

NO. 84483-6

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SUPREME COURT OF THE STATE OF WASHINGTON

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CITY OF SEATTLE, a municipal corporation,

Petitioner,

v.

ROBERT M. MCKENNA, Attorney General, Washington State,

Respondent.

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BRIEF OF RESPONDENT ROBERT M. MCKENNA

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## TABLE OF CONTENTS

I.	COUNTERSTATEMENT OF THE ISSUES .....	1
	1. Where the City of Seattle has no legally cognizable interest and has suffered no injury in fact, does the City have standing to sue the Attorney General to end Washington’s challenge to the constitutionality of the federal health care act? .....	1
	2. Where there is no express duty in the law prohibiting the Attorney General from challenging the constitutionality of the federal health care act, does the City invoke the Court’s jurisdiction in mandamus? .....	1
	3. Does the Attorney General, as the chief legal officer of the state, have the authority and discretion to challenge the validity of the federal health care act where, in the Attorney General’s considered legal judgment, the federal act violates the rights of the state and its citizens guaranteed by the United States Constitution?.....	1
II.	COUNTERSTATEMENT OF THE CASE .....	2
	A. Factual Background .....	2
	B. Procedural Background.....	3
III.	SUMMARY OF ARGUMENT.....	4
IV.	ARGUMENT .....	8
	A. The City Of Seattle Lacks Standing To Preclude The Attorney General From Bringing A Legal Action Against The Federal Government To Protect The Rights Of The State Of Washington And Its Citizens Guaranteed By The Constitution Of The United States .....	8

1.	The City Of Seattle Has No Legally Cognizable Interest In This Matter And Can Demonstrate No Injury In Fact .....	8
2.	The City’s Reliance On Taxpayer Standing Lacks Merit .....	10
3.	The Cases Relied Upon By The City To Claim Taxpayer Standing Are Inapposite .....	15
4.	The City Lacks Representational Standing .....	18
5.	The Court Should Not Disregard Standing Requirements As the City Requests .....	20
B.	The City Also Fails To State A Claim In Mandamus, Seeks Relief Not Within The Original Jurisdiction Of This Court, And Fails To Present A Justiciable Controversy .....	27
1.	The City Fails To State A Claim In Mandamus .....	27
2.	Even If Declaratory Relief Were Available, Such Relief Requires A Justiciable Controversy, And The City’s Action Fails To Present One .....	32
C.	The Attorney General Has Ample Constitutional And Statutory Authority To Institute Litigation On Behalf Of The State Of Washington Where, In The Sound Discretion Of The Attorney General, The Legal Interests Of The State And The Public Interest Warrant It .....	33
1.	The Attorney General Is a Constitutional Officer Who Is Afforded Broad Authority Under the Constitution and Statutes to Represent the State .....	33
2.	This Court Has Long Recognized the Attorney General’s Discretionary Authority To Institute and Participate in Litigation on Behalf of the State .....	37
V.	CONCLUSION .....	50

## TABLE OF AUTHORITIES

### Cases

<i>American Legion Post 149 v. Dep't of Health</i> , 164 Wn.2d 570, 192 P.3d 306 (2008).....	19
<i>Berge v. Gorton</i> , 88 Wn.2d 756, 567 P.2d 187 .....	44, 45
<i>Boe v. Gorton</i> , 88 Wn.2d 773, 567 P.2d 197 (1977).....	44, 45, 46
<i>Brown v. Owen</i> , 165 Wn.2d 706, 206 P.3d 310 (2009).....	27
<i>Cedar Cnty. Comm. v. Munro</i> , 134 Wn.2d 377, 950 P.2d 446 (1998).....	27
<i>City of Seattle v. State</i> , 103 Wn.2d 663, 694 P.2d 641 (1985).....	15, 19
<i>City of Spokane v. J-R Distribs., Inc.</i> , 90 Wn.2d 722, 585 P.2d 784 (1978).....	17
<i>City of Tacoma v. O'Brien</i> , 85 Wn.2d 266, 534 P.2d 114 (1975).....	15, 17
<i>Dick Enterprises, Inc. v. King Cnty.</i> , 83 Wn. App. 566, 922 P.2d 184 (1996).....	12
<i>Farris v. Munro</i> , 99 Wn.2d 326, 662 P.2d 821, 824 (1983).....	14, 21
<i>Gerberding v. Munro</i> , 134 Wn.2d 188, 949 P.2d 1366 (1998).....	27
<i>Grant Cnty. Fire Prot. Dist. 5 v. City of Moses Lake</i> , 150 Wn.2d 791, 83 P.3d 419 (2004).....	passim

<i>Greater Harbor 2000 v. City of Seattle</i> , 132 Wn.2d 267, 937 P.2d 1082 (1997).....	12
<i>Haberman v. Washington Pub. Power Supply Sys.</i> , 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987).....	18, 20
<i>Hoppe v. King County</i> , 95 Wn.2d 332, 622 P.2d 845 (1980).....	11
<i>In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation</i> , 747 F.2d 1303 (9th Cir. 1984).....	44
<i>King County v. Port of Seattle</i> , 37 Wn.2d 338, 223 P.2d 834 (1950).....	11
<i>Nelson v. Appleway Chevrolet, Inc.</i> , 160 Wn.2d 173, 157 P.3d 847 (2007).....	8
<i>Ordell v. Gaddis</i> , 99 Wn.2d 409, 622 P.2d 49 (1983).....	23, 25
<i>Perdue v. Baker</i> , 277 Ga. 1, 586 S.E.2d 606 (2003) .....	46
<i>Reiter v. Wallgren</i> , 28 Wn.2d 872, 184 P.2d 571 (1947).....	passim
<i>State ex rel. Attorney General v. Seattle Gas &amp; Electric Co.</i> , 28 Wash. 488, 68 P. 946, <i>rehearing denied</i> , 28 Wash 511, 70 P. 114 (1902) .....	33
<i>State ex rel. Boyles v. Whatcom Cnty.</i> , 103 Wn.2d 610, 694 P.2d 27 (1985).....	10
<i>State ex rel. Burlington Northern, Inc. v. Utilities &amp; Transportation Commission</i> , 93 Wn.2d 398, 609 P.2d 1375 (1980).....	31
<i>State ex rel. Distilled Spirits Institute, Inc. v. Kinnear</i> , 80 Wn.2d 175, 492 P.2d 1012 (1972).....	25, 26

<i>State ex rel. Dunbar v. Board of Equalization,</i> 140 Wash. 433, 249 P. 996 (1926) .....	39, 40
<i>State ex rel. Hartley v. Clausen,</i> 146 Wash. 588, 264 P. 403 (1928) .....	48, 49
<i>State ex rel. Lemon v. Langlie,</i> 45 Wn.2d 82, 273 P.2d 464 (1954).....	17
<i>State ex rel. Mason v. Board of County Commissioners,</i> 146 Wash. 449, 263 P. 735 (1928) .....	30
<i>State ex rel. Strecker v. Listman,</i> 156 Wash. 562, 287 P. 663 (1930) .....	30, 31
<i>State v. Gattavara,</i> 182 Wash. 325, 332-33, 47 P.2d 18 (1935).....	38, 39
<i>State v. Salavea,</i> 151 Wn.2d 133, 86 P.3d 125 (2004).....	36
<i>State v. Taylor,</i> 58 Wn.2d 252, 362 P.2d 247 (1961).....	41, 42, 43
<i>Walker v. Munro,</i> 124 Wn.2d 402, 879 P.2d 920 (1994).....	passim
<i>Washington Natural Gas Co. v. PUD 1 of Snohomish County,</i> 77 Wn.2d 94, 459 P.2d 633 (1969).....	23, 24
<i>Washington State Farm Bureau Fed'n v. Reed,</i> 154 Wn.2d 668, 115 P.3d 301 (2005).....	27
<i>Washington State Labor Council v. Reed,</i> 149 Wn.2d 48, 65 P.3d 1203 (2003).....	28
<i>Young Americans for Freedom v. Gorton,</i> 91 Wn.2d 204, 588 P.2d 195 (1978).....	40, 41, 42

**Statutes**

Laws of 1965, ch. 8, § 43.198.010(143) .....	36
RCW 43.01.020 .....	35
RCW 43.10.030 .....	34
RCW 43.10.040 .....	35
RCW 43.10.067 .....	35
RCW 7.24.020 .....	29

**Other Authorities**

17 McQuillan § 51:14, at 777-78, 781-82.....	32
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**Constitutional Provisions**

Wash. Const. art. III, § 1 .....	34
Wash. Const. art. III, § 21 .....	33, 34, 35

## I. COUNTERSTATEMENT OF THE ISSUES

Washington is one of twenty (20) states that commenced litigation against the federal government challenging the constitutionality of the federal health care act. In the Attorney General's considered legal judgment, the federal health care act violates the rights of the state and its citizens guaranteed by the Constitution of the United States.

1. Where the City of Seattle has no legally cognizable interest and has suffered no injury in fact, does the City have standing to sue the Attorney General to end Washington's challenge to the constitutionality of the federal health care act?

2. Where there is no express duty in the law prohibiting the Attorney General from challenging the constitutionality of the federal health care act, does the City invoke the Court's jurisdiction in mandamus?

3. Does the Attorney General, as the chief legal officer of the state, have the authority and discretion to challenge the validity of the federal health care act where, in the Attorney General's considered legal judgment, the federal act violates the rights of the state and its citizens guaranteed by the United States Constitution?

## II. COUNTERSTATEMENT OF THE CASE

### A. Factual Background<sup>1</sup>

The State of Washington is one of 20 states that commenced a multistate action in the United States District Court for the Northern District of Florida, in *State of Florida, et al. v. United States Department of Health and Human Services, et al.*, Case No. 3:10-cv-91-RV/EMT, referred to in this brief as the “federal health care litigation.” ASF ¶ 13, p. 4; Attach. 8, 0038-0071. The Amended Complaint in the case alleges that certain provisions of the “Patient Protection and Affordable Care Act,” P.L. 111-14, as amended by the “Health Care and Education Reconciliation Act of 2010,” P.L. 111-152, (the federal health care act or Act) exceed the power and authority of Congress and violate the rights of the states and their citizens under the Constitution of the United States.

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<sup>1</sup> This case is before the Court on an Agreed Statement of Facts, cited in this brief as ASF. Ruling on Original Action at 5. The parties do not agree that all of the facts in that document are relevant. ASF ¶ 2, p. 1. The ASF, however, does provide the only facts properly before the Court. *Id.* The City’s Statement of the Case includes factual assertions that are not part of the ASF, and that are contrary to its terms. The City asserts that, “No state agency or officer requested joinder in the Florida case.” Petitioner’s Opening Brief (City’s Br.) at 2. There is no basis for this assertion in the ASF. The City also asserts, “[t]o the contrary, the Governor, the State Insurance Commissioner, the Speaker of the House, and the Majority Leader of the Senate all objected to the Attorney General’s action.” *Id.* This assertion is drawn from Attach. 5, 0031-0032 to the ASF. The ASF provides that: “Documents attached to this Agreed Statement of Facts are submitted to demonstrate that the party or parties who drafted the document made the statements in the document. The parties do not stipulate to the truth or accuracy of the content of the documents.” ASF ¶ 2, p. 1. Respondent requests the Court to strike and disregard the above assertions by the City with respect to their reference to officers other than the Governor. The nature of the Governor’s objection is explained in footnote 4, *infra* pp. 13-14.

“Plaintiffs seek declaratory and injunctive relief against the Act’s operation in order to avoid an unprecedented and unconstitutional intrusion by the federal government into the private affairs of every American and to preserve Plaintiff States’ respective sovereignty, as guaranteed by the Constitution.” ASF ¶ 13, p. 4; Attach. 8, 0041, ¶ 3.<sup>2</sup>

**B. Procedural Background**

The City of Seattle, a municipal corporation, sued the Attorney General in this Court, styling its litigation as an original action. *See* Petition Against State Officer Robert M. McKenna: Writ of Prohibition (Petition). The City asks this Court to compel the Attorney General of Washington “to withdraw the State of Washington from the case of *State of Florida, et. al v. United State Department of Health and Human Services, et al.*, Case No. 3:10-cv-91” and “to cease participating in that case.” Pet. at 1, 9. In a Ruling on Original Action dated July 2, 2010, the

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<sup>2</sup> As part of its Statement of the Case, the City asserts that the federal district court denied the Governor’s request to file an amicus brief in the federal health care litigation. City’s Br. at 3. Because this is an incomplete statement, it may be misunderstood. At the Governor’s request, on April 30, 2010, the Attorney General appointed special assistant attorneys general to represent the Governor’s interests in the health care litigation. ASF ¶ 9, p. 3; Attach. 3, 0025-26. Several weeks later, on June 14, 2010, the district court *sua sponte* entered an Order on Amicus Filings. ASF ¶ 14, pp. 4-5; Attach. 9, 0072-75. The Order ruled that amicus briefs would not be accepted at the motion to dismiss stage of the litigation. *Id.* Subsequently, on June 23, 2010, the Governor, along with the governors of three additional states, sought to file an amicus brief at the motion to dismiss stage of the litigation. ASF ¶ 16, p. 5; Attach. 11, 0082-0094. The district court denied the governors’ request. ASF ¶ 20, pp. 5-6; Attach. 15, 0105-0106. The district court’s Order explains that the proposed state *amici* may have arguments helpful to the court during the merits phase of the case, and allows leave to renew motions at that time. *Id.*

Court Commissioner retained this case for decision by the Court, and upon the Commissioner's direction, the parties prepared and submitted an ASF.

### **III. SUMMARY OF ARGUMENT**

The City's Petition should be dismissed at the outset for two reasons. First, the City lacks standing to bring this action. Second, its claim does not invoke the original jurisdiction of the Court. The Court need not and should not reach the merits of the City's claim. However, the City's Petition also fails on its merits.

The City contends that the Attorney General exceeded his constitutional and statutory authority in joining Washington in litigation challenging the federal health care act on the grounds that Act violates the rights of the state and its citizens under the Constitution of the United States. The City of Seattle seeks an extraordinary writ from this Court ordering the Attorney General to withdraw the state from the federal health care litigation.

To bring an action, a party must have standing. The City lacks standing because it has no legally protected interest in the action that it challenges, and it has suffered no injury in fact based on that action. The constitutional and statutory provisions upon which the City's claimed right relies, address the authority of the Attorney General in representing the State of Washington. They do not protect or regulate any legal interest of

the City. Nor has the City suffered injury in fact based on the Attorney General's determination to join litigation challenging the federal health care act. No one suffers injury in fact by virtue of an action in federal court to determine the constitutionality of a federal law.

Nor may the City invoke taxpayer standing. That doctrine extends to citizens, not to municipal corporations. The Court established the doctrine to help ensure that citizens have adequate means to challenge the conduct of their government, not so that one government may sue another without demonstrating a legally cognizable right and injury in fact. Moreover, even if the City could assert taxpayer standing, and it may not, the City failed to comply with procedural prerequisites to taxpayer standing.

The City lacks representational standing. And it has no standing to raise rights of third parties, including alleged rights of state officers.

The Court should not overlook the City's lack of standing based on the alleged importance of this case, as the City suggests. The City's Petition raises no issue with respect to the constitutionality of state law. In addition, the writ that the City seeks would have no substantial effect on the citizens of Washington. The federal health care litigation is a multistate action that will continue even if the Court were to issue the writ.

The City's Petition also fails at the outset because it does not state a claim in mandamus and therefore does not invoke the jurisdiction of the Court. There is no express mandatory duty on the part of the Attorney General to withdraw from the federal health care litigation. Mandamus requires such a duty. Instead, this case simply is a request for a declaratory judgment. Declaratory relief is not within the original jurisdiction of the Court, and the City's claim presents no justiciable controversy even if it were.

For these reasons, the Court need not and should not reach the merits of the City's Petition. If the Court does, however, the City's claim fails. The Attorney General has ample constitutional and statutory authority and discretion to challenge the constitutionality of the federal health care act on the basis of his legal judgment that the Act violates rights of the state and its citizens guaranteed by the Constitution of the United States.

The Attorney General is a constitutional officer, independently elected by the people of the State of Washington, and answerable to them. The constitution directs that the Attorney General shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law. Statutes concerning the authority of the Attorney

General empower the Attorney General to represent the state in all of the courts in all legal proceedings.

This Court has recognized that the office of Attorney General was created to provide an additional check in state government, and that the paramount duty of the Attorney General is to protect the interests of the people of Washington. The Court thus has rejected the claim that state officers antagonistic to the position of the Attorney General may preclude him from instituting legal proceedings where, in the exercise of his judgment, the public interest warrants them. Similarly, the Court has held that neither state officers nor private parties may compel the Attorney General to institute legal proceedings where, in the sound discretion of the Attorney General, such proceedings should not be brought.

The constitution, statutes, and cases of this Court reflect an understanding that Washington's officers and citizens will not always agree upon the appropriate legal course for the state. They also reflect that our constitution and statutes place the discretion to consider the state's legal interests as a whole, and the public interest, in the sound discretion of an independently elected Attorney General who is answerable to the people, and who is accountable in the courts if his action is so arbitrary and capricious that it amounts to a failure to exercise discretion. No such failure is alleged in this case.

#### IV. ARGUMENT

**A. The City Of Seattle Lacks Standing To Preclude The Attorney General From Bringing A Legal Action Against The Federal Government To Protect The Rights Of The State Of Washington And Its Citizens Guaranteed By The Constitution Of The United States**

**1. The City Of Seattle Has No Legally Cognizable Interest In This Matter And Can Demonstrate No Injury In Fact**

To have standing, a plaintiff must demonstrate *both* (1) that it has legal interest that is within the zone of interests protected or regulated by the statutory or constitutional provisions in question; and (2) that it has suffered an injury in fact, economic or otherwise by virtue of the challenged action. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 186, 157 P.3d 847 (2007); *Grant Cnty. Fire Prot. Dist. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (*Grant Cnty. II*) (under two-part test, fire protection district lacked standing to challenge petition method of annexation): *see also Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994) (state officers who had not suffered concrete harm lacked standing to challenge act).

The City of Seattle does not argue that it satisfies this traditional test for standing. The constitutional and statutory provisions at issue in this case address the authority and responsibility of the Attorney General as the chief law officer of the State of Washington. They do not protect or regulate any interest of the City of Seattle, or any other municipal

corporation. The City has no role or authority with respect to their implementation. The City thus has no legal interest within the zone of interests protected or regulated by the statutory or constitutional provisions upon which it bases this action. Indeed, the City does not claim one. Rather, it asserts only taxpayer standing to which it is not entitled. *See infra* pp. 10-18.

Because the City fails the first prong of the traditional test for standing, the Court need not consider the second prong, but the City fails that prong too. The City has not alleged that the Attorney General's constitutional challenge to the federal health care act has caused the City injury in fact because it has not. The Attorney General instituted a legal challenge to a federal health care act that, in the legal judgment of the Attorney General, violates the rights of the State of Washington and its citizens, as guaranteed by the Constitution of the United States. The City suffers no injury in fact by virtue of litigation against the federal government seeking a judicial determination that the federal act is unconstitutional. No one, including the City of Seattle, is entitled to the "benefit" of an unconstitutional law, regardless of whether that person favors such a law. At issue in the federal health care litigation is the constitutionality of the Act, nothing more.

## 2. The City's Reliance On Taxpayer Standing Lacks Merit

Because the City cannot demonstrate standing under the traditional standing test, it endeavors to invoke taxpayer standing. The City's effort fails for at least three distinct reasons, any one of which precludes its reliance on taxpayer standing.

First, this Court has recognized taxpayer standing in order to allow *citizens* to bring actions against *their government* without having to demonstrate that they are within the zone of interests regulated or protected by the laws at issue and a particularized injury. The purpose of taxpayer standing is to "provid[e] a judicial forum [for] *citizens* [to] contest the legality of official acts of *their government*" when their government refuses to act, on the basis that those citizens otherwise would be without any remedy. *State ex rel. Boyles v. Whatcom Cnty.*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985) (emphasis added). The Court repeatedly has explained this purpose of the doctrine: "The recognition of taxpayer standing has been given freely in the interest of providing a judicial forum when *this state's citizens* contest the legality of official acts of *their government.*" *Id.* at 614 (emphasis added).

Municipalities decidedly are not citizens. They are creatures of law. The purpose of allowing taxpayer standing is *not* to create in municipal corporations, such as cities, a roving commission to bring suit

against state or other government officers where the municipal corporation cannot demonstrate a cognizable legal interest and injury in fact.

Several cases are instructive in this respect. In *Hoppe v. King County*, 95 Wn.2d 332, 622 P.2d 845 (1980), the Court held that the King County assessor lacked standing to sue King County and the state. “Hoppe has failed to cite any authority conferring standing on assessors to challenge the validity of duly enacted levies or to enforce the [statutory] levy ceiling limitation[.]” *Id.* at 337. “The statutory obligation to set rates does not give the assessor a roving commission to bring a lawsuit to question levy amounts.” *Id.* To similar effect is *King County v. Port of Seattle*, 37 Wn.2d 338, 223 P.2d 834 (1950). There, the Court held that King County lacked standing to sue the Port of Seattle to challenge an exclusive franchise the Port granted to a taxi company to serve SeaTac Airport because the County did not show that any legal right of its own was invaded by the Port’s action or that the County had been harmed. *Id.* at 345-46; *see also Grant Cnty. Fire Prot. Dist. 5*, 150 Wn.2d at 802 (fire protection district lacked standing to challenge petition method of annexation where its only interest was protection of its tax base); *Walker*, 124 Wn.2d at 419 (government petitioners lacked standing where there was no showing that they had suffered concrete harm from the challenged act).

Second, to invoke taxpayer standing, a plaintiff must plead and prove its status as a taxpayer. “In order to bring a taxpayer suit, the complaint must allege both a taxpayer’s cause of action and facts supporting taxpayer status.” *Dick Enterprises, Inc. v. King Cnty.*, 83 Wn. App. 566, 572-73, 922 P.2d 184 (1996); *see also Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 299, 937 P.2d 1082 (1997) (Sanders, J., dissenting). The City’s Petition does not plead or demonstrate taxpayer status.

Third, “a demand upon the proper public officer to take appropriate action is a condition precedent to the maintenance of a taxpayer action to challenge the validity and legality of what public officers are intending to do or have done.” *Reiter v. Wallgren*, 28 Wn.2d 872, 184 P.2d 571 (1947). The City made no request of the Attorney General to cease participation in the health care litigation before the City sued the Attorney General. City’s Br. at 33 n.11.

This condition precedent is fundamental to the doctrine of taxpayer standing. It is designed to ensure that the government functions properly, and that unnecessary litigation is avoided. As the Court explained in *Reiter*, any other rule would

result in lending encouragement to one who is not vested with duties or discretion in such matters to substitute his

judgment and discretion for that of those to whom the law has confided them.

*Reiter*, 28 Wn.2d at 877 (quoting *Williams v. Stallard*, 213 S.W. 197, 199 (Ky. 1919)).

Demand on the appropriate official to take action must be made unless facts are alleged which sufficiently show that the demand would have been useless. *Reiter*, 28 Wn.2d at 876-77. The City asserts that it is excused on this basis, alleging that an exchange of letters between the Governor and the Attorney General in May 2010 demonstrates that a demand by the City would have been useless.<sup>3</sup> The City asserts that the Attorney General “refused the Governor’s request that he cease purporting to represent the State” and “it would have been useless for the City to make the same request.” City’s Br. at 33 n.11. Apart from the fact that the City erroneously equates the relief that it seeks with the request made of the Attorney General by the Governor, the City’s argument fails.<sup>4</sup>

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<sup>3</sup> The City relies on a letter from the Governor to the Attorney General dated May 5, 2010 (ASF Attach. 5, 0031-32) and the Attorney General’s response to the Governor dated May 12, 2010 ASF Attach. 6, 0033-34.

<sup>4</sup> The Governor’s correspondence acknowledges that “[i]t is the [Attorney General’s] choice whether to participate in the [health care] lawsuit in your capacity as Attorney General.” (ASF, Attach. 5, 0031-32) By contrast, the City, “seeks a writ of mandamus to compel [the Attorney General] to withdraw the State of Washington from [the health care litigation] and to cease participating in the case.” City’s Petition Against State Officer, p. 1, ¶ 1.

The Governor requested that “upon review of legal authorities or for reasons of comity”, the Attorney General file a then-pending amended complaint redesignating the caption as “Robert M. McKenna, Attorney General of the State of Washington.” ASF Attach. 5, 0031-32. The Attorney General determined to maintain the existing caption in

Whether a request to the Attorney General to withdraw from the health care litigation would have been useless must be judged at the time the taxpayer action is brought. *Reiter*, 28 Wn.2d at 878. In *Reiter*, a taxpayer argued that the Attorney General's defense of an action challenging the state capitol committee's sale of capitol timber made it apparent that a demand upon the Attorney General to prevent the sale would have been useless. The Court rejected this contention. "[A]ppellant could not know what the attorney general would have done if the facts had been laid before him and a proper demand made upon him at the time the complaint was prepared[.]" *Id.* "Neither personal interest nor previous failure to act raises a presumption that the attorney general will not act if a demand is made." *Id.*; accord *Farris v. Munro*, 99 Wn.2d 326, 329, 662 P.2d 821, 824 (1983).

The City sued the Attorney General on April 22, 2010, nearly two weeks prior to the Governor's letter to the Attorney General, and nearly three weeks prior to the Attorney General's response to the Governor.

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the federal health care litigation, "State of Washington by and through Robert M. McKenna, Attorney General", and to agree to parallel appearance and participation in the federal health care litigation by the Governor as "State of Washington by and through Christine O. Gregoire, Governor of the State of Washington." ASF, Attach. 6, 0033-34. The Attorney General had previously appointed special assistant attorneys general to represent the Governor in the health care litigation. ASF, Attach. 3, 0025-0026; Attach. 4, 0027-0030; ASF Attach. 6, 0034.

The City may not rely upon correspondence postdating its failure to make a demand upon the Attorney General in order to excuse that failure.

The City also asserts that it would have been absurd to ask the Attorney General to sue himself. City's Br. at 33 n.11. Obviously, had the City made a demand that the Attorney General cease participation in the federal health care lawsuit, the Attorney General could have acted upon that demand by withdrawing from the litigation without bringing suit against himself.

For each of the foregoing reasons, the City of Seattle cannot invoke taxpayer standing.

**3. The Cases Relied Upon By The City To Claim Taxpayer Standing Are Inapposite**

The City cites two cases for the proposition that the City has taxpayer standing: *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 534 P.2d 114 (1975), and *City of Seattle v. State*, 103 Wn.2d 663, 694 P.2d 641 (1985). Neither supports the City's argument.

*City of Seattle* did not concern taxpayer standing at all. In that case, the Court applied the traditional two-part standing test. Based upon that test, the Court held that the City of Seattle had standing to raise an equal protection challenge to two statutes governing city annexation proceedings. In *City of Seattle*, the City had begun annexation

proceedings but the City's attempts were twice halted by newly-enacted statutes that the City sought to challenge. The Court granted standing in *City of Seattle* because the City had a "direct interest in the fairness and constitutionality of the process by which it annexes territory." *Walker*, 124 Wn.2d at 416. As this Court explained in *Walker*, in distinguishing *City of Seattle*, "[t]he City had, in fact, been affected by the legislation," a claim that could not be made by the government officials who were petitioners in *Walker*, and that cannot be made by the City in the instant case. *Walker*, 124 Wn.2d at 416.

*O'Brien* also concerned a challenge to the validity of a statute that had a direct and negative effect on the legal interests of the cities and county who, along with a citizen, sought to challenge it. The statute at issue in *O'Brien* plainly regulated cities and counties and harmed their legal interests in existing contracts. The statute allowed suppliers of petroleum products to terminate public works contracts if the cost of petroleum increased by more than 20 percent over its cost at the time of contracting. In order to require completion of the contract, the statute required any contracting municipality to pay 80 percent of the increased cost of the petroleum products. Two cities, a county, and an individual challenged the law and sought mandamus to prohibit the treasurer from disbursing funds for cost increases. As was the case in *City of Seattle*, the

government plaintiffs in *O'Brien* were directly regulated and adversely affected by the statute at issue, and thus would satisfy the zone of interest and injury in fact prongs of traditional standing.

Moreover, unlike the instant case, in *O'Brien*, a *citizen* was a petitioner, the action had been brought as a taxpayer action, and demand first had been made upon the Attorney General to initiate the action and had been refused. After reciting the standard for taxpayer standing, which the citizen petitioner met, the Court stated without analysis or elaboration, “we perceive no justifiable reason to apply a different standard where a county or municipality brings the action.” *O'Brien*, 85 Wn.2d at 269. Because there was a citizen petitioner in the case, the Court’s statement was not necessary for its decision. As an observation or remark made by a court not necessary to the court’s decision, it is *obiter dictum*. *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954) (citing *Black’s Law Dictionary* 541 (4th ed.)). Respondent has located no case before or after *O'Brien* supporting or following that dictum. The dictum in *O'Brien* would judicially expand the role of municipal corporations in our structure of government, converting them from legal entities established “chiefly to regulate and administer the local and internal affairs of the incorporated city, town, or district” (*City of Spokane v. J-R Distributions, Inc.*, 90 Wn.2d 722, 726, 585 P.2d 784 (1978) (citing *Columbia Irrigation Dist. v. Benton*

*Cnty.*, 149 Wash. 234, 235, 270 P. 813 (1928))), into itinerant litigants entitled to second-guess the actions of other government entities or officials, without regard to whether the municipal corporation can demonstrate a legally cognizable interest and injury in fact caused by the action that it challenges.

#### 4. The City Lacks Representational Standing

The City also relies on *City of Seattle* to assert that “[i]ndividual residents in Seattle could bring the present petition in order to require a State officer to stop exceeding his authority, therefore the City may bring it on their behalf.” City’s Br. at 32-33. *City of Seattle* does not support this proposition either, and the proposition is directly contrary to well-established principles of standing.

With limited exceptions not applicable here, “[t]he doctrine of standing prohibits a litigant from raising another’s legal rights.” *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987). The Court in *City of Seattle* held that the City had standing to challenge annexation statutes on equal protection grounds for the reason that “[w]hen the annexation process is initiated, residents of an area proposed for annexation become potential city residents. Once the City has initiated or approved an annexation petition, it has a duty to represent the interests of area residents, as well as

its own interests in further proceedings. Thus, the City has standing to raise the equal protection claims of its potential residents.” *City of Seattle*, 103 Wn.2d at 669 (citation omitted). *City of Seattle* simply does not stand for the proposition that the City advances. Contrary to the City’s assertion, *City of Seattle* does not hold that “[s]ince the residents of the area could make the claim, the City could make it on their behalf.” City’s Br. at 32. *See also Grant Cnty. II*, 150 Wn.2d at 803-04 (holding that a fire protection district lacked representational standing to challenge annexation procedures on behalf of residents of the district).

To have standing in a representational capacity, an organization must demonstrate that “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *American Legion Post 149 v. Dep’t of Health*, 164 Wn.2d 570, 595, 192 P.3d 306 (2008) (quoting *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)) (American Legion lacked representational standing to challenge smoking ban because member smoking was not germane to its purposes). It is doubtful that representational standing should be applied by analogy to municipal corporations, as residents of a municipality do not “join” a municipality,

and it is unlikely that all residents share the goals or interests of the municipal corporation. Even assuming for the sake of argument, however, that the standard could apply to a municipal corporation, the City would not satisfy the “purpose” prong of representational standing. The purpose of a city is to administer the affairs of the municipality, not to act as a roving examiner identifying and challenging actions by state agencies or officials whenever a majority of a city council disagrees with them without regard to a legally cognizable interest and injury in fact.

As a related matter, the City has no standing to assert rights allegedly belonging to others, including alleged legal interests of the Governor. *Haberman*, 109 Wn.2d at 138; *Grant Cnty. II*, 150 Wn.2d 791. Although the City does not expressly assert, and could not seriously assert, that it has standing to raise alleged legal interests of state officers, it nonetheless endeavors to rely upon them. *See City’s Br.* at 27-28 (asserting alleged rights of the Governor).

**5. The Court Should Not Disregard Standing Requirements As the City Requests**

The City cites a handful of cases to support an argument that the Court should apply a more liberal approach in evaluating whether the City has standing because this case is of great and immediate public importance. *City’s Br.* at 31, 33-34. The City’s argument is not well

taken. Nor should the Court overlook the City's plea for liberalized standing to bring litigation in order to preclude litigation. Whether viewed liberally or more objectively, the City simply lacks standing. *See supra* pp. 8-20. And, despite the City's assertion to the contrary, the issue in this case is not of the nature that occasionally has led the Court to liberalize standing requirements and reach the merits of a case where standing was doubtful.

First, the City equates this case and the issue it presents with *Farris v. Munro*, 99 Wn.2d 326, 662 P.2d 821 (1983). City's Br. at 33. The cases cannot be equated. *Farris* was an action by a state citizen who could assert taxpayer standing, not an action by a municipality. The taxpayer petitioner in *Farris* sought a writ of mandamus to declare the then-recently enacted lottery statute unconstitutional, and to compel the Secretary of State to accept petitioner's filing of a referendum opposing the statute. *Farris*, 99 Wn.2d at 328. Although the petitioning citizen had not first requested the Attorney General to bring the action, the Court determined to reach the merits of the case because he had "raised an issue vital to the state revenue process that remained unresolved at the time of this suit and might have affected a measure on the November 1982 ballot." *Id.* at 330. In other words, the petitioner's action was of vital public importance because it challenged the constitutionality of a newly enacted

state statute to raise revenues for the support of state government, and put at issue the scope of the constitutional referendum power of the people.

This case is in no way analogous to *Farris* on its facts or in its import. Unlike the case in *Farris*, *no citizen* brings this action. The only petitioner is a municipal corporation, an entity for whose benefit taxpayer standing was not created. Unlike *Farris*, this case does not raise any issue of the constitutionality of a state law, or the scope of the people's constitutional right to direct democracy.

Rather, the City seeks a writ from this Court to compel the Attorney General to cease challenging the constitutionality of a federal act that in the Attorney General's legal judgment violates the rights of the state and its citizens as guaranteed by the United States Constitution. The City does not explain how its preference that the federal law be shielded from constitutional scrutiny at the instance of the Attorney General is a matter of great public importance that would warrant abandoning standing requirements.

Additionally, unlike the writ sought in *Farris*, the writ that the City seeks would have no substantial effect on Washington citizens. The City asserts that "the questions presented in this case regarding the Attorney General's authority are so fundamental and the implications so far-reaching, that they touch every person in the state." City's Br. at 31. How

such a writ, even if granted, would “touch every person in the state” the City does not say. The fact of the matter is that without regard to a decision by this Court on the City’s petition, the multistate challenge to the constitutionality of the federal health care act will proceed in the federal courts, and the validity of the federal health care act will be determined in that forum. Washington is but one of 20 state plaintiffs in that action. It will go forward.

The City also relies on *Washington Natural Gas Co. v. PUD 1 of Snohomish County*, 77 Wn.2d 94, 459 P.2d 633 (1969), and *Ordell v. Gaddis*, 99 Wn.2d 409, 622 P.2d 49 (1983), for the argument that standing requirements should be liberalized in this case. Again, whether viewed liberally or not, the City has no standing, and neither case supports a liberal analysis of standing in this matter.

In *Washington Natural Gas Co.*, Washington Natural Gas Company sought, *inter alia*, to challenge the constitutionality of a program by the Snohomish County PUD that provided substantial financial incentives for residential developers to install underground electrical distribution systems and to persuade householders in new developments to buy electrical energy and service. The gas company asserted that the program violated equal protection and constituted an impermissible gift of public funds. The Court held that Washington Natural Gas had standing

to litigate the case based upon the combination of two factors: (1) the company's status as a substantial customer of the PUD, unlikely to benefit from the PUD's program; and (2) the direct effect that resolution of the issue would have on the people and the economy of the State. "[W]hen we consider the public importance of the issues presented and the direct effect their resolution will have on the people and the economy of the state and add these to the fact that plaintiff gas company is a substantial customer of the PUD, we think that the Washington Natural Gas Company can properly be said to have standing to maintain the action." *Washington Natural Gas Co.*, 77 Wn.2d at 96. By contrast, in this case, the City has no substantial relationship to the statutes at issue concerning the authority of the Attorney General, no legal interest in precluding a challenge to the constitutionality of the federal health care act, and the relief sought by the City would have no direct effect on the people of Washington or the economy.

~~For the same reasons, *Ordell* does not support the City. In *Ordell*,~~  
attorneys whose practice area was domestic relations brought an action challenging the authority of the superior court to appoint commissioners pro tem to serve in the absence of regularly appointed court commissioners. The Court held that the challengers had standing. "Appellants have adequate standing to maintain this action. As attorneys

they are officers of the court, their practice is largely before the officers whom they challenge, and they have raised issues of serious public importance affecting substantial segments of the population. Before bringing this action they requested the prosecutor to initiate suit which invitation he declined.” *Ordell*, 99 Wn.2d at 411. The City has no comparable interest in this case; it is not eligible for taxpayer standing; it did not plead such standing or make a demand on the Attorney General even if it were eligible; and a decision by the Court would have no practical effect on “substantial segments of the population.” *Id.*

Finally, the City quotes from *State ex rel. Distilled Spirits Institute, Inc. v. Kinnear*, 80 Wn.2d 175, 492 P.2d 1012 (1972), as support for the argument that the Court should reach the merits of this case. City’s Br. at 34. *Distilled Spirits* does not resemble the instant case. First, *Distilled Spirits* was a taxpayer action brought by a *citizen* who challenged the validity of a liquor tax increase that she had paid. *Id.* at 176 n.1. Thus, there was no question in the case that the petitioner satisfied taxpayer standing requirements. Standing was not even an issue.

Second, decidedly unlike the instant case, *Distilled Spirits* involved a question of constitutional interpretation having immediate and far-reaching consequences for the validity of numerous state laws. The question in *Distilled Spirits* was whether based the enrolled bill doctrine, a

self-imposed judicial restraint stemming from article II, section 32, the Court should decline to consider whether the 60-day limit on regular sessions of the legislature in article II, section 12 also applied to special sessions. The petitioner contended that the 60-day limit applied, and that the tax increase was invalid because the legislature passed it more than 60 days into a special session.

The Court determined to reach the merits based upon its authority to interpret the constitution; a request by members of the legislature, the Governor, and the Attorney General to do so; the lack of any apparent adverse consequence from rendering a decision on the question; and the fact that a decision would “serve to remove doubts concerning the validity of a number of important legislative acts passed not only in this session but in previous sessions.” *Id.* at 178. The instant case concerns no question of the validity of a state law, let alone multiple state laws. *Distilled Spirits* is no more apposite in this case than it was in *Walker*, where the Court declined to extend *Distilled Spirits* based upon a similarly overbroad claim concerning the reach of the decision. *Walker*, 124 Wn.2d at 414-15. *Distilled Spirits* provides no support for the notion that the Court should ignore a lack of standing and reach the merits of a case where, as here, a municipal corporation without standing simply asserts that “the public deserves to know” the answer and where the answer will

have no practical impact on Washington citizens. City's Br. at 34. If that is all that is required for standing, then standing is meaningless.

The City lacks standing to bring this action. Its Petition should be dismissed for this reason.

**B. The City Also Fails To State A Claim In Mandamus, Seeks Relief Not Within The Original Jurisdiction Of This Court, And Fails To Present A Justiciable Controversy**

**1. The City Fails To State A Claim In Mandamus**

Although the City has styled this case an original action in mandamus, it is not such an action. Mandamus is available "to compel a state officer to undertake a clear duty." *Gerberding v. Munro*, 134 Wn.2d 188, 195, 949 P.2d 1366 (1998). "The duty to act must be imposed expressly by law, and involve no discretion." *Cedar Cnty. Comm. v. Munro*, 134 Wn.2d 377, 380-81, 950 P.2d 446 (1998) (citing *State ex rel. Clark v. City of Seattle*, 137 Wash. 455, 461, 242 P. 966 (1926)); *Washington State Farm Bureau Fed'n v. Reed*, 154 Wn.2d 668, 672, 115 P.3d 301 (2005). "A mandatory duty exists when a constitutional provision or statute directs a state officer to take some course of action." *Brown v. Owen*, 165 Wn.2d 706, 724-25, 206 P.3d 310 (2009) (citing *Heavey v. Murphy*, 138 Wn.2d 800, 804-05, 982 P.2d 611 (1999)) (statute providing state treasurer shall deposit certain taxes created a mandatory duty); *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 55, 65

P.3d 1203 (2003) (statute providing the secretary of state shall canvass votes and certify the results to the governor created a mandatory duty). “Where there is a specific, existing duty which a state officer has violated and continues to violate, mandamus is an appropriate remedy to compel performance.” *Walker*, 124 Wn.2d at 408.

Neither the City’s Petition nor its brief identifies any statute or constitutional provision that imposes a clear mandatory duty on the Attorney General. No statute precludes the Attorney General from challenging the constitutionality of the federal health care act. Finding no clear duty, the City instead presents more than 25 pages of argument, setting forth its view of the scope of the Attorney General’s authority, drawing from constitutional and statutory provisions and case law from this and other states on the subject of the authority of attorneys general. Indeed, the City asserts that “[t]he Court should exercise its original jurisdiction . . . to settle the constitutional and statutory limits of the Attorney General’s authority.” City’s Br. at 4.<sup>5</sup>

This is the essence of a request for a declaratory judgment, not an extraordinary proceeding seeking a writ of mandamus to enforce or prohibit the performance of an express mandatory constitutional or

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<sup>5</sup> The City’s “Issues Presented” also ask the Court to determine the scope of the Attorney General’s authority. City’s Br. at 1.

statutory duty. *See* RCW 7.24.020 (“A person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction . . . arising under the . . . statute . . . and obtain a declaration of rights . . . or other legal relations thereunder.”). “This court’s original jurisdiction is governed by the constitution and, by the plain language of the constitution, does not include original jurisdiction in a declaratory judgment action.” *Walker*, 124 Wn.2d at 411.

The Court will render declaratory relief in an original action only if such a declaration necessarily underlies a writ of mandate. *Walker*, 124 Wn.2d at 411. The Court thus will provide declaratory relief concerning the constitutionality of a statute where the clear duty sought to be prohibited in mandamus is set forth in the challenged statute. But that is not the case in this action. Here, there simply is no express duty imposed by law.

In this respect, the City erroneously contends that mandamus is available to compel a state officer to undo unauthorized acts whenever the officer has acted outside his authority. City’s Br. at 29. The Attorney General has not acted outside his authority. Even so, none of the authorities cited by the City support the proposition that mandamus is available in the absence of a clear existing duty, and the proposition is

incorrect. In fact, all of the authorities cited by the City demonstrate the requirement for a clear mandatory duty as a predicate to mandamus.

The first is *State ex rel. Mason v. Board of County Commissioners*, 146 Wash. 449, 263 P. 735 (1928), *overruled on other grounds*, *Lopp v. Peninsula School District 401*, 90 Wn.2d 754, 759, 585 P.2d 801 (1978). In that case, mandamus was sought to compel the board to rescind an order redistricting the county's three districts. The mandamus action was based upon a statute expressly requiring that "[s]uch districts shall comprise as nearly as possible one-third of the population of the county[.]" *Id.* at 458-59 (quoting Laws of 1893, p. 63, § 2). The redistricting order at issue resulted in one district "hav[ing] almost eight times as many registered voters as either one of the other districts and almost four times the number of both of the other two combined." *Id.* at 452. As the Court recognized, "[t]he statute is express and positive, as already pointed out, that the districts shall comprise as nearly as possible one-third of the population of the county." *Id.* at 463 (internal quotation marks omitted).

The same is true of *State ex rel. Strecker v. Listman*, 156 Wash. 562, 287 P. 663 (1930), also cited by the City. In *Listman*, a civil service commission regulation expressly limited the conditions under which the commission could revise a list of police officers eligible for promotion.

*Id.* at 565-66. The commission revised the eligibility list in the absence of such conditions, and mandamus was sought to compel the commission to rescind the revision. As the Court explained: “[T]he present case turns solely upon the right of the commission to disregard the clear and unequivocal requirements of the rule promulgated by it.” *Id.* at 566.

A clear existing duty also was the basis for mandamus in *State ex rel. Burlington Northern, Inc. v. Utilities & Transportation Commission*, 93 Wn.2d 398, 609 P.2d 1375 (1980), relied upon by the City. In that case, railroads regulated by Utilities & Transportation Commission sued in mandamus to prevent the Commission from using regulatory fees collected from them in order to pay tort judgments against the state in cases involving railroad crossing accidents. The writ relied on statutes limiting the use of the fees only for the reasonable costs of supervising and regulating the railroad companies. This Court explained that RCW 81.24.010 made the annual fee at issue payable only to cover “the reasonable cost of supervising and regulating” the railroads; that RCW 81.24.060 set out the legislature’s “clear intent that the fee use be so limited”; and that “[s]uch a restrictive purpose is mandated by the decision of the United States Supreme Court in *Great N. Ry. v. Washington*, 300 U.S. 154, 81 L. Ed. 573, 57 S. Ct. 397 (1937), in which an earlier version of RCW 81.24 was considered.” *Id.* at 405-06.

Finally, the City selectively quotes from 17 McQuillan, *Municipal Corporations* § 51:13 (3d ed. 2004) for the proposition that mandamus will be granted to compel the undoing of things illegally done. City's Br. at 29 n.10. Passages not quoted by the City explain that an express mandatory duty is a predicate before mandamus is available to compel the undoing of things illegally done. 17 McQuillan § 51:14, pp. 777-78, 781-82.

The City has failed to state a claim in mandamus and its petition should be dismissed for this additional reason.

**2. Even If Declaratory Relief Were Available, Such Relief Requires A Justiciable Controversy, And The City's Action Fails To Present One**

Even in the limited circumstances where, unlike here, declaratory relief is considered in a mandamus action because it necessarily underlies the writ, there must be a justiciable controversy. Among other factors, a justiciable controversy requires “an actual, present and existing dispute . . . between parties having genuine and opposing interests . . . which involves interests that must be direct and substantial[.]” *Walker*, 124 Wn.2d at 411. This requirement incorporates the traditional two-part “zone of interest” and “injury in fact” test for standing, including harm to the party that is substantial, rather than speculative or abstract. *Grant Cnty. Fire Prot. Dist. 5*, 150 Wn.2d at 802. As explained in Part IV. A.,

above, the City lacks standing in this case. Accordingly, the City's claim fails to present a justiciable controversy. The City's Petition should be dismissed on this basis as well.

**C. The Attorney General Has Ample Constitutional And Statutory Authority To Institute Litigation On Behalf Of The State Of Washington Where, In The Sound Discretion Of The Attorney General, The Legal Interests Of The State And The Public Interest Warrant It**

For each of the reasons set forth above, the Court need not and should not reach the merits of the City's claim, but if the Court does, the claim lacks merit.

**1. The Attorney General Is a Constitutional Officer Who Is Afforded Broad Authority Under the Constitution and Statutes to Represent the State<sup>6</sup>**

The Attorney General is a constitutional officer. Article III, section 21 of the Washington Constitution directs that the Attorney General "shall be the legal adviser of the state officers, and shall perform

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<sup>6</sup> The City quotes extensively from *State ex rel. Attorney General v. Seattle Gas & Electric Co.*, 28 Wash. 488, 68 P. 946, *rehearing denied*, 28 Wash 511, 70 P. 114 (1902), for the proposition that the Attorney General has no "common law" authority. City's Br. at 11. Because the Attorney General has constitutional and statutory authority to institute litigation on the part of the state, it is not necessary to consider the City's argument concerning the common law authority of the Attorney General in this case. But the City overstates the holding of *State ex rel. Attorney General*, failing to recognize the Court's opinion on rehearing. On rehearing in *State ex rel. Attorney General*, the Court ultimately held that where statutes placed legal authority to prosecute the action in the prosecuting attorney, the Attorney General did not have common law authority to maintain it. "At least, in this class of cases the attorney general has no common-law powers, because the legislature has seen fit to confer the power or duty ordinarily exercised at common-law by the attorney general upon the prosecuting attorney of the county where the wrong is alleged to have been committed." *State ex rel. Attorney General*, 28 Wash. at 512.

such other duties as may be prescribed by law.” By virtue of the state constitution, the Attorney General also is independently elected by the voters of Washington and answerable to them. Wash. Const. art. III, § 1.

The Attorney General has broad statutory authority to institute and prosecute all actions for the state, and to represent the state in all courts in all legal matters in which the state is interested. The following statutes speak most directly to that authority.

The attorney general shall:

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

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

RCW 43.10.030.

*The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal*

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This limited holding of *State ex rel. Attorney General* is consistent with RCW 4.04.010, which has been part of Washington law since statehood and was part of Washington’s territorial laws when the state constitution, including article III, section 21, was ratified in 1889. “The common law of England was the law of decision in Washington Territory as it is in the state today.” *Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 724, 565 P.2d 812 (1977), citing RCW 4.40.010. That statute provides:

The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.

*or quasi legal matters, hearings, or proceedings . . . except those declared by law to be the duty of the prosecuting attorney of any county.*

RCW 43.10.040 (emphasis added).

The laws also mirror the constitutional command of article III, section 21, that the Attorney General “shall be the legal adviser of the state officers” by providing with limited exceptions, that state officers may not employ counsel to perform the duties of the Attorney General.

No officer, director, administrative agency, board, or commission of the state, other than the attorney general, shall employ, appoint or retain in employment any attorney for any administrative body, department, commission, agency, or tribunal or any other person to act as attorney in any legal or quasi legal capacity in the exercise of any of the powers or performance of any of the duties specified by law to be performed by the attorney general[.]

RCW 43.10.067.

The Attorney General also subscribes to an oath to “support the Constitution of the United States” and the state, and to faithfully discharge the duties of his office. RCW 43.01.020.

The City erroneously contends that RCW 43.10.040, which provides that “[t]he attorney general shall also represent the state and all officials . . . in the courts . . . in all legal or quasi legal matters, hearings, or proceedings,” serves only to identify “who” represents the state and its officers, and despite what it says, actually does not grant the Attorney

General authority to represent the state in the courts. City's Br. at 14-15. The City's argument is untenable for three reasons. First, it ignores the plain language of the statute which not only prescribes who represents the state ("the attorney general"), but also where ("in the courts"), and in what ("all legal or quasi legal matters, hearings, or proceedings."). Where statutory language is plain, that ends the inquiry. *State v. Salavea*, 151 Wn.2d 133, 142, 86 P.3d 125 (2004).

Second, even if one were to consider the legislative history of RCW 43.10.040, it refutes the City's claim. RCW 43.10.040 was enacted by Laws of 1941, ch. 50, § 1, which explicitly provided: "*In addition to the powers and duties now given the Attorney General of the State of Washington by law, he shall also have the power, and it shall be his duty, to represent the State of Washington . . . in the courts . . . in all legal or quasi legal matters[.]*" (Emphasis added.) The italicized language was deleted from RCW 43.10.040 in 1965 as part of a recodification of RCW Title 43 that expressly did not change the meaning of the provision. Laws of 1965, ch. 8, § 43.198.010. ("[T]he provisions of this chapter insofar as they are substantially the same as statutory provisions repealed by this chapter shall be construed as restatements and continuations, not as new enactments."). Laws of 1965, ch. 8, § 43.198.010(143) repealed Laws of 1941, ch. 50.

Third, the City argues that a plain reading of RCW 43.10.040 (and RCW 43.10.020(2)) must be rejected because such a reading would render other more specific grants of authority to the Attorney General meaningless or superfluous. City's Br. at 15. The legislature is well aware that the Attorney General has additional specific duties prescribed in other statutes, and that they do not detract from those in RCW 43.10. RCW 43.10.110 provides: "The attorney general shall have the power and it shall be his or her duty to perform any other duties that are, or may from time to time be required of him or her by law."

Finally, the claims in the federal health care lawsuit seek to protect the state and its citizens from a federal law that, in the legal judgment of the Attorney General, infringes on their rights under the United States Constitution. The litigation certainly implicates the obligation of the Attorney General under RCW 43.01.020 to support the Constitution of the United States. The City's effort to discount the authority of the Attorney General to bring such an action under RCW 43.10.030(2) is misguided. City's Br. at 16-17.

**2. This Court Has Long Recognized the Attorney General's Discretionary Authority To Institute and Participate in Litigation on Behalf of the State**

The independent constitutional role of the Attorney General reflects a conscious decision by the authors of our state constitution to

create an additional check within state government. *State v. Gattavara*, 182 Wash. 325, 332-33, 47 P.2d 18 (1935). In *Gattavara*, the Court held that the Director of the Department of Labor and Industries could not pursue an action to collect delinquent industrial insurance premiums because the action was not instituted by the Attorney General. The Court rejected a claim that the Attorney General's authority was superseded by a statute authorizing the Director to allow Department employees who were attorneys to appear for the Department in actions instituted to collect industrial insurance premiums. In so holding, the Court relied upon the constitutional authority of the Attorney General, as well as his statutory authority "[t]o institute and prosecute all actions and proceedings for, or for the use of the state which may be necessary in the execution of the duties of any state officer[.]" *Id.* at 328 (quoting Rem. Rev. Stat. § 112).

The Court concluded:

We agree with the . . . Attorney General . . . that the constitution of this state is patterned after the United States constitution, and that the people had in mind the same objects sought by the creation of the attorney general's office of the Federal government; that is, a severance of the various branches of the government, *thereby creating one office a check upon the other*; [and] that the section of the 1933 act relied upon did not give authority to departments to institute actions in their own right, but only in conjunction with the authority of the Attorney General[.]

*Id.* at 332-33 (emphasis added).

The Court further held:

Although [article III, section 21] is not self-executing, when the duties of the Attorney General are prescribed by statute and the statute has for its purpose the authorization of proper state officers to bring actions, that authority is exclusive. *As such officer, the Attorney General might, in the absence of express legislative restriction to the contrary, exercise all such power and authority as the public interest may, from time to time, require.*

*Id.* at 329 (emphasis added).

*Gattavara* is far from alone in recognizing the authority of the Attorney General to exercise independent legal judgment in determining whether to institute legal proceedings in matters implicating the legal rights of the State and the public interest. In *State ex rel. Dunbar v. Board of Equalization*, 140 Wash. 433, 249 P. 996 (1926), the Attorney General brought an action in mandamus against the state Board of Equalization to compel the Board to comply with statutory direction. The Board contended that the Attorney General was without authority to bring an action against the state officers who comprised the Board, and instead, had a duty to defend them. The Court rejected such a restriction on the authority of the Attorney General.

The legitimate conclusion of such an argument is that the Attorney General must, if such a situation arise, sit supinely by and allow state officers to violate their duties . . . . The law can not be given any such construction. *[The Attorney General's] paramount duty is made the*

*protection of the interest of the people of the state and, where he is cognizant of violations of the constitution or the statutes . . . his duty is to obstruct and not to assist; and where the interests of the public are antagonistic to those of state officers, or where state officers may conflict among themselves, it is impossible and improper for the Attorney General to defend such state officers.*

*Id.* at 440 (emphasis added).

The Court thus has rejected the argument that state officers antagonistic to the legal position of the Attorney General may preclude the Attorney General from instituting legal proceedings when the Attorney General determined that litigation should be brought to protect the legal interests of the people of Washington. This is the same claim that the City makes in this case. *See also Reiter*, 28 Wn.2d at 880 (“It has always been a paramount duty of the attorney general to protect the interests of the people of the state.”).

Similarly, in *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 588 P.2d 195 (1978), the Court rejected a challenge to the authority of the Attorney General to file an amicus brief in the United States Supreme Court. Referring to constitutional and statutory provisions quoted above, the Court held that “this compendium of constitutional and statutory provisions relating to the Attorney General and his status as attorney for the state and its departments and agencies is broad and inclusive enough” to confer upon the Attorney General authority to decide

upon the state's participation in litigation as amicus curiae. *Id.* at 207. The Court explained that the Attorney General's constitutional status in state government as "the legal adviser of the state officers" (art. III, § 21) "contemplates something more than a mere passive role in the formulation and implementation of state governmental policies and practices." *Young Americans*, 91 Wn.2d at 207 n.2.

The City suggests that the Attorney General's authority in *Young Americans* depended upon convergence of the legal position advanced by the Attorney General on behalf of the state of Washington, with the policy preference of the University of Washington. City's Br. at 23. The opinion of the Court does not so provide. Rather, as the language quoted above demonstrates, the focus of the Court was the constitutional and statutory authority of the Attorney General and whether there was a state or public interest in the subject of the litigation. The Court did not suggest that if, as a policy matter, the University had been disinterested in or opposed to affirmative action, the State of Washington, through the Attorney General, could not have filed a brief in the broader state or public interest arguing that affirmative action comported with the constitution.

The City also argues that the Court should view *Young Americans* skeptically because *Young Americans* notes that its decision is consistent with *State v. Taylor*, 58 Wn.2d 252, 362 P.2d 247 (1961), and, in *Taylor*,

the Court's opinion cites a codification of RCW 43.10.030(1) that subsequently was changed. The City's argument is tortured and lacks substance. *Young Americans* correctly sets forth all of the language of the statutes upon which it relies, including RCW 43.10.030(1), and it also sets forth the correct language of RCW 43.10.030(1) in expressing its approval of *Taylor*. *Young Americans*, 91 Wn.2d at 209. Moreover, *Young Americans* largely relied on RCW 43.10.040, not .030.

Since the constitutional and statutory provisions hereinabove alluded to vest the Attorney General with a reasonable degree of discretion as an official legal adviser and RCW 43.10.040 specifically authorizes that elected official "to represent the state . . . in the courts . . . in all legal and quasi legal matters," we find no reason to presume that the constitutional framers or the legislature intended to deny the Attorney General the power to represent the state or its agencies in the time-honored capacity of *amicus curiae*.

*Id.* at 208-09 (alterations in original).

In *Taylor*, the Court held that the Attorney General could maintain an action for an accounting against the trustees of a public charitable trust. The Court explained that "[i]t has long been recognized that at common law the Attorney General has the duty of representing the public interest in securing the enforcement of charitable trusts." *Taylor*, 58 Wn.2d at 255. "Although some courts in the United States do not subscribe to the doctrine of *parens patriae* as being the source of the Attorney General's

authority in relation to charitable trusts, it is generally recognized in this country that the authority of *parens patriae* is exercised by the Attorney General.” *Id.* (citation omitted). The *Taylor* court quoted RCW 43.10.030(1) as it then appeared in the code: “The attorney general shall: (1) Appear for and represent the state before the courts in all cases in which the state is interested[.]” *Id.* at 256. The City points out that the codification substituted “the courts” for “the supreme court” in RCW 43.10.030(2). Regardless, the Court recognized that “[t]he foregoing authority certainly does not embody a clear command to the Attorney General to enforce charitable trusts.” *Id.* The Court nonetheless concluded: “However, we are convinced that, inasmuch as the proper management of charitable trusts is a matter of public concern, this is a case in which the state is interested.” *Id.* The *Taylor* decision thus was not driven by the precise language of RCW 43.10.030(2), but by broader considerations of the role of the Attorney General in protecting the legal rights of the public at large. Moreover, in light of the separate authority of the Attorney General to represent the state “in the courts” under RCW 43.10.040, the codification discrepancy in RCW 43.10.030(2) is of little practical consequence.

The federal court of appeals also has considered the scope of the Attorney General’s authority in litigation under RCW 43.10, and similarly

has reached the conclusion that the Attorney General is the state officer in charge of initiating litigation for the state. In *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 747 F.2d 1303 (9th Cir. 1984), then-Attorney General Eikenberry was held in contempt by the district court for refusing to comply with a discovery order requiring disclosure of a confidential informant. The Attorney General appealed under 28 U.S.C. § 1291, which allows a nonparty to appeal a contempt order before final judgment, if the order is directed at him. Under the statute, interlocutory appeal is not available if there is a substantial congruence of interests between the nonparty and a party to the action. The Ninth Circuit found such congruence between the State of Washington and the Attorney General in part because “in the role of Attorney General, Eikenberry is not only the counsel for Washington but also the state official in charge of initiating and conducting the course of litigation. The determination whether to bring an action rests within the sole discretion of the Attorney General.” *In re Coordinated Pretrial Proceedings*, 747 F.2d at 1306 (citing *Boe v. Gorton*, 88 Wn.2d 773, 776, 567 P.2d 197 (1977); *Berge v. Gorton*, 88 Wn.2d 756, 761, 567 P.2d 187

(1977)). “It is the Attorney General who has the authority to prosecute the suit.” *Id.* (citing RCW 43.10.030(2)).<sup>7</sup>

In *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977), the Court rejected a claim by citizens that the Attorney General had a duty under RCW 43.10.030(2) to bring an action to recover funds that had been disbursed to students attending private higher education institutions pursuant to a statute that subsequently was held unconstitutional. The Court held that the duty to bring such litigation was “to be exercised wholly within the discretion of the Attorney General[.]” *Berge*, 88 Wn.2d at 761. The Court went on to recognize “[t]his has been the consistent ruling of courts under statutes vesting power to commence actions or institute proceedings on behalf of the State in the Attorney General.” *Id.* “If in his judgment the proposed litigation was warranted, he could, as the Attorney General, have attempted to bring such an action. He was not, however, required by law to do so.” *Id.* at 761-62.

*Boe v. Gorton*, was an action in mandamus involving the same underlying question as *Berge*. The Court held that mandamus would not issue to compel the Attorney General to bring such an action. The Attorney General’s only duty is “a duty to exercise discretion.” *Id.* at 775.

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<sup>7</sup> The City contends that these statements are dicta. City’s Br. at 25. This is incorrect. The determinations were necessary to the court of appeal’s decision that the Attorney General could not pursue an interlocutory appeal.

The Court recited the familiar rule that “[m]andamus will not lie to compel the performance of acts or duties which call for the exercise of discretion on the part of public officers,” and that mandamus would not issue absent a showing that “the action is so arbitrary and capricious as to evidence a total failure to exercise discretion[.]” *Id.* at 774-75. The Court found no such showing. *Id.* at 776.

All of these cases recognize that the Attorney General is not reduced to determining whether to commence litigation based upon the policy preferences of a particular state officer, agency, or private party. Rather, they recognize that the role of the Attorney General in state government is broader, and that it includes authority to evaluate the legal interests of the state and the public, and to initiate litigation where, in the sound legal discretion of the Attorney General, those legal interests warrant it.

This principle is succinctly and well-stated in an amicus brief filed by the attorneys general of 47 states and territories, including then-Washington Attorney General Gregoire, in *Perdue v. Baker*, 277 Ga. 1, 586 S.E.2d 606 (2003).

In the vast majority of States and Territories . . . the rule is that the Attorney General litigates on behalf of the people and of the State itself, not simply on behalf of the Governor or some other executive or subdivision of state government that can override the litigation decisions of the

Attorney General. Without such prerogative, the Attorney General would be unable to institute and maintain a uniform and coherent legal policy that takes full account of the public interest. The essential role of the Attorney General, relative to other constitutional offices, would be radically transformed if the Governor or other state officials were able to exercise veto power over the Attorney General's litigation decisions . . . .

The independence of the Attorney General is also critical to the preservation of ordered liberty. The State must speak with one voice in the courtroom, and that voice is of the Attorney General. It is for the Attorney General to reconcile the interests of individual state officials with the interests of the State and of the people. Sometimes this responsibility requires the Attorney General to take positions to which individual state officials or agencies object. To permit these officials, including the Governor, to displace the Attorney General's determination of the public interest, and to dictate what lawsuits should be brought and what legal remedies should be sought, would turn the Attorney General into a mouthpiece for other political interests. The constitutional, statutory, and common law traditions of [the States and Territories] do not countenance such a result.

Br. of Amici at 3-4, *Perdue v. Baker*, 277 Ga. 1, 586 S.E.2d 606 (2003) (No. S03A1154), 2003 WL 23220942.

Based on article III, section 2 which vests "[t]he supreme executive power of th[e] state" in the Governor, and article III, section 5, which provides that the Governor "shall see that the laws are faithfully executed," the City contends the Attorney General may not challenge the

constitutionality of the federal health care act because the Governor objects to his doing so. City's Br. at 27-28.<sup>8</sup>

The City's argument is at odds with the Court's jurisprudence discussed above, and is also at odds with *State ex rel. Hartley v. Clausen*, 146 Wash. 588, 593, 264 P. 403 (1928). In that case, after the Attorney General had declined Governor Hartley's request to bring the action, Governor Hartley brought an action against the State Highway Committee, of which the Governor was a member, to restrain the other members of the Committee (the State Auditor and State Treasurer) from employing and paying a secretary and consulting engineer. The Committee, represented by then-Attorney General John Dunbar, sought dismissal of the Governor's suit. Attorney General Dunbar asserted that "the only person authorized to institute an action to restrain the unlawful expenditure of state funds is the Attorney General." *Id.* at 589. The trial court dismissed the Governor's suit. *Id.* This Court reversed, and importantly, set forth the manner in which such a matter should proceed when the Governor and the Attorney General are at odds over enforcement of state law.

We hold that, under our constitutional provisions and in accordance with the cases above cited, the Attorney

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<sup>8</sup> The logical extension of the City's position would displace the Attorney General and all of the constitutional officers of the executive branch, with the Governor. The City's position necessarily assumes that ultimately, the Governor may direct their actions in implementing state law in areas under their authority. Such a conclusion is contrary to the constitutional structure of Washington's government.

General may act in any matter such as this upon his own initiative or at the request of the governor, but upon his failure or refusal to act, the governor, because of the provisions of section 2, article III, of our constitution, granting him the supreme executive power of the state, is entitled to maintain an action such as this.

*Id.* at 593. *Hartley*, thus, upheld the authority of the Attorney General to maintain an action upon his own initiative, and recognized that the Attorney General could decline to follow the preference of the Governor. Based on the constitutional status of the Governor as the state's chief executive, however, the Court held that where the Attorney General declined to act at the Governor's request in order to enforce state law, the Governor could maintain an action of his own accord. The *Hartley* decision does not support the notion, advanced by the City, that the Attorney General is powerless to bring litigation whenever the Governor objects. In fact, the Court's decision in *Hartley* is to the opposite effect. *See also Reiter*, 28 Wn.2d at 880 ("Even when the governor brings such an action, as he may, he should first demand that the attorney general commence the action.").<sup>9</sup>

The state constitution, statutes, and cases discussed above concerning the authority and role of the Attorney General reflect an

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<sup>9</sup> The City's argument also assumes the Governor's authority to execute *state law* includes authority to preclude a constitutional challenge to *federal law* by the Attorney General. Nothing suggests that would be the case.

understanding that Washington's officers will not always agree on the appropriate legal course for the state. For this reason, our laws place the discretion to consider the state's legal interests as a whole, and to commence litigation based upon that assessment, in the sound discretion of an independently elected Attorney General who ultimately is answerable to the people, and who also is accountable in the courts if his action is so arbitrary and capricious that it amounts to a failure to exercise discretion. *Boe*, 88 Wn.2d at 774-76. There is no such contention in this matter.

#### V. CONCLUSION

For all of the reasons set forth in this brief, the City's Petition should be dismissed without reaching the merits, and the Petition also should be dismissed on its merits, if the Court determines to reach them.

RESPECTFULLY SUBMITTED this 20th day of September 2010.

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