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Court of Appeals File No. 57134-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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

Petitioners/Plaintiffs,

vs.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY and STATE OF WASHINGTON,

Respondents/Defendants.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. IDENTITY OF PETITIONERS

Petitioners Joshua Penner and Todd McKellips ("Penner") ask this court to accept review of the Court of Appeals decision terminating review designated below.

II. COURT OF APPEALS DECISION

A copy of the published Court of Appeals decision, *Penner v. Central Puget Sound Regional Transit Authority*, — Wn.App. 2d —, 535 P.3d 1010, 2023 WL 2579066 (March 21, 2023), is reproduced in the Appendix to this Petition at pages A-1 to A-18.

III. ISSUES PRESENTED FOR REVIEW

1. May a court bar a taxpayer's claim because a similar claim was previously raised by another taxpayer, regardless of privity?
2. Does due process require that a class action be certified before a class representative's case binds absent class members?

IV. STATEMENT OF THE CASE

On June 25, 2021, a complaint was filed by Joshua Penner and Todd McKellips against Central Puget Sound Regional Transit Authority ("CPSRTA") and the State of Washington on behalf of themselves and a class of similarly situated motor vehicle owners. The complaint alleged that CPSRTA had illegally collected a motor vehicle excise tax ("MVET") based on valuation tables that had never been authorized by statute. Both CPSRTA and the State—the two government entities responsible for

collecting the MVET—claimed that they had been unable, for over a decade, to determine that they were using the wrong MVET schedule. Because the authorized schedule requires slightly higher vehicle valuations for certain newer vehicles, numerous statutes and public authorizing votes misstated the effect of CPSRTA's tax authorizations. Both CPSRTA and the State represent that they were unaware of these misstatements, and no citizen, including plaintiffs and the class they represent, could be expected to know of such misstatements when they voted to approve an increased MVET. Plaintiffs also alleged in their complaint that CPSRTA knowingly concealed its non-compliance with the correct, higher MVET schedule, tolling any statute of limitations until the truth was revealed in September 2019.

Plaintiffs sought discovery of documents relevant to their claims, but were denied access to those documents pending CPSRTA's legal challenge to the plaintiffs' right to sue. CPSRTA claimed that (1) *Black et al. v. Central Puget Sound Regional Transit Authority*, 195 Wn.2d 198, 457 P.3d 453 (2020) ("*Black I*"), was binding precedent foreclosing any of the claims challenging CPSRTA's use of its valuation tables; (2) a previous suit brought by Taylor Black et al., Pierce County No. 19-2-11073-8 ("*Black II*"), had res judicata and collateral estoppel effect, barring the suit brought by Penner and McKellips—even though Penner and McKellips had never

been a party to the suit brought in *Black II*; and (3) *Pierce County v. State*, 159 Wn.2d 16, 148 P.3d 1002 (2006) ("*Pierce County II*"), not only permitted, but actually required, CPSRTA to continue collecting an MVET based on the valuation tables in use at the time it issued bonds to which the MVET revenue had been pledged. CPSRTA insisted that any legislation resulting in a reduction of the MVET valuation base would be an unconstitutional impairment of contract, without regard for any measurement of the effect on revenue or the continued availability of contract remedies. On April 18, 2022, Superior Court Judge Susan Adams ruled in favor of CPSRTA, agreeing with each of CPSRTA's arguments.

Penner timely appealed.[1] Division 2 of the Court of Appeals published its opinion on March 21, 2023, holding that res judicata barred Penner's claim. The opinion claimed to find a "common public interest exception" to the requirements of res judicata, relying on two lines of cases: first, two cases more than a century old, applying what has been called a "common-law kind of class action." *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (cleaned up). In addition, the court held that the rule applied in *In re Election Contest Filed by Coday*, 156 Wn.2d 485, 130 P.3d 809 (2006),

[1] Penner filed a Petition for Direct Review by this Court, which then transferred the case to Division 2 of the Court of Appeals.

which permitted res judicata to be applied to non-parties who challenged election results or initiated recall petitions, also applied to other cases involving a "common public interest"—even though the rule in *Coday* was found to be necessary to avoid "subject[ing] an elected official to answer the same charges each time a different citizen is willing to put their name on a recall petition." *Matter of Recall of Fortney,* 199 Wn.2d 109, 124, 503 P.3d 556 (2022). [2]

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

By claiming to find a "common public interest exception" to the requirements for applying res judicata, Division 2 has introduced a substantial departure from traditional principles of due process previously recognized by this Court. Even if such a departure were to be recognized, its boundaries must be defined in a way that is consistent with due process.

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[2] In addition, as discussed below, Division 2 cited dicta from a variety of other cases, which purported to recognize a "common public interest exception" to the requirements for res judicata.

A. Review is warranted under RAP 13.4(b)(1) and (2) because the Court of Appeals' application of res judicata conflicts with other decisions from this Court and the Court of Appeals.

Under RAP 13.4(b)(1) and (2), review is warranted if a decision of the Court of Appeals conflicts with other decisions from this Court or the Court of Appeals. Division 2's application of res judicata in this case conflicts with other decisions of this Court and the Court of Appeals in multiple respects, any one of which would justify review.

1. The existing standard for res judicata preserves a litigant's due process right to be heard

To apply res judicata, the court must find four elements, or types of identity, between the current action and the previous action; there must be identity of (1) subject matter; (2) cause of action; (3) **persons or parties**; and (4) quality of persons. *Weaver v. City of Everett*, 194 Wn.2d 464, 450 P.3d 177 (2019). If res judicata applies, it bars not only relitigation of those issues resolved in the previous proceeding, but also bars any claim that *could have been brought* based on the same "subject matter." *Id.* Because of the effect of applying res judicata—to deny a litigant his or her day in court—previous cases have been careful to ensure that application of the doctrine is consistent with due process, as the following sections demonstrate.

a. The inclusion of parties in privity with the original party is consistent with due process

In determining whether there is identity of "persons or parties," courts have properly included those "in privity" with the original party in determining whether a subsequent claim should be barred. Not only does the recognition of the privity rule promote the goals of res judicata—to "prevent piecemeal litigation and ensure the finality of judgments"[3]—but it is also consistent with due process, since one in privity with the original litigant not only has notice of the original suit but also has the opportunity to intervene if the party subject to res judicata believes that the original suit does not fully protect the interests at stake. No such notice or opportunity to intervene is present in the case at bar.

Although the Court of Appeals states at one point that "Penner and Black . . . are in privity for res judicata purposes," 525 P.3d at 1015, no such finding was ever made by the trial court, nor argued by CPSRTA, nor does it comply with existing standards for determining who is "in privity" with a previous party. Indeed, in *Stevens County. v. Futurewise,* 146 Wn.App. 493, 192 P.3d 1 (2008)—one of the cases relied upon by the Court of Appeals—the election cases are characterized as "an exception to strict

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[3] *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117, 1123 (2005).

adherence to the privity rule of res judicata." *Id.* at 505. As the Court held in *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 764, 887 P.2d 898, 900 (1995) (cleaned up; emphasis added):

> Privity does not arise from the mere fact that persons as litigants are interested in the same question or in proving or disproving the same state of facts. Privity within the meaning of the doctrine of res judicata is privity as it exists in relation to the subject matter of the litigation, and the rule is construed strictly to mean parties claiming under the same title. It denotes mutual or successive relationship to the same right or property. [¶] **Privity is established in cases where a person is in actual control of the litigation, or substantially participates in it even though not in actual control.**

In other words, the Court of Appeals did not resolve this case according to the traditional definition of what constitutes privity with a prior litigant; instead, it used the "common public interest exception" to satisfy the "identity of persons or parties" element of res judicata.

b. <u>The additional (narrow) exception for election challenges (*Coday*) is also consistent with due process</u>

The one significant exception to the third requirement of identity of persons and parties has been applied to challenges to elected officials, where successive parties either seek to invalidate an election, or seek to recall an official once in office. *In re Election Contest Filed by Coday*, 156 Wn.2d 485, 130 P.3d 809 (2006); *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 961 P.2d 343 (1998); and *Matter of Recall of Fortney,* 199 Wn.2d 109, 503 P.3d 556 (2022). In such cases res judicata can properly be applied to bar a

subsequent election challenge if a previous challenge on the same grounds had been rejected. Given the notoriety of election challenges or recall efforts, any person contemplating such a case is on notice of the pendency of such a case, and can choose to intervene or otherwise participate in the case. Moreover, there are strong public interests both in resolving election disputes as well as in preventing the use of the judicial system to "subject an elected official to answer the same charges each time a different citizen is willing to put their name on a recall petition." *Fortney*, 199 Wn.2d at 124.

c. No previous case has expanded res judicata beyond these two exceptions

It is significant that no prior case has extended res judicata beyond the two exceptions identified above. Division 2 cited two additional cases that purportedly applied the "common public interest exception," but neither stands for the proposition relied upon by Division 2.

In *Harley H. Hoppe & Associates, Inc. v. King County*, 162 Wn.App. 40, 255 P.3d 819 (2011), Hoppe filed a Public Records Act (PRA) request for documents held by King County. The County refused and the trial court upheld the refusal because the documents were exempt. Amy Hoppe (both an employee of the company as well as the owner's daughter) filed a similar request, which the trial court also found excluded from the

PRA. Amy Hoppe appealed that decision, and the County cross-appealed, asking for a dismissal of her claim on res judicata. The bulk of the opinion addresses the merits of the PRA claim and affirms the trial court's finding that the requested documents were exempt from disclosure. Before reaching the merits, however, Division 1 considers whether res judicata should have barred Amy Hoppe's claim. Significantly, Division 1 noted that "**Amy Hoppe is in sufficient privity with Hoppe** to satisfy the concurrence of identity inquiry and thus meets the third and fourth elements of a res judicata analysis**."** *Hoppe*, 162 Wn.App. at 51-52. In other words, *Hoppe* falls within the existing rule applying res judicata to parties in privity, and cannot be said to have recognized a "common public interest exception" to the requirement that there be identity of persons or parties..

Similarly, in *Stevens County. v. Futurewise,* 146 Wn.App. 493, 192 P.3d 1 (2008), one group of citizens filed a challenge to the County's adoption of a Critical Areas Ordinance. When a later group, which had advised the first group, filed a similar challenge, the County argued that it was barred by res judicata, because the two groups shared the same "legal interests," citing the election cases. Although Division 3 recognized the "voter exception to the privity requirement," *Futurewise,* 146 Wn.App. at 505, and described it in more general terms, it ultimately rejected the County's argument. Again, nothing in the opinion adopts the "common

public interest exception" that Division 2 claims permits the application of res judicata.

2. Division 2's new "common public interest exception" would displace CR 23 as a means to grant finality while recognizing the right to be heard

There is a means by which a "common public interest" can be litigated once with finality: it is by certifying a class action pursuant to CR 23. Indeed, in this case CPSRTA was offered (in *Black I*) a means to obtain the preclusive effect they now claim to be entitled to. Plaintiffs' counsel proposed a stipulation agreeing to the certification of a class. CPSRTA refused—but now seeks to gain the benefits of class certification without taking any of its risks.

a. <u>*Forgues* was effectively abrogated by the adoption of CR 23</u>

Division 2's opinion treats a century-old (pre-CR 23) case as though it determined the merits of this case. In *State ex rel. Forgues v. Superior Court of Lewis County,* 70 Wash. 670, 127 P. 313 (1912), a taxpayer challenged the validity of a petition seeking to submit to the voters a question regarding the sale of alcohol. The challenge was dismissed by the trial court. A later challenge was filed by a different taxpayer. The court held that the decision in the first case was res judicata with respect to the second action, because

> a judgment for or against a municipal corporation, in a suit concerning a matter which is of general interest to all the citizens or taxpayers thereof, as the levy and collection of taxes, or public contracts or other obligations, or public property, its title, character or boundaries, is binding, not only on the municipality and its officers, but also upon such citizens or taxpayers, in so far as concerns their rights or interests as members of the general public, although not in respect to rights which they hold as individuals, peculiar to themselves and not shared with the public.

Forgues, 70 Wash. at 673-74.[4] *Forgues* has not been cited since the adoption of CR 23—for good reason. CR 23 provided a mechanism whereby a binding judgment could be entered on a claim brought on behalf of all taxpayers against a government entity. Significantly, however, CR 23 provides detailed protections insuring that before a judgment is entered against absent class members, they have been given adequate notice of the pendency of the case, an opportunity to participate or opt out of the class action, and a court has determined that the interests of all of the class members would be well represented before a binding judgment was entered.

If the rule stated in *Forgues* continued to be good law, a defendant who had successfully blocked the certification of a class could then enter into a settlement with the putative class representative, and if any

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[4] The Division 2 opinion also cites *In re Assessment for Loc. Imp. Sewer Dist. No. 1 of City of Chehalis*, 84 Wash. 565 (1915) (*Summersett*). *Summersett* rejected the application of res judicata to the facts of that case, but restated with approval the rule announced in *Forgues.*

subsequent suit were filed seeking the same relief, the defendant could cite the rule announced in *Forgues* and ask the court to apply res judicata to bar the claim. Doing so would stand CR 23 on its head. Yet that is precisely the disposition approved by Division 2.

Division 2's opinion rejects the comparison to class actions governed by CR 23, suggesting that

> it has not been shown that a class action is necessarily a superior form of litigation to a declaratory judgment action with application of the common public interest exception for res judicata. Indeed, the doctrine of res judicata in this context has its own elements that provide protection for future litigants, like requiring the same cause of action, same subject matter, and a final decision. And the additional requirements derived from *Coday* of identical common public interest and adequate representation provide further protection to the taxpayers who are not actual litigants.

525 P.3d at 1018. Of course there are different types of class actions, some of which require notice and the opportunity to "opt out," while others do not. But because of the due process implications of a class action, CR 23 imposes a series of *ex ante* requirements to insure that the entry of a judgment binding on all class members would be consistent with principles of notice and fairness. By contrast, the broad "common public interest exception" advanced by Division 2 relies on an uncertain, *ex post* evaluation of various factors to determine whether the previous disposition should be

binding on all similarly situated parties. Such a vague standard fails to satisfy the requirements of due process.

b. If a broad "common public interest exception" is to be permitted as a basis for res judicata, it should be adopted by this Court

Division 2's claim to find a "common public interest exception" to the long-standing rules of res judicata and its resurrection of *Forgues* from its century-old slumber create profound implications for the understanding of CR 23. No longer would CR23 be the primary means by which dispositive rulings can be issued against a party lacking any privity with prior litigants. If the first bite of the apple taken by a previous litigant becomes the only bite of the apple for every citizen with a common interest, it will be necessary for citizens to monitor litigation to determine whether their interests are adequately protected, because they could easily be determined by a future court to be bound by the outcome of that case. The *Forgues* case involved a taxpayer claim, but the *Futurewise* case (cited by Division 2 as additional authority for this "common public interest exception") did not. To what kinds of cases involving the "public interest" does the exception apply? It is a strong argument against adopting such an exception that it forces litigants to guess at what some future court might do if asked to apply it. But even if it were to become recognized, the scope of this exception should be clarified by this Court.

B. Review is warranted under RAP 13.4(b)(3) and (4) because the Court of Appeals decision presents a significant question of law under the state and federal constitutions and involves an issue of substantial public interest that should be addressed by this Court.

Under RAP 13.4(b)(3), review is warranted "[i]f a significant question of law under the Constitution of the State of Washington or of the United States is involved[.]" (Brackets added). Under RAP 13.4(b)(4), review is warranted "[i]f the petition involves an issue of substantial public interest that should be determined by this Court." (Brackets added.) Both provisions apply here. To be consistent with due process, the conditions for applying res judicata should be carefully delineated.

1. Due process requires that a litigant's right to a day in court is respected

"Neither the doctrine of res judicata nor collateral estoppel are intended to deny a litigant his day in court." *Luisi Truck Lines, Inc. v. Washington Utilities and Transp. Commission*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967). "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (internal quotations removed). At the same time, of course, once a litigant has had his or her day in court (his "one bite of the apple"), res judicata is properly applied to deny a second "bite of the apple." *Id*.

Here, however, neither Penner nor McKellips has had his day in court, and neither CPSRTA nor the Court of Appeals contends otherwise. Instead, Division 2 held that a special principle created for and applied exclusively in election cases should be extended to this case and all cases in which a "common public interest" is involved[5]—particularly cases challenging taxes. This court recently reaffirmed the narrow exception to the requirement of prior participation, namely those cases when a voter seeks relief against an elected official. In such cases the resolution of the previous challenge is binding on other voters who raise similar challenges. *Matter of Recall of Fortney*, 199 Wn.2d 109, 503 P.3d 556 (2022), citing *In re Recall of Pearsall-Stipek*, 129 Wn.2d 339, 961 P.2d 343 (1996). In the unique situation where successive challenges could be brought against the same elected official asserting the same charges, "we [the court] will not subject an elected official to answer the same charges each time a different citizen is willing to put their name on a recall petition." *Fortney*, 503 P.3d

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[5] Although this case involves a challenge to the calculation of a tax, CPSRTA argued for an even broader exception—whenever "public rights" are involved. Even though the exception adopted by the Court of Appeals (a "common public interest") does not precisely track CPSRTA's argument, it provides little guidance as to what kinds of cases are subject to res judicata because they involve a "common public interest." Because this ill-defined concept provides no notice to potential litigants that their claims may be barred by a suit brought by a different party, it fails to satisfy the constitutional requirement of due process.

at 566. However, this principle has been limited to challenges against elected officials, who have no defense against successive lawsuits asserting identical claims.

If the unique circumstance of suits against elected officials is ignored, and the same rule is extended to bar suits by any litigant who has a "unity of interest" with a previous litigant, the bedrock right to due process—the "principle of general application"— will no longer apply.

2. The U.S. Supreme Court has rejected comparable attempts to expand res judicata

In *Taylor v. Sturgell*, 553 U.S. 880 (2008), the U.S. Supreme Court rejected a similar invitation to expand the scope of res judicata. In *Taylor*, Greg Herrick filed a Freedom of Information Act (FOIA) request with the FAA for the plans and specifications of a vintage aircraft. The FAA refused to comply with the FOIA request. When Herrick sued, the district court sided with the FAA, and the 10th Circuit affirmed the dismissal. A month later, Brent Taylor, a friend and fellow antique aircraft enthusiast, filed a functionally identical FOIA request, and after it was denied, he sued the FAA. The district court held that Taylor had been "virtually represented" by Herrick, and dismissed the case on the basis of res judicata. The D.C. Circuit affirmed. The Supreme Court granted certiorari and reversed. The trial judge in *Taylor* had relied on reasoning very similar to that advanced

by CPSRTA here: that there was "identity of interests" between the party to be bound and the subject of the previous judgment. The D.C. Circuit affirmed, but thought that due process required the presence of two factors: first, that there was identity of interests, and second that there was adequate representation. In addition, the D.C. Circuit required one of three additional factors to be proven: (1) a close relationship between the present party and his putative representative; (2) substantial participation by the present party in the first case; or (3) tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment. This test was satisfied, said the D.C. Circuit, because Herrick and Taylor had an identity of interests, and Taylor had received notice of Herrick's earlier suit (a strong factor in determining whether there was adequate representation). In addition, Taylor was a "close associate" of Herrick. Thus, said the D.C. Circuit, Taylor had been "virtually represented" in the previous suit brought by Herrick, and his case was properly barred by res judicata.

The Supreme Court unanimously rejected this version of "virtual representation." Instead, due process permits nonparties to be precluded in only a limited number of cases, none of which were shown to have applied

to Taylor, and none of which apply here.[6] The five-factor test carefully crafted by the D.C. Circuit to permit preclusion of nonparties—the standard of "virtual representation"—was insufficient to satisfy the United States Supreme Court. CPSRTA argued in previous briefing that it need not satisfy the "virtual representation" standard, and the version of "virtual representation" adopted by Division 2 is significantly weaker than the one rejected by the U.S. Supreme Court. The "common public interest exception" to the requirements of res judicata plainly cannot satisfy the due process protections reaffirmed by the United States Supreme Court in *Taylor*.

Taylor also rejected the FAA's claim that without expanding the scope of res judicata, "the threat of vexatious litigation is heightened . . . because the number of plaintiffs with standing is potentially limitless." *Taylor*, 553 U.S. at 903 (internal quotation marks omitted). The Supreme Court responded that "stare decisis will allow courts swiftly to dispose of

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[6] (1) an agreement to be bound by the previous action; (2) a legal relationship between the previous party and the one sought to be bound; (3) representative suits, including those brought by class representatives, trustees, guardians and other fiduciaries; (4) the current party "assumed control" over the litigation resulting in the prior judgment; (5) the current party is simply a proxy of the party bound by the earlier judgment; or (6) a statute authorizes preclusive effect, such as a bankruptcy proceeding, probate or the like. *Taylor*, 553 U.S. at 893-95.

repetitive suits . . .." *Id*. Similarly here, Division 2's fear is unfounded that in the absence of a preclusion rule defendants will be helpless against multiple suits. Unlike *Coday* and similar cases, in which there is a strong public interest in protecting elected officials from repetitive litigation, here there is no justification for a wholesale abandonment of due process protections.

3. The Court of Appeals failed to distinguish *Taylor*

The Division 2's discussion of *Taylor* (restricted to a footnote) fails to explain how the holding in this case is consistent with binding precedent regarding due process. Division 2's opinion attempts to distinguish *Taylor* on several grounds. 525 P.3d at 1018 n.9 (A-17). First, "*Taylor* is a federal case that does not discuss or apply Washington law." *Id.* But principles of due process are not unique to Washington. Unless Washington were to adopt an understanding of due process at variance what that applied by the United States Supreme Court (assuming it would be constitutional to do so), the application of due process principles by the U.S. Supreme Court is compelling authority for the application of such principles by Washington courts.

Second, the Court of Appeals quoted a portion of the *Taylor* opinion approving of the states' "wide latitude to establish procedures [limiting] the number of judicial proceedings that may be entertained." 525 P.3d at 1018

n.9 (cleaned up). But this quotation actually undermines Division 2's reasoning. The Supreme Court explained that where there are "**special statutory schemes** that expressly limit subsequent suits," 553 U.S. at 903 n.12 (emphasis added), res judicata may apply, making the first bite of the apple the only bite of the apple. Of course, in this case there is no statutory scheme that prevents subsequent suits. Taxing statutes could easily include special procedures to provide finality to any challenges to the validity of such statutes. But looking to statutory authority for such claim preclusion, is preferable to allowing courts to apply res judicata *ad hoc,* because by doing so litigants would be put on notice of the types of claims that permit an expanded application of res judicata.

Significantly, *Taylor* the U.S. Supreme Court explicitly refused the invitation to adopt the type of limitation that Division 2 thought necessary here. After noting that states are free to adopt "procedures for limiting repetitive legislation"—a phrase relied on by Division 2 to justify its holding—the Supreme Court noted that these are *statutory* provisions. Of course, Congress remains free to adopt restrictions on repetitive suits—just as our Legislature could add such provisions to statutes such as the ones at issue here. "It hardly follows, however, that *this Court* should proscribe or confine successive FOIA suits by different requesters. Indeed, Congress' provision for FOIA suits with no statutory constraint on successive actions

counsels against judicial imposition of constraints through extraordinary application of the common law of preclusion." *Taylor,* 553 U.S. at 2177-78 (emphasis in original). In a similar way, Division 2 should have declined the invitation to expand the scope of res judicata when statutory remedies could accomplish the same goal consistent with the requirements of due process.

VI. CONCLUSION

Division 2 denied Penner and McKellips their day in court, even though they were not party to the previous proceeding, nor were they in privity with that party. Because of the profound implications of adopting the "common public interest exception" relied upon by Division 2, it should be reviewed by this Court.

I hereby certify that the foregoing brief contains 4,895 words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images, as calculated using Microsoft Word, the word processing software used to prepare this brief.

Respectfully submitted this 19th day of April 2023.

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APPENDIX

Court of Appeals Decision

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOSHUA PENNER and TODD McKELLIPS, individually and on behalf of a class of all persons similarly situated, Appellants, v. CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY and STATE OF WASHINGTON, Respondents.	No. 57134-0-II PUBLISHED OPINION

PRICE, J. — Joshua Penner[1] appeals the superior court's order granting summary judgment in favor of Central Puget Sound Regional Transit Authority and the State (collectively Sound Transit) based on the doctrine of res judicata as a result of previous litigation asserting the same claims. The superior court also decided, in the alternative, that stare decisis and the statute of limitations barred Penner's claims. On appeal, Penner argues that res judicata does not apply because he was not a party to the previous litigation. He also claims the superior court's alternative holdings were in error. We disagree and affirm.

[1] Joshua Penner and Todd McKellips are both representatives in a proposed class action and will be referred to collectively as "Penner."

FACTS

I. BACKGROUND FACTS

In 1992, the legislature authorized the most populous counties in this state to create a local agency to plan and implement a "high capacity transportation system." *Black v. Cent. Puget Sound Reg'l Transit Auth.*, 195 Wn.2d 198, 201, 457 P.3d 453 (2020) (*Black* I) (quoting ENGROSSED SUBSTITUTE H.B. 2610, at 2, 52d Leg., Reg. Sess. (Wash. 1992)). Using this authority, King, Pierce, and Snohomish Counties voted in 1993 to create Sound Transit "to address traffic congestion in the central Puget Sound region." *Pierce County v. State*, 159 Wn.2d 16, 21, 148 P.3d 1002 (2006) (*Pierce County* II); *Black* I, 195 Wn.2d at 202. In 1996, voters in those counties approved a motor vehicle excise tax (MVET) to fund bus services and rail lines through Sound Transit. *Black* I, 195 Wn.2d at 202. MVETs are calculated by a depreciation schedule based on the vehicle's value, set out by statute. *Id.*; former RCW 82.44.041 (1990). Voters authorized a 0.3 percent MVET.

At the time, the MVET utilized a depreciation schedule created by the legislature in 1990, which calculated the value of a vehicle based on its age. *Black* I, 195 Wn.2d at 216 (Gordon McCloud, J., dissenting). A depreciation schedule is a table that determines the MVET a vehicle owner must pay based on the years of service of the vehicle and the latest purchase price of a vehicle, which reduces as the vehicle ages. RCW 82.44.035. As detailed below, the legislature and voters have changed the depreciation schedule several times over the past twenty years, thus changing the MVET amount required to be paid by vehicle owners.

In 1998, voters approved Referendum 49 (1999 depreciation schedule),[2] which went into effect in 1999. The 1999 depreciation schedule repealed the then-effective 1996 depreciation schedule by reducing the taxable value of certain vehicles. *Black* I, 195 Wn.2d at 216 (Gordon McCloud, J., dissenting).

The next year, in 1999, Sound Transit issued $350 million in bonds (Sound Transit Bonds) to initially finance its projects, pledging revenues from sales tax and the MVET in place in 1996, as modified by the 1999 depreciation schedule, for payment of the bonds. *Id.* at 202. The bonds will expire in 2028. *Id.*; *see also Pierce County* II, 159 Wn.2d at 25.

Also in 1999, voters approved Initiative 695 (I-695),[3] which was intended to reduce motor vehicle tabs to $30. *Pierce County. v. State*, 150 Wn.2d 422, 447, 78 P.3d 640 (2003) (hereinafter *Pierce County* I); *Black* I, 195 Wn.2d at 216 (Gordon McCloud, J., dissenting). The initiative purported to repeal all MVETs and corresponding depreciation schedules, including the 1999 depreciation schedule. *Black* I, 195 Wn.2d at 216 (Gordon McCloud, J., dissenting). Our Supreme Court held I-695 was unconstitutional in its entirety in 2000. *Amalg. Transit Union Loc. 587 v. State*, 142 Wn.2d 183, 257, 11 P.3d 762, 27 P.3d 608 (2000).

But in 2000, before the Supreme Court's opinion was finalized, the legislature enacted portions of I-695, including repealing the statewide MVET and allowing local entities to collect the MVET under specific conditions. *Black* I, 195 Wn.2d at 216 (Gordon McCloud, J., dissenting).

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[2] In 1998, the legislature passed Engrossed House Bill (EHB) 2894, (LAWS OF 1998, ch. 321); EHB 2984, § 4 was referred to the voters as part of Referendum 49.

[3] LAWS OF 2000, ch. 1, § 3.

Two years later, in 2002, voters approved Initiative 776 (I-776), which was also intended to limit motor vehicle tabs. *Pierce County* I, 150 Wn.2d at 427. However, I-776 also purported to repeal the use of MVETs for transit funding, repeal the depreciation schedule used to calculate the MVET, and deny Sound Transit's authority to collect and levy MVETs, which were central to funding the bus and rail systems and repaying its bonds. *Black* I, 195 Wn.2d at 202.

In 2006, in *Pierce County* II, our Supreme Court declared these portions of I-776 related to Sound Transit unconstitutional, holding the portions violated article I, section 23 of the Washington Constitution through the improper impairment of contracts, specifically the contracts with the bondholders. 159 Wn.2d at 27, 51.

Also in 2006, just prior to the *Pierce County* II decision, the legislature passed SUBSTITUTE S.B. 6247, codified as RCW 82.44.035 (2006 depreciation schedule), to provide statutory guidance to all local jurisdictions with authority to use MVETs to calculate the correct values, since I-776 had purported to repeal the MVETs. FINAL B. REP. ON SUBSTITUTE S.B. 6247, at 1, 59th Leg. Reg. Sess. (Wash. 2006). This legislation enacted new depreciation values used to calculate the MVETs. *Black* I, 195 Wn.2d at 218 (Gordon McCloud, J., dissenting).

In 2010, in an attempt to "streamline and make technical amendments" to the vehicle registration statutes and in response to *Pierce County* II, the legislature passed Senate Bill 6379, which amended RCW 81.104.160 (2010 statute). LAWS OF 2010, ch. 161, § 1; *Black* I, 195 Wn.2d at 202. The previous 2006 depreciation schedule still applied to the MVET. *See* FINAL B. REP. ON S.B. 6379, 61st Leg., Reg. Sess. (Wash. 2010). However, because of the *Pierce County* II holding, the 2010 statute apparently attempted to exclude the Sound Transit Bonds from the application of the 2006 depreciation schedule. *See* former RCW 81.104.160 (2010). But instead

of referring to the 1999 depreciation schedule then being used by Sound Transit, the statute referred to the repealed 1996 schedule. *See* former RCW 81.104.160 (2010).

In 2015, the legislature again amended RCW 81.104.160 (2015 statute) and still generally imposed the 2006 depreciation schedule on MVETs but, once again, attempted a carve out for the Sound Transit Bonds. But like the 2010 statute, the 2015 statute referred to the 1996 laws, not the 1999 depreciation schedule. Former RCW 81.104.160(1) (2015).

II. BLACK LITIGATION

In 2018, a group of taxpayers, including Taylor Black (Black), filed a complaint against Sound Transit and the State, arguing the 2015 statute was unconstitutional under article II, section 37 of the Washington Constitution because it did not restate in full any depreciation schedules referenced in the statute. *Black* I, 195 Wn.2d at 203. Shortly before oral argument, the State filed a notice that Sound Transit had been applying the 1999 depreciation schedule instead of the depreciation schedule in place in 1996 that was referenced in the 2015 statute. *Id.* at 204. The *Black* I court determined Sound Transit's notice was irrelevant to the case, stating, "[B]ecause Sound Transit's actions d[id] not have any bearing on the constitutionality of the MVET statute itself, this notice d[id] not impact [their] holding." *Id.*

The court then concluded that the 2015 statute did not violate article II, section 37 of the Washington Constitution because it was a complete act and "d[id] not render [] other existing statutes erroneous . . . ." *Id.* at 214.

In 2020, after the *Black* I decision, Black filed a motion for reconsideration, arguing Sound Transit's admitted use of the 1999 depreciation schedule in face of the 2015 statute's requirement to use the 1996 depreciation schedule violated article II, section 37 of the Washington Constitution.

Black asked the court to vacate its decision in *Black* I and remand the case for consolidation with Black's second complaint, which was to be filed imminently. The court denied the motion for reconsideration.

Within days of filing his motion for reconsideration based on Sound Transit's use of the 1999 depreciation schedule, Black filed his second complaint, a proposed class action, against Sound Transit and the State (*Black* II),[4] alleging 19 causes of action, including seeking to recover tax refund payments and an injunction to prevent Sound Transit's use of the 1999 depreciation schedule, as well as challenging the constitutionality of the 2010 and 2015 statutes.

Sound Transit moved for summary judgment at the superior court, arguing Black's complaint was barred by the holdings in *Black* I and *Pierce County* II. Sound Transit also argued res judicata applied to the constitutionality claims in *Black* II since the *Black* I court's denial of Black's motion to reconsider was a final judgment. Finally, Sound Transit argued the three-year statute of limitations had run on any refund claims that were based on the 2010 and 2015 statutes.

Black responded that his claims were not barred by *Black* I and *Pierce County* II, nor did the statute of limitations apply to his claims.

The superior court in *Black* II granted Sound Transit's motion for summary judgment, agreeing with Sound Transit that the lawsuit was precluded by *Black* I and *Pierce County* II[5] and

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[4] Black alleged he had standing because he was a taxpayer of the region where Sound Transit operated and paid, at some point, the MVET.

[5] In *Black* II, the superior court specifically stated, "I am going to grant the motion for summary judgment from [Sound Transit] . . . . I do accept and agree with your argument that the lawsuit is precluded by the [*Black* I] case, as well as the case referred to as *Pierce County* II . . . ." Clerk's Papers (CP) at 664.

res judicata applied to the constitutionality claims. The superior court also ruled that the tax refund claims were barred by the statute of limitations and the reasoning of *Black* I also applied to bar those claims. The superior court further ruled that Black was not entitled to an injunction. Given its rulings, the superior court in *Black* II ruled any discovery issues were moot.

Black initially appealed the *Black* II summary judgment dismissal to this court, but then later voluntarily dismissed the appeal.

III. PROCEDURAL HISTORY

Following Black's voluntary dismissal of the *Black* II appeal, Penner,[6] with representation from the same attorneys who represented Black, filed a new proposed class action lawsuit against Sound Transit in 2021. Penner's complaint was identical to *Black* II's complaint, including the identical causes of action; only the names of the parties changed. The lawsuit alleged the same exact 19 causes of action as Black did, including seeking a return to the taxpayers of tax proceeds obtained by Sound Transit's misapplication of the MVET depreciation schedule (causes of action 1, 8, 16, and 17), challenging the constitutionality of the 2010 and 2015 statutes and the 2015 statute ballot title (causes of action 2-7, 9-15), and seeking an injunction to bar Sound Transit from applying the 1999 depreciation schedule (causes of action 18-19).

Sound Transit again moved for summary judgment. Pointing to the superior court's decision in *Black* II, Sound Transit argued Penner's complaint should be dismissed due to res judicata because Penner and Black shared a "unity of interest" as taxpayers with identical claims and *Black* II was binding precedent. CP at 734-35. Alternatively, Sound Transit argued that the

[6] Like Black, Penner alleged he has standing because he is a taxpayer and a resident of the region where Sound Transit operates and, accordingly, paid the MVET at some point.

tax refund claims were moot and nonjusticiable; res judicata, collateral estoppel, and stare decisis (from *Pierce County* II and *Black* I) barred the constitutionality claims; and the ballot title claim was untimely and nonjusticiable.

Penner responded that res judicata and collateral estoppel did not apply because Penner was not a party to the *Black* II litigation and no taxpayer "unity of interest" doctrine existed in this context. CP at 759. As for the alternative arguments, Penner responded that the subject matter and causes of action in the Penner litigation differed from the *Black* I litigation because *Black* I only challenged the constitutionality of the statute under article II, section 37 of the Washington Constitution. Penner finally argued that stare decisis from *Black* I and *Pierce County* II did not apply, nor was *Black* II binding, and he was entitled to discovery.

The superior court granted Sound Transit's motion for summary judgment, finding all claims were barred under res judicata because of the final decision in *Black* II. The court further ruled, apparently in the alternative, that the tax refund and 2015 constitutionality claims were precluded by stare decisis from *Black* I and *Pierce County* II, the tax refund claims were barred by the statute of limitations,[7] and the 2010 constitutionality claims were time barred and moot. The court also determined the ballot title claims were nonjusticiable and untimely, and that Penner forfeited his claim because he did not defend the merits.

Penner sought discretionary review of the superior court's ruling with our Supreme Court, which the court denied. Penner then appealed to this court.

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[7] The superior court expressly adopted the reasoning for the stare decisis and statute of limitation rulings from the *Black* II oral hearing.

ANALYSIS

I. STANDARD OF REVIEW

We review summary judgment rulings de novo. *M.E. v. City of Tacoma*, 15 Wn. App. 2d 21, 31, 471 P.3d 950 (2020), *review denied*, 196 Wn.2d 1035 (2021). "Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions demonstrate the absence of any genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* The reviewing court should view "the facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party." *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794, 64 P.3d 22 (2003). We may affirm the superior court's summary judgment ruling on any ground supported by the record. *Pac. Marine Ins. Co. v. Dep't of Revenue*, 181 Wn. App. 730, 737, 329 P.3d 101 (2014).

II. RES JUDICATA

Penner argues res judicata does not apply to his case because he was not in privity with any party to the *Black* II litigation as required for the doctrine to apply. Sound Transit responds that Penner and Black share a common public interest as taxpayers; therefore, they are in privity for res judicata purposes. We agree with Sound Transit.

A. LEGAL PRINCIPLES

We review an application of res judicata de novo. *Lynn v. Dep't of Lab. & Indus.*, 130 Wn. App. 829, 837, 125 P.3d 202 (2005). " 'The doctrine of res judicata rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial

proceedings.' " *Marino Prop. Co. v. Port Comm'rs*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982) (quoting *Walsh v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d 215 (1949)).

Res judicata attempts to prevent piecemeal litigation and supports the finality of judgment. *Spokane Rsch. & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005); *see also Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 395, 429 P.2d 207 (1967) ("Res judicata [is] . . . designed to . . . curtail multiplicity of actions and harassment in the courts . . . ."); *In re Recall of Fortney*, 199 Wn.2d 109, 124, 503 P.3d 556 (2022) ("[W]e will not subject an elected official to answer the same charges each time a different citizen is willing to put their name on a recall petition.").

Res judicata requires a valid and final judgment on the merits in a previous suit. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004). Summary judgment is a final judgment on the merits. *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 892, 1 P.3d 587 (2000), *review denied,* 146 Wn.2d 1016 (2002). The party asserting res judicata bears the burden of proof. *Hisle*, 151 Wn.2d at 865.

"Res judicata prevents relitigation of the same claim where a subsequent claim involves the same (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of persons for or against the claim made." *Harley H. Hoppe & Assocs. v. King County*, 162 Wn. App. 40, 51, 255 P.3d 819, *review denied*, 172 Wn.2d 1019 (2011); *see also Weaver v. City of Everett*, 194 Wn.2d 464, 480, 450 P.3d 177 (2019).

Penner focuses on the third element, arguing res judicata does not apply because he was not a party nor was he in privity to a party in the *Black* II litigation.[8]

A review of the caselaw shows that there is an exception to this third element that may be applicable in certain cases for plaintiffs that share a common public interest.

Generally, for a party to be the same persons or parties for res judicata purposes, they must have the same identities as the parties from the previous litigation. *See Neighbors v. King County*, 15 Wn. App. 2d 71, 79, 479 P.3d 724 (2020) (finding the parties in both litigations were the same because "[t]he four identities here are the same"). Although identity of the parties is typically strict under this element, " 'nominally different parties' " may be precluded from bringing subsequent claims if the parties " 'have sufficiently identical interests to satisfy the identity of parties' inquiry' because they possess 'the same legal interests as all citizens of the state.' " *In re Election Contest Filed by Coday*, 156 Wn.2d 485, 501, 130 P.3d 809 (2006) (internal quotation marks omitted) (quoting *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 261, 961 P.2d 343 (1998)), *cert. denied*, 549 U.S. 976 (2006). " 'Identity of parties is not a mere matter of form, but of substance. . . . [P]arties nominally different may be, in legal effect, the same.' " *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983) (alterations in original) (internal quotation marks omitted) (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402, 60 S. Ct. 907, 84 L. Ed. 1263 (1940)).

Historically, even if the plaintiffs were not the same persons, Washington courts have applied res judicata to cases involving common public rights if the plaintiffs shared identities as

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[8] Penner does not argue on appeal that the superior court erred in finding this case and *Black* II had the same subject matter, cause of action, or quality of persons for or against the claim made.

taxpayers. *See State ex rel. Forgues v. Superior Ct. of Lewis County*, 70 Wash. 670, 673-74, 127 P. 313 (1912). In *Forgues*, a relator filed suit against the Centralia city clerk, alleging a petition prohibiting the sale of alcoholic beverages was void because certain elector voters who signed a petition did not properly state where they lived or their post office addresses. *Id.* at 671. The court stated,

> "A judgment for or against a municipal corporation, in a suit concerning a matter which is of general interest to all the citizens or taxpayers thereof, as the levy and collection of taxes, or public contracts or other obligations, or public property, its title, character or boundaries, is binding, not only on the municipality and its officers, but also upon such citizens or taxpayers, in so far as concerns their rights or interests as members of the general public . . . . [A] judgment between certain residents or taxpayers and the municipality may be conclusive on all other citizens similarly situated, and where an action between individuals concerns public interests or rights, and the municipality is represented in the litigation by its proper officers and takes part in the prosecution or defense of the action, it is estopped by the result".

Id. at 673-74 (*quoting*, 23 CYC. *Judgments* 1269 (1906)). The court determined the issues in the relator's case were previously determined in an earlier case, both plaintiffs sued in their capacity as taxpayers, and any remedies would be common to both relators. *Id.* at 674-75. Therefore, the *Forgues* court barred the relator's claim on the basis of res judicata. *Id.*

But res judicata in this context only applies if the cause of action is common to all taxpayers and is not dependent on rights particular to the specific plaintiff. In *In re Assessment for Local Improvement Sewer Dist. No. 1 of City of Chehalis*, 84 Wash. 565, 147 P. 199 (1915) (*Summersett*), a constructor of sanitary sewers appealed a decision which set aside and cancelled special assessments levied on certain properties—levies which the constructor claimed he was due. *Id.* at 566. The appellant argued that the decision was error because a previous suit found the city was

required to pay the levies and res judicata should have compelled the same result in his case. *Id.* at 569-70. The court rejected the argument, stating:

> [A] final judgment rendered by a court of competent jurisdiction for or against a municipality, adjudicating a matter of general concern to its citizens and taxpayers, is binding alike upon the municipality and all of its citizens and taxpayers in so far as there is thereby adjudicated such matter of general concern . . . . [I]t 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.

Id. at 571.

Accordingly, the *Summersett* court decided property owners were not barred by res judicata to challenge certain assessments because they each had individual rights to have their property valued, which they did not share in common with others. *Id.* at 576 ("We conclude that the judgment of the superior court for Lewis County, which was affirmed by this court in the mandamus case requiring the city commission to proceed with the levying of assessments, was not, and could not have been, *res judicata* of the rights of *Summersett* . . . in so far as the question of benefits and apportionment thereof is concerned.").

Recent Washington courts have used similar rationale to *Forgues* to bar claims on res judicata grounds in cases involving voters, even though the parties in the second litigation were not identical to the parties in the previous litigation. *See Coday*, 156 Wn.2d at 502-03; *Pearsall-Stipek*, 136 Wn.2d at 261 (court applying res judicata to a nonparty claim in an election recall case); *Fortney*, 199 Wn.2d at 124-26 (court applying res judicata to a nonparty claim in election recall case); *Snyder v. Munro*, 106 Wn.2d 380, 721 P.2d 962 (1986) (court applying res judicata to nonparty claims because, as citizens of the state, plaintiffs had their interests properly represented in previous litigation that included major political parties and state officials).

In the case of *Coday*, our Supreme Court held that a plaintiff was barred by res judicata in an election contest claim because "her interest [was] identical to that of the [previous suit she was not a party to] and of all citizens of the state: ensuring a fair, just, and accurate election. She [was], therefore, an identical party . . . for res judicata purposes." 156 Wn.2d at 502. The *Coday* decision discussed four different plaintiffs who were challenging the election of Governor Gregoire on four different grounds. *Id.* at 488. Of the four plaintiffs, only one, Karr, was barred by res judicata because her asserted grounds were identical to previous litigation against the governor's election. *Id.* at 501-02. Notably, the *Coday* court explained it only applied res judicata against Karr's claims because the parties in the previous litigation had adequate representation and a "significant stake in the outcome of the contest and invest[ed] significant resources in pursuing all viable grounds for the contest." *Id.* at 502 n.4. In other words, res judicata applied only in "substantially identical contests." *Id.* The court specifically cautioned that res judicata should not apply if the previous litigants did not have adequate representation. *Id.*

Washington courts have applied *Coday*'s reasoning in other contexts, such as public records requests. *See Hoppe*, 162 Wn. App. at 51-53. In *Hoppe*, a company, Harley H. Hoppe & Associates, Inc., filed a public records request, which King County refused to fulfill. *Id.* at 46-47. The case ended when the superior court granted King County's summary judgment motion. *Id.* at 47. Later, Hoppe's employee, who was also the daughter of Hoppe's owner, filed an identical public records request, and was again denied. *Id.* at 48. Although Hoppe and the employee were not identical parties, the *Hoppe* court applied res judicata, stating, "[T]he same reasoning [as *Coday*] applies here in the public records act context; any member of the public has standing to bring such a public records request. We hold that . . . [Hoppe's employee] is in sufficient privity

with Hoppe to satisfy the concurrence of identity inquiry and thus meets the third and fourth elements of a res judicata analysis." *Id.* at 51-52.

But courts have been careful to limit the reach of *Coday's* holding. For example, Division Three of this court did not extend *Coday*'s reasoning to two different Eastern Washington Growth Management Hearings Board (Board) claims because the interests of the two plaintiffs were not sufficiently similar. *Stevens County. v. Futurewise*, 146 Wn. App. 493, 505, 192 P.3d 1 (2008), *review denied*, 165 Wn.2d 1038 (2009). There, a county resident filed a petition for review of Title 13 of a Stevens County ordinance. *Id.* at 500-01. Futurewise then later filed its own petition with the Board for review of Title 13. *Id.* at 501. The court found that the "various citizens and citizen groups challenged Title 13 as it affected *their particular interests*," and therefore, "[t]hese various parties, including Futurewise in the most recent petition, did not have sufficiently identical legal interests to trigger the [*Coday*] voter exception to the privity requirement." *Id.* at 505 (emphasis added).

B. APPLICATION

Penner argues that applying the *Coday* exception to cases outside of the election context is an unprecedented expansion unsupported by the case law and is inferior to class action litigation under CR 23.

As seen above, *Coday's* reasoning has already extended beyond election recall cases. But the reasoning should be only applied in limited situations. 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.

Applying this standard here, Penner's claims are properly barred by res judicata. First, the interests involved here are both public and identical. In *Black* II, Black asserted standing because he was a taxpayer of the region where Sound Transit operated and paid, at some point, the MVET. Penner alleges standing on the exact same basis. In addition, they both allege the same common public interest: to ensure the constitutionality of the statutes enacted in this state and a return of proceeds "to taxpayers." Indeed, there is nothing unique or different between Penner's interests and Black's interests, unlike the litigants in *Summersett* and *Futurewise*. Penner also asserts the exact same issues and claims as Black as a taxpayer in the Sound Transit region—in fact, Penner's complaint is substantively identical to Black's complaint, with only differences in the formatting of the document.

Second, neither party has alleged that Black had inadequate representation in the earlier *Black* II litigation. Without question, Penner cannot reasonably make such an argument because the lawyers for both parties are the same. Thus, the two aspects of *Coday's* reasoning, identical common public interest and adequate representation, are met.

Moreover, applying res judicata in this context is appropriate. For example, its application prevents "serial litigation" that is of concern in the *Coday* line of cases. Similar to election recall petitions at issue in *Coday*, unless it has the doctrine of res judicate available, Sound Transit could be forced to defend multiple cases with the exact same claims where plaintiffs' interests were adequately represented previously. This would waste not only public funds but also court resources.

Penner contends applying res judicata here would erode many of the safeguards that exist in class action litigation, relying on due process concerns discussed in the federal case, *Taylor v.*

Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008). For example, Penner argues that a class action would allow individual members to determine for themselves whether they choose to be bound by the outcome of the litigation, whereas a common public interest exception for res judicata would unfairly bind those individuals.

But class actions are only appropriate if it "is superior to other available methods for the fair and efficient adjudication of the controversy." CR 23(b)(3). And here, it has not been shown that a class action is necessarily a superior form of litigation to a declaratory judgment action with application of the common public interest exception for res judicata. Indeed, the doctrine of res judicata in this context has its own elements that provide protection for future litigants, like requiring the same cause of action, same subject matter, and a final decision. And the additional requirements derived from *Coday* of identical common public interest and adequate representation provide further protection to the taxpayers who are not actual litigants.[9]

Here, looking at the four requirements for res judicata—(1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of persons for or against the claim made—the doctrine appropriately bars Penner's claims after the final decision in *Black* II. With identical

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[9] Penner's reliance on *Taylor* for its position is unpersuasive. *Taylor* is a federal case that does not discuss or apply Washington law. Further, in a portion of its decision, the *Taylor* court rejected the application of a federal "public law" exception to privity of parties for res judicata for the Freedom of Information Act requests based, in large part, on the fact that the relief was specific to individuals and would not have inured to the benefit of the public. 553 U.S. at 902-03. But here, as previously explained, a successful challenge to the 2015 statute would likely result in relief to all persons who paid the Sound Transit MVET in Washington, not just individual refunds to Penner or Black. The *Taylor* court also explained that in claims involving the "public law" exception in federal law (conceptually similar common public interest issues discussed in *Coday*), " 'the States have wide latitude to establish procedures [limiting] the number of judicial proceedings that may be entertained.' " *Id.* at 902 (alteration in original) (quoting *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 803, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996)).

complaints between Penner and Black, the subject matter and causes of action are the same. The defendant, Sound Transit, is the same. And, consistent with the reasoning in *Coday*, because Black was adequately represented, had a significant stake in the outcome of the litigation, and invested significant resources in pursuing all viable grounds for the litigation, the common public interest taxpayer exception to the same party requirement is met. *See Coday*, 156 Wn.2d at 502 n.4. The superior court did not err by applying res judicata to bar Penner's claims.

CONCLUSION

Penner's claims are barred by res judicata from the *Black* II litigation. Accordingly, we do not reach Penner's remaining arguments. We affirm the superior court's decision granting summary judgment to Sound Transit.

PRICE, J.

We concur:

MAXA, P.J.

VELJACIC, J.

ALBRECHT LAW PLLC

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