

STATE OF WASHINGTON
THURSTON COUNTY COUNTY SUPERIOR COURT

In the Matter of:)	
)	No. 21-2-01945-34
TIM EYMAN,)	
)	MOTION FOR SUMMARY JUDGMENT
Plaintiff)	
)	
v.)	
)	
JAY INSLEE, in his official capacity as)	
Governor of the State of Washington,)	
)	
Defendant.)	
)	

I. INTRODUCTION

In 1974, the Legislature passed (in a bipartisan way) a constitutional amendment and then referred it to the November 1974 ballot. Senate Joint Resolution 140 proposed permanently restricting the Governor's veto power due to repeated abuses of power by the executive branch. From the 1974 Voter's Guide: "Help Rid Your State of One-Man Lawmaking – Washington is the only state in the nation in which the Governor exercises practically unlimited power to remove portions of laws passed by the Legislature . . . SJR 140 will prevent one person from changing behind closed doors of his office bills which are the product of an open hearing process, accessible and visible to all citizens." See Eyman Decl. Ex. C. The voters overwhelming passed this restriction on the executive branch and it has been in our state Constitution ever since.

This year's Legislature barely passed a bill that enacted a Low Carbon Fuel Standard (Engrossed Third Substitute House Bill No. 1091 – E3SHB 1091) and barely passed a bill that enacted a Cap-and-Trade Scheme (Engrossed Second Substitute Senate Bill No. 5126 – E2SSB 5126). In both bills, the Legislature included a provision that *explicitly delayed* the implementation of these policies. This was referred to during the session as the "Grand Bargain." Governor Inslee broke the "Grand Bargain" and in his veto messages, he openly confessed his reason for doing so: to amend the bills and override the Legislature's decision to delay the implementation of the bills' policies and instead enact the bills' policies immediately. This was exactly the kind of "One-Man Lawmaking" that SRJ 140 was intended to stop ("SJR 140 will prevent *one person* from changing *behind closed doors* of his office *bills which are the product of an open hearing process*, accessible and visible to all citizens." Eyman Decl. Ex. C. That is exactly what Governor Inslee did with these two bills.

As Jeff Even of the Attorney General's office stated in his January 17, 2020 legal brief before this superior court (this same judge in fact), "The Governor may sign or veto a bill, but the Constitution denies him the power to edit a bill or change its structure." This superior court (this same judge in fact) agreed with that argument and ruled against the Governor. The state supreme court recently affirmed this superior court's ruling saying " ... Governor Inslee exceeded his article III, section 12 veto power . . . We affirm the superior court's orders on summary judgment in favor of the legislature." *Legislature v Inslee*, 2021.

I'm reminded of Britney Spears' hit song "Oops! ... I Did It Again." Despite this superior court's cogent, well-reasoned decision that his 2019 vetoes were illegal, Governor Inslee ignored this judicial determination and "did it again" this year with his partial veto of E3SHB

1091 (delay of the Low Carbon Fuel Standard) and with his partial veto of E2SSB 5126 (the delay of the Cap-and-Trade Scheme).

Britney Spears' song included the line: "I'm not that innocent."

Such is the case with Governor Inslee – he's not that innocent.

In his veto message for E3SHB 1091, he admitted the reason for the partial veto:

"Subsection (8) of Section 3 operates to delay ... we cannot delay its implementation ..."

For E2SSB 5126, he admitted his partial veto was for the same reason: " ... the delayed effective date established in subsection (7) unnecessarily hinders our state's ability to combat climate change ..."

Reflecting the separation of powers implicit in the state constitution, Washington courts recognize that structuring a legislative bill is the exclusive province of the Legislature, not for the courts or the Governor. *Wash. State Legislature v. State (Locke)*, 139 Wn.2d 129, 140, 985 P.2d 353 (1999). "We defer to the Legislature's designation of a section in a bill just as we defer to the Legislature's finding of facts." *Wash. State Legislature v Lowry*, 131 Wn.2d 309, 320, 931 P.2d 9885 (1997)(citations omitted). Courts will interfere "[o]nly rarely, and reluctantly" "to ensure that neither the Legislature nor the Governor will so conduct its affairs . . . [such] that the coordinate branch of government is substantially deprived of the fair opportunity to exercise its constitutional prerogatives as to legislation." *Id.* at 320-21. Thus, the Legislature's determination to structure a bill in a particular way is usually conclusive "unless it is obviously designed to circumvent the Governor's veto power and is a 'palpable attempt at dissimulation.'" *Locke*, 139 Wn.2d at 140 (quoting *Lowry*, 131 Wn.2d at 320-21 (citation omitted)).

Absent extreme legislative manipulation of the structure of a bill, then, the Governor may not change the fundamental decision of the Legislature.

In this instance regarding E3SHB 1091 (the Low Carbon Fuel Standard), the Legislature *clearly and expressly* included subsection 8 in section 3 to delay its implementation until a later date.

In this instance regarding E2SSB 5126 (Cap and Trade Scheme), the Legislature *clearly and expressly* included subsection (7) in section 22 to delay its implementation until a later date.

With his partial vetoes, the Governor shattered the “Grand Bargain” by overruling the Legislature’s carefully crafted compromise to authorize the policies but delay their implementation. In both instances, the Governor clearly intended to approve the bills but amend the substance of the bills by removing the subsections the Legislature included in the bills to delay the implementation of the policies in them.

This runs completely contrary to the voters’ decision in passing SJR 140 in 1974 and amending our state Constitution. They voted against “One-Man Lawmaking.” This superior court should, therefore, as it did the last time Governor Inslee issued illegal vetoes, declare that the Governor exceeded his constitutional authority (again) through his partial vetoes of E3SHB 1091 (the Low Carbon Fuel Standard) and E2SSB 5126 (the Cap and Trade Scheme).

II. STATEMENT OF RELIEF SOUGHT

Plaintiff Tim Eyman requests that this Court enter a declaratory judgment that the Governor’s veto of subsection (8) of section 3 of E3SHB 1091 (the Low Carbon Fuel Standard) and the Governor’s veto of subsection (7) of section 22 of E2SSB 5126 (Cap and Trade Scheme) exceeded the Governor’s constitutional authority under article III, section 12 of the Washington

Constitution. Upon such judgment, Laws of 2021, chapter 316, section 22 and chapter 317, section 3 are valid and effective in their entire form in which the Legislature enacted them, including the delays in the destructive policies the Governor unlawfully vetoed from the two bills.

III. RECORD RELIED UPON

This motion is based upon this motion, memorandum, the accompanying Declaration of Tim Eyman, exhibits, and attachments thereto, the original complaint, and on the pleadings, papers, and files of this Court in this matter.

IV. ISSUES

Did Governor Inslee exceed his constitutional authority when he issued his partial veto of E3SHB 1091, specifically subsection (8) of section 3 that explicitly delayed the implementation of the Low Carbon Fuel Standard?

Did Governor Inslee exceed his constitutional authority when he issued his partial veto of E2SSB 5126, specifically subsection 7 of section 22 that explicitly delayed the implementation of the Cap and Trade Scheme?

V. STATEMENT OF THE CASE

The Legislature barely passed the Low Carbon Fuel Standard (E3SHB 1091) and only did so by explicitly including a delay in the implementation of its policies until a future date.

The Legislature barely passed the Cap and Trade Scheme (E2SSB 5126) and only did so by explicitly including a delay in the implementation of its policies until a future date.

With his partial vetoes, Governor Inslee, behind closed doors, did some "One-Man Lawmaking" and amended both bills. If he had been elected to the Legislature, "legislator

Inslee” could have proposed amendments to these bills and had he done so, there would have been a hearing on “legislator Inslee’s” changes and the people would have had the opportunity at a public hearing to testify on them. And if “legislator Inslee’s” amendments were rejected by the committee, he could have proposed them on the floor of the House or Senate and there could have been an open debate and a legislative vote on those amendments in a public process. But that didn’t happen here because there is no “legislator Inslee”, there’s only Governor Inslee.

Jay Inslee made unilateral decisions “behind closed doors” with no public hearing, no public input, no legislative votes. It was one person – one super-legislator – changing those bills. That is not how our system of government is supposed to work.

The Legislature passed two bills with certain policies but *explicitly* delayed the implementation of those policies until a future date.

Plaintiff Tim Eyman challenges the validity of the Governor’s partial vetoes.

This memorandum sets forth Plaintiff Tim Eyman’s basis for his principle claim which is challenging the validity of the Governor’s partial vetoes.

VI. ARGUMENT

A. Standard of Review

Summary judgment should be granted when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” CR 56(c). The material facts of this case are not in dispute. They consist of the Legislature’s enactment of the Low Carbon Fuel Standard (E3SHB 1091) (Eyman Decl., Ex. A) and the Governor’s veto of portions of that bill. Eyman Decl., Ex. B (Governor’s veto message). And they consist of the

Legislature's enactment of the Cap and Trade Scheme (E2SSB 5126) (Eyman Decl., Ex. D), and the Governor's veto of portions of that bill. Eyman Decl., Ex. E (Governor's veto message).

B. The Governor May Not Engage in "One-Man Lawmaking"

The Washington Constitution restricts the Governor's partial (or "item" or "line-item") veto authority—that is, his power to veto less than an entire bill. The Governor "may not object to less than an entire section, except that if the section contains one or more appropriation items he may object to any such appropriation item or items." Const. art. III, s 12 (see Eyman Decl. Ex. G). The Legislature made an express decision to delay the implementation of these bills' policies and the Governor's attempt to *amend away* these delays was improper and invalid under the meaning of article III, section 12.

The Constitution vests the authority to propose, draft, and adopt laws in the Legislature. Const. art. II s 1. Bills passed by the Legislature must be presented to the Governor before becoming law. Const. art. III s 12; *Locke*, 153 Wn2d at 486-87 (the Governor acts in a legislative capacity when approving or vetoing a bill). The bill becomes law if the Governor signs it. The Governor also has the option of vetoing the bill in whole or in part, subject to potential override by a two-thirds legislative vote. Const. art. III s 12. The Governor thus plays a limited role within the legislative process. The court's task in considering the validity of a partial veto is to maintain "the delicate constitutional balance . . . between the executive and legislative branches with respect to the veto power." *Lowry*, 131 Wn.2d at 320.

C. The Governor's Vetoes were "One-Man Lawmaking" and inconsistent with SJR 140 adopted by voters in 1974

Washington courts engage in a two-step analysis when considering the validity of a Governor's veto. Here, regarding Inslee's decision to amend the Low Carbon Fuel Standard (E3SHB 1091) and override the Legislature's express decision to delay its implementation and Inslee's decision to amend the Cap and Trade Scheme (E2SSB 5126) and override the Legislature's express decision to delay its' implementation both fail to pass constitutional muster.

1. By vetoing the subsections requiring a delay, the Governor's actions are presumptively invalid

In the first step, the court defers to the Legislature's choice as to the structure of the bill. *Locke*, 139 Wn.2d at 139 (discussing the judicial deference to the Legislature's bill drafting reflected in *Lowry*). Here, Governor Inslee in his veto messages admitted he was vetoing subsection 8 of section 3 of E3SHB 1091 and subsection 7 of section 22 of E2SSB 5126 to amend the bills and remove the delay the Legislature included in these subsections. Therefore, the Governor's vetoes are therefore presumptively invalid. *Locke*, 139 Wn.2d at 138.

2. The Governor cannot overcome the presumptive validity of the Legislature's decision to delay the implementation of these bills' policies

The Governor's burden, when he does a partial veto, is to overcome the presumption of validity of the Legislature's enactment. The burden in this second step of analysis is a heavy one, for the deference the court accords legislative bill drafting is the same as the highly deferential standard it applies to legislative fact finding. *Lowry*, 131 Wn.2d at 320 (citing *CLEAN v. State*, 130 Wn.2d 782, 928 P.2d 1054(1996); *City of Tacoma v Luvane*, 118 Wn.2d 826, 851, 827 P.2d 1374 (1992); *State ex rel. Hamilton v. Martin*, 173 Wn. 249, 257, 23 P.2d. 1 (1933)). A

court is reluctant “to substitute its judgment for the [L]egislature’s” as to legislative fact-finding, because to do so “would be most unwise and would constitute a major assault on the historic balance of powers.” *Wash. State Farm Bur. Fed’n v Reed*, 154 Wn.2d 668, 676, 115 P.3d 301 (2005) (quoting *CLEAN*, 130 Wn.2d at 813). The court gives “substantial deference” to the Legislature, and any doubt is resolved in favor of the Legislature. *CLEAN*, 130 Wn.2d at 807-08.

a. The Legislature logically delayed the implementation of these policies

The Legislature is not obligated to go out of its way to structure bills so as to maximize the Governor’s options in exercising the veto power. Rather, the Governor must demonstrate the converse, that the Legislature “obviously designed [the bill] to circumvent the Governor’s veto power.” *Lowry*, 131 Wn.2d at 320. This analysis is based on the text of the bills and their effect on the constitutional division of legislative power, rather than on subjective intent in structuring a bill in a particular way. See *Eyman v. Wyman*, 191 Wn.2d 581, 603-04, 424 P.3d 1183 (2018) (lead opinion by Gordon McCloud, J.). The Legislature’s choices as to the structure and content and delay of the policies in these two bills is unassailable from this standpoint. See *Eyman Decl. Ex. A* and *Eyman Decl. Ex. D*.

The logical structure for drafting the bills precludes the Governor from overcoming their presumptive validity. The Governor’s veto statement on the Low Carbon Fuel Standard (E3SHB 1091) asserts merely that “Subsection (8) of subsection 3 operates to delay ... we cannot delay its implementation ...” (*Eyman Decl., Ex. B*) and the Governor’s veto statement on the Cap and Trade Scheme (E2SSB 5126) asserts merely that “ ... the delayed effective date established in subsection (7) unnecessarily hinders our state’s ability to combat climate change, ...” (*Eyman*

Decl., Ex. E). In both cases, the Governor is amending the bills and overriding the Legislature's express decision to delay the implementation of the bills' policies.

The text and history of the Low Carbon Fuel Standard (E3SHB 1091) and of the Cap and Trade Scheme (E2SSB 5126) accordingly suggests no basis to challenge the presumption in favor of the Legislature's express decision to delay the implementation of the bills' policies.

The Governor's vetoes thus exceeded the limited scope of his veto authority. So this Court should declare that the Governor's vetoes in E3SHB 1091 and E2SSB 5126 exceeded the Governor's constitutional authority under article III, section 12 of the Washington Constitution, and are for that reason invalid and of no legal force or effect. And this Court should declare that subsection 8 of section 3 of E3SHB 1091 and section 22 of E2SSB 5126 are currently in full force and effect and in the form in which they passed the Legislature and without the Governor's vetoes.

D The Governor's Vetoes Exemplify the Type of Executive Overreach that the Voters

Adopted Amendment 62 to End

The history of the veto power under the Washington Constitution and of its abuse by prior governors, and Jay Inslee himself, confirms that Governor Inslee overstepped his constitutional authority by attempting to amend these two bills. The voters amended the Constitution in 1974 specifically to curtail a governor's use of the veto power to amend legislation rather than to negate it. Const. Amend. 62 (1974) (amending Const. art. III, s 12). Judicial application of article III, section 12 after the voters amended that section has emphasized the deference to be accorded the Legislature so as to avoid reinjecting into the law the gubernatorial overreach that Amendment 62 was adopted to eliminate. *Lowry*, 131 Wn.2d at 320-21; *Locke*, 139 Wn.2d at

140-41. According too little deference to the Legislature by allowing the Governor to easily set aside the Legislature's structure of a bill risks reinstating the pattern of misconduct that caused the voters to reform the veto power decades ago.

The trend toward increasingly bold exercises of the veto power accelerated, peaking "in about 1971-72 when the then governor exercised 149 partial vetoes on bills passed by the 42nd Legislature ..." *Motorcycle Dealers*, 111 Wn.2d at 671-72. In some instances "this 'item veto' power [was] interpreted . . . Governors to apply to any element of a bill down to a single word." *Id.* at 672.

The Legislature proposed, and the voters adopted, a constitutional amendment in response to this aggressive use of the veto power. Article III, section 12, as amended, limits the Governor's authority to partially veto a bill. Const. art. III, s 12 (as amended by Amend. 62). Our Supreme Court has relied upon the Voters' Pamphlet argument in favor of Amendment 62 as setting forth the voters' intent to reign in the abuse of the Governor's veto power. The Voters' Pamphlet explained that the original constitution:

empowers our Governors to act in effect as an unseparated third house of the Legislature to alter measures substantially prior to signing them into law. This is contrary to the grant of authority allowed our nation's Presidents under the Federal Constitution—which is to reject entire pieces of legislation by veto, not to change them.

Motorcycle Dealers, 111 Wn.2d at 672; see also Eyman Decl., Ex. C (setting forth the pages of the 1974 Voters' Pamphlet relating to Amendment 62).

Prior to Amendment 62, Washington courts had employed two judicially-created doctrines to check the governors' abuse of their partial veto powers – neither test proved workable. Their “use by the judiciary is an intrusion into the legislative branch, contrary to the separation of powers doctrine [citations omitted], and substitutes judicial judgment for the judgment of the legislative branch.” *Wash. Fed’n*, 101 Wn.2d at 546.

In sum, affording too little deference to the Legislature in the way it structures a bill risks reintroducing the very element of unpredictable and standardless subjectivity that the Washington Supreme Court sought to eliminate by abandoning the two judicially-created doctrines/tests. *Grange*, 153 Wn.2d at 488. Judicial overruling of legislature’s judgment in bill-drafting must remain “rare[]” and “reluctant[.]” *Lowry*, 131 Wn.2d at 320. If the Legislature’s structuring and compromises and delays in the implementation of the policies in its bills are too easily set aside, then judicial analysis would revert to the kind of ad hoc, unpredictable approach that the Washington Supreme Court rejected. See *Grange*, 153 Wn.2d at 488.

E. The Governor’s View of the Constitutionality of a Bill Provision Does Not Expand

His Veto Power

The Governor’s views on the constitutionality of legislation does not expand his authority to exercise a veto beyond that provided by the Constitution. Cf. *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 711-13, 911 P.2d 389 (1996) (the fact that the Attorney General correctly believed that a proposed initiative would be unconstitutional if enacted did not authorize the Attorney General to decline to write a ballot title for the measure, constitutionality being a judicial determination).

The scope of the Governor's veto authority does not supercede that of the legislature's power to structure its bills as it sees fit. Nor does it disallow the Legislature from delaying the implementation of the policies in its bills especially when such bills are approved by such narrow margins. But in his veto messages, Governor Inslee justifies his actions by claiming what the Legislature did was unconstitutional – that determination is not for him to decide, that is the role of the judiciary (thus, this legal challenge).

VII. CONCLUSION

On November 10, 2021, the state supreme court ruled that this Governor issued illegal partial vetoes in 2019 (*Legislature v Inslee*): "This case requires the court to exercise two of our most fundamental duties: to 'delineate and maintain the proper constitutional balance between the coordinate branches of our State government with respect to the veto' and, more broadly, to interpret the constitution faithfully." *Lowry*, 131 Wn.2d at 313; *Juvenile Dir.*, 87 Wn.2d at 241. ... We affirm the superior court's orders on summary judgment in favor of the legislature."

On June 19, 2020, this superior court (the same judge in fact) issued a cogent, well-reasoned oral ruling that read in part: "In a time of great uncertainty in our country and in our community during this pandemic, this case assures us that disputes regarding the constitutional roles of our three branches of government and the system of checks and balances are quite relevant today. ... And similar to the court's prior analysis, the court defers to the legislature unless sufficient manipulation has been shown by the legislature to overcome such deference. Again, that burden has not been met. ... The court concludes that the vetoes are, therefore, invalid ... Based on that, the court therefore grants the legislature's motion for summary

judgment ...". Eyman Decl. Ex. F.

On June 25, 2020, this superior court (the same judge in fact) signed the Order that read in part: "The Legislature's Motion for Summary Judgment is GRANTED[.] Eyman Decl. Ex. G.

I am a *pro se* litigant. I am not a trained attorney. Much of the above was simply copy and pasted from the briefs filed in the previous case *Legislature v Inslee (2021)*. But the principle involved is the same: opposition to One-Man Lawmaking. The fact that I am *pro se* litigant should not result in a different judicial determination.

I am bringing this Summary Judgment Motion because it has been over 200 days since Governor Inslee's partial vetoes and the Legislature has not challenged them. I have taxpayer standing and am harmed by the immediate implementation of the policies in these laws because the resulting dramatic increase in fuel costs will be hurtful, costly, arbitrary, anti-competitive, and absurd especially because neighboring states are not required to follow them. I support the decision by the Legislature to delay these policies and will be hurt if Governor Inslee's unilateral actions to rewrite these laws is allowed – they will result in higher fuel costs that I will be forced to pay. In addition, Attorney General Bob Ferguson, who would represent the Legislature in any legal challenge to these bills, is a proponent of these destructive policies, is an ally of Governor Inslee, and wishes to be Governor in the future. Bob Ferguson would not vigorously challenge the Governor's unconstitutional actions because of Mr. Ferguson's conflict-of-interest and his own political self-interest. For example, Mr. Ferguson's opposition to Initiative Measure No. 976 and his subsequent failure to vigorously defend this voter-approved initiative, going so far as to celebrate the court's rejection of it, instills zero confidence in the Attorney General.

Therefore, I bring this action to challenge the validity of Governor Jay Inslee's vetoes because they have resulted in these detrimental policies taking effect immediately, thus not only hurting me, but all citizens and companies doing business in Washington state. The Governor exceeded his constitutional authority multiple times this session and cannot be allowed to get away with such blatant abuses of power.

On April 25, 2021, the house and senate barely passed the Low Carbon Fuel Standard in Engrossed Third Substitute House Bill 1091 which included subsection 8 in section 3 which delayed the implementation date of this policy – the bill would not have been passed without the delay required in this subsection. And then on May 17, 2021, the Governor vetoed that single subsection (the delay of the Lower Carbon Fuel Standard required in subsection 8) of the bill in order to implement this destructive policy immediately rather than delaying it as the bare majority of the people's representatives required. His partial veto of that single subsection is impermissible under the state Constitution and so it constitutes an unconstitutional action that immediately inflicts a painful policy upon me, the people, and the companies that do business in Washington.

Similarly, the Governor took the same unconstitutional action on the anti-competitive Cap-and-Trade Scheme (Engrossed Second Substitute Senate Bill No. 5126). The bill barely passed the Legislature and only because it included subsection 7 of Section 22 which delayed the implementation of this destructive policy. The Constitution does not grant the Governor the power to rewrite legislation. But in his veto message, the Governor admitted that's exactly what he was doing. He went further and provided his justification for his unconstitutional action: ... "the delayed effective date established in subsection (7) unnecessarily hinders our

state's ability to combat climate change" So to him, the end justifies the means. No matter how much he wants his policy goals, his desires do not justify violating the Constitution to achieve them.

There are supposed to be three co-equal branches of government – legislative, judicial, and executive. But to Governor Inslee, he believes there is only one: him. Governor Inslee prefers to be judge, jury, and executioner, sidestepping the Constitution and co-opting the powers of the Legislature and the courts.

Such mad, power-hungry actions must be challenged.

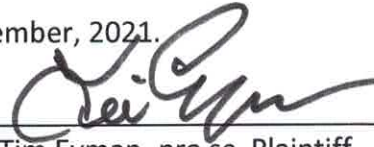
With both bills requiring delays in the implementation of a Low Carbon Fuel Standard and the Cap and Trade Scheme, the Governor exceeded his constitutional authority. This Court should grant declaratory judgment invalidating the Governor's vetoes and declaring the vetoed portions of the bills to be part of the validly enacted laws.

This is an issue of substantial public interest affecting the constitutional roles and prerogatives of the people, the people's elected representatives in the Legislature and of the Governor as the State's chief executive officer.

As the Plaintiff in this case, I ask this court for declaratory judgment that the Governor's partial vetoes in E3SHB 1091 and E2SSB 5126 are constitutionally invalid and have no force or effect. And I ask for declaratory judgment declaring Laws of 2021, chapter 316, section 22 and chapter 317, section 3 are valid and effective in their entire form in which the Legislature enacted them, including the delays in the destructive policies the Governor unlawfully vetoed from the two bills. And I ask for such other and further relief as may follow from the entry of declaratory judgment. And I ask for reasonable attorneys' fees (if an attorney later agrees to

handle this case), expenses and costs to the fullest extent allowed by law and equity, and any further relief as this Court may deem necessary and proper.

Respectfully submitted this 10th day of December, 2021.

A handwritten signature in black ink, appearing to read 'Tim Eyman', written over a horizontal line.

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