controversy exists because the Taxpayers do not claim any economic injury. The Taxpayers argue that their taxpayer status gives them sufficient interest in the subject matter to sue. Further, according to the Taxpayers, justiciability is not required where the issue is of major public importance.

Id., at 505. Standing overlaps with justiciability in an UDJA case. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411n.5 (2001). Applying the traditional justiciability test – i.e., (1) an actual, present and existing dispute or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that are direct and substantial rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive [see *Spokane v. Taxpayers*, 111 Wn.2d 91, 96 (1988)], the Court of Appeals ruled in favor of the taxpayer plaintiffs on both grounds of justiciable controversy and issue of major public importance:

Here, the parties have an actual, present, and existing dispute: whether the PUD has legal authority to repair appliances. This dispute is not hypothetical or speculative. ... The parties also have "genuine and opposing interests," which are both direct and substantial. ... The PUD has an

interest in continuing its repair services to serve customers and maintain its employees. The Taxpayers have an interest in assuring that the PUD does not spend their tax dollars to repair appliances (especially since it appears to be losing money). Finally, a judicial determination of the dispute would be final and conclusive.

But even if no justiciable controversy exists, the court may hear a declaratory judgment action if the issue is of major public importance. ... We conclude that the issue is of widespread public interest because of the media coverage in Clark County and because of the possibility that other PUD's statewide may be interested in repairing appliances.

Kightlinger, 119 Wash. App. At 505 (citations omitted).

In accord, consider *Sasse v. King Cy.* 196 Wash. 242 (1938). The Supreme Court there again acknowledges that certain types of taxpayer actions, like the instant one, provide both standing and the ability to state a claim where injunctive relief is sought:

As authority for his right to maintain this action, appellant cites the case of Barnett v. Lincoln, 162 Wash. 613, 299 P. 392. To this case may be added the following: ... Maxwell v. Smith, 87 Wash. 629, 152 P. 530;

Those cases, however, were actions for injunctions to prevent the doing of illegal acts involving the expenditure of public moneys. The authorities are agreed that in such cases a resident taxpayer has the right to invoke the interposition of a court of equity to prevent the consummation of a wrong which would result in an illegal disposition of the moneys of a municipal corporation. ... The reasons for sustaining such right of action are obvious.

Id., at 250 (citations omitted; emphasis added).

As in *Kightlinger* and *Sasse*, the Plaintiffs have alleged a justiciable controversy. The taxpayer action confers both standing and a claim upon which relief can be granted and is, therefore, justiciable. For if the taxpayer cannot demonstrate illegal governmental activity, then he has no standing to challenge those acts absent direct, special, or pecuniary injury in the first place.

The dispute here is far from abstract or speculative, for it seeks to remedy numerous facial, constitutional deficiencies in Ch. 16.52 RCW that arguably result in daily the torture of thousands of animals within the borders of the State of Washington and King County. The cruelty condoned by the statutory exemptions at issue, forcing animals to suffer at the hands of the proverbial foxes guarding the henhouses, presents quite the opposite of a merely speculative or hypothetical disagreement. The dispute is imminent, ongoing, and threatens the lives of nonhuman animal victims throughout the region, those without voices but through taxpayers such as NARN and Ms. Bjork.

Importantly, justiciability may exist where there is not yet a full-bodied “actual, present, and existing dispute,” but “mature seeds” will suffice. Passing the challenged laws and putting them into effect creates ripeness, to be sure, but also plants the seeds that have matured for over a

end animal cruelty. Finally, judicial determination of the exemptions' constitutionality will be final and conclusive.

Even if not justiciable, the court may still choose to hear a matter of major public importance. The court is likely aware how the public reacts to animal cases, particularly those involving abuse or neglect (with more attendance in, and letters to, the court, as well as outrage over criminal acts against nonhumans versus those against humans). Further, the court may take judicial notice of the fact that more than 95 percent of all Washingtonians consider themselves omnivores and consume animal products, but who also do not desire that the animals giving their lives should be treated cruelly. The court may also take notice that Washington's farmers, ranchers, veterinarians, and rodeo organizers do not want to engage in activity that could expose them to criminal prosecution, which is why eliminating the unconstitutional exceptions will provide greater certainty to those industries and individuals who may not know what is "accepted." Lastly, the court may take judicial notice of the fact that the vast majority of households share their lives with an animal companion, and that more than 97 percent of those families regard the dog or cat as "family" or a "companion," not mere property.

It would be hard to fathom an issue that would command more attention from every member of the public than the one before the court presently. In every supermarket, nearly every restaurant, and on nearly every dinner table, the ethical and legal issue of cruelty to farmed animals is one of national import and rhetorical consumption. Of recent note is Nicholas D. Kristof, *Humanity Even for Nonhumans*, New York Times (Apr. 9, 2009), noting that “animal rights are now firmly on the mainstream ethical agenda.”

The issue is not one of only passing or quite recent significance, for in November 2002, by a 5% margin in favor, Floridians passed a constitutional amendment making it a misdemeanor to confine or tether a pig during pregnancy so as to prevent her from turning around freely. On November 4, 2008, Californians followed suit, voting overwhelmingly (63%) to pass Prop 2. The “Prevention of Farm Animal Cruelty Act” provides for phasing out of and changing requirements for veal crates, battery cages, and gestation crates to allow the calves, chickens, and pigs to lie down, stand up, fully extend their limbs and turn around freely. Whether these “animal husbandry practices” were “accepted” prior to passage of Prop 2 is unclear. If one were to poll the California electorate, the answer would be they were not accepted. But if one were to ask the

veal, egg, and pork producers of California, the answer would be they were accepted. As Washington law stands now, however, Washington voters get no say in this regard, and the small, unidentified group of producers can cast a get-out-of-jail-free card simply by banding together to self-servingly endorse their profitable, though cruel, practices.

Plaintiffs do not ask the court to make a policy judgment. Rather, they seek invalidation of a statute on constitutional grounds, which raises no nonjusticiable, political question. Whether Congress has passed an unconstitutional law is not a political question; to the contrary, the United States Supreme Court held, it “has a duty to conduct such a review.” *U.S. v. Munoz-Flores*, 495 U.S. 385, 390-91 (1990) (claim that statute requiring courts to impose monetary “special assessment” on any person convicted of federal crime passed in violation of origination clause and did not present nonjusticiable political question, on theory that invalidation of statute would evince lack of respect for determination of House of Representatives). “[I]t goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts.” *Japan Whaling Ass’n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986). “The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value

determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions.” *Id.* At the same time, the courts must differentiate between political questions that courts are precluded from addressing, and those with simply “significant political overtones,” which courts may address. *Id.* (explaining that the political question doctrine did not bar judicial resolution of controversy as to whether, under Pelly and Packwood Amendments, Secretary of Commerce was required to certify that Japan's whaling practices diminished effectiveness of International Convention for Regulation of Whaling because Japan's harvest exceeded quotas established under Convention, since challenge to decision not to certify Japan for harvesting whales in excess of quotas required "applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented").

The cases cited by Defendants, *Northwest Greyhound Kennel Ass'n v. State*, 8 Wash.App. 314 (II, 1973), and *Brown v. Owen*, --- P.3d ---, 2009 WL 564432 (Wash.,2009) allude to the United States Supreme Court factors of *Baker v. Carr* to determine nonjusticiability on political grounds. *Greyhound*, at 321; *Brown*, at ¶ 21. In *Baker v. Carr*, 369 U.S.

186 (1962), the Supreme Court identified six factors that may make a question nonjusticiable: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.* at 217 (complaint containing allegations that a state statute affected an apportionment depriving plaintiffs of equal protection of the laws in violation of the Fourteenth Amendment presented a justiciable constitutional cause of action, and the right asserted was within reach of judicial protection under the Fourteenth Amendment, and did not present a nonjusticiable political question). *See also Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 702 (9th Cir.1992) (quoting the six *Baker* factors).

The *Baker* factors must be interpreted in light of the purpose of the political question doctrine, which "excludes from judicial review those

controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling*, supra, at 230. A nonjusticiable political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis. See *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir.1992); *U.S. v. Munoz-Flores*, supra, at 390-91; see also *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir.2007) (in general, the political question doctrine does not bar adjudication of a facial constitutional challenge even though Congress has plenary authority, and the executive has broad delegation, over Indian affairs).

Brown v. Owen did not reach the question of whether the supermajority requirement of RCW 43.135.035 was constitutional because it found the action inappropriate for mandamus. Nonetheless, it did address the political question raised by the plaintiff – viz., whether she could ask the court to in essence “make a parliamentary ruling” by overturning the president of the senate’s determination on her point of order, using a writ of mandamus. *Brown*, at ¶¶ 22-24. This decision is eminently sensible since it clearly involves using the judicial branch to

officially and directly interfere in the affairs of the legislature branch by “referee[ing] disputes over parliamentary rulings between members of the same house.” *Id.*, ¶ 25. The *Brown* case sits at the opposite end of the spectrum from this case when it comes to determining justiciability on a political question. To read the cases as urged by Defendants would result in courts never being permitted to declare a statute unconstitutional since, in doing so, the court would be tinkering with the fruit of the political process.

Brown cites to *State v. Manussier*, 129 Wn.2d 652 (1996), which involved a claim that I-593, the “three strikes law,” violated the federal constitution’s Guarantee Clause (i.e., republican form of government), resulting in an attack on the very constitutionality of the initiative process itself. *Id.*, at 670. Prudently, the Supreme Court held that such argument “presents an issue which may be beyond the power of this court to decide[.]” adding that a similar challenge raised before the United States Supreme Court was rejected when that court “held that the issue was political and governmental and not within the judicial power to determine[.]” *Id.*, at 670-71 (citing *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912)). Unlike *Manussier*, the Plaintiffs here are not attacking the legislative process itself (i.e., a certain Senator

should have voted differently on a bill, or the House should have banned a specific veterinary procedure such as nontherapeutic declawing procedures), but the unconstitutional product of that process (viz., a law that violates the nondelegation doctrine, equal protection, privileges and immunities). As it is the judiciary's job to interpret the laws passed by the legislature, no political question arises here.

D. Motion to Amend Complaint.

1. *Generalized Taxpayer Standing and UDJA.*

As discussed in Section III, the proposed *Second Amended Complaint*, to the extent it impacts the question of general taxpayer standing and the UDJA claim, should be construed de novo under CR 12, giving due consideration to the enumerated illegal government acts.

2. *Specialized Taxpayer Standing.*

In order to challenge a government's lawful, discretionary acts, the taxpayer must show special injury. *See Kightlinger*, at 506. The trial court appeared to disregard the assertion of a special injury based on aesthetic, emotional, and organizational injuries suffered by NARN and Ms. Bjork, as alleged. It is unclear whether the trial court reviewed special injury standing under CR 15 or CR 12, but one suspects it had to be the former, since Defendants' CR 12(c) motion only applied to the first *Amended*

Complaint, which made no mention of standing through special injury. Accordingly, the more liberal “freely granted” CR 15(a) standard should apply.

The systemic nonenforcement of Ch. 16.52 RCW and municipal corollaries, thanks to the Exemptions, against the large number of individuals and entities committing animal cruelty daily leaves visible carnage in numerous fora, on an ongoing and imminent basis – whether in supermarkets where cruelly-produced animal products are sold; in stores selling products permitting the cruel killing of various species; in restaurants that continue to serve and prepare cruelly-produced animal products; at fairs and rodeos throughout that put animal cruelty on public display; in public parks and trails that permit decimation of wildlife by hunters; while driving along country roads that delineate the boundaries of concentrated animal feedlot operations (“CAFO”), slaughterhouses, battery cage egg farms, and pork production facilities using gestation and farrowing crates; or on billboards and through other media outlets that promulgate, advertise, and disseminate images of state-sanctioned animal cruelty – all caused by the State and County’s misapplication of taxpayer funds to make and enforce constitutionally infirm laws. NARN spends money combating animal cruelty through education, demonstrations, and

other means. Ms. Bjork and NARN's members also suffer ongoing aesthetic and emotional injury as a result of this onslaught described above.

The following cases provide for this type of special injury taxpayer standing. *See Sierra Club v. Morton*, 405 U.S. 727 (1972) (permitting "aesthetic injury" under Art. III standing principles); *Humane Society of the United States v. United States Postal Service*, 609 F.Supp.2d 85 (D.D.C.2009)(despite fact HSUS was volunteer organization and could not name exact date or location of raid on an illegal animal fight for which it would be called to assist animals, if need to care for animals on emergency basis increased by USPS's circulation of animal fighting periodical, financial injury would be neither voluntary nor self-inflicted; and adding that challenge to USPS was redressable injury due to causal relationship between continued mailings and illegal animal fighting; *held*: Art. III standing existed). *USPS* adds:

Standing to challenge government conduct that allegedly causes a third party to injure the plaintiff can exist *either* "where the challenged government action authorized conduct that would otherwise have been illegal" *or* "where the record presented substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress."

Id., at 92 (quoting *Renal Physicians Ass'n v. U.S. Dept. of Health and Human Services*, 489 F.3d 1267, 1275 (D.C.Cir.2007)(emphasis in original)).⁹

E. RAP 18.1 Request for Fees.

Plaintiffs request attorney's fees under RAP 18.1 on the equitable basis that they are conferring a substantial benefit to an ascertainable class (i.e., the State and public), as private attorneys general, protecting constitutional principles, using public funds, that adversely impact and threaten the safety of the animals subjected to "accepted," "customary," "normal," "usual" but otherwise indistinguishably "cruel" acts. *Dempere v. Nelson*, 76 Wash.App. 403, 407 (1994); *Weiss v. Bruno*, 83 Wn.2d 911 (1974).

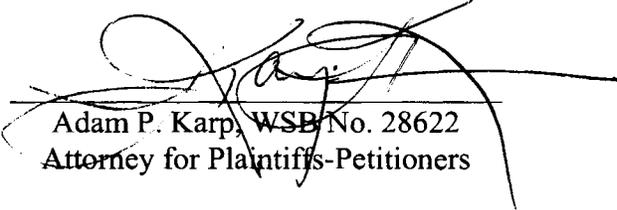
IV. CONCLUSION

For the reasons stated herein, the assignments of error should be sustained and the matter remanded for hearing on the merits.

Dated this Jan. 7, 2009

ANIMAL LAW OFFICES

⁹ See also *ARDF v. Glickman*, 101 F.Supp.2d 7 (D.D.C.2000)(while government does not mandate inhumane treatment, where it permits otherwise illegal third party conduct, fair traceability to injury is established); *ASPCA v. Ringling Bros.*, 317 F.3d 334 (C.A.D.C.2003)(emotional attachment to animal provides injury-in-fact).



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APPENDIX

WASHINGTON CONSTITUTION

(emphasis added)

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED. No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.

SECTION 11 RELIGIOUS FREEDOM. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: ...

SECTION 12 SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

FEDERAL CONSTITUTION

(emphasis added)

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.**

Amendment XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

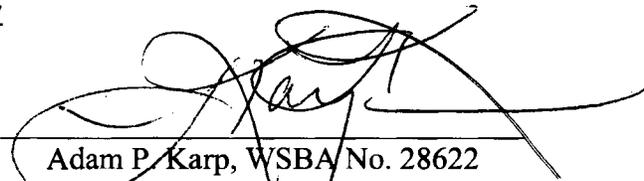
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Jan. 7, 2009, I caused a true and correct copy of the foregoing APPELLANTS' BRIEF, to be served upon the following person(s) in the following manner:

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