COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SILENT MAJORITY FOUNDATION, a Washington non-profit corporation,
Plaintiff-Appellant,

v.

JAY INSLEE, in his official and individual capacity as Governor of the State of Washington,
Defendant-Appellee,

On Appeal from the Superior Court
of the County of Thurston
No. 22-2-01146-34

Brief of Appellant

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I. Introduction

The Appellant, Silent Majority Foundation ("SMF"), brought this action by way of a Complaint dated May 10, 2022. CP, p. 1-8. Silent Majority Foundation challenged two of the more than five hundred Emergency Proclamations issued by Governor Jay Inslee in response to the COVID-19 pandemic.[1] The challenged Proclamations were Proclamation 20.25.19 and 21.14.4, respectively. CP, p. 4-5.

The challenged Proclamations were each issued in March 2022 (March 11 and 23, respectively). SMF alleged that Governor Inslee failed to meet his two statutory duties under Revised Code of Washington ("RCW") 43.06.210: (1) to declare an "affected area;" and (2) to terminate the emergency once order is restored to that area. CP, p. 1-4.

[1] *See generally*: https://www.governor.wa.gov/office-governor/official-actions/proclamations. A search of the Governor's *Proclamations* page offers 507 references to COVID-19. Last accessed March 11, 2023.

SMF further alleged:

"On March 11, 2022 there was no state of emergency in several Washington counties, including Garfield County, which had 0 cases." CP, p. 5, ¶ 16. Notably, SMF did not merely allege that there was no state of emergency, SMF provided statistics that demonstrated there was no such emergency, specifically noting that COVID-19 cases did not exist (or existed in small quantities of less than 10 total cases) in several counties at the time of the issuance of the challenged Proclamations. CP, p. 2, ¶ 3; p. 5, ¶¶ 15-17 and ¶ 21; p. 9, ¶ 4. Finally, relevant to the appeal here, SMF alleged:

"Despite failing to find a state of emergency in each of the 39 counties in Washington, Governor Inslee proclaimed and ordered a state of State of Emergency continues to exist in all counties of Washington State and imposed restrictions on individuals' ability to make their own medical and

employment decisions under penalty of criminal sanctions." CP, p. 5, ¶ 18.

SMF challenged the Governor's Proclamations alleging that the Governor failed to find a state of emergency, which precedes the declaration of a state of emergency. *See:* RCW 43.06.010(12) ("The governor may, *after finding* that a public disorder, disaster, energy emergency, or riot exists within this state or any part thereof which affects life, health, property, or the public peace, *proclaim a state of emergency in the area affected*, and the powers granted the governor during a state of emergency shall be effective only within the area described in the proclamation") (emphasis added). SMF also challenged the Proclamations, given the limited number of COVID-19 cases that existed throughout Washington, including the non-existence of COVID-19 positive cases in certain counties at the time of the issuance of the Proclamations, noting that they

should have terminated pursuant to RCW 43.06.210, which provides that "[t]he state of emergency shall cease to exist upon the issuance of a proclamation of the governor declaring its termination: PROVIDED, That the governor *must* terminate said state of emergency proclamation when order has been restored in the area affected." *Id*. (emphasis added).

After briefing the issue and discovery disputes, the Defendant-Appellee filed a motion for judgment on the pleading under CR 12. The court granted the motion without a written opinion, although the Court did issue an extensive oral ruling. That ruling provides, in part, that the "court agrees as a matter of law that the governor must identify a state of emergency by specifically identifying the areas affected and that the governor must terminate once order has been restored to the identified areas affected." RP, p. 24:1-5. The Court further held that, "Based upon this record and the authorities

cited by the parties, the court concludes that the phrase 'for all counties' is identifying the affected area. The court finds no legal requirement to identify the affected area by county. In addition, the court finds that the particular emergency here presents an adequate record supporting the authority for the governor's action and inaction challenged here." *Id*., 12-19. In denying SMF's Motion, the Court concluded that "[h]ere, the issue surrounds an airborne virus that may have impacts across county lines." *Id.* p. 25:2-4. The Court's oral ruling is the basis of this appeal.

II. Assignments of Error and Issues Presented

A. Assignments of Error

Assignment of Error No. 1

The trial court erred in granting the Appellee's Motion for Judgment on the Pleadings, as the trial court relied on facts or documents not found within the record, and the Court did not take judicial notice of such facts.

Assignment of Error No. 2

The trial Court improperly found facts in support of its decision including:

1. "the court finds that the particular emergency here presents an adequate record supporting the authority for the governor's action and inaction challenged here." RP, p. 24:16-19.

2. "[h]ere, the issue surrounds an airborne virus that may have impacts across county lines." RP, p. 25:2-4.

Assignment of Error No. 3

The trial court failed to consider the Plaintiff's allegations as true, which would support the Plaintiff's cause of action, including:

"On March 11, 2022 there was no state of emergency in several Washington counties, including Garfield County, which had 0 cases." CP, p. 5, ¶ 16.

"Despite failing to find a state of emergency in each of the 39 counties in Washington, Governor Inslee proclaimed and ordered a State of Emergency continues to exist in all counties of Washington State and imposed restrictions on individuals' ability to make their own medical and employment decisions under penalty of criminal sanctions." CP, p. 5, ¶ 18.

B. Issues Presented

1. Did the trial court err in finding that the Governor had satisfied a condition precedent when renewing the emergency proclamation?
2. Did the trial court err by not presuming that the facts alleged in the complaint were true and by relying on facts not within the pleadings?
3. Did the trial court err by deciding that as a matter of law the governor identified the area affected to be statewide when he proclaimed an emergency existed in all counties?
4. Is this appeal ripe as it is a public interest exception to the general rule that moot claims are not reviewed?

III. Statement of the Case

SMF brought this action by complaint dated May 10, 2022. The Appellee filed a motion for judgment on the pleadings, which was granted by the trial court on October 7, 2022. This appeal followed.

IV. Argument

A. Standard of Review

The Appellate Court reviews the trial court's grant of a judgment on the pleadings *de novo*. *Davidson v. Glenny*, 14 Wn. App. 2d 370, 375, 470 P.3d 549 (2020). "On review, [the court] engage[s] in a similar inquiry, and will not draw inferences or consider additional factual allegations that contradict [the Plaintiff's] allegations below." *N. Coast v. Factoria P'ship*, 94 Wn. App. 855, 861, 974 P.2d 1257 (1999). "In reviewing the trial court's entry of judgment on the pleadings, we examine the pleadings to determine whether the claimant can prove any set of facts, consistent with the complaint, that would entitle the claimant to relief." *Id.* (internal citation omitted).

The trial court dismissed the matter under the Civil Rule 12(c) judgement on the pleadings standard, under which, "[a] court may dismiss a complaint under CR 12 only if 'it appears

beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery.'" *Howell v. Dep't of Soc. & Health Servs.*, 7 Wn. App. 2d 899, 910 (2019) (citing *Didlake v. State*, 186 Wn. App. 417, 345 P.3d 43 (2015)). Such "motions should be granted 'sparingly and with care' and 'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" *Tenore v. AT & T Wireless Servs.*, 136 Wn. 2d 322, 330, 962 P.2d 104 (1998). "In such a case, a plaintiff's allegations are presumed to be true, and a court may consider hypothetical facts not included in the record." *Id.* citing *Cutler v. Philips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994), *cert. denied*, 515 U.S. 1169, 115 S. Ct. 2634 (1995). "Like a CR 12 (b)(6) motion, the purpose is to determine if a plaintiff can prove any set of facts that would justify relief." *P.E. Systems, LLC v. CPI*

Corp., 176 Wn.2d 198, 203, 289 P.3d 638 (2012) citing *Suleiman v. Lasher*, 48 Wn. App. 373, 376, 739 P.2d 712 (1987).

When considering a motion for judgment on the pleadings, a court may consider *hypothetical* facts not in the record. However, when reviewing a challenged administrative decision, "the superior court's findings of fact or conclusions of law are 'surplusage.'" *Morawek v. City of Bonney Lake*, 184 Wn. App. 487, 491, 337 P.3d 1097 (2014). The decision is reviewed on the record of the actor, not the trial court. *Id*. Therefore, the findings, or lack thereof, as alleged by SMF, are the findings properly within the scope of review of the Court.

Before this court is *de novo* review of the pleadings and the trial court's decision.

B. Argument

i. SMF's alleged facts were not presumed true, and the Trial Court considered extraneous facts.

The trial court erred in relying on facts outside the pleadings in granting the Defendant's Motion for Judgment on the Pleadings, while simultaneously not presuming that the allegations of SMF were true.

Appellee further asserted that the Governor's *inaction* constituted an *ultra vires* act through his failure to terminate the emergency, rescind the challenged Proclamations, or simply by continuing the emergency proclamation status in the counties that had zero or low Covid infection rates. CP, p. 5. Construed in a light most favorable to supporting the SMF's Complaint, Governor Inslee failed to properly terminate his emergency orders at a time when COVID-19 were either non-existent or had significantly decreased; moreover, the

Governor tied the emergency declaration to federal funding—all facts well-advanced by SMF through the briefing. *Id*. Whether COVID-19 *could* recur is of no import. Moreover, the Court's finding that, as an airborne virus, COVID-19 did not/does not respect jurisdictional boundaries is of no import and demonstrates that court's decision relied on facts outside of the record—facts on which no party sought judicial notice.

For this appeal before the court, the Governor must be found to have exceeded his statutory limits of emergency powers by not ending the emergency, particularly on a county-by-county basis, when the Covid threat was nearly nonexistent or was actually nonexistent in several counties.

The Governor's decision to continue the State of Emergency requires review by the court to ensure that the Governor is not writing himself a blank check, especially with Federal Covid funds involved. Governor Inslee was clear that

he saw COVID-19 as a blank check of emergency funds from the federal government: "We want to make sure that federal money keeps coming. So, it's important to keep this in place right now."[2] Additionally, when pressed on *when* the emergency would terminate, Governor Inslee stated "When it makes sense" and "when federal funds expire."[3] Finally, during the Hearing on Appellee's CR 12 motion, SMF noted that Governor Inslee had offered a prospective termination date of the COVID-19 state of emergency well more than a month in advance. RP, p. 20:6-18. These facts were before the court and should have been viewed as true; they also

[2] SMF's Motion for Temporary Restraining Order, at 1; citing: Governor Inslee Press Conference, April 11, 2022. Available at: https://komonews.com/news/politics/emergencypowers-for-gov-inslee-remain-in-place-although-covid-crisis-has-eased.

[3] *Id.* Reyna, Luna. Gov. Inslee won't lift WA's vaccine mandate for state employees yet, May 9, 2022. Available at: https://crosscut.com/news/2022/05/gov-inslee-wont-lift-was-vaccine-mandate-state-employees-yet.

demonstrate that the Governor failed to meet his statutory duties in declaring and terminating a state of emergency.

For over three years, the Governor has issued emergency proclamations and measures and the people of Washington have a right to judicial review of the conditions existing and the government controls resulting from an emergency declaration.

The trial court found, "[h]ere, the issue surrounds an airborne virus that may have impacts across county lines." RP, p. 25:2-4. The trial court further found, "[I]n addition, the court finds that the particular emergency here presents an adequate record supporting the authority for the governor's action and inaction challenged here." RP, p. 24:16-19. SMF argued that "Governor Inslee exceeded the scope of his emergency powers under RCW 43.06.210 because on March 11, 2022 and March 23, 2022 there was no state of emergency

in all counties throughout Washington; order was restored in several counties, including, but not limited to: Adams, Asotin, Columbia, Ferry, Jefferson, Klickitat, Lincoln, Pacific, Pend, Oreille, San Juan and Wahkiakum counties." CP, p. 7, ¶ 30. "On April 1, 2022, Columbia, Garfield, and Wahkiakum counties each had 0 COVID-19 cases. Another 14 had less than 10 COVID-19 cases on that date." CP, p. 5, ¶ 21.

The lower court both considered facts outside of the pleadings and also disregarded SMF's claims that must be presumed as true—specifically, the SMF claimed that the Governor was required by law, RCW 43.06.210, to terminate the state of emergency "when order has been restored in the area affected." RCW 43.06.210. SMF proffered sufficient evidence to demonstrate that the emergency did not exist in *all* counties of the State of Washington at the time of the two challenged Proclamations. CP, p. 5, ¶ 20.

While it is within the Governor's discretion to decide when an emergency starts and ends, *Sehmel v. Shah*, 23 Wn. App. 2d 182, 198, 514 P.3d 1238 (2022), that discretion has limits. The Governor has declared emergencies in specific counties in the past and can do so again; in fact, he did so throughout the COVID-19 pandemic. See, *e.g.*, Proclamation 20-25.3, Governor Inslee's phased COVID-19 reopening plan, *Safe Start Washington: Phase I – Re-Opening Washington*, Proclamation 20-25.4, the Governor's *Transition from "Stay Home – Stay Health" to "Safe Start – Stay Health" County-by-County Phased Reopening*; Proclamation 20-25.7, *"Safe Start – Stay Health" County-by-County Phased Reopening*, or Proclamation 20-25.14, *Washington Ready*. Alternatively, the Court may look to Proclamation 21-14.4 challenged herein ("if people fail to comply with the required facial coverings, social distancing and other protective measures while

engaging in this phased reopening, I may be forced to reinstate the prohibitions established in earlier proclamations").

Appellees relied heavily upon *Cougar Business Owners Ass'n v. State*, 97 Wn.2d 466, 647 P.2d 481 (1982) for their position that *both* the start and end of a state of emergency are entirely discretionary. However, the very language of the statute provides otherwise; the proviso of RCW 43.06.210 utilizes mandatory language and includes a triggering threshold for when an emergency *must* end. While a game of semantics could be played that a lab-created novel coronavirus[4] is not a "natural disaster" bringing it within the ambit of gubernatorial emergency powers, no such quibbling need occur; one need only examine the plain language of the

[4] Michael R. Gordon, *Lab Leak Most Likely Origin of Covid-19 Pandemic, Energy Department Now Says*, The Wall Street Journal, February 26, 2023, available at: https://www.wsj.com/articles/covid-origin-china-lab-leak-807b7b0a (last accessed March 17, 2023)

statute to determine that ending a pandemic is not a purely discretionary decision left only with the governor. Further, *Cougar* is inapposite as it applied to a natural disaster which is not the subject of extensive extant law and local policies, such as pandemic preparedness. *See, e.g.*, RCW 70.26 *et seq*. Airborne viruses (and coronaviruses) are not new; while it can be argued that COVID-19 presented a novel disease, as a matter of law it did not.

ii. As a matter of law, the area affected cannot be both 'all counties' and 'the state of Washington.'

When the governor initially declared the emergency, he proclaimed "that a State of Emergency exists in all counties in the state of Washington[.]" This comports with the general scheme of Washington law pertaining to viral pandemics and local health jurisdictions. *See, e.g.*, RCW 70.26 *et seq.*, Pandemic Influenza Preparedness; RCW 70.05 *et seq.*, Local

Health Departments, Boards, Officers – Regulations; RCW 70.08 *et seq.*, Combined City-County Health Departments; and RCW 70.46 *et seq.*, Health Districts. From a logical standpoint, health-based policy decisions are made at the local level to facilitate decisions based on real-time data received from ground level personnel and entities that reflects current circumstances.

This is reflected in other areas of Washington law, such as the limitation on the Secretary of Health's powers which limit the Secretary to acting when "an emergency exists *and* the local board of health has failed to act with sufficient promptness or efficiency[.]" RCW 43.70.130(4). More pertinently, the emergency provisions relied upon by the governor explicitly require that an emergency be constrained to "the area affected." RCW 43.06.010(12) and .210.

The common sense reading of the initial emergency proclamation sets the "area affected" by the pandemic as each and every county in the state of Washington. This is further evidenced by the governor's "Safe Start Washington, Phased Reopening County-by-County" approach. Despite the common sense reading and the governor's own county-based approach, the emergency proclamation was eventually lifted for all counties by an announcement made more than a month before the actual end of the State of Emergency.

Requiring the area affected to be statewide results in an incompatible tension between the definition of "emergency" and "when order is restored." As detailed in SMF's pleadings to the trial court, numerous counties had single digit to zero cases of Covid, while other counties had thousands of cases. The manner in which the governor proceeded effectively ignored the proviso that "the governor must terminate said

state of emergency proclamation when order has been restored in the area affected." RCW 43.06.210. This violates basic interpretation principles elucidated by the Supreme Court, which held that "statutes should be construed to effect their purpose, and unlikely, absurd, or strained consequences should be avoided." *State v. Smith*, 189 Wn.2d 655, 662, 405 P.3d 997 (2017). Further, the court is to "give effect to all the statutory language" and "should consider and harmonize the statutory provisions in relation to each other." *Regence Blueshield v. Ins. Comm'r*, 131 Wn. App. 639, 648, 128 P.3d 640 (2006) (citing *C.J.C. v. Corp. of the Catholic Bishop*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999) and *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 560, 14 P.3d 133 (2000).

The actions of the governor, and the interpretation of the trial court also ignore the mandatory language of the

proviso. While the governor has sole discretion on when to proclaim a state of emergency, the governor does not have sole discretion to determine when it ends. The state of emergency ends when "order is restored in the area affected." To completely ignore these words invokes the doctrine of "*expressio unius est exclusio alterius*, a canon of statutory construction, [which means] to express one thing in a statute implies the exclusion of the other." *Schitzer W., LLC v. City of Puyallup*, 190 Wn.2d 568, 582, 416 P.3d 1172 (2018). The statute pertaining to emergency proclamations states that a proclamation is effective upon the governor's signature. An act that is discretionary to the governor. It also provides that the state of emergency ceases to exist upon the issuance of a proclamation of the governor declaring its termination. Discretionary to the governor.

The proviso, however, takes the discretion away from the governor, and provides a triggering condition that when met, the governor no longer wields discretion and "must terminate said state of emergency proclamation when order has been restored in the area affected," and the Governor failed to adhere to that statutory mandate when he issued Proclamations 20-25.19 and 21-14.4 and COVID-19, the proclaimed emergency, did not exist in multiple counties, hospitals were not overrun, and life continued in an orderly manner. By the time the State of Emergency ended, professional sports had resumed, a completely superfluous (yet enjoyable) activity, with an average of 68,408 screaming Seahawk fans in Lumen field for eight home games, more than 17,000 fans in each of the Kraken's home games for their inaugural season, more than 44,000 fans at T-Mobile Park watching the Mariners make their first postseason appearance

since the historic 2001 season. If the return of professional sports and the congregation of tens of thousands of fans in close quarters does not evince the fact that order had been restored, there is no meaning to those words in the statute.

In *Cougar Business Owners Ass'n v. State*, the Supreme Court reiterated the 4-part test for determining whether an action is truly discretionary, of which only the fourth prong is currently implicated: "Does the governmental agency involved possess the requisite constitutional, [or] statutory … authority … to do or make the challenged act… ?" *Cougar Business Owners Ass'n*, 97 Wn.2d at 471 (citing *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 253-55, 407 P.2d 440 (1965)) (alteration in original). While the governor does have the discretion to end an emergency, the governor does not have the discretion to determine when order has been restored.

The governor illustrated the arbitrariness of his actions and his blatant disregard of the proviso, which he exhibited throughout the pandemic by declaring that the state of emergency was to end nearly a month after his announcement, even though not all counties met his "Safe Start Washington, Phased Reopening County-by-County" criteria, and the announcement was made sufficiently early that conditions could have changed drastically in the interim.

An examination of the emergency powers of the governor as well as the regulatory scheme of the Department of Health, State Board of Health, and Local Health Departments, Combined City-County Health Department, and Health Districts also belies a locally based and decentralized control system in responding to health crises.

The State Department of Health and the public health system thereunder is comprised of 35 local health departments

and local health districts serving 39 counties (31 county health departments, three multi-county health districts, and two city-county health departments).[5] The Board of Health promulgates regulations for the local health departments/districts to follow. The Board's rulemaking authority encapsulates rules regarding "isolation and quarantine" and for "the prevention and control of infectious and noninfectious diseases." RCW 43.20.050(2)(e) and (f). There is a chapter specifically pertaining to "Pandemic Influenza Preparedness" which requires local health jurisdictions to "develop a pandemic flu preparedness and response plan" which are overseen by the Secretary of Health and assessed at least biannually. RCW 70.26.030(2) and .070(1).

[5] https://doh.wa.gov/about-us/washingtons-public-health-system

The entire statutory and regulatory scheme devoted to public health is local in nature, requires prior planning and preparedness, even specifically geared toward an airborne virus which has been classified as a pandemic several times in the past, and contemplates federal funding and assistance and coordination and consultation between the public and private sectors, and yet the governor disregarded these extant plans in order to declare an emergency, and keep that emergency in place for 975 days.

Conversely, the governor's emergency powers were originally adopted to "control or suppress riots or unlawful strikes" and not to address health emergencies. *See* 1965 c 8 § 43.06.010, Prior: 1890 p 627 § 1; RRS § 10982.

In sum, the governor eschewed utilizing existing pandemic preparedness and response plans, usurped the authority of local health departments and ignored

countervailing recommendations or measures from local authorities when they disagreed with his arbitrary determinations, and completely ignored the statutory proviso that he must end the State of Emergency when order is restored in the area affected.

iii. This Matter Is Not Moot Under the Public Policy Exception to Mootness.

While the courts of appeal will generally dismiss an appeal that presents only moot issues, it may review "if the case involves matters of continuing and substantial public interest." *State v. Clark*, 91 Wn. App. 581, 584, 958 P.2d 1028 (1998) (citing *Dioxin/Organochlorine Ctr. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 351, 932 P.2d 158 (1997)). When determining whether the public interest exception applies, the following criteria are examined: "(1) the public or private nature of the question presented; (2) the desirability of

an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur." *In re Detention of Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983) (citing *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).

If the public interest is implicated, the "appellate court also will review issues of public interest that are capable of repetition yet easily evade review." *Clark*, 91 Wn. App. at 584 (citing *In re Dependency of H.*, 71 Wn. App. 524, 527, 859 P.2d 1258 (1993). The Supreme Court has "declined to adopt the 'capable of repetition, yet evading review' exception to mootness. *Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 451, 759 P.2d 1206 (1988). However, the Supreme Court will do so if the "issue is a matter of continuing and substantial public interest, 'capable of repetition yet easily evad[ing] review.'" *State v. Hale*, 94 Wn. App. 46, 52, 971 P.2d 88

(1999) (quoting *Clark*, 91 Wn. App. at 584) (substitution in original).

Here, the exceptions are clearly met. The COVID-19 pandemic, *is* a matter "of continuing and substantial public interest." *See, Clark, supra*. Moreover, the Parties are left with no resolution—the Governor has declared the emergency over without a foundational basis; the legislature has not reigned in the Governor's emergency powers; and the public remains subject to the whims of the Governor, not knowing when, whether, or if another 975-day emergency will occur. Because this is a case "involving 'matters of continuing and substantial public interest,'" it is well within this Court's discretion to hear and rule on the matter. *Orwick v. Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) (citing *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). Moreover, as the matter is now before an appellate court, the issues have "been

fully litigated by parties with a stake in the outcome of a live controversy. After a hearing on the merits, it is a waste of judicial resources to dismiss an appeal on an issue of public importance which is likely to recur in the future." *Id.* As COVID-19 and its impacts continues to exist, it certainly cannot be said that such a recurrence is unlikely. Thus, a decision from this Court preserves judicial resources.

This issue was examined but not decided in *Brach v. Newsom*, 38 F.4th 6, 18 (9th Cir. 2022), where the court considered emergency orders issued by Governor Newsom of California relating to COVID-19. The case was dismissed as moot because the emergency orders regarding mandatory online public education had expired. Nevertheless, the dissent wrote, "[t]he fact remains that the pandemic is not over. Governor Newsom has not relinquished his emergency powers, nor has the California Legislature stripped him of

those powers." *Brach v. Newsom*, 38 F.4th 6, 18 (9th Cir. 2022) (Paez, J., dissenting). The *Brach* court did not decide the issue here, as alleged by SMF, that the Governor is continuing an emergency when no emergency exists. The dissent ably sums up that the ending of gubernatorial emergency powers is ripe for review, and should be reviewed, both as a matter of public policy, and as a matter of statutory interpretation to determine what the proviso of RCW 43.06.210 actually means.

VI. Conclusion

SMF, having demonstrated the trial court erred in relying on facts outside of the record and not contemplating facts within the record, have shown sufficient basis for this court to reverse and remand the case to the trial court based on its decision granting the Defendant's Motion for Judgment on the Pleadings.

This document contains 4,485 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted,

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March 24, 2023 - 9:44 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
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Appellate Court Case Title:	Silent Majority Foundation, Appellant v. Jay Inslee, Respondent
Superior Court Case Number:	22-2-01146-4

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