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No. 86602-2

SUPREME COURT
OF THE STATE OR WASHINGTON CLERK

WASHINGTON OFF HIGHWAY VEHICLE ALLIANCE, NMA
TRAIL DIVISION, DAVID S. BOWERS, KATHLEEN J. HARRISON,
JON O'BRIEN, and KURT J. KOOTNEKOFF,

Petitioners,

v.

STATE OF WASHINGTON, JAMES L. MCINTIRE, in his
capacity as Treasurer thereof, STATE OF WASHINGTON STATE
PARKS AND RECREATION COMMISSION, and REX DERR, in his
capacity as Director thereof,

Respondents.

REPLY IN SUPPORT OF MOTION FOR DISCRETIONARY
REVIEW

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Constitution, Statutes, and Rules

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I. INTRODUCTION

The State urges this Court to deny review on the ground that this recurring dispute over the plain meaning of Article II, § 40 of the Washington State Constitution is both “moot” and “political”. As set forth below, the case should not be regarded as moot because of its recurring nature and public importance. As to the claim that it is “political,” the Legislature’s attempts to evade constitutional constraints necessarily arise out of political decisions, but it remains the solemn duty of this Court to interpret the Constitution.

II. MOOTNESS DOCTRINE SHOULD NOT STAND IN THE WAY OF DISCRETIONARY REVIEW

The State argues that because the particular appropriation whereby the Legislature unlawfully appropriated motor vehicle fuel excise tax proceeds has now expired, review should be denied. But this Court has long recognized that a case should not be denied review on the ground of mootness where “matters of continuing and substantial public interest are involved”. *Sorenson v. Bellingham*, 80 Wn.2d 547, 548 (1972). Several factors are to be considered in considering whether a case meets this standing, and each and every one of them compels the conclusion that mootness should not be found here:

“Three factors in particular are determinative: (1) whether the issue is of a public or private nature; (2) whether an authoritative

determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur'. [4] A fourth factor may also play a role: the 'level of genuine adverseness and the quality of advocacy of the issues'. [5] Lastly, the court may consider 'the likelihood that the issue will escape review because the facts of the controversy are short-lived'."

Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781 (quoting *In re Marriage of Homer*, 151 Wn.2d 884, 892 (2004)).

1. The issues involved here are of a wholly public nature, making this first factor supportive of exercising review jurisdiction. Although no private rights as between individual parties are involved, the State nonetheless disparages the interest of movants by claiming that they seek to restore use of the funds for recreational trails. (Response to Motion at 9.) Their public policy goals do not make the dispute "private." Nor is the State correct to suggest that the People's general "non-diversionary interest is not implicated by this case" (*id.*), for as the dissenting Justice correctly noted, the majority's legal interpretation of Article II, § 40 "essentially authorize[s] the legislature to enact a NOVA excess fund balance transfer for nearly any purpose . . ." (A20).¹

¹ As the dissenting justice went on to explain, all that is required is that the Legislature "makes a finding that nonhighway users will benefit, regardless of how weak that link is". (A20.)

Nor is it significant that no party other than Petitioners has challenged the legislative action, for the rights involved are public rights whether or not other members of the public have stepped forward to invest the large sums required to vindicate them. Petitioner Washington Off Highway Vehicle Alliance is an extremely broad coalition of interests that speaks for a large segment of the public.

2. An authoritative determination is desirable to provide guidance to future legislatures, because Washington's citizens continue to believe that the plain language of the People's initiative that became Article II, § 40 flatly prohibits precisely the conduct challenged here: diverting motor vehicle fuel excise tax revenues to non-highway uses. Unless and until this Court provides an authoritative determination, the issue will continue to be litigated in the courts below. The cogent dissent in this case provides an additional reason for an authoritative determination, for lower court judges are divided on the questions presented.

The State complains that parties interested in the issue did not accept the first court of appeals decision as authoritative (Response to Motion at 9), but that is precisely why this Court's authoritative guidance is required. It is obvious that "a ruling by this Court *would* reduce legal uncertainty". (*Id.*; emphasis in original.)

3. The issue is almost certain to recur, as Washington State government faces chronic revenue shortfalls, and the Legislature has repeatedly raided the NOVA fund. As set forth in *Northwest Motorcycle Ass'n v. Interagency Comm'n for Outdoor Recreation*, 127 Wn. App. 408, 411 & n.4 (2005), *rev. denied*, 156 Wn.2d 1008 (2006), the statute was the subject of budgetary amendments in 2002, 2003, and 2004. Thereafter there were subsequent budgetary amendments in 2007 and 2009, as discussed in the appellate briefing.

4. These budget bills have an operative duration of two years or less. Accordingly, it is certain that “the issue will escape review because the facts of the controversy are short-lived”. While “budget appropriations are inherently unique and fact specific” to some extent (Response to Motion at 10), the common thread uniting them is the same statutory language of purporting to appropriate an “excess fund balance” to uses beyond those provided in the statutory grant scheme tied to the fuel use study. Any future challenge to future appropriations will raise the same fundamental question of what the term “refund” means in Article II, § 40.

5. As to the “level of genuine adverseness and the quality of advocacy of the issues,” there is no sense in which this is a collusive suit or the issues have not been adequately briefed. The question is squarely

presented for this Court on a clear record.² The State's only argument relating to this factor is the repeated suggestion that movants and their predecessors had a "significant logical flaw" in their position (Response at 5) because they did not take the position that the entire NOVA program was unconstitutional. It is well-established that courts may hold portions of statutes unconstitutional without striking down the entire statute, *e.g.*, *In re Hendrickson*, 12 Wn.2d 600, 609 (1942), and, in any event, no defect in briefing or the record prevents this Court from considering whether any departure from individual cash refunds is contrary to Article II, § 40.

In sum, each and every factor relevant to whether or not this Court should exercise jurisdiction is strongly in favor of its exercise here. The Legislature will continue to violate Article II, § 40 by characterizing its misappropriation of NOVA funds as "refunds" unless and until this Court makes it clear that "refunds as authorized by law" does not mean general public spending with some asserted benefit to members of the public that include motor vehicle fuel excise taxpayers.

² Although the State now insinuates that the "particular agency action challenged has not been entirely clear" (Response to Motion at 6 n.19), the State agrees that the focus of the case is upon the constitutionality of the legislative appropriation, with the appropriation taking the form of specific agency action when the appropriated funds were allotted for expenditure. There is nothing unclear about the constitutional challenge to the Legislative action.

III. REVIEW IS WARRANTED UNDER RAP 13.4

A. Deference and the Standard of Review Cannot Sustain the Decision Below.

While the State emphasizes the need to be “especially respectful of the Legislature’s constitutional prerogative” in the areas of taxation and spending, that principle has no application where, as here, the Legislature has acted contrary to the plain language of a specific Constitutional limitation. The State insinuates that the question of whether gasoline excise tax revenues are being spent in compliance with the Constitutional command is a “quintessentially political dispute” (Response at 1), but this Court has repeatedly emphasized that “[w]here, as here, the issues involve the constitutionality of a statute and matters relating to the expenditure of public funds, it is appropriate for us to exercise our original jurisdiction”. *Dep’t of Ecology v. State Fin. Comm.*, 116 Wn.2d 246, 251 (1991).

And, of course, this Court has repeatedly set aside legislation contrary to Article II, § 40 under the “reasonable doubt standard” with no hint that the fundamental legal interpretation of that provision is a “political question.” *E.g., State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 804 (1999) (reiterating appropriateness of exercising jurisdiction in cases involving the constitutionality of a statute and the expenditure of public funds).

B. The Conflict with Prior Precedent Supports Review.

The State argues that prior cases of this Court interpreting Article II, § 40 have not involved the “refunds authorized by law” proviso. (Response at 14.) But the Court has been diligent in enforcing *both* the fundamental non-diversionary purpose of the enacting clause *and* the specific proviso under review. The majority’s failure to recognize the subversion of the non-diversionary enactment clause puts the decision below at squarely odds with this Court’s prior precedent.

Nor did the majority opinion follow this Court’s precedent forbidding the Legislature any “power or authority to define, by legislative enactment, the meaning and scope of a constitutional provision”. *Washington State Highway Comm’n v. Pacific Northwest Bell Tel. Co.*, 59 Wn.2d 216, 222 (1961); *see also Automobile Club of Washington v. City of Seattle*, 55 Wn.2d 161, 167 (1959) (“we are here confronted with a constitutional limitation adopted by the people, which is to be understood as their words are used in their ordinary meaning and not in any technical sense”). The majority opinion accepted the Legislature’s attempt to define “refund” to mean collecting taxes and spending them for purposes alleged to benefit the taxpayers—in common with all other citizens of Washington (and even those who got direct cash refunds).

C. An Issue of Substantial Public Interest Is Involved.

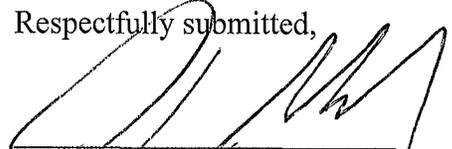
The State insinuates that because the NOVA fund represents a relatively small percentage of the total motor vehicle excise taxes paid, the issue cannot be seen as “substantial”. First, irrespective of the financial magnitude of the Constitutional error, any Legislative transgression of metes and bounds on legislative action established by the People raises a substantial issue. While the legislators may, as the State points out, also be sworn to uphold the Constitution (Response at 11 n.25), the People rely upon this Court, not their legislators, to say what the Constitution means. To paraphrase this Court’s remarks in *Washington Legislature v. Lowry*, 131 Wn.2d 309, 317 (1997), “courts, legislators, and Governors have had significant difficulties defining [‘highway purposes’ and ‘refunds authorized by law’ such that it is appropriate] . . . in the Court’s constitutional rule as interpreter of the Washington Constitution, to set forth operating guidelines”.

IV. CONCLUSION

For the foregoing reasons, this Court should accept review, reverse the decision of the Court of Appeals, and remand the case for further proceedings consistent with its ruling.

Dated: November 30, 2011.

Respectfully submitted,



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Attorney for Petitioners

CERTIFICATE OF SERVICE

I certify that on November 30, 2011, I caused to be served a copy of Petitioners' REPLY IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW in the above-captioned matter upon the parties herein by first class mail:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated November 30, 2011.



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