

NO. 81809-6

SUPREME COURT OF THE STATE OF WASHINGTON

LUMMI INDIAN NATION; MAKAH INDIAN TRIBE; QUINULT INDIAN NATION; SQUAXIN ISLAND INDIAN TRIBE; SUQUAMISH INDIAN TRIBE; TULALIP TRIBES, federally recognized Indian tribes, JOAN BURLINGAME; LEE BERNHEISEL; SCOTT CORNELIUS; PETER KNUTSON; PUGET SOUND HARVESTERS; WASHINGTON ENVIRONMENTAL COUNCIL; SIERRA CLUB; and THE CENTER FOR ENVIRONMENTAL LAW AND POLICY,

Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON; CHRISTINE GREGOIRE, Governor of the State of Washington; WASHINGTON DEPARTMENT OF ECOLOGY; JAY MANNING, Director of the Washington Department of Ecology; WASHINGTON DEPARTMENT OF HEALTH; and MARY SELECKY, Secretary of Health for the State of Washington,

Appellants/Cross-Respondents,

WASHINGTON WATER UTILITIES COUNCIL, CASCADE WATER ALLIANCE and WASHINGTON STATE UNIVERSITY,

Intervenors-Appellants/Cross-Respondents.

**RESPONSE AND REPLY BRIEF OF APPELLANT/CROSS
RESPONDENT STATE OF WASHINGTON**

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I. INTRODUCTION

The Municipal Water Law (MWL) has been law in Washington since September 2003. Respondents¹ have had several years to identify a single instance of retroactive revival of relinquished water rights, or retroactive expansion of municipal water rights to the detriment of junior water right holders. They have not, and even if they could, it would be insufficient to have the challenged statutes declared *facially* unconstitutional. Lacking concrete facts, the Respondents' claims rely entirely on speculation, and they ask the Court to apply a lesser standard of review than has been consistently applied by both this Court and the United States Supreme Court to facial challenges.

RCW 90.03.015(3) and (4) and RCW 90.03.330(3) do not violate the separation of powers. Under this Court's recent decision in *Hale v. Wellpinit School District No. 49*, __ Wn.2d __, 198 P.3d 1021 (2009), enactment of a retroactive statutory amendment by the Legislature violates separation of powers when it reverses a prior judicial decision. The MWL does not reverse any judicial decisions.

The Respondents fail to demonstrate that RCW 90.03.015(3) and (4) and RCW 90.03.330(3) violate substantive due process. They cannot

¹ In this brief, Respondents/Cross-Appellants Burlingame, et al. are referred to as "Burlingame," and Respondents/Cross-Appellants Lummi Indian Nation, et al. are referred to as "the Tribes." Collectively, they are referred to as "Respondents."

satisfy their burden in a facial challenge to prove that these provisions violate substantive due process under all sets of circumstances.

The Respondents also fail to meet their burden to demonstrate that RCW 90.03.260(4) and (5), RCW 90.03.330(2), and RCW 90.03.386(2) violate substantive due process. Each of these statutes operates prospectively and does not change the consequences of past events to the detriment of other water right holders. Further, even if the Court determines that any of these provisions does operate retroactively, the Respondents cannot show that they will cause detriment to others' water rights under any scenarios, let alone in all sets of circumstances.

Finally, the superior court ruled correctly in rejecting Respondents' procedural due process claims. RCW 90.03.260(4) and (5) did not strip away any procedure relating to service connections or population limits that was available prior to the MWL, and RCW 90.03.330(2) and RCW 90.03.386(2) both provide adequate notice and opportunity to be heard.

This Court should reject Respondents' legally deficient challenges and refrain from taking the extraordinary measure of declaring the law facially unconstitutional.

II. RESTATEMENT OF ISSUES

1. Does RCW 90.03.386(2), which clarifies the place of use for water rights for municipal supply purposes, facially violate substantive due process? (Burlingame Issue No. 1; Tribes' Issue No. 1)
2. Do RCW 90.03.260(4) and (5), which address service connection and maximum population limits under approved water system plans, facially violate substantive due process? (Tribes' Issue No. 3)
3. Does RCW 90.03.386(2), which clarifies the place of use for water rights for municipal supply purposes, facially violate procedural due process? (Burlingame Issue No. 2; Tribes' Issue No. 2)
4. Do RCW 90.03.260(4) and (5), which address service connection and maximum population limits under approved water system plans, facially violate procedural due process? (Tribes' Issue No. 4)
5. Does RCW 90.03.330(2), which provides that water right certificates for municipal water supply purposes that were issued based on system capacity may only be revoked or diminished under certain circumstances, facially violate procedural due process? (Burlingame Issue No. 3; Tribes' Issue No. 5)

III. REPLY ARGUMENT

A. Standard Of Review

1. The “no set of circumstances test” applies to facial challenges to Washington law.

This Court has consistently recognized that to prevail in a facial challenge, the challenging party must show that “no set of circumstances” exists in which the statute can be constitutionally applied. *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005).² For example, in *Hughes* the Court upheld the exceptional sentence provisions of the Sentencing Reform Act, stating: “[b]ecause there is *at least one way* in which RCW 9.94A.535 can be applied constitutionally, it cannot be declared facially unconstitutional.” *Id.* at 133 (emphasis added).³

Respondents sharply object to the “no set of circumstances” test. They ask the Court to ignore its longstanding precedent, and follow a wrongly decided Court of Appeals case. Opening Brief of Respondents/Cross-Appellants Joan Burlingame, et al. (Burlingame Br.) at 26 (citing *Robinson v. City of Seattle*, 102 Wn. App. 795, 808, 10 P.3d 452 (2000)). Respondents improperly rely on decisions in which the Court

² See also, *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004); *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000); *State Republican Party v. State Pub. Disclosure Comm’n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000); *In re Det. of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999).

³ The Court of Appeals recently applied the no set of circumstances test in a case involving a facial and as applied challenge to the Highway Access Management Act. *Galvis v. Dep’t of Transp.*, 140 Wn. App. 693, 702, 167 P.3d 584 (2007).

was presented with an as applied challenge, and was therefore able to avoid the “strong medicine” of declaring a statute facially inoperative. *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916, 37 L. Ed. 2d 830 (1973) (Facial invalidation of a statute “is, manifestly, strong medicine” that “has been employed by the Court sparingly and only as a last resort.”). Because Respondents bring a purely facial challenge in this case, the Court does not have that option.

2. Respondents should not be afforded special treatment as taxpayer litigants.

Respondents are also wrong to suggest that the “no set of circumstances” test does not apply to facial challenges brought as taxpayers. Respondents hang their hats on one wrongly decided appellate decision that held that when *taxpayer* litigants bring a facial challenge, the Court applies the test “dictated by the nature of the challenge,”⁴ rather than the no set of circumstances test. *Burlingame Br.* at 16 (quoting *Robinson*, 102 Wn. App. 795 at 808). The superior court properly concluded that *Robinson* is not good law. The Respondents offer no

⁴ The *Robinson* Court never explained what this statement meant.

sound basis for treating taxpayer litigants differently from other litigants in facial constitutional litigation.⁵

As explained in the State's opening brief, when the Court of Appeals decided *Robinson*, it mistakenly believed that the no set of circumstances test had not been applied to facial challenges in Washington. Opening Brief of Appellant/Cross-Respondent State of Washington (State's Opening Br.) at 17. The *Robinson* Court was wrong, however, as this Court had already recognized the no set of circumstances test as the appropriate standard against which to weigh facial constitutional challenges on two occasions. *Tunstall ex rel. Tunstal*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000); *In re Det. of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999). Moreover, *Robinson* offers no sound basis for taxpayer litigants to be subject to a different, presumably lesser, standard than traditional litigants in facial challenges. The Court should thus clarify that the no set of circumstances test applies in all facial challenges, no matter the standing of the litigants.

⁵ Respondents' suggestion that taxpayer litigants be afforded deferential treatment would lead to absurd results in cases such as this, with multiple plaintiffs. If some plaintiffs rely on traditional standing, for example because they have suffered an injury in fact, while others rely simply on their taxpayer status, the court would have to apply multiple standards of review to plaintiffs' claims.

3. The no set of circumstances test applies to Respondents' separation of powers claims.

Respondents correctly assert that their separation of powers claims are not fact dependant, and, instead, are dependant on the text of the law as compared to the Court's decision in *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). Respondents are wrong, however, that the no set of circumstances test does not apply to the Court's separation of powers analysis because the test is inherent in the analysis. In effect, a law that is alleged to violate the constitutional separation of powers will either violate separation of powers "in all circumstances," or in no circumstances at all. There can be no occasional violation of the separation of powers, whereas a law may in certain *factual scenarios* violate due process, when it will not do so in other factual scenarios.

4. The no set of circumstances test applies to Respondents' procedural due process claims.

On the procedural due process issues, Respondents advocate for application of the factors prescribed in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976),⁶ and suggest that these factors conflict with the no set of circumstances test. On the contrary, the no set of circumstances test is a *standard of review* that complements the

⁶ The *Mathews* factors are set forth on page 45 of this brief, below.

Mathews factors, and is appropriately applied with the *Mathews* factors in a facial procedural due process challenge, such as this.

For example, this Court has applied the *Mathews* factors in assessing procedural due process challenges and has applied the no set of circumstances test coupled with those factors to declare a statute facially unconstitutional. In *City of Redmond v. Moore*, 151 Wn.2d 664, 667, 91 P.3d 875 (2004) the Court held that statutes that provided for mandatory suspension of driver's licenses after drivers failed to resolve traffic infractions violated procedural due process because the drivers were not afforded an administrative hearing before or after the effective date of the suspension. *Moore*, 151 Wn.2d at 667. The Court concluded that the drivers had presented a facial challenge, and that the no set of circumstances test was the appropriate standard of review. *Id.* at 669. The Court then weighed the *Mathews* factors, and determined that the challenged statutes facially violated procedural due process *in all circumstances* because they failed to afford *any driver* facing a license suspension an opportunity for an administrative hearing.

In summary, the no set of circumstances test is not in conflict with the balancing analysis required under *Mathews*. To the contrary, the tests are complementary and function well together, as *Moore* demonstrates.

5. ***Planned Parenthood v. Casey* is applicable only to first amendment claims.**

Citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), Respondents argue that if the Court applies the no set of circumstances test to its substantive due process claims, it must focus the analysis on situations in which water rights are harmed by the MWL, rather than considering the impact on all water rights holders. Burlingame Br. at 28. In *Casey*, the United States Supreme Court addressed a First Amendment challenge to a law that required women to notify their spouses before obtaining an abortion. The Court held that in analyzing the impact on the women's rights under the First Amendment, "the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 833. Applying this analysis, the Court's plurality decision held that in "a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid." *Id.* at 894.

The *Casey* decision does not represent a wholesale departure from the no set of circumstances test applied in *Salerno*. *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). As the

