Supreme Court No. 100036-7

Court of Appeals No. 37516-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STEVENS COUNTY,

Petitioner,

v.

WESTERN RIVERS CONSERVANCY,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Western Rivers Conservancy requests that the Court deny review of the Court of Appeals decision.

II. COURT OF APPEALS DECISION

Stevens County has filed a petition for review of a unanimous decision of Division III of the Court of Appeals in *Western Rivers Conservancy v. Stevens County*, Court of Appeals No. 37516-1-III (2021) (cited herein as "slip op.").

III. COUNTERSTATEMENT OF THE ISSUES PRESENTED

The petition presents two issues:

1. RAP 13.4(b)(3) allows review if the decision involves "a significant question of law" under the U.S. Constitution. The Court of Appeals applied a recent controlling U.S. Supreme Court decision clarifying the constitutional doctrine of intergovernmental tax immunity. Does this decision adhering to clear recent precedent merit review?

2. RAP 13.4(b)(4) allows review if the case involves "an issue of substantial public interest." This case involves an issue under a compensating tax exemption that would apply only in unusual circumstances. Does this decision affecting a narrow issue that arises infrequently warrant review?

IV. COUNTERSTATEMENT OF THE CASE

The Court of Appeals decision accurately summarizes the facts in this case. Western Rivers Conservancy is a nonprofit

organization dedicated to saving the great rivers of the West through land acquisition. CP 21-22. Western Rivers sold land located in Stevens County to the United States Forest Service ("USFS"). Slip op. at 2. USFS acquired the land to make it available for public recreation as part of the Colville National Forest, and specifically to include it as part of the route of the Pacific Northwest National Scenic Trail, a new 1,200-mile trail that will run from the Continental Divide to the Pacific Ocean. Slip op. at 2; CP 27-28, 175.

For property tax purposes, the land prior to the sale was "designated forestland" under chapter 84.33 RCW and was thus subject to reduced property tax assessments. Slip. op. at 2, 4. Shortly before the sale closed, Stevens County issued a notice that it would be removed from the designation and that $194,652 in compensating tax would be due as a result of the removal. *Id*. at 2. Western Rivers paid the tax under protest and sued for a refund because the tax violated the intergovernmental tax immunity doctrine. *Id*. at 3. This is because, had Western Rivers sold the forestland to the Washington State Parks and Recreation Commission for park and recreation purposes, an exemption

under RCW 84.33.140(13)(d) would have applied. *Id.* at 3, 5. Because no sale to the federal government for the same purposes could qualify for an exemption, the statute unlawfully discriminated against those who deal with the federal government. *Id.* at 3. The superior court agreed and ordered the County to refund the tax with interest. *Id.* The Court of Appeals affirmed the superior court's order because "the entire compensating tax assessed against Western Rivers was discriminatory and therefore unlawful." *Id.* at 10.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Neither of the claimed grounds under RAP 13.4(b) justifies review here.

A. The decision below followed clear and recent controlling precedent.

This case does involve a constitutional question. That, by itself, is not sufficient to warrant review under RAP 13.4(b)(3). What is required, rather, is a "significant question of law." That is, the County must point to some significant doubt about whether the Court of Appeals followed precedent or is, on the contrary, creating some new interpretation or application of law. Here, the U.S. Supreme Court's unanimous decision in *Dawson v. Steager*,

586 U.S. ---, 139 S. Ct. 698, 702-03, 203 L. Ed. 2d 29 (2019), should put any such doubt to rest because the Court of Appeals here correctly followed its guidance, and no significant question of law arises to warrant this Court's review.

Dawson clarified the intergovernmental tax immunity doctrine. This doctrine presents a two-pronged analysis: (1) a state cannot discriminate by taxing those who deal with the federal government less favorably than those who deal with the state (2) unless significant differences justify the different treatment. Slip. op. at 5-6. As the Court of Appeals explained, *Dawson* "illustrates the significant differences test in practice." *Id.* at 6. The Court of Appeals directly applied this clearly governing precedent to the central arguments raised by Stevens County.

First, the Court of Appeals provided a detailed summary of the *Dawson* decision. Slip op. at 6-7. "With these legal principles [from *Dawson*] in mind," the court "turn[ed] to the case at hand." *Id.* at 7. In applying the first prong of the analysis, the Court of Appeals recognized that the tax exemption under RCW 84.33.140(13)(d), "[b]y its plain terms . . . favors land sales to an

entity of the state over sales to the federal government." *Id*. The Court of Appeals followed *Dawson* in rejecting the argument that no discrimination exists if the exemption is only for some state agencies. *Id*. at 8. *Dawson* made clear that it does not change the assessment of facial discrimination if the state gives preferential tax treatment to only a subset of those who deal with the state. *Dawson*, 139 S. Ct. at 703. Applying a key quote from *Dawson* to the facts in this case, the Court of Appeals explained, "the relevant question for tax immunity purposes isn't whether [federal land sales] are similarly situated to [state land sales that] don't receive a tax benefit; the relevant question is whether they are similarly situated to those [that] do." Slip op. at 9 (quoting *Dawson*, 139 S. Ct. at 705).

The Court of Appeals similarly adhered to *Dawson* in response to the County's argument that RCW 84.33.140(13)(d) does not discriminate against USFS because it is a federal agency but rather for other reasons. Petition at 9-10. Regarding the second prong, *Dawson* confirmed that the analysis must focus solely on the state's own definition rule for the favored class. *Dawson* at 705. Similarly, the Court of Appeals here focused on how the state

chose to define the favored class in RCW 84.33.140(13)(d), which simply provides an exemption for "the sale or transfer of fee title to the parks and recreation commission for park and recreation purposes." The "definitional rule set by RCW 84.33.140(13)(d)" is that "[o]nly sales for parks and recreation purposes are protected." Slip op. at 8. Since "uncontested evidence" showed the sale satisfied this definitional rule, no "significant differences" could justify the different tax treatment. *Id*. at 10.

Stevens County continues to misapprehend the import of *Dawson* and its application to this case and makes hyperbolic claims about what the Court of Appeals decision means. Petition at 10-11. The Court of Appeals' holding here is narrow: where a sale of designated forestland to the federal government occurs with "uncontested evidence" that it will be put to park and recreations purposes, no compensating tax can apply as long as the state continues to exempt similar transfers to a state agency without any opportunity for the federal government to avail itself of the same exemption. This narrow holding espouses no novel interpretation of the law; it simply applies clear precedent in an area of law that was already settled.

B. The decision below does not involve an issue of substantial public interest.

The County launches the argument section of its petition by emphasizing how much forest, publicly and privately owned, exists in Washington. Petition at 6-7. The Court of Appeals decision, however, does not involve all forests in the state. The total area of forest is six steps removed from the very limited area involved here, as illustrated in the list below:

(1) The petition focuses only on the total forest area in the state.

(2) Less than 30% of the total forest area is "designated forestland" for property tax purposes.[1]

(3) Only the land *removed* from the designation is subject to compensating tax under RCW 84.33.140 at the time of removal.

(4) Only the land whose removal occurs under specific circumstances qualifies for one of nine exemptions listed in RCW 84.33.140(13). All nine of those exemptions result

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[1] *Compare* Wash. Department of Revenue, Property Tax Statistics 2020, Designated Forest Land by County, https://dor.wa.gov/about/statistics-reports/property-tax-statistics/property-tax-statistics-2020 (reporting 6,111,161 acres of designated forestland in the state) *with* Petition at 6 (reporting that approximately half the state's total land area of 42.6 million acres is forest).

in approximately $1 million total in exempted state and local taxes annually.[2]

(5) This case involves only one of those nine exemptions—RCW 84.33.140(13)(d).

(6) More particularly, the case involves only those who sell or transfer fee title to the *federal* government for park and recreation purposes, not to the "parks and recreation commission" as set forth in the exemption language.

There is an indication that this sixth sub-portion is extremely rare. The exemption under RCW 84.33.140(13)(d) has existed for nearly 30 years.[3] There is no evidence that this issue with the exemption has arisen during that time. There is similarly no evidence that this issue will recur very often. The facts in the record show that this specific area of designated forestland presented a special situation: USFS received special "funding in order to purchase this property to add to the newly designated Pacific Northwest Scenic Trail." CP 25.

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[2] Wash. Department of Revenue, *2016 Tax Exemption Study* 17-389, https://dor.wa.gov/sites/default/files/legacy/Docs/reports/2016/Tax_Exemption_Study_2016/17_Property_Tax.pdf (*see* "taxpayer savings" table).

[3] Laws of 1995, ch. 330, § 2.

The County's claim that the Court of Appeals decision could be distorted into exempting transfers of designated forestland for other than park and recreation purposes—such as a "radioactive waste storage site"—is unfounded. Petition at 11. The Court of Appeals decision applied to designated forestland transferred to the federal government for park and recreation purposes based on "uncontested evidence showing [Western Rivers'] land sale met the definitional purpose of a tax exemption under RCW 84.33.140(13)(d)." Slip op. at 10. The decision explains that the "definitional rule set by RCW 84.33.140(13)(d)" is that "[o]nly sales for parks and recreation purposes are protected." *Id*. at 8.

Hence the total area of forest is far removed from the very limited effect of this case. To illustrate the magnitude of the disparity, it is as though in a matter about a solitary life raft, one emphasized only the massive size of the Titanic. The Court of Appeals decision is narrowly tailored and has a limited effect on a compensating tax exemption that rarely presents the issue under the intergovernmental tax immunity doctrine that arose in this case.

This is in marked contrast with the sole case interpreting RAP 13.4(b)(4) that the County cited: *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005). Petition at 12. The factors in *Watson* in fact further support denying review. *Watson* "present[ed] a prime example of an issue of substantial public interest." *Watson*, 155 Wn.2d at 577. In *Watson*, a Court of Appeals decision that a prosecuting attorney's memo to judges about general policy on drug offender sentencing was a prohibited *ex parte* communication threatened sweeping implications for numerous individuals. The Supreme Court explained its consideration of several factors to determine whether the petition involved a substantial public interest: the decision had the potential to affect every similar proceeding, invited unnecessary litigation, created confusion generally, had the potential to chill policy decisions taken by attorneys and judges, immediately affected a significant segment of the population, presented a question of a public nature that was likely to recur, and presented the need for an authoritative determination for future guidance of public officials. *Id*. at 577-78.

None of these factors are present here. The Court of Appeals decision addresses a narrow issue that arises infrequently. The decision is clear, will not create unnecessary litigation, and affects only a small segment of the population.

VI. CONCLUSION

Because the decision follows clear controlling precedent, no significant question of law is involved. And because the petition involves a narrow issue that arises infrequently and with very limited effect, it is not of sufficient public interest to warrant Supreme Court review. Western Rivers therefore asks the Court to deny the petition.

Respectfully submitted this 27th day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the date written below, I caused a true and correct copy of the foregoing to be delivered to the following parties in the manner indicated:

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DATED this 27th day of August, 2021.

Robert Bishop

FOX ROTHSCHILD LLP

August 27, 2021 - 1:36 PM

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