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SUPREME COURT  
STATE OF WASHINGTON

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BY RONALD R. CARPENTER

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No. 83349-4

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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KEMPER FREEMAN, JIM HORN, STEVE STIVALA,  
KEN COLLINS, MICHAEL DUNMIRE, SARAH RINDLAUB,  
AL DEATLEY, JIM COLES, BRYAN BOEHM, and  
EASTSIDE TRANSPORTATION ASSOCIATION,  
a Washington nonprofit corporation,

Petitioners,

v.

CHRISTINE O. GREGOIRE, a state officer in her capacity  
as Governor of the State of Washington, and PAULA J. HAMMOND,  
a state officer in her capacity as Secretary of the Washington  
State Department of Transportation,

Respondents,

and

CENTRAL PUGET SOUND  
REGIONAL TRANSIT AUTHORITY,

Intervenor.

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ANSWER TO AMICI BRIEFS OF SAVE MI SOV AND  
NELSON TRUCKING COMPANY

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A. INTRODUCTION

Petitioners have received the amici briefs of SAVE MI SOV and Nelson Trucking Company (“Nelson”) and submit the following response to those amici briefs.

B. ANSWER TO AMICI BRIEFS

The SAVE MI SOV and Nelson amici briefs make clear the core issues in this case.

First, it is undisputed here that Interstate 90 from Seattle east was constructed with monies from the Motor Vehicle Fund (“MVF”), a fund mandated by the Eighteenth Amendment to Washington’s Constitution (Article II, § 40). AF 7, 9.

Second, it is undisputed by respondents Central Puget Sound Regional Transit Authority (“Sound Transit”), and the Washington State Department of Transportation (“WSDOT”), that under this Court’s decision in *State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969), light rail is not a “highway purpose” within the meaning of the Eighteenth Amendment. WSDOT br. at 33; Sound Transit br. at 31. They ignore case law from other jurisdictions, cited by petitioners, that have held rail is not a highway purpose under analogous state constitutional provisions. On its face, any expenditure of MVF monies in support of light rail transportation is *unconstitutional* as it is expenditure of money in

support of a non-highway purpose forbidden by the Eighteenth Amendment.

While *conceding* the anti-diversionary policy of the Eighteenth Amendment, both Sound Transit and the WSDOT, nevertheless, ask this Court to ignore these two points referenced above.<sup>1</sup> Instead, both Sound Transit and WSDOT offer an unprecedented analysis designed to circumvent the Eighteenth Amendment's restriction upon the use of MVF monies, claiming that WSDOT has essentially absolute discretion to lease, sell, or otherwise dispose of facilities built with MVF monies to third parties for non-highway purposes as a mere "administrative function." WSDOT br. at 30-35. WSDOT asserts that it need not comply with the statutes relating to the lease or sale of surplus transportation property, and may dispose of transportation facilities at its whim. That argument utterly subverts the anti-diversionary policy of the Eighteenth Amendment and should be rejected by this Court for the reasons set forth in the petitioners' briefing.

The amici briefs, however, make clear that even if the Court were to apply the statutes relating to the lease or sale of surplus transportation properties by WSDOT, such as RCW 47.12.063, RCW 47.12.080, RCW

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<sup>1</sup> Both Sound Transit and WSDOT raise procedural arguments as to why this Court should not issue a writ of mandamus or writ of prohibition to forbid the transfer of

47.12.120,<sup>2</sup> Sound Transit and WSDOT cannot meet the standard set forth in those statutes. *The two center lanes of Interstate 90 are not surplus.* The two center lanes of Interstate 90 have viable highway and transportation purposes, disqualifying those center lanes from being surplus property.

WSDOT and Sound Transit want this Court to ignore that Interstate 90 is a vital component of America's interstate highway system, AF 1, and a highway of statewide significance. RCW 47.05.021(3). They want the Court to ignore the 142,500 vehicles, including King County Metro and Sound Transit buses and vanpools, that use Interstate 90 and its center lanes every day. AF 3, 12. It does not pass the "straight face" test to say that the center lanes of Interstate 90 are not now needed for highway and transportation purposes. It is even more laughable to say that this need will disappear in the future, given anticipated increases in population and highway use.

The amici briefs reinforce that Interstate 90 has a present and future transportation use.

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the two center lanes of Interstate 90, built with MVF monies, to Sound Transit for light rail. The petitioners have already answered those procedural arguments in their briefing.

<sup>2</sup> Both Sound Transit and WSDOT have conceded that sale is not at issue here so that the sale statutes are inapplicable.

First, the SAVE MI SOV brief clearly indicates that under the 1976 Memorandum of Agreement, Mercer Island residents had a special entitlement to access to the two center lanes of Interstate 90 for transportation to and from the Island. The two center lanes of Interstate 90 remain a transportation necessity for Mercer Island residents. Moreover, displacement of Mercer Island traffic and HOV traffic from the two center lanes of Interstate 90 will, as indicated in the SAVE MI SOV brief at 5, only add to the congestion in the remaining lanes of Interstate 90. 65,000 daily vehicle trips now handled by Interstate 90's center lanes must be accommodated on the remaining lanes, if WSDOT's proposed transfer of the lanes to Sound Transit occurs.

Second, as Nelson forcefully indicates in its brief at 12-14, the two center lanes of Interstate 90 are critical for commercial traffic. If those lanes are transferred to Sound Transit for the non-highway purpose of light rail, the adverse impact on commercial transportation will be dramatic. Nelson reinforces the point that the loss of the center lanes will exacerbate congestion problems. When the center lanes of Interstate 90 were closed for four days in 2007-08 by storms, such closures resulted in added congestion to the remainder of Interstate 90, costing \$75 million in economic losses due to freight delays and the loss of 460 jobs. TRAC

Report at 21 (Appendix to Nelson brief). The economic impact of a permanent loss of the center lanes is potentially catastrophic.

The two center lanes of Interstate 90 are vital to linking Seattle and the rest of the central Puget Sound basin with areas east of Lake Washington, Eastern Washington, and points beyond. In the absence of those center lanes being available for vehicular traffic, including Mercer Island or HOV traffic, the remaining lanes of Interstate 90 will be further congested. The two center lanes of Interstate 90 are not "surplus." There is little wonder WSDOT and Sound Transit want to ignore the actual language of statutes pertaining to lease of transportation facilities. They cannot meet the statutory requirements.

#### C. CONCLUSION

The amici briefs make clear this Court should issue a writ in this original action. WSDOT and Sound Transit are attempting to divert MVF monies for an admittedly non-highway purpose in the guise of declaring the two center lanes of Interstate 90 to be subject to lease or other disposition by WSDOT at its whim. This effort is not sustainable under the Eighteenth Amendment.

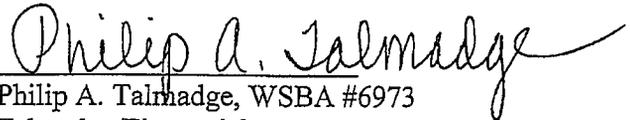
The Eighteenth Amendment was designed to prevent the diversion of transportation-generated excise tax revenues to non-highway purposes. The reason for the anti-diversionary policy of constitutional provisions

enacted in a number of states, including Washington, was to make sure that revenues generated by users of motor vehicle fuel was applied *exclusively* to highway purposes. To allow WSDOT to transfer facilities built with fuel taxes for what is an admittedly non-highway purpose defeats the anti-diversionary policy of the Eighteenth Amendment. The Court should not read the anti-diversionary policy of the Eighteenth Amendment simply to focus on the diversion of MVF dollars. That anti-diversionary policy includes not only the diversion of dollars, but the diversion of facilities built with those MVF dollars.

The State's expenditure funds under § 204(3) of the 2009 Transportation Budget and the proposed transfer of the two center lanes of Interstate 90 to Sound Transit violate Article II, § 40 of the Washington Constitution. This Court should issue a writ of mandamus or prohibition preventing Governor Gregoire or WSDOT's Secretary from expending MVF monies for the non-highway purpose of § 204(3) and from transferring any portion of Interstate 90 to Sound Transit for the purpose of its East Link light rail Project. Costs in this case, including reasonable attorney fees, should be awarded to petitioners.

DATED this 3d day of September, 2010.

Respectfully submitted,



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DECLARATION OF SERVICE

BY RONALD R. CARPENTER On said day below I emailed and deposited in the US Postal Service a true and accurate copy of: Answer to Amici Briefs of SAVE Si SOV and Nelson Trucking Company in Supreme Court Cause No. 83349-4 to the following parties:  
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 3, 2010, at Tukwila, Washington.

  
Paula Chapler  
Talmadge/Fitzpatrick

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DECLARATION

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