No. 101916-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOSHUA PENNER and TODD MCKELLIPS, individually and on behalf of a class of all persons similarly situated,

Petitioners/Plaintiffs,

v.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY and STATE OF WASHINGTON,

Respondents/Defendants.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals here affirmed the trial court's grant of summary judgment in favor of Central Puget Sound Regional Transit Authority ("Sound Transit") dismissing all claims by Joshua Penner and Todd McKellips ("Penner"). Specifically, the Court of Appeals found Penner, as Sound Transit taxpayers, were barred from pursuing exactly identical claims against Sound Transit that had previously been fully and finally adjudicated in a prior taxpayer case. Penner does not dispute that all their claims were finally and fully adjudicated in that prior litigation. Rather, they claim a right to bring an identical lawsuit, in the same taxpayer capacity as the plaintiffs in the prior suit, while seeking the same relief that would have benefitted all Sound Transit taxpayers had the prior plaintiffs prevailed. Citing longstanding authority, the Court of Appeals concluded duplicative litigation asserting public rights is barred by collateral estoppel. Penner now seeks review of that decision.

Review is not warranted because Penner cannot meet any of the criteria under RAP 13.4(b). Penner has identified no case that conflicts with the Court of Appeals decision, nor does Penner cite federal or state authority which prevents this suit from being collaterally estopped. Moreover, because previous decisions by this Court control critical issues in this case, Penner does not raise a significant legal question or issue of substantial public importance warranting review. The petition should be denied.

II. IDENTITY OF RESPONDENT

Respondent Sound Transit was a defendant in the proceedings below.

III. COUNTERSTATEMENT OF THE CASE

A. Sound Transit collects Motor Vehicle Excise Taxes to fund regional transit and pledged those tax revenues to secure project financing.

King, Pierce, and Snohomish Counties formed Sound Transit in 1993. Voters within the Sound Transit taxing district later passed ballot measures empowering Sound Transit to

collect certain taxes, including sales taxes and Motor Vehicle Excise Taxes. *See Black v. Cent. Puget Sound Reg'l Transit Auth.*, 195 Wn.2d 198, 201-203, 457 P.3d 453 (2020) (*Black I*). Sound Transit calculates its MVET by multiplying a vehicle's value against the applicable tax rate. The tax rates applicable to Sound Transit MVETs are established by legislatively enacted valuation schedules. *See id.*

In 1999, Sound Transit pledged certain tax revenues, including its MVET, as security in a sale of bonds to raise money to fund rail and bus projects. *Pierce Cnty. v. State of Wash.*, 159 Wn.2d 16, 24-25, 148 P.3d 1002 (2006) (*Pierce Cnty. II*). The bond contracts memorializing that pledge do not allow Sound Transit to reduce its MVET obligations. *Id.* at 24-25, 34-35. The contracts further direct Sound Transit to calculate its MVETs under the MVET Schedule in effect at the time – the Referendum 49 Schedule – until its bonds retire in 2028. *Id. See also* CP 68:22-69:4, CP 70:19-73:18. After the bond sale in 1999, Sound Transit continued to raise funds

through federal programs and other bond sales. CP 73:13-18. Documents concerning those financing arrangements also reference the Sound Transit MVET revenues which secure Sound Transit's 1999 bonds. *See id.* As of 2019, Sound Transit's MVET revenues secure more than $2.3 billion in bond financing. *Id.*

B. Washington's Contract Clause obligates Sound Transit to calculate Motor Vehicle Excise Taxes using the Referendum 49 Schedule.

This Court examined Sound Transit's bond contracts when Initiative 776 attempted to repeal the Referendum 49 Schedule and Sound Transit's taxing authority. *See, e.g.*, *Pierce Cnty. II*, 159 Wn.2d at 24-26. The decision struck down the Initiative as an unconstitutional impairment of Sound Transit's obligation to impose the MVET using the Referendum 49 Schedule. *See id.* at 50. Citing the Contract Clause, the holding made two overarching rulings concerning Sound Transit's bond obligations.

First, *Pierce County II* held that Sound Transit must honor its pledge to use the Referendum 49 Schedule when calculating its MVET because the Referendum 49 Schedule was the schedule in effect when Sound Transit sold its bonds in 1999, referenced in the bond documents, and thus relied upon by the bondholders. *See Pierce Cnty. II*, 159 Wn.2d at 30, 34-37, 49-52. *See also* CP 1011:9-1012:13.

Second, *Pierce County II* held that Sound Transit's ability to pay its bonds without relying upon security is irrelevant under the Contract Clause. *Pierce Cnty. II*, 159 Wn.2d at 37 & n.9. Contrary conclusions, the Court observed, would create "uncertainty as to the reliability of pledged funding sources" thus imperiling the "ability of local governments to finance important public works projects." *Id.* at 37 n.9.

Consistent with the Contract Clause Sound Transit continues to collect its MVET under the Referendum 49 Schedule as pledged to its bondholders. *Black I*, 195 Wn.2d at

204. *See also* CP 730:20-731:11. The most recent MVET statute provides that after the 1999 bonds are retired, Sound Transit's MVET will be calculated using schedules in effect on the date the voters approved post-1999 MVETs. *Id. See also* CP 730:20-731:11.

C. Post *Pierce County II* litigation challenging Sound Transit's MVET.

This is the third post *Pierce County II* taxpayer lawsuit challenging the constitutionality of Sound Transit's MVET. All three have been filed by the same lawyers.

In the first suit (*Black I*), this Court squarely decided the Article 2 Section 37 challenge raised in this litigation and reiterated its prior holding in *Pierce County II* that the Contract Clause requires Sound Transit to assess the MVET challenged here: the Referendum 49 Schedule.

After losing *Black I*, Black filed the second lawsuit (*Black II*). That second suit reasserted the same theories *Black I* rejected, but also challenged Sound Transit's use of the Referendum 49 Schedule, citing prior MVET enactments as

well as Washington Constitution Article II, Section 19. *Black II* concluded the claims in that suit failed under *Black I* and *Pierce County II*, and were untimely, nonjusticiable, or otherwise barred by res judicata and collateral estoppel. CP 664:11-667:4.

Black appealed those rulings to the Court of Appeals but later moved to dismiss their appeal after Sound Transit filed its merits brief. CP 672-674. For their part, Black and their lawyers realized the opinion and order denying reconsideration in *Black I* resolved *Black II* as collateral estoppel and res judicata. *Id.* Their dismissal papers stated other plaintiffs would soon file an identical lawsuit to avoid the pitfalls created by the mutuality of parties between the two suits. *Id.* The Court of Appeals granted the motion. *Black II* therefore became a final judgment. *See Harley H. Hoppe & Assocs., Inc. v. King Cnty.*, 162 Wn. App. 40, 51, 224 P.3d 819 (2011).

In this third suit, Black's attorneys filed the exact same claims that had been dismissed in *Black II* although naming Penner as plaintiffs. Sound Transit consequently told Penner it

intended to move for summary judgment because Penner's claims were (1) barred by res judicata/collateral estoppel; and (2) without merit, having been decided by *Pierce County II, Black I,* and *Black II.* Contrary to Penner's statement that they were wrongfully "denied access" to discovery (Petition at 2), Penner and Sound Transit stipulated to stay discovery pending resolution of Sound Transit' planned summary judgment. CP 1156-57.[1]

As in *Black II*, the court held for Sound Transit and dismissed Penner's claims on multiple grounds. The court first dismissed Penner's complaint as barred by res judicata and collateral estoppel, citing *Black II*. The court then concluded the merits of Penner's claims independently failed under *Black I*, *Black II* and *Pierce County II*, the applicable limitations period, and principles concerning justiciability, abandonment, and waiver. CP 1152:1-1153:4.

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[1] Although filed as a class action, Penner chose not to move for class certification prior to or in conjunction with Sound Transit's summary judgment motion.

Penner appealed seeking direct review from this Court which this Court denied. Penner and Sound Transit then briefed both the collateral estoppel/res judicata issues and the merits of the claims before the Court of Appeals. The Court of Appeals held Penner's claims were collaterally estoppped and thus did not reach the trial court's decision concerning the merits.

This petition for review followed.

IV. ARGUMENT

A. The Court of Appeals decision is consistent with 100 plus years of settled law.

Penner argues the Court of Appeals decision reflects a "substantial departure" from prior res judicata/collateral estoppel case law. Penner is wrong. The decision is consistent with, not contrary to, prior decisions of this Court. Taxpayers and citizens whose interests are the same as those asserted in prior cases dealing with public rights are bound by judgments reached in those prior cases. *In re Coday*, 156 Wn.2d 485, 501, 130 P.3d 809 (2006).

This Court addressed the issue squarely in the context of multiple taxpayer suits challenging the validity of an enacted law in 1912. As the Court of Appeals determined, *State ex rel. Forgues v. Superior Ct. of Lewis Cnty.*, 70 Wn. 670, 673-674, 127 P. 313 (1912) (*Forgues*), is on point and still good law.

In *Forgues*, the Court considered whether a suit to invalidate legislation was barred by an earlier judgment that resolved the same claims by a different taxpayer. The Court held it was.

> A judgment in a suit between a taxpayer and a municipality. . . concerning a matter which is of general interest to all the citizens or taxpayers thereof, [such] as the levy and collection of taxes . . . is binding, not only on the municipality and its officers, but also upon such citizens or taxpayers, in so far as [it] concerns their rights or interests as members of the general public.

Forgues, 70 Wn. at 673-674. *Forgues* has been cited in subsequent decisions, but never questioned by this Court.

B. Civil Rule 23 did not abrogate *Forgues*.

Penner does not dispute that if still good law, *Forgues* resolves this case. Penner instead argues *Forgues* was

abrogated by this Court's adoption of CR 23. Penner cites no case law supporting that notion, and none exists. CR 23 was adopted to provide **additional** means to efficiently litigate certain controversies, its adoption did not **extinguish** other forms of action that are of equal or superior efficiency compared to a class action.

As the Court of Appeals noted, and CR 23(b)(3) states, class actions are appropriate only when that method of action is "superior to other available methods for the fair and efficient administration of the controversy." CR 23(b)(3). Penner has made no such showing here, nor can they. As this Court well knows, cases challenging the facial validity of a law, including under Washington Constitution Article 2, Sections 19 and 39 (i.e., the Sections at issue in this case), are routinely brought as taxpayer declaratory judgment actions, not taxpayer class actions.[2] Indeed, declaratory judgment actions provide

[2] *See, e.g.*, *Lee v. State of Wash.*, 185 Wn.2d 608, 616, 374 P.3d 157 (2016); *Wash. Ass'n for Substance Abuse & Violence*

taxpayers (and courts) the most efficient, and therefore superior, method for deciding cases that broadly impact Washington taxpayers. Success by a declaratory judgment taxpayer asserting public (as opposed to private or individual) rights inure for the benefit of all like taxpayers. *Forgues,* 70 Wn. at 673-674. In fact, given the class certification and notice standards applicable under CR 23, taxpayer class actions are substantially more cumbersome than an action for declaratory relief.

Quinn v. State of Wash., --- Wn.2d ---, ---, 526 P.3d 1, 7 (2023) is a recent example. In that case, this Court in a taxpayer declaratory judgment action upheld the Washington capital gains tax against several facial constitutional challenges. The case was not brought as a class action. The case resolved the facial constitutionality of the tax for all Washingtonians. Under

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Prevention v. State of Wash., 174 Wn.2d 642, 653-54, 278 P.3d 632 (2012); *City of Burien v. Kiga*, 144 Wn.2d 819, 824, 31 P.3d 659 (2001); *Amalgamated Transit Union Local 587 v. State of Wash.*, 142 Wn.2d 183, 206, 11 P.3d 762 (2000); *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 23, 200 P.2d 467 (1948).

Penner's view, any taxpayer not a party to *Quinn* should be free to file their own duplicative suit in any county in the state.

C. The Court of Appeals did not expand this Court's prior decisions, it soundly applied them.

Penner argues there is no limiting principle if *Forgues* precludes this suit. But this Court already rejected such a position when discussing collateral estoppel in a taxpayer case concerning public rights. In *In re Assessment for Loc. Imp. Sewer Dist. No. 1*, 84 Wn. 565, 575-576, 147 P.199 (1915) (*Summersett*) this Court held:

> When [a prior judgment] is sought to bind a citizen or taxpayer of a municipality by the application of this doctrine, it must be remembered that he is not by such a judgment precluded from asserting any right which he holds as an individual peculiar to himself, and which he does not share with the public.

Summersett, 84 Wn. at 571. Here, Penner assert no right peculiar to themselves.

Moreover, this Court recently applied the rationale of *Forgues* to a series of cases involving recall petitions of elected officers. *In re Coday*, 156 Wn.2d at 501; *In re Recall of*

Pearsall-Stipek, 141 Wn.2d 756, 762, 10 P.3d 1034 (2000); *Matter of Recall of Fortney*, 199 Wn.2d 109, 124, 503 P.3d 556 (2022). Other than stating that election cases are different than constitutional taxpayer challenges, Penner offers no substantive rationale that distinguishes *Forges* and *Summersett* from *Coday*, *Persall-Stipek*, or *Fortney.* In each sets of cases, taxpayers and citizens share a common interest in the respective outcome of a tax challenge or recall petition. Moreover, as the Court of Appeals aptly noted, the potential for vexatious litigation effecting public officials and entities is the same in both contexts.

> Combining *Forgues*, *Summersett,* and *Coday* with their progeny, we hold that the common public interest exception for res judicata should only apply when the interests of the parties are both identical and of a clearly public nature and, importantly, there has been adequate representation.

Penner v. Cent. Puget Sound Reg'l Transit Auth., --- Wn. App. 2d. ---, ---, 525 P.3d 1010, 1018 (2023).

Penner next suggests that if a "broad" exception is to be adopted, then this Court should be the one to do so. But the exception applied here is not broad, nor is it new; it applies to taxpayer facial challenges concerning the legality of a law, the same situation as in *Forgues*. *Forgues* requires the full, fair, and final litigation of an issue. And it requires adequate representation in the initial lawsuit. Here, nothing in the record suggests the resolution in *Black II* was not full, fair, or final. Moreover, as the Court of Appeals concluded, Penner cannot credibly question the adequacy of Black's representation because the lawyers for Black and Penner are the same. *Id.*

Finally, to the extent Penner asks the Court to delineate the types of cases "involving the 'public interest'" to which *Penner* applies (Petition at 13), the issue is not properly before this Court. Here, the Court of Appeals did not modify existing precedent or create new law. The court instead considered the undisputed material facts and applied them to *Forgues* and *Summersett*. *See id.* at 1016. Whether *Forgues* and *Summersett*

should extend to other public interests (beyond those also in *Coday*) is a hypothetical this Court should reserve for another day. *Lakeside Indus., Inc. v. Wash. State Dep't of Rev.*, --- Wn.2d ---, ---, 524 P.3d 639, 645 (2023) ("Advisory opinions should be issued only on those rare occasions where the interest of the public in the resolution of an issue is overwhelming and where the issue has been adequately briefed and argued.") (cleaned up).

D. Applying collateral estoppel does not deprive Penner of their day in court.

Citing *Luisi Truck Lines, Inc. v. Washington Utilities & Transportation Commission*, 72 Wn.2d 887, 435 P.2d 654 (1967) and *Taylor v. Sturgell*, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d. 155 (2008), Penner contends to have been deprived their day in court. However neither *Taylor* nor *Luisi* support that position.

In *Luisi*, Washington's Utilities and Transportation Commission successfully prosecuted Luisi for unlawfully hauling canned goods. In a subsequent revocation action, the

Commission decided the initial proceedings foreclosed a position Luisi advanced and issued a second revocation. The *Luisi* court concluded the second revocation could not stand as the second action implicated matters the first action did not. In this way, *Luisi* merely holds that for collateral estoppel to apply, prior proceedings must resolve a claim or issue subsequent proceedings seek to reraise. *Id.* at 893-894.

Unlike in *Luisi*, all of Penner's claims were fully and fairly adjudicated in *Black II*.

Taylor is similarly inapposite. 553 U.S. at 903. *Taylor* concerns "virtual representation" in litigation involving a federal statutory public records claim. Under the pertinent statute, individuals can make records requests, but such requests are unique to the requester and therefore implicate individual interests, not public rights.

Moreover, the Court of Appeals correctly noted that the case only addressed federal not state law. Penner suggests the distinction is not relevant. But when it comes to claims asserted

based on taxpayer status, the difference between federal and state law is significant. Federal taxpayer claims are generally disfavored because of heightened standing requirements in federal court that require plaintiffs to show individual harm. *See Flast v. Cohen*, 392 U.S. 83, 103-06, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968). Under Washington law, taxpayer standing to challenge unconstitutional laws, such as here, is freely given. *See Lee*, 185 Wn.2d at 614. Plaintiffs in such state cases consequently represent all taxpayers and do not have to show individualized harm.

Further, *Taylor* explicitly preserves a state's ability to limit repetitive litigation involving "public-law claims." 553 U.S. at 903. There can be little dispute that a challenge to the constitutionality of a state statute is a public-law claim in the same way that litigation concerning a recall petition is a public-law claim.

Finally, Penner suggests *Taylor*'s public-law exception only applies to statutory claims, but *Taylor* does not say that.

Neither *Taylor* nor any of the cases cited therein address a facial challenge by a taxpayer who alleges a law violates a state constitutional provision. The rule typified by *Coday*, *Summersett*, and *Forgues* does not conflict *Taylor*.

Finally, Penner's reading of *Taylor* is also unworkable because, if accepted, it would require the overruling of *Summersett*, *Forgues*, and *Coday*, each of which is not a statutory decision.

By alleging violations under Article II, Sections 19 and 37, *Black II* challenged a tax that did not uniquely or specifically affect Penner in any way different than all other taxpayers.[3] Due process consequently did not require that Penner receive individualized notice of *Black II*, or an opportunity to be heard in that case, before binding Penner to the *Black II* judgment. *Forgues,* 70 Wn. at 673-674. Likewise,

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[3] Indeed, the complaint in this case and the amended complaint *Black II* dismissed allege both sets of plaintiffs share the same claims and interests as all Sound Transit taxpayers. *See* CP 63:5-7, 702:18-706:3.

due process does support Penner's attempt to relitigate issues that were fully resolved through that judgment. *Id.*

V. CONCLUSION

Penner argues that they and every Sound Transit taxpayer has a right to bring facial challenges concerning Sound Transit's MVET identical to those which have already been rejected. Such a rule would impose a significant burden on the state's courts and permit unwarranted harassment of a public entity. Moreover, the Court of Appeals decision here is consistent with Washington's long-standing limitation on duplicative taxpayer lawsuits where the taxpayers were adequately represented and the issues fully and fairly litigated.

Penner's Petition for Review should be denied.

I certify that the foregoing document contains 3,266 words in accordance with RAP 18.17.

Respectfully submitted this 19th day of May, 2023.

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