☐ EXPEDITE
☒ No hearing set
☐ Hearing is set
Date: _____
Time: _____
Judge: Hon. Mary Sue Wilson

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

MICHAEL PADDEN and CHRIS CORRY, *Plaintiffs*, v. STATE OF WASHINGTON, the WASHINGTON STATE LEGISLATURE, JAY INSLEE, sued in his official capacity as governor of the state of Washington, and LAURA WATSON, sued in her official capacity as the Director of Washington State's Environment and Natural Resources Division, *Defendants*.	No. 23-2-04021-34 PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. Introduction.

Article II, § 1 of the Washington State Constitution vests the power to legislate in the state legislature. "[L]egislation which attempts to adopt or acquiesce in *future* federal rules, regulations or statutes is an unconstitutional delegation of legislative power and thus void." *State v. Dougall*, 89 Wash. 2d 118, 122-23 (1977) (emphasis supplied). The same prohibition presumably applies to the adoption of the rules, regulations or statutes of any other jurisdiction.

In 2020 the Legislature enacted SB 5811 (codified as RCW 70A.30.010), addressing motor vehicle emissions. RCW 70A.30.010 adopts no standard for vehicle emissions, but instead (1) instructs the Department of Ecology to (2) adopt a rule that simply copies (3) a chapter of California regulations. Over a year later, Ecology did so. It adopted portions of the identified chapter, most of which had been significantly amended after the 2020 enactment. In doing so, Ecology's rule does not even bother to include the regulations it was copying, but instead merely enumerates (with helpful links) those sections of California regulations that would become enforceable against Washington citizens. RCW 70A.30.010 is therefore an unconstitutional delegation of legislative power. In addition, Ecology's rule fails to comply with the Legislature's directive and is therefore void.

II. Facts.

There are no disputed facts that would prevent the entry of judgment in plaintiffs' favor. The outcome in this case is entirely dependent upon an analysis of the law distinguishing a proper from an improper delegation of legislative authority. The following paragraphs simply review the sequence of the relevant legislative and agency actions.

During the 2020 session, the Washington State Legislature enacted SB 5811, now codified at RCW 70A.30.010:

> Pursuant to the federal clean air act, the legislature adopts the California motor vehicle emission standards in Title 13 of the California Code of Regulations. The department of ecology shall adopt rules to implement the motor vehicle emission standards of the state of California, including the zero emission vehicle program, and shall amend the rules from time to time, to maintain consistency with the California motor vehicle emission standards and 42 U.S.C. Sec. 7507 (section 177 of the federal clean air act).

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The section became effective on June 11, 2020. *See* Chapter 143, Laws of 2020; 2020 SB 5811. Pursuant to that statutory authority, on November 29, 2021 and with an effective date of December 30, 2021, the Department of Ecology adopted current WAC 173-423-030:

> (1) This chapter adopts by reference California Code of Regulations, Title 13, sections 1900, 1956.8 (g) and (h), 1960.1, 1961, 1961.1 to 1961.3, 1962.2, 1962.3, 1963, 1963.1 to 1963.5, 1965, 1968.2, 1968.5, 1976, 1978, 2035 to 2040, 2046, 2109, 2111 to 2120, 2122 to 2133, 2135, 2141 to 2149, 2235, and Appendix A to Article 2.1 in section 2112.
>
> (2) Adoption or adoption by reference means the rule applies as if it was copied into this rule. California Code of Regulations mentioned in this rule are adopted as they exist on June 22, 2021, or the adoption date in WAC 173-400-025 (1), whichever is later.
>
> (3) Copies of the relevant sections of California Code of Regulations adopted by reference in this chapter are available on ecology's website or by contacting: Washington State Department of Ecology, Air Quality Program, 300 Desmond Drive, Lacey, WA 98503.

Between November 29 and December 30, 2021, the State of California, through its California Air Resources Board, amended various of the provisions of CCR which had earlier been adopted by Ecology. Most of those amendments became effective in spring 2022, according to California law, but nonetheless could not and did not take effect until after the US EPA granted California a waiver as required by the federal Clean Air Act.

The minutiae of the timing of notice-and-comment regulatory activities of Ecology, CARB, and US EPA are not relevant to the question presented by this lawsuit. Instead, only one fact matters: the date order of the enactment of RCW 70A.30.010, the date of adoption of WAC 173-423-030, and the date of adoption in California of the various sections of the California Code of Regulations which were in turn adopted by Ecology. **First** came RCW 70A.30.010; **second** WAC 173-423-030, and only **third** the adopted sections of CCR.[1]

While Ecology's rule adopted much of Title 13 of CCR, it did not adopt the entirety of the California rules. Instead, Ecology elected to omit Section 1956.8(a)-(f) and Section 1962.4. In doing

[1] The regulations can be found at https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=I78D423105A1E11EC8227000D3A7C4BC3. Each section also lists its dates of amendment, showing, for example, that the most recent amendment to Section 1961.2 became operative on April 1, 2022. *See* https://govt.westlaw.com/calregs/Document/I0A3DA4C07AFD11EDB6DFBD43FBB6EAB8.

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so, Ecology decided to ignore the Legislature's mandate to adopt various regulations of diesel engines (found in Section 1956.8(a)-(f))[2] as well as "Zero-Emission Vehicle Requirements for 2026 and Subsequent Model Year Passenger Cars and Light-Duty Trucks" found in Section 1962.4, which was ignored by Ecology.[3]

III. ARGUMENT.

The outcome of this case is mandated by decades of Supreme Court jurisprudence which repeatedly states the principle quoted in the second sentence of this brief: while the Legislature may adopt a policy whose enforcement requires state agencies or other bodies to supply specific factual details, the Legislature may not delegate to any other body—including the federal government—the authority to *make* the policy that governs Washington citizens. Under our state constitution, the power to *make* policy is exclusively vested in the Washington State Legislature.

A. SB5811 Was An Improper Delegation Of Legislative Authority.

1. SB 5811 Adopts As Washington Law The Future Regulation Of Another State.

On June 11, 2020, the Legislature enacted SB 5811, which directed the Department of Ecology to "adopt rules to implement the motor vehicle emission standards of the state of California, including the zero emission vehicle program . . .." RCW 70A.30.010. But at the time of SB 5811's adoption, the regulations which Ecology eventually adopted did not yet exist. Thus, the effect of SB 5811 was to set a placeholder in Washington laws and regulations, to be filled by Ecology at a later date. This is not a law which "delegate[s] administrative power to fill in the interstices of the law if the Legislature defines generally what is to be done …" *Diversified Inv. P'ship v. Dep't of Soc. & Health Servs.*, 113 Wash. 2d 19, 25 (1989). SB 5811 is not a direction to Ecology to merely "fill in the interstices." The law is a blanket instruction to Ecology to await, then copy and adopt, the complete policy decisions of another state's government. There are no

[2] *See* https://govt.westlaw.com/calregs/Document/I79383C135A1E11EC8227000D3A7C4BC3.

[3] *See* https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=I78D423105A1E11EC8227000D3A7C4BC3.

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"interstices" in RCW 70A.30.010. The statute is instead a gaping hole, to be completely filled by California regulations.

2. *Dougall* Prohibits Adoption of Another State's Future Law or Regulation

The Washington Supreme Court declared unconstitutional precisely what has occurred with SB 5811: "While the legislature may enact statutes which adopt *existing* federal rules, regulations, or statutes, legislation which attempts to adopt or acquiesce in *future* federal rules, regulations, or statutes is an unconstitutional delegation of legislative power and thus void." *Dougall*, 89 Wash. 2d at 122–23 (emphasis added).

In *Dougall*, the defendant was charged with possession of valium, and he appealed the trial court's refusal to dismiss the charges based on the way in which valium had been designated as a "controlled substance." Instead of listing what was a controlled substance, or requiring the State Board of Pharmacy to designate which drugs were considered a controlled substance, the Legislature had allowed a drug to be classified as a controlled substance based upon whether future federal regulations added or subtracted that drug from the list of controlled substances:

> If any substance is designated, rescheduled, or deleted as a controlled substance under federal law and notice thereof is given to the board, the substance shall be similarly controlled under this chapter after the expiration of thirty days from publication in the Federal Register of a final order designating a substance as a controlled substance or rescheduling or deleting a substance, unless within that thirty day period, the board objects to inclusion, rescheduling, or deletion. In that case, the board shall proceed pursuant to the rule-making procedures of chapter 34.04 RCW.

Dougall, 89 Wash. 2d at 120 (quoting then-effective RCW 69.50.201(d)). This subsection of a section of the Uniform Controlled Substances Act followed two extensive definitions sections, and was (and still is) followed by extensive statutory regulation defining four schedules of controlled substances, each identified by name; laws detailing the prerequisites and procedures for registration of manufacturers and distributors; rules for prescribing and packaging controlled substances; extensive and detailed lists of offenses and penalties for violations; and enforcement and administrative provisions.

Amidst all these detailed proscriptions and prohibitions, the challenged statute in *Dougall* allowed a substance to become a controlled substance in Washington by virtue of the federal

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government adding it to federal regulation, as long as the relevant Washington administrative agency did not reject the new designation. While the *Dougall* court also rejected the statute as violating Dougall's due process rights, because it failed to "give[] fair notice of conduct forbidden by a penal statute," *id.* at 121, the Court held that "legislation which attempts to adopt or acquiesce in *future* federal rules, regulations, or statutes is an unconstitutional delegation of legislative power and thus void." *Id.* at 122-23 (emphasis supplied). The due process violation arose because "a substance that is newly designated or rescheduled as a controlled substance by publication in the Federal Register becomes the criminal law of this state without appearing in either a state statute or the state administrative code. The only way one can determine the current status of a drug as a possible controlled substance is by reference to the Federal Register, a publication not readily available even to many lawyers." *Id.* at 121.

In *Dougall*, the statute's failure to satisfy due process also constituted a violation of the constitutional prohibition against improper delegation: unless a *Washington* agency engaged in the process of notice-and-comment rulemaking according to established procedures, in which the existing policies laid out in the Uniform Controlled Substances Act were followed, there was an improper delegation of legislative authority. And indeed, current RCW 69.50.201(d) requires rulemaking in accordance with the state APA, albeit with accelerated procedures in the case of new federal designations.

To be sure, RCW 70A.30.010 requires Ecology to follow notice and comment procedures in adopting the California rules. However, that fig leaf hardly avoids the improper delegation problem, because Ecology is statutorily **required** to adopt the CARB regulations. This defect is starkly illustrated by the fact that Ecology didn't even bother to recite the text of the legislation it was adopting, but instead merely listed sections of the California regulations it was adopting.

None of the steps taken by Ecology in promulgating the regulations address the core delegation problem in RCW 70A.30.010: The 2020 Legislature did not adopt an act as detailed as the Uniform Controlled Substances Act. A statute of less than 100 words contains only a curt direction to Ecology that it adopt a set of ***future*** regulations from California. While the identified

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chapter of CCR existed when SB 5811 was enacted, the actual regulations governing Washington today only came into existence ***after*** the statute was enacted.

RCW 70A.30.010's abandonment of the Legislature's responsibility to legislate is far worse than the Legislature's attempt (struck down in *Dougall*) to designate a controlled substance based on what might later appear in the Federal Register. The federal government had periodically added substances to its list of controlled substances. Some existed when the UCSA was adopted. In *Dougall* the relevant Washington state agency had the statutory authority to reject the listing of a new substance that the federal agency added, by taking affirmative action. Not enough, said the state Supreme Court. Relying on the federal government's determinations was an improper delegation of the Legislature's authority.

Here, the relevant agency (Ecology) lacks even the limited discretion retained by the Legislature in Dougall. It must simply adopt into Washington law any regulations drafted by CARB, as they came into existence after RCW 70A.30.010 was passed. Worse yet, until it is repealed or amended, RCW 70A.30.010 sets that process on autopilot. Ecology simply updates the hyperlinks or regulation list on its website and thereby changes the laws governing Washington. No further vote of the Legislature is ever required, because in 2020 it required that Ecology "shall amend the rules from time to time, to maintain consistency with the California motor vehicle emission standards …" RCW 70A.30.010. Unlike the agency in *Dougall*, which had the statutory authority to reject a federal designation, RCW 70A.30.010 gives Ecology no option to select or reject any part of the rules it was instructed to adopt. Future California rules become Washington law. Period, full stop.

B. Ecology's Rule Is Void For Failure To Comply With The Mandate In RCW 70A.30.010.

1. To Be Valid, Agency Rules Must Comply With Statutory Directions.

Pursuant to the state APA, a "court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious." RCW 34.05.570(2)(c). To comply with the APA, "[a]dministrative rules

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or regulations cannot amend or change legislative enactments." *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash. 2d 1, 19 (2002). Yet that is exactly what Ecology did here.

2. Ecology's Rule Clearly Failed To Follow RCW 70A.30.010's Mandate.

Through RCW 70A.30.010, the Legislature purported to "adopt[] the California motor vehicle emission standards in Title 13 of the California Code of Regulations." RCW 70A.30.010. To effect this adoption, it gave Ecology a clear and blanket mandate that it "adopt rules to implement the motor vehicle emission standards of the state of California, including the zero emission vehicle program …" *Id.* Instead, Ecology elected to pick and choose among the sections contained in Title 13 of CCR. It chose to implement some, but not all, of the zero emission vehicle program. This renders the rule invalid. "Administrative agencies have only those powers expressly granted by statute or necessarily implied from the legislature's statutory delegation of authority. When an agency rule is reasonably consistent with the statutes the rule implements, an agency acts within its statutory rule-making authority, and the rule is presumed to be valid. However, an agency cannot promulgate rules that amend or change legislative enactments. Rules that are inconsistent with the statutes they implement are beyond the agency's authority and are therefore invalid." *Washington Rest. Ass'n v. Washington State Liquor Bd.*, 200 Wash. App. 119, 126–27 (2017).

RCW 70A.30.010 instructed Ecology to "adopt rules to implement the motor vehicle emission standards of the state of California, ***including the zero emission vehicle program*** …" RCW 70A.30.010 (emphasis added). Ecology's refusal to adopt certain of the zero-emission vehicle requirements found in CCR Title 13, namely, the zero-emission vehicle requirements for 2026 and subsequent model year passenger cars and light-duty trucks found in the non-adopted Section 1962.4, means that the Rule as adopted is inconsistent with the statute because it amends or changes the legislative enactment of RCW 70A.30.010. For this reason, the Rule must be struck down as violating the APA.

IV. Conclusion.

2020's SB 5811 adopted as the future law of Washington a California government mandate in the form of a large set of regulations. However, in 2020, none of the California regulations

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existed in the form under which they were later adopted by Ecology. Indeed, even when they were eventually adopted by Ecology, those California regulations were not yet final and binding even in California![4] While the Legislature may adopt policies it finds in other states or the federal government as binding law in Washington, it can only do so by adopting, directly or by reference, policies which are in existence at the time the Legislature enacts a law. Adopting the *future* law of another state or the federal government, as it purported to do here, is an unconstitutional delegation of legislative authority. The statute must be declared unconstitutional. If the Legislature wishes to enact the policies now found in current versions of the California Code of Regulations, it may do so in a future legislative act that adopts policies which actually exist when the Legislature votes. And if that statute gives directions to the Department of Ecology, that agency must actually follow the statutory direction it is given. Here, it did not, providing an independent reason to strike down the Rule.

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[4] They are still not; as of the date of this filing, the EPA has yet to approve them.

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January 29, 2024.

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Certificate of Service

I certify under penalty of perjury under the laws of the United States of America that on January 29, 2024, I served the foregoing Plaintiffs' Motion for Summary Judgment in *Padden et al. v. Washington et al.*, No. 23-2-04021-34 (Thurston C'ty Sup. Ct.), via email pursuant to prior consent of the parties, on counsel as follows:

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