IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JEFFREY JOHNSON, Respondent, v. JAY INSLEE, Governor, in his official capacity; WASHINGTON STATE DEPARTMENT OF CORRECTIONS; CHERYL STRANGE, Secretary of the Department of Corrections, in her official capacity; and the STATE OF WASHINGTON, Petitioners.	No. 100255-6 RULING GRANTING EMERGENCY MOTION FOR STAY PENDING REVIEW

Petitioners Governor Jay Inslee; the Washington Department of Corrections; Cheryl Strange, Secretary of the Department of Corrections; and the State of Washington move to stay all proceedings in respondent Jeffrey Johnson's Franklin County Superior Court action challenging the governor's vaccine mandate Proclamation pending petitioner's motion for direct discretionary review of the superior court's order denying petitioner's motion to change venue to Thurston County. The motion for a stay is granted for reasons explained below.

Some general contextual observations are warranted in this case. As most people are aware, Washington, the United States, and the entire world have been in the grips of the worst public health crisis since the great flu pandemic after the Great

War. COVID-19 has killed a staggering number of Americans in the past 18 months, and the people of Washington have not been spared from this ordeal.

In response to the pandemic, the governor issued a series of proclamations, first by declaring a state of emergency, followed by a series of proclamations imposing restrictions on public gatherings and requiring face masks. In early 2021, a series of effective vaccines became available, and the crisis showed signs of receding as more people became inoculated. The governor issued new proclamations easing up on the previously imposed restrictions. It seemed Washington was on the downward slope of mass illness and death.

Then the even more virulent Delta variant of COVID-19 spread like wildfire, striking down unvaccinated individuals with particular ferocity. Sadly, too few people have accepted the gift of free and effective vaccines, preferring to risk getting by without it or resorting to various alternative "remedies" like Ivermectin, an anti-parasite medication commonly used to deworm livestock.[1] The seemingly inevitable result has been an astonishing spike in COVID-19 cases and deaths, overwhelmingly among the unvaccinated populace. It has gotten so bad some hospitals are turning away patients, are resorting to rationed care, and are running out of morgue capacity.

In response to this crisis, the governor issued Proclamation 21-14 on August 9, 2021, superseded by Proclamation 21-14.1, issued on August 20 (collectively "the Proclamation"). In relevant part, the Proclamation prohibits workers at certain state agencies from maintaining employment in such agencies after October 18, 2021, if they are not fully vaccinated against COVID-19. There are exemptions based on medical conditions and/or sincerely held religious beliefs.

[1] Having been raised on a small horse and cattle ranch, it does not take an expert to persuade me that consuming Ivermectin to prevent or treat COVID-19 is a highly dubious practice.

Respondent is an employee of the Washington Department of Corrections (department), working at the Coyote Ridge Corrections Center as a Corrections and Custody Officer.[2] Respondent falls within the scope of the Proclamation, and he invoked a religious exemption to vaccination. The department determined that he qualified for it.[3] The department proposed as a possible accommodation for respondent's unvaccinated status that he be reassigned so as to protect the safety of him and others in his workplace. Respondent declined to consider such an accommodation and instead, on September 10, 2021, filed the instant action for declaratory and injunctive relief in Franklin County, alleging that the Proclamation is unconstitutional.

Petitioners moved to change venue to Thurston County, citing RCW 4.12.020(2), which provides that in any action against a "public officer" for an act done by them "in virtue of" their office the action "shall be tried in the county where the cause, or some part thereof, arose." Here, the governor issued the Proclamation, the event arguably giving rise to this action, in Olympia, which is situated in Thurston County. Petitioners also relied on RCW 4.12.030(3), which provides for a change of venue when "the convenience of witnesses or the ends of justice would be forwarded by the change."

On September 27, 2021, the superior court denied the motion, reasoning that if the Proclamation is unconstitutional, then it cannot be said that it was done within the governor's authority and therefore, issuance of the Proclamation was not an act done

[2] Respondent's employment with the department is significant in light of the severity of the COVID-19 outbreak within Washington's correctional system. As of this writing, 445 incarcerated individuals at Coyote Ridge have been infected with COVID-19 and three of them have died. 288 correctional staff—respondent's colleagues—have contracted the deadly ailment but thus far none of them have succumbed to it. *See* https://www.doc.wa.gov/corrections/covid-19/data.htm#confirmed (last visited October 1, 2021).

[3] The sincerity of respondent's religious belief is not being questioned here.

"in virtue" of the governor's office under RCW 4.12.020(2). It seems the court also concluded that a change of venue was not warranted under RCW 4.12.030(3). Petitioners now seek direct discretionary review of the superior court's order and filed the instant motion for a stay. Respondent opposes the motion for a stay.

Meanwhile, also on September 27, the Walla Walla County Superior Court granted a motion to change venue to Thurston County of a very similar action challenging the Proclamation. *Cleary v. Inslee*, Walla Walla County Superior Court No. 21-2-00411-36.[4] Now before me is petitioners' motion for a stay in the Franklin County matter.

An appellate court may issue a stay of superior court proceedings under either RAP 8.1(b) or RAP 8.3. The former rule applies to civil cases. RAP 8.1(a). In such a case, the appellate court deciding whether to issue a stay will "(i) consider whether the moving party can demonstrate that debatable issues are presented on appeal and (ii) compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed." RAP 8.1(b)(3). Alternatively, in either civil or criminal cases, this court "has authority to issue orders, before or after acceptance of review . . ., to insure effective and equitable review, including authority to grant injunctive or other relief to a party." RAP 8.3. The purpose of this rule is to provide appellate courts with authority to provide preliminary relief so as to preserve the fruits of a successful appeal. *Wash. Fed'n of State Employees v. State*, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983). The appellate court applying this rule undertakes an analysis similar to that applied with RAP 8.1(b), pondering whether debatable issues exist and a stay is necessary to preserve the fruits of a successful appeal, and considering the equities of

[4] A third action challenging the Proclamation filed in Thurston County was dismissed on September 21, 2021. *Wash. Fed'n of State Emps. v. Inslee*, Thurston County Superior Court No. 21-2-01495-34.

the circumstances. *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 759, 958 P.2d 260 (1998).

This is not a difficult decision. For purposes of RCW 4.12.020(2), a "public officer" acts "in virtue" of their office when they act "with the authority of the office." *Eubanks v. Brown*, 180 Wn.2d 590, 600, 327 P.3d 635 (2014). The officer's motivations are irrelevant; therefore, the statute applies in actions where the plaintiff alleges that the officer exercised their powers of their office for improper purposes or that the officer failed to exercise the powers of their office. *Id*. When this statute applies, venue in the specified county is mandatory. *Eubanks*, 180 Wn.2d at 595-96.

The governor is a public officer and he has the authority to issue proclamations in relation to a state of emergency. RCW 43.06.010(12), 210., .220. The governor exercised such authority when he issued the Proclamation at issue here. He thus acted "in virtue" of his office. *Eubanks*, 180 Wn.2d at 600.

There may be a question whether respondent's causes of action "arose" in Thurston County as a result of issuance of the Proclamation in that county, but the weight of foreign authorities interpreting similar venue statutes support the proposition that the official act itself—the act for which redress is sought—"gives rise" to the cause of action and thus venue is in the county where the act is made. *See, e.g.*, *Exec. Dir., Colo. Dep't of Corrs. v. Dist. Ct. for Boulder County*, 923 P.2d 885, 886 (Colo. 1986); *Okla. Ordnance Works Auth. v. Dist. Ct. of Wagoner County*, 613 P.2d 746, 750 (Okla. 1980); *Stalheim v. Doskocil*, 275 S.C. 252, 255, 269 S.E.2d 346 (1980); *Ebenezer Soc'y v. Minn. State Bd. of Health*, 301 Minn. 188, 198, 223 N.W.2d 385, 391 (1974); *McDonald v. State*, 86 S.D. 570, 576-77, 199 N.W.2d 583 (1972); *Coats v. Sampson County Mem'l Hosp., Inc.*, 264 N.C. 332, 334, 141 S.E.2d 490 (1965); *Huerter v. Hassig*, 175 Kan. 781, 784, 267 P.2d 532 (1954); *Brownell v. Aetna St. Bank of Oelwein, et al.*, 201 Iowa 781, 208 N.W. 210, 211 (1926); *Meeker v.*

Scudder, 108 Ohio St. 423, 428, 140 N.E. 627 (1923). The United States Supreme Court also appears to take this approach. *See Leroy v. Great W. United Corp.*, 443 U.S. 173, 185-86, 99 S. Ct. 2710, 61 L. Ed. 2d 464 (1979) (Texas plaintiff's action challenging Idaho statute "arose" in Idaho federal district, where the statute was enacted and enforced by Idaho officials).

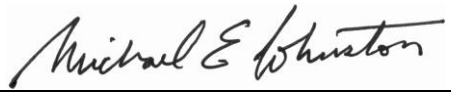
In light of the great weight of these persuasive authorities, petitioners make a powerful argument that the superior court committed obvious error within the meaning of RAP 2.3(b)(1) when it denied their motion to change venue to Thurston County under RCW 4.12.020(2). Furthermore, petitioners make a compelling argument that a change of venue will forward the ends of justice within the meaning of RCW 4.12.030(3). This Franklin County case and the matter recently transferred from Walla Walla County to Thurston County (*Cleary*) appear to be very similar, particularly as to the form of relief sought. Placing the two cases in the same venue will make it possible to consider consolidation or other steps that are certain to save judicial resources and avoid inconsistent decisions. It will further aid the consideration of any future appeal. The argument that the superior court erred in denying a change of venue on this alternative basis is equally debatable. There is also a very distinct possibility that direct review is warranted because (1) the validity of the Proclamation is a fundamental and urgent matter of statewide importance within the meaning of RAP 4.2(a)(4) and (2) the case involves an action for injunctive relief against a state officer under RAP 4.2(a)(5).[5]

The harm to petitioners if a stay is not granted easily outweighs any harm to respondent if a stay is granted. If the superior court erred, and a stay is not imposed, petitioners are utterly deprived of their right to the proper venue while being forced to

5 The merits of the competing arguments concerning the validity of the Proclamation will not be resolved here.

simultaneously litigate at least one other case challenging the Proclamation residing in the correct venue. There is also a risk of inconsistent decisions and a waste of judicial resources. More fundamentally, lives are at stake. Respondent is inconvenienced rather slightly in comparison.

In sum, having reviewed the briefing and records provided, a stay is warranted at least until a decision is made whether to grant review directly in this court. Accordingly, the motion for a stay is granted. All proceedings in Franklin County Superior Court No. 21-2-50510-11 are stayed until further order of this court.



COMMISSIONER

October 1, 2021