No. 84483-6

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE, a municipal corporation,

Petitioner,

v.

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

Respondent.

PETITIONER'S RESPONSIVE MEMORANDUM

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I. SUMMARY OF THE ARGUMENTS

Respondent argues three grounds for dismissal of the Petition: 1) The Attorney General has authority to make the State a plaintiff in the Florida case,[1] and the exercise of that authority is discretionary; 2) the Petition is actually a suit for a declaratory judgment and fails to meet the justiciability criteria for such a claim; and 3) the City lacks standing to assert the Governor's interests. Petitioner responds: 1) The Attorney General exceeded his statutory authority and has no discretion to do so; 2) the City is not seeking a declaratory judgment; and 3) the City has standing on its own behalf and in a representative capacity on behalf of its residents to stop a public officer from exceeding his authority.

II. FACTS

The key facts are undisputed. Respondent joined the State of Washington as a plaintiff in a federal case challenging the Patient Protection and Affordable Care Act ("the Florida case"). He purports to represent the State of Washington in its sovereign capacity. He did not consult with the Governor before making Washington a plaintiff and, when she objected, he refused to withdraw the State from the case.

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[1] *State of Florida, et al. v. United States. Dept. of Health and Human Services, et al.*, Case No.: 3:10-cv-91-RV/EMT (N.D.Fla.)

Plaintiffs in the Florida case were granted permission to file an Amended Complaint. Washington's Governor expressly asked the Attorney General to alter his role when the Amended Complaint was filed, from representing the "State of Washington, by and through Attorney General Robert M. McKenna" to participating as "Robert M. McKenna Attorney General for the State of Washington." Wishik Declaration, Ex. F (May 7, 2010 letter from Governor Gregoire to Attorney General McKenna). Respondent refused and proposed instead that the Governor appear on the opposing side as the "State of Washington, by and through Governor Christine O. Gregoire." Wishik Decl., Ex. G (May 12, 2010 letter from McKenna to Gregoire). In other words, Respondent proposes that the State of Washington be both plaintiff and intervenor-defendant.

III. ARGUMENT

A. The Court should exercise its original jurisdiction.

This Court has original jurisdiction in mandamus as to all State officers. Const. art. IV, §4. There are three reasons for the Court to exercise its original jurisdiction in this case: 1) It is the Supreme Court's role to resolve issues of constitutional and statutory construction; 2) the Supreme Court is the only tribunal that can correct a mistake in its prior decisions; and 3) a significant public interest is involved.

The Supreme Court's role is to resolve issues requiring construction of the State Constitution and statutes. *State ex. rel. Hartley v. Clausen,* 146 Wash. 588, 592, 264 P. 403 (1928). Once the Court has done so, its interpretation is binding on lower courts until overruled. *State v. Gore,* 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Here, the Court should exercise its original jurisdiction to correct prior decisions that relied upon an incorrect version of RCW 43.10.030(1). See discussion *infra* at 11-13. The Court has a duty to reexamine the meaning of a statute when its prior decisions were "incorrect, through a mistaken conception of the statute or rule." *In re Yand's Estate,* 23 Wn.2d 831, 837, 162 P.2d 434 (1945). The scope of the Attorney General's authority should not be defined by a typing error.

In addition, the Court will exercise its jurisdiction when a significant public interest is involved. *Washington State Labor Council v. Reed,* 149 Wn.2d 48, 54, 65 P.3d 1203 (2003); *Heavey v. Murphy,* 138 Wn.2d 800, 804, 982 P.2d 611 (1999); *City of Tacoma v. O'Brien,* 85 Wn.2d 266, 268, 534 P.2d 114 (1975). The public has a significant interest in knowing: What are the limits of the Attorney General's authority in this state?[2] Is the

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[2] The scope of a state attorney general's authority varies depending on the wording in state constitutions and statutes. *E.g., Hancock v. Terry Elkhorn Mining Co.,* 503 S.W.2d 710, 715 (Ky. 1973) (attorney general, " shall exercise all common law duties and authority . . . under the common law, except when modified by statutory enactment"); *Humphrey v. McLaren,* 402 N.W. 2d 535, 543 (Minn. 1987) (constitution lacks limiting language "prescribed by law").

Attorney General authorized to unilaterally make the State a plaintiff in a federal case, without any agency or officer as a client, over objections by the Governor?

B. Mandamus is appropriate to compel a State officer to undo an unauthorized act.

The Petition seeks a writ to compel Respondent to withdraw the State of Washington from the Florida case, because he exceeded his authority in making the State a plaintiff in the first place. Mandamus may be used to stop a public officer from acting outside his authority and to compel him to undo unauthorized acts. *State ex rel. Burlington Northern v. Washington State Utilities & Transportation Comm'n ("WUTC"),* 93 Wn.2d 398, 609 P.2d 1375 (1980); *City of Tacoma,* 85 Wn.2d at 268, (citing, *State ex rel. O'Connell v. Yelle,* 51 Wn.2d 620, 320 P.2d 1086 (1958)).

Respondent argues that mandamus is only appropriate when a statute explicitly requires the act that the petitioner seeks to compel or prohibit. Resp't Mem. at 4-5. Not so. In *Burlington Northern*, the Court issued a writ of mandamus to compel the WUTC to stop using regulatory fees to pay legal expenses and to reimburse fees already expended. *See* 93 Wn.2d at 410. No statute expressly barred the disputed use of fees, and no statute directed the WUTC to reimburse fees improperly spent. The

Supreme Court considered case law to determine whether the WUTC had authority to use fees for legal expenses. Since the Court concluded that the WUTC had exceeded its authority, mandamus was issued to require the unauthorized act to be undone.

Likewise, Respondent lacks authority and therefore lacks discretion to make the State a plaintiff in the Florida case. Mandamus is appropriate to compel him to undo the unauthorized act by withdrawing the State from the case.

C. The Attorney General has only the authority granted by statute.

Respondent assumes that the fact he is "independently elected" somehow clothes him with extrastatutory authority. Resp't. Mem. at 5. The history and provisions regarding the role of the Attorney General in this state demonstrate otherwise. The Constitution provides as follows:

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

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

In *Seattle Gas & Electric*, the Attorney General brought a *quo warranto* proceeding alleging the Seattle Gas & Electric Company was using city streets without authorization. 28 Wash. at 490. The defendant argued that only the prosecuting attorney had statutory authority to bring such an action. The Court agreed, explaining:

> Political power in this state inheres in the people, and by constitutional or statutory authority the exercise of this power in behalf of the people is delegated to certain officers. In the exercise of power the officer is controlled by the law theretofore declared.

Id. at 495-96. After reviewing the statutory grants of authority to the Attorney General, the Court held, "Nowhere is there any express provision of the law authorizing the attorney general to institute the suit in question." *Id.* at 499. The Court explained:

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

Id. at 501-02 (emphasis added). Similarly, in this case no statute expressly authorizes the Attorney General's actions.

The principle statute granting the Attorney General authority is RCW 43.10.030 (copy attached). Only subsection (3) mentions the federal courts and it only authorizes the Attorney General to defend state officers, not make

the State a plaintiff. Under the rule of *expressio unius est exclusio alterius*, the Legislature's inclusion of the federal courts in one section means the other sections authorize the Attorney General to act only in state courts. *Landmark Development v. City of Roy,* 138 Wn.2d 561, 572-73, 980 P.2d 1234 (1999).

Respondent, however, argues that the first subsection of RCW 43.10.030, combined with RCW 43.10.040, grants the Attorney General broad authority to act whenever he deems it to be in the state's interest. Resp't Mem.at 5-6. RCW 43.10.030(1) authorizes the Attorney General to "appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested." This grant of authority is limited to (state) appellate courts.

RCW 43.10.040 provides:

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

This might superficially appear to grant broad authority; however, in construing a statute the court does not read the words in isolation, but also considers related provisions to determine the "plain meaning." *Dept. of*

Ecology v. Campbell & Gwinn, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). The language now codified as RCW 43.10.040 was enacted in 1941 as the first section of a chapter with several related sections. Laws of 1941, ch. 50 (copy attached). The second section barred state agencies and officers from hiring their own legal counsel. *Id.* The third section authorized the Attorney General to employ experts to assist with litigation. *Id.* Together, these provisions addressed who would represent state agencies and officers.

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

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

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

Further, construing RCW 43.10.040 as a broad grant of authority renders obsolete many other statutes that grant the Attorney General authority to act in specific circumstances. *E.g.,* RCW 42.17.400 (Attorney General may bring civil action to enforce state campaign financing law);

RCW 42.52.490 (upon a written determination by the Attorney General that the action of an ethics board was clearly erroneous or if requested by an ethics board, the Attorney General may bring a civil action to enforce the state ethics code); RCW 19.86.080 (Attorney General may enforce the consumer protection statute).

"Whenever possible, courts should avoid a statutory construction which nullifies, voids, or renders meaningless or superfluous any section or words." *Nisqually Delta Assoc. v. City of DuPont,* 95 Wn.2d 563, 568, 627 P.2d 956, (1981); *see also Taylor v. Redmond,* 89 Wn.2d 315, 319, 571 P.2d 1388 (1977). Since construing RCW 43.10.040 as a broad grant of authority would render numerous statutes superfluous, that construction cannot be correct. The Legislature intended RCW 43.10.040 to limit who would provide legal services to state agencies and officers, nothing more.

D. Case law does not support expansive authority.

Respondent argues that this Court's decisions describe the Attorney General's authority so expansively they encompass his actions in this case. Resp't Mem.at 6-10. Respondent reads the cases too broadly.

In the companion cases of *Berg v. Gorton* and *Boe v. Gorton*, the question presented was whether the Attorney General "had an absolute duty" to recover funds expended under a program later determined to be unconstitutional. 88 Wn.2d 756, 769, 567 P.2d 187 (1977); 88 Wn.2d

773, 775, 567 P.2d 197 (1977). In *Berg* the plaintiffs sued the Attorney General for monetary damages and in *Boe* the plaintiff sought a writ of mandamus. There was no dispute over whether the Attorney General had statutory authority to recover the funds. The issue was whether he must do so. Not surprisingly, the Supreme Court held that the Attorney General has discretion over when to exercise authority expressly granted to him by statute. In this case, the Attorney General does not have statutory authority to unilaterally make the State a plaintiff in the Florida case. *Boe* and *Berg* are therefore inapposite.

The same is true of *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994). Petitioners in that case sought a writ of mandamus directing several State officers (including the Attorney General) "to adhere to the requirements of the Washington State Constitution and to prohibit them from implementing and enforcing Initiative 601." *Id. at* 407. The Court declined to issue a writ compelling a general course of conduct which would include discretionary actions. The Petition in this case is not directed at a general course of conduct. It seeks to compel Respondent to undo an unauthorized action that Respondent did not have discretion: to take.

Berg, Boe, and *Walker* stand for the unremarkable principle that when the Attorney General has been expressly granted authority by

statute, he then has discretion over how and when to exercise it. The question in this case is whether the Attorney General has been granted authority to take the challenged actions. These questions are fundamentally different.

Respondent's best support is set forth in *Young Americans for Freedom v. Gorton,* 91 Wn.2d 204, 588 P.2d 195 (1978). The Court should review that decision cautiously, however, due to an error in a prior guiding decision and circumstances which differ dramatically from this case.

In *Young Americans,* the Attorney General filed an amicus brief in the *Bakke* case, then pending in the United States Supreme Court. The brief was filed "to preserve the right of the University [of Washington] to serve the interests of all of its students in education for life and careers in a pluralistic, multi-racial society . . ." Brief of Amicus Curiae State of Washington (1977 WL 189504) at 2, *Regents of the Univ. of Cal. v. Bakke,* 98 S. Ct. 2733 (1977) (excerpt attached). Plaintiffs sued the Attorney General and an assistant attorney general individually, seeking damages for "abridgment of their constitutional rights." 91 Wn.2d at 206. The Court affirmed dismissal of their claim, saying:

> In *Taylor* we held that RCW 43.10.030(1), as it then read, [FN5] authorized the Attorney General to enforce charitable trusts by way of an accounting action, although the statutes did not embody a clear command to the Attorney General to do so. We reasoned that "inasmuch as

> the proper management of charitable trusts is a matter of public concern, this is a case in which the state is interested."

Id. at 209 (citing *State v. Taylor*, 58 Wn.2d 252, 255, 362 P.2d 247 (1962)). In the footnote to the statement above, the *Young Americans* court quoted the statute that it apparently thought the *Taylor* court had relied upon:

> FN5. "The attorney general shall:
>
> "(1) Appear for and represent the state before the supreme court in all cases in which the state is interested; . . ." RCW 43.10.030(1).

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

> In RCW 43.10.030, the legislature has provided that 'The attorney general shall:
>
> '(1) Appear for and represent the state before the courts in all cases in which the state is interested;

58 Wn.2d at 256 (emphasis added).

The error arose as follows. Before Washington became a state, the statute provided the Attorney General with authority to "appear for and represent the people of the Territory before the supreme court in all cases in which the Territory or the people of the Territory are interested." Territorial Laws, chapter VII, Section 6, 1st paragraph (1888) (emphasis

added). The same wording was used in early codifications of Washington laws. Rem. Rev. Statutes, ch. 9, §112(1) (1932) (copy attached).

A new codification, which renumbered and rearranged the statutes, was prepared in 1949. RCW Vol. 1 (1949) (copy attached). In the process, the reference to the supreme court was deleted. *Id. at* 43-21. The erroneous publication stated the Attorney General was authorized to "appear for and represent the state before the courts in all cases in which the state is interested." (emphasis added). In 1965 -- 3 years after the *Taylor* decision -- the error was corrected, and the limiting reference to the "supreme court" was reinserted. Laws of 1965 (notes for changes to 43.10.030(1): "'courts' to 'supreme court' in subdivision 1 to restore session law language.") (emphasis added).

The erroneous wording was central, however, to the Court's decision in *Taylor*. 58 Wn.2d at 255. The question in that case was whether the Attorney General had authority to enforce charitable trusts. Such authority was not expressly granted in any statute. The Court stated as follows:

> In RCW 43.10.030, the legislature has provided that,
> 'The attorney general shall: (1) Appear for and represent the state before the courts in all cases in which the state is interested.'
>
> The foregoing authority certainly does not embody a clear command to the Attorney General to enforce charitable

> trusts. 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. at 256 (emphasis added). The decision in *Taylor* was based upon an erroneous version of the statute, therefore it is not reliable authority.[3] *Young Americans* is suspect also to the extent it relied on *Taylor*.

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

In addition, the circumstances in *Young Americans* differ significantly from the present case. In *Young Americans*, the attorney general had a client, the University of Washington, and was acting on its behalf. He has no agency or officer as a client in the Florida case.

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[3] Further, statutes granting such authority were enacted later, which is inconsistent with the idea that the attorney general had implied authority in their absence. RCW 11.110.100 (1967).

In *Young Americans*, the Attorney General was defending the policy choice made by the executive branch that consideration of race in admissions to graduate programs was appropriate. In this case, the Attorney General is opposing the policy choice made by the executive branch.

In *Young Americans*, the Attorney General filed an amicus brief, which carries far different legal ramifications than making the State a plaintiff. Whatever a court ultimately decides has no direct effect on a party filing an amicus brief. When the State is a plaintiff the court's rulings are binding on it and the doctrines of judicial estoppel, res judicata, and collateral estoppel may bar the State from taking a different position in another case.

Another distinction between *Young Americans* and this case is that the plaintiffs in *Young Americans* were seeking monetary damages from the Attorney General and an assistant attorney general in their individual capacities. Petitioner in this case seeks a writ of mandamus to compel the Attorney General to cease acting outside his authority. The Court may well apply a different lens to considering whether the Attorney General has so exceeded his authority that he should face personal liability for violating the plaintiffs' civil rights, especially when the allegedly unauthorized action was the filing of an amicus brief on behalf of his client.

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

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

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

Respondent further relies upon dicta in a federal case that inaccurately describes Washington law. Resp't Mem. at 7-8, citing *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 747 F.2d 1303 (9th Cir. 1984), *cert. denied,* 105 S. Ct. 2323. In that case, the state, represented by Attorney General Eikenberry, brought an antitrust action against several oil companies. When the trial court held him

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

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

E. The Attorney General cannot act unilaterally.

Respondent cites *State ex rel. Hartley v. Clause, 146 Wash. 588, 264 P. 403 (1928)* as having "upheld the authority of the Attorney General to maintain an action upon his own initiative" and as recognizing "that the Attorney General could decline to follow the preference of the Governor[4]."

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[4] Respondent goes so far as to mischaracterize *Hartley* as authority that the Attorney General need not withdraw from a case when the Governor disagrees with his position. Resp't Mem. at 17-18. In *Hartley* the issue was whether there would be a case, not whether the Attorney General would be in it.

Resp't Mem. at 18. Nothing in the opinion indicates those issues were before the court.

In *Hartley*, the Governor asked the Attorney General to bring suit to determine whether it was legal for the State Auditor and Treasurer, as members of the state highway committee, to employ a secretary and consulting engineer. When the Attorney General declined, the Governor sued them himself. The State Auditor and Treasurer moved to dismiss the complaint, contending the Governor did not have authority to bring it.

There was no question that the Attorney General had statutory authority to bring the suit. The question was whether the Attorney General was the only party that could bring it. 146 Wash. at 589. The Court noted that the constitution designates the Governor the "supreme executive officer" and makes the Governor responsible for seeing that "the laws are faithfully executed." Id. at 592 (quoting) Const. art. III, §1. The phrase "supreme executive authority" means "'the highest executive authority in the state, all other powers being inferior thereto.'" *Id.* The Court ruled, therefore, that the Governor could bring the suit if the Attorney General refused:

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

Id. at 592. The opinion is silent on the question of whether the Attorney General must sue if the Governor directed him to do so, because that was not the relief the Governor sought. *Hartley* does not stand for the propositions Respondent attributes to it.

Respondent also reads too much into other cases. Resp't Mem. at 18–19, (citing *State v. Gattavara,* 182 Wash. 325, 47 P.2d 18 (1935); *State ex rel. Dunbar v. Board of Equalization,* 140 Wash. 433, 249 P.2d 996 (1926); *Reiter v. Wallgren,* 28 Wn.2d 872, 184 P.2d 571 (1947)). In *Gattavara*, the Department of Labor and Industries filed suit, using in-house attorneys, to collect delinquent insurance premiums and penalties. The defendants moved to dismiss, contending the action could only be brought by the Attorney General or someone else with express statutory authority. *Id. at* 327. The trial court denied the motion, but the Supreme Court reversed, concluding the Department of Labor & Industries lacked statutory authority to initiate lawsuits. *Id. at* 328.

The Court noted the Constitution says the Attorney General, "shall be the legal adviser of State officers, and shall perform such other duties as may be prescribed by law." The Court then said:

> Although the constitutional provision above quoted 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). In other words, when a statute expressly grants the Attorney General and no one else authority to bring an action, then the Attorney General's authority is exclusive. That holding has no bearing on the present case, because no statute grants the Attorney General authority to act in the manner challenged here.

In *Dunbar*, the Court held that the statute authorizing the Attorney General to "[i]nstitute 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," authorized the Attorney General to prosecute State officers when they violate the law. 140 Wash. at 439-440. This construction of a particular statutory provision in a particular context, does not mean the Attorney General has expansive authority to act unilaterally for the State. The same is true of *Reiter*, in which the issue before the Court was whether a taxpayer could sue, not the scope of the Attorney General's authority. 28 Wn.2d at 881.

This case demonstrates why the Attorney General does not have authority to unilaterally make the State a plaintiff in a federal case. Respondent has suggested to the Governor that both of them could represent the State, on opposite sides of the case, ignoring, for instance, the uncertain

effect of rulings in a case in which a party is on both sides.[5] Discovery disputes are likely to arise, with the same party both issuing and answering opposing interrogatories, both taking and defending depositions, and so on. There may not be any discovery in the Florida case, but the plaintiffs have alleged ten pages of facts. Resp't Mem., Ex. A (amended complaint), p.9-20. If the Governor brings the State into the case on the defense side, the State could be contesting facts it has also averred. Washington's founders surely did not intend the State to be divided against itself in this way.

F. Justiciability is not a basis for dismissal.

Respondent attempts to restyle the Petition as a suit for a declaratory judgment and then argues the City has not met the justiciability requirements for such a claim. Resp't Mem. at 10. The City is not seeking a declaratory judgment, therefore this entire section of Respondent's brief (pp 10–14) is irrelevant. Nonetheless, were the justiciability criteria applicable, the Petition would meet them because Petitioner has an interest in not having state officers exceed their authority, the dispute became actual and present when Respondent brought the State into the Florida case, and the Court can conclusively resolve the dispute by issuing the requested writ. Further, the Court exercises its discretion to resolve issues, even when the justiciability

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[5] State agencies or officers with opposing interests are sometimes plaintiff and defendant, but here the exact same entity – the sovereign State – would be on both sides.

test is not met, if doing so would guide public officers in the future or be beneficial to the public or other branches of government. *Snohomish County v. Anderson,* 124 Wn.2d 834, 841, 881 P.2d 240 (1994).

G. The City has standing to seek a writ to compel a State officer to stop exceeding his authority.

Respondent argues that Petitioner is asserting an interest that belongs solely to the Governor and lacks standing to do so. Resp't Mem. at 15. Petitioner is asserting an interest in having public officers abide by the constitution and statutes. The City has standing to protect this interest on its own behalf and in a representative capacity on behalf of its residents. *City of Seattle v. State,* 103 Wn.2d 663, 646, 694 P.2d 641 (1985) (city may assert an equal protection violation on behalf of people who might become city residents if annexation occurred).

In the *City of Tacoma* case, the plaintiffs were two cities, a county, and a taxpayer. They sought a writ of mandamus to prohibit the State Treasurer from disbursing funds under a statute they claimed was unconstitutional. 85 Wn.2d at 268. Respondent moved to dismiss the petition for lack of standing. The Supreme Court held there was no reason to apply a different standard for standing to the governmental entities as to the taxpayer. None of them had to allege a direct, special or pecuniary interest in the outcome of the action. *Id. at* 269 (citations omitted). Like the *City of*

Tacoma case, Petitioner in this case is challenging the act of a public official. Its allegations are, therefore, sufficient to establish standing.

Usually, before bringing suit, a taxpayer must ask the Attorney General to sue the public official whose actions are at issue. *Reiter v. Walgren,* 28 Wn.2d 872, 876-77, 184 P.2d 571 (1947). This step is not required when such a demand would have been useless. *Id. at* 877. Here, Respondent refused to withdraw from the Florida case when the Governor asked him to do so. It would have been useless for the City to make the same request and it would be absurd to ask the Attorney General to seek a writ against himself.

This Court also has recognized standing in a variety of situations that raise issues of broad public importance, without requiring plaintiffs to have a direct or pecuniary interest. *State ex rel. Boyles v. Whatcom County Superior Court,* 103 Wn.2d 610, 612, 694 P.2d 27 (1985) (taxpayer could challenge constitutionality of a work release program); *Washington Natural Gas Co. v. PUD No. 1 of Snohomish County,* 77 Wn.2d 94, 96, 459 P.2d 633 (1969) (controversy "affects substantial segments of the population"); *Ordell v. Gaddis,* 99 Wn.2d 409, 662 P.2d 49 (1983) (plaintiffs raised issues of "serious public importance").

The Attorney General previously endorsed use of a writ of mandamus by a private citizen to compel a public officer to act within his

statutory authority. Wash. AGO 1953-55 No. 94 (copy attached). The State Treasurer had refused to confiscate personal property for nonpayment of personal property taxes and instead charged the unpaid taxes against real property. The Attorney General concluded the Treasurer did not have authority to choose which remedy to use. Petitioner concurs with the closing line of the Attorney General's Opinion, "The people whom we all serve have a right to good government. That right is never without a remedy." *Id. at* 5.

IV. CONCLUSION

Respondent stitches together dicta and quotes from inapposite cases to support the proposition that the Attorney General has unfettered discretion to being suit whenever he deems the State to be interested. When the cases and statutes are examined, it is clear the Attorney General does not have authority to act unilaterally and make the State of Washington a plaintiff in the Florida case. Respondent's motion to dismiss the Petition should, therefore, be denied and the Court should exercise its original jurisdiction.

RESPECTFULLY SUBMITTED this 15th day of June, 2010.

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