

No. 83349-4

IN THE SUPREME COURT OF WASHINGTON

KEMPER FREEMAN, JIM HORN,
STEVE STIVALA, KEN
COLLINS, MICHAEL DUNMIRE,
SARAH RINLAUB, AL
DEATLEY, JIM COLES, BRIAN
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

PETITIONERS' REPLY IN
SUPPORT OF PETITION
AGAINST STATE OFFICER AND
IN OPPOSITION TO
RESPONDENTS'
MEMORANDUM IN SUPPORT
OF DISMISSAL

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Petitioners respectfully submit this reply in response to
respondents Governor Christine O. Gregoire and Secretary Paula J.
Hammond's Answer to Petition Against State Officer and Memorandum
in Support of Dismissal and non-party Sound Transit's Answer to Petition

Against State Officer¹. In summary, this Court should retain the petition in this matter. First, petitioners, respondents (hereinafter "State") and Sound Transit are in agreement on all of the core facts in this matter, negating the need for remand to superior court. Judicial economy calls for the original jurisdiction of this Court. Second, this matter involves the determination of a narrow, but significant, legal question that is within unique purview of the Supreme Court: whether the Secretary of the Washington State Department of Transportation ("DOT") and/or the Governor of the State of Washington may enter into any agreement with Sound Transit to allow use of two center lanes of Interstate 90 when those lanes were built, at least in part, with funds from the Motor Vehicle Fund created by the 18th Amendment to Washington's Constitution? This Court is the proper venue to resolve questions involving the constitutionality of a statute and the expenditure of public funds. Third, this matter is ripe and justiciable. The undisputed facts show, and Sound Transit agrees, that the State is committed to providing a portion of Interstate 90 to Sound Transit for rail transit, a non-highway use. A writ of prohibition or mandamus is the correct remedy to prevent the State from taking such unconstitutional action.

¹ As set forth in petitioners' opposition to Sound Transit's motion to intervene, Sound Transit's answer is both premature and improper. However, petitioners are compelled to address Sound Transit's answer as a result of the timing of its motion to intervene, which Petitioners urge the Court to deny.

I. **THIS CASE IS WITHIN THE ORIGINAL JURISDICTION OF THE SUPREME COURT**

(1) *Both the State and Sound Transit concede that all of the issues raised are legal and do not require any further factual development.*

The Supreme Court is vested with discretion to determine whether a case presented is of such a character as to call for the exercise of its original jurisdiction to issue a writ prohibiting a state officer from completing a mandatory duty. *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (quoting *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 54, 65 P.3d 1203 (2003)); *State ex rel. O'Connell v. Meyers*, 51 Wn.2d 454, 459-60, 319 P.2d 828 (1957). There are three requirements for a claim fit for judicial determination: if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008) (citing *First United Methodist Church v. Hr'g Exam'r*, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996)). The Court will also consider the public interest and judicial economy in making a determination of whether to exercise original jurisdiction. *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 54-55, 65 P.3d 1203 (2003) (exercising original jurisdiction upon finding the petitioners were likely to renew their petition in superior court and finding that public interest required remedy); *State ex*

rel. O'Connell v. Kramer, 73 Wn.2d 85, 86, 436 P.2d 786 (1968) (parties stipulated to and agreed upon a statement of facts, thus obviating referral of the cause to superior court). In this case, there are no essential facts in dispute.

Both the State and Sound Transit concede all of the key factual allegations pled by petitioners:

1. The State *concedes* that I-90 was constructed at least in part with funds from the Motor Vehicle Fund. State's Answer at 8.
2. The State and Sound Transit *concede* that the Legislature appropriate funds from the Motor Vehicle Fund created by the 18th Amendment for valuation of the Interstate 90 center lanes. State's Answer at 8-9; Motion to Intervene at Appendix D.
3. The State and Sound Transit *concede* that the State intends to provide the two center lanes of Interstate 90 to Sound Transit for light rail use, specifically the East Link Light Rail Project, a non-highway purpose within the meaning of the 18th Amendment. State's Answer at 5-6; Sound Transit's Answer at 10.

Thus, the sole issue for resolution by the Court is whether the DOT Secretary and/or the Governor may enter into any agreement with Sound Transit to allow use of two center lanes of Interstate 90 when those lanes were built, at least in part, with funds from the Motor Vehicle Fund

created by the 18th Amendment to Washington's Constitution. The 18th Amendment specifically forbids use of motor vehicle fund monies for non-highway purposes, and this Court has clearly held that rail transportation is *not* a highway purpose under the 18th Amendment. *State ex. rel. O'Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969). There are no material factual disputes precluding resolution of this case, therefore, it is unnecessary to remand the case for fact finding by the superior court. A dismissal in this case would only result in petitioners re-filing the case in superior court. Either action would only result in futility and delay. This Court has concluded that a party need not take futile action in order to determine a case is ripe for review. *See Orion Corp. v. State*, 109 Wn.2d 621, 633, 747 P.2d 1062 (1987). Thus, in the interest of judicial economy, the Court should accept original jurisdiction of this matter.

(2) *Original jurisdiction is appropriate in cases involving the expenditure of public funds.*

Whether this Court will exercise its jurisdiction depends on the nature of the interests involved. *Department of Ecology v. State Finance Committee*, 116 Wn.2d 246, 251, 804 P.2d 1241 (1991); *Tacoma v. O'Brien*, 85 Wn.2d 266, 268, 534 P.2d 114 (1975). However, where a case concerns the constitutionality of a statute and matters relating to the expenditure of public funds, it is appropriate for the Court to exercise its

original jurisdiction. *State ex. rel Heavey v. Murphy*, 138 Wn. 2d 800, 804 (1999) (quoting *Wash. Dept. of Ecology v. State Fin. Comm.*, 116 Wn. 2d. 246, 251 (1991)). Here, the key issue for resolution by the Court concerns the constitutionality of using restricted 18th Amendment funds for a non-highway use. Thus, it is entirely appropriate for the Court to exercise its original jurisdiction in this case.

II. PETIONERS' CLAIM IS FIT FOR JUDICIAL RESOLUTION BY THIS COURT

(1) This matter is ripe and justiciable.

The remedy sought by petitioners is to prohibit the State from entering into any agreement with Sound Transit to allow use of Interstate 90 for exclusive light rail use. It is noteworthy that Sound Transit agrees with petitioners that the Court has jurisdiction over this case and that it is in the vital interest of the public that that Court retains the matter, stating:

Petitioners' facial challenge to the State's constitutional authority raises an issue of substantial public importance.... No material factual disputes preclude resolution of the facial challenge, so remand would only result in delay. This Court should, therefore, retain this matter and decide Petitioner's facial challenge under its original jurisdiction.

See Motion to Intervene at page 4. The State attempts to obfuscate the issue by alleging that the proper remedy in this case would be termed a writ of mandamus as opposed to a writ of prohibition. This argument is one of semantics and is not determinative of the justiciability of this

matter. The petition makes clear that the relief sought is the prohibition of a mandatory duty of a state officer. Either a writ of mandamus or a writ of prohibition would grant this relief. See RCW 7.16.290², *Brower v. Charles*, 82 Wn.App. 53, 914 P.2d 1202 (1996), *review denied* 130 Wn.2d 1028, 930 P.2d 1231 (1996) (writ of prohibition may be invoked to prohibit judicial, legislative, executive, or administrative acts if official or body to whom it is directed is acting in excess of its power); *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 55, 65 P.3d 1203 (2003) (“mandamus is an³ appropriate remedy where a petitioner seeks to prohibit a mandatory duty”). Regardless of whether the writ is described as one of mandamus or prohibition, the undisputed evidence shows that this case is ripe and justiciable.

Justiciability requires: (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that

² RCW 7.16.290 provides: The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

³ The State erroneously asserts that the Court in *Reed* held that that mandamus was the appropriate remedy where a petition seeks to prohibit the performance of a mandatory duty. See Memorandum in Support of Dismissal at 9. However, Court in *Reed* used the modifier “an,” not “the.” See *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 55, 65 P.3d 1203 (2003).

must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive. *First United Methodist Church of Seattle v. Hearing Exam'r*, 129 Wn.2d 238, 245, 916 P.2d 374 (1996).

The State claims that it does not have authority to sell or lease any portion of I-90 pursuant to E.S.S.B. 5352 Section 204(3) or Section 306(17) and thus no mandatory duty exists that the Court can prohibit. However, this assertion is contrary to the plain language of Section 306(17) as well the contractual duties agreed to by the State in the 2004 Amendment to the 1976 Memorandum of Agreement.

E.S.S.B. 5352 Section 204(3) provides in relevant part as follows:

The legislature is committed to the timely completion of R8A which supports the construction of sound transit's east link. Following the completion of the independent analysis of the methodologies to value the reversible lanes on Interstate 90 which may be used for high capacity transit as directed in section 204 of this act, the department **shall** complete the process of negotiations with sound transit. Such agreement **shall** be completed no later than December 1, 2009.

(emphasis added)

The State argues that this provision only applies to establishing a valuation of Interstate 90 and that that there is no mandatory duty to reach agreement. However, it is well established that the use of the term "shall" in a statute imposes a mandatory duty. *Waste Management of Seattle, Inc. v. Utilities and Transp. Com'n*, 123 Wn.2d 621, 630, 869 P.2d 1034

(1994); *Our Lady of Lourdes Hosp. v. Franklin Cy.*, 120 Wn.2d 439, 446, 842 P.2d 956 (1993). Section 306(17) states that the department “**shall** complete the process of negotiations with sound transit” and that “[s]uch agreement **shall** be completed no later than December 1, 2009. (emphasis added). Section 3069(17) does not state that the agreement is limited to establishing valuation methodologies. Clearly, the use of the term “shall” does impose a mandatory duty on DOT to reach an agreement.

Further, Sound Transit and DOT have established a “work plan” to implement E.S.S.B. Section 204(3) and Section 306(17), which representatives of DOT and Sound Transit presented to the Joint Transportation Committee (JTC) at its May 26, 2009 public meeting. *See* Exhibit 1 to Declaration of George Kargianis. This work plan confirms DOT and Sound Transit’s understanding of Section 306(17) to mean that a duty exists to reach an agreement regarding compensation for the transfer of the center roadway to Sound Transit. Pursuant to the work plan, DOT and Sound Transit established scheduled deadlines for the completion of the valuation of the Interstate 90 center roadway and completion of the agreement for any reimbursement needed for use of the center lanes. Under the plan, a valuation study is to be completed by October 1, 2009 and DOT and Sound Transit are to report their final recommendations regarding valuation to JTC, the Sound Transit Board and Governor

Gregoire by November 1, 2009. By December 1, 2009, DOT and Sound Transit are to approve the valuation study and **complete agreement for any reimbursement needed for use of the center lanes.** (emphasis added). See Exhibit 1 at page 2.

In addition, DOT and Sound Transit entered into a contract pursuant to the 2004 Amendment of the 1976 Memorandum of Agreement, which specified that all parties “[c]ommit to the earliest possible conversion of center roadway to two-way High Capacity Transit operation based on outcome of studies and funding approvals.” High Capacity Transit was defined in the Amendment as “a transit system operating in dedicated right-of-way such as light rail, monorail or a substantially equivalent system” See Exhibit C to Declaration of Don Billen in Support of Sound Transit’s Motion to Intervene. The 2004 Amendment creates a contractual duty and obligates the State to provide the center roadway to Sound Transit for light rail use. The State would be in breach of contract were it to refuse to honor its contractual obligation. Further, Governor Gregoire reiterated the State’s commitment to converting the I-90 center lanes to light rail in a July 13, 2006 letter to Sound Transit, in which she stated:

I also accept and support the state’s previous commitment, consistent with the 1976 I-90 Memorandum of Agreement as

amended in 2004, to dedicate the center roadway to light rail or light rail convertible bus rapid transit.

See Exhibit 2 to Declaration of George Kargianis.

The State's actions since these commitments have been entirely consistent with moving forward on selling or leasing portions of Interstate 90 to Sound Transit for light rail. The State is in agreement with the R8A configuration, it has participated in the DEIS, and the Legislature has made a commitment in the 2009 budget of \$300,000 from the Motor Vehicle Fund for the valuation of I-90 in anticipation of its transfer. See E.S.S.B 5352, Section 306(17) ("The legislature is committed to the timely completion of R8A which supports the construction of sound transit's east link".)

In its answer and memorandum in support of dismissal, the State identifies a number of conditions that it alleges need to be satisfied prior to the actual construction of light rail on Interstate 90. However, contrary to the State's arguments, the "validity" of any sale or lease of Interstate 90 to Sound Transit for its East Link Light Rail Project does not "depend on the terms, facts, and circumstances" of the transaction. The State seeks to reframe the issue before the Court by claiming that the sale or lease of Interstate 90 falls under the surplusage statutes relating to state owned property. However, the sole issue for resolution by the Court is whether

the DOT Secretary and/or the Governor may enter into any agreement with Sound Transit to allow use of two center lanes of Interstate 90 for a non-highway purpose when those lanes were built, at least in part, with funds from the Motor Vehicle Fund created by the 18th Amendment to Washington's Constitution. The "terms, facts and circumstances" of such a transaction pursuant to the surplusing statutes are not implicated and are irrelevant to this issue.

In addition, it is in the public interest for the Court to accept the Petition. As set forth in the State and Sound Transit's responsive briefings, extensive public resources, including tax payer funds, have been and are continuing to be committed to development of the East Link project. The State's commitment to the East Link Light Rail Project is far from speculative. A delay in a determination of the issues raised in the petition would only result in further expenditures that may well be wasted but impossible to recoup. Further, RCW 47.20.653 expresses a public policy that I-90-related litigation requires consideration of the petition by the Court. It provides in relevant part:

Interstate 90 corridor — Court proceedings, priority
State court proceedings instituted to challenge the validity of any steps taken in pursuance of the construction of the segment of the interstate system between south Bellevue and state route No. 5 in Seattle, or the construction of substitute public mass transit projects in lieu thereof, shall take precedence over all other causes

not involving the public interest in all courts of this state to the end construction of such facilities may be expedited to the fullest.

Petitioners also seek to prohibit the State from continuing to expend 18th Amendment restricted funds pursuant to E.S.S.B. 5352, Section 204(3), which appropriated such funds to establish a process to value the I-90 center lanes in order to determine what compensation must be reimbursed to the State for the conversion to light rail. The valuation process has already been undertaken by DOT and Sound Transit, including hiring consultants to produce the independent analysis of the methodologies to value the reversible lanes on Interstate 90 and currently continues underway. Such an appropriation is a clear violation of the 18th Amendment and a similar appropriation was ruled unconstitutional by this Court. See *State ex. rel. O'Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969) (a \$250,000 appropriation from the Fund to Metro Transit for planning, engineering, financial and feasibility studies incident to the preparation of a comprehensive public transportation plan was unconstitutional under the 18th Amendment). The State should be restrained from taking any further action pursuant to E.S.S.B. 5352, Section 204(3), including the further unconstitutional spending of 18th Amendment restricted highway funds to finance a valuation study in order

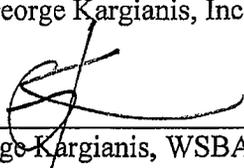
to determine the amount of compensation required to be paid by Sound Transit for exclusive non-highway rail use.

III. CONCLUSION

This Court should retain the petition in this matter. There are no factual matters in dispute and judicial economy calls for the original jurisdiction of this Court. This Court is the proper venue to resolve questions involving the constitutionality of a statute and the expenditure of public funds. The only legal issue for resolution by the Court is whether the DOT Secretary and/or the Governor may enter into any agreement with Sound Transit to allow use of two center lanes of Interstate 90 when those lanes were built, at least in part, with funds from the Motor Vehicle Fund created by the 18th Amendment to Washington's Constitution. This matter is ripe and justiciable. The undisputed facts show, and Sound Transit agrees, that the State is committed to providing a portion of Interstate 90 to Sound Transit for rail transit, a non-highway use. A writ of prohibition or mandamus is the correct remedy to prevent the State from taking such unconstitutional action.

DATED this 28th day of August, 2009.

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