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NO. 98320-8

SUPREME COURT OF THE STATE OF WASHINGTON

GARFIELD COUNTY TRANSPORTATION AUTHORITY; et al.,
Appellants,
WASHINGTON ADAPT; TRANSIT RIDERS UNION; and
CLIMATE SOLUTIONS,
Appellants/Intervenor-Plaintiffs,
v.
STATE OF WASHINGTON,
Respondent/Cross-Appellant,
CLINT DIDIER; PERMANENT OFFENSE; TIMOTHY D. EYMAN;
MICHAEL FAGAN; JACK FAGAN; and PIERCE COUNTY,
Respondents/Intervenor-Defendants.

**STATE OF WASHINGTON'S AND PIERCE COUNTY'S JOINT
REPLY ON CROSS-APPEAL**

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I. INTRODUCTION

The trial court erred in concluding that sections 8 and 9 of I-976 violate article I, section 12 of the Washington Constitution. The State and Pierce County identified multiple independent reasons for reversing the trial court on that issue: Appellants' facial challenge is speculative and premature; they have not met either prong of the two-step inquiry this Court applies to determine whether a law violates the privileges or immunities clause; and they lack standing to bring an article I, section 12 challenge. State's Br. at 45-52; Pierce Cty's Br. at 1 (adopting State's arguments on issue). Any one of these four reasons is enough to reverse the trial court on this issue, and Appellants have not overcome any of them.

II. ARGUMENT

A. Sections 8 and 9 of Initiative 976 Do Not Violate Article I, Section 12 of the Washington Constitution

In its Order on Cross-Motions for Summary Judgment, the trial court denied Appellants' article I, section 12 challenge. CP 2229. On reconsideration, however, the trial court granted their motion for summary judgment on that issue, ruled that sections 8 and 9 violate article I, section 12, severed those sections from I-976, and concluded that the preliminary injunction should be lifted as to the rest of I-976 (except as to one issue involving the City of Burien). CP 2371-2372.

Review of the trial court's summary judgment ruling is de novo. *LaCoursiere v. Camwest Dev., Inc.*, 181 Wn.2d 734, 740, 339 P.3d 963 (2014). Since Appellants are the parties alleging unconstitutionality, they continue to bear the "heavy burden" of demonstrating unconstitutionality beyond a reasonable doubt. *Pierce County v. State*, 150 Wn.2d 422, 430, 78 P.3d 640 (2003) (*Pierce County I*) (quoting *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000)).

1. Appellants' facial challenge to Sections 8 and 9 is speculative and premature

Appellants are raising a facial challenge that is both speculative and premature. State's Br. at 46-47. They cite trial declarations regarding Kelley Blue Book's business practices that may be relevant should sections 8 and 9 take effect, Apps.' Reply at 42, but that information does not control how the State would implement sections 8 and 9 and it does not predetermine the outcome of any negotiation that might occur. If the State were to implement sections 8 and 9 in a way that violates article I, section 12, there would be an opportunity for an as-applied challenge at that time, based on specific facts. At this time, however, Appellants have not shown that "there exists *no set of circumstances* in which [sections 8 and 9] can constitutionally be applied." *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000).

Appellants' success in delaying the implementation of I-976 after it was approved by voters last November does not convert their speculative and premature facial challenge into an applied challenge. I-976 still has not been implemented. No contracts have been proposed or entered into under Section 8.

2. Appellants have not demonstrated that Sections 8 and 9 implicate a privilege or immunity

This Court applies a two-step inquiry to determine whether a law violates the privileges or immunities clause: (1) whether the law in question involves a privilege or immunity; and, if so, (2) whether the legislative body had a "reasonable ground" for granting the privilege or immunity. *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 776, 317 P.3d 1009 (2014). Appellants have not met either prong.

Addressing the first prong, they repeat their argument that the "avoidance of corporate favoritism" is a privilege or immunity, Apps.' Reply at 42-49, but they still have found no decision of this Court or any other so holding. As explained in State's Br. at 47-50, this Court has never held that the "avoidance of corporate favoritism" is one of the "fundamental rights which belong to the citizens of [Washington] by reason of such citizenship." *Grant County Fire Prot. Dist. 5 v. City of Moses Lake*, 150

Wn.2d 791, 812-13, 83 P.3d 419 (2004) (*Grant County II*) (citing *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)).

Appellants cite *Dennis v. Moses*, 18 Wash. 537, 52 P. 333 (1898), which invalidated portions of an 1897 statute enacted to protect a mortgagor during foreclosure, in part because they did not also apply to “other special liens, such as mechanics’ liens, or upon debts secured by a deposit of collaterals.” *Id.* at 570. The Court majority did not identify any privilege or immunity for purposes of article I, section 12—indeed, it did not discuss article I, section 12 at all, holding instead that mortgagors were selectively deprived of a liberty interest because the statute, without justification, limited their right to contract with reference to their property.

Lacking supporting case law, Appellants attempt to construct an argument from history.¹ They correctly note that article I, section 12 was

¹ In an interesting detour, Appellants cite *Bloomer v. Todd*, 3 Wash. Terr. 599, 19 P. 135 (1888), for the proposition that “Washingtonians had eagerly awaited their chance to determine the scope of a state privileges and immunities provision.” Apps.’ Reply at 48-49. That is a creative reading of that decision, which addressed whether women had the right to vote in the Washington Territory. The Court reasoned first that “[t]he privilege of voting is not a natural right, but a privilege conferred by law,” *id.* at 618, that the right to vote had not been conferred on women in the organic act of the Territory, and that the organic act was not in conflict with the federal Constitution. *Id.* at 618-21. It was in this context of that issue—whether women should be allowed to vote—that the Court stated the language Appellants now misconstrue:

In 1852, when this act was passed, the word “citizen” was used as a qualification for voting and holding office, and, in our judgment, the word then meant and still signifies male citizenship, and must be so construed. That the rule contended for might be better, we are not called upon to determine. The congress can confer the desired power upon our legislature, and we cherish the hope that in the near future our own

meant to address “the sort of favoritism that ran rampant during the territorial period,” *Ockletree*, 179 Wn.2d at 775 (citing Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 26–27 (G. Alan Tarr ed., 2002)), but they fail to address the Court’s explicit recognition that “‘not every statute authorizing a particular class to do or obtain something involves a “privilege” subject to article I, section 12.’” *Id.* at 778 (quoting *Grant County II*, 150 Wn.2d at 812). The Court explained that to recognize a privilege “anytime a statute grants a right to some but not others” would call on the Court to “second-guess the distinctions drawn by the legislature for policy reasons nearly every time it enacts a statute.” *Id.* at 779 (giving examples). “Rather, . . . the term ‘privileges and immunities’ refers ‘alone to those fundamental rights which belong to the citizens of [Washington] by reason of such citizenship.’” *Id.* at 778 (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)).

The plaintiff in *Ockletree* argued that “the right to work free from discrimination” is a privilege of citizenship, citing a dictionary for the meaning of the term “privilege.” *Id.* at 777. He asked the Court to “embrace a broader meaning of ‘privilege or immunity’ for purposes of article I,

citizens will have an opportunity to determine this question for themselves in the formation of a constitution for the state of Washington.

Id. at 623

section 12 to mean any exemption in derogation of a common right. *Id.* at 778. The Court rejected both arguments, adhering to the “fundamental rights” formulation articulated in *Vance* and *Grant County II*, *id.*, and explaining that even “important rights” are not necessarily “fundamental rights” under article I, section 12. *Id.* at 780-81.

Appellants seize on the reference in *Ockletree* to legislative classifications that “may be said . . . to have been had in mind by the framers” of the Washington Constitution—language *Ockletree* borrowed from *Vance*. *Id.* at 778 (quoting *Vance*, 29 Wash. at 458-59). See Apps.’ Reply at 43-44, 48. But *Ockletree* also quoted *Vance* for the holding that

[a] statute can be declared unconstitutional only where specific restrictions upon the power of the legislature can be pointed out, and the case shown to come within them, *and not upon any general theory that the statute conflicts with a spirit supposed to pervade the constitution, but not expressed in words.*

Id. (quoting *Vance*, 29 Wash. at 459) (emphasis added). “Avoidance of corporate favoritism” may have been in the framers’ minds, but Appellants have not shown that it is a fundamental right that belongs to the citizens of Washington by reason of such citizenship. They have not identified a single case so holding.²

² Appellants cite a law review article purporting to show how this Court “repeatedly struck down laws that played favorites with” the right “to carry on business.” See Michael Bindas et. al., *The Washington Supreme Court and the State Constitution: A 2010 Assessment*, 46 Gonz. L. Rev. 1, 25 (2011) (cited in Apps.’ Reply at 48). In fact, the

Moreover, in *American Legion Post #149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 192 P.3d 306 (2008), the Court highlighted the importance of correctly identifying the alleged right at issue. In that case, plaintiff claimed that a law banning smoking in a public place or place of employment deprived him of his fundamental right to carry on business. *Id.* at 607. The Court rejected that contention:

[T]he Act does not prevent any entity from engaging in business, which is a privilege for purposes of article I, section 12. Instead, the Act merely prohibits smoking within a place of employment. . . . Smoking inside a place of employment is not a fundamental right of citizenship and, therefore, is not a privilege. Because there is no privilege involved, we hold there is no violation of article I, section 12.

Id. at 608.

Likewise, here, Section 8 of I-976 directs the use of the Kelley Blue Book as a vehicle valuation tool. It does not specify how it is to be used or the arrangements that must or should be made for its use. Appellants claim they presented undisputed facts regarding the Kelley Blue Book, but those facts are predictive; they do not describe anything that has taken place under I-976. But even if Appellants correctly predict that the State will have to enter into a contract in order to use the Kelley Blue Book, this is not a case

cases cited for that proposition are concerned with discriminatory regulations or licensure requirements, not with special privileges. None of them address a contractual relationship with government at any level.

in which a government regulation constrains or precludes any company from engaging in business, and they cite no case in which a government contract with a private entity has been held to constitute a privilege for purposes of article I, section 12. *See Peterson v. Dep't of Revenue*, 9 Wn. App. 2d 220, 233, 443 P.3d 818 (2019) (noting the absence of any authority where an appellant successfully challenged a government contract as violating the privileges and immunities clause of article I, section 12), *aff'd on other grounds*, ___ Wn.2d ___, 460 P.3d 1080 (Apr. 17, 2020).³ Appellants have not demonstrated the existence of a privilege for purposes of article I, section 12.

Finally, as they did in their opening brief, Appellants again assert violations of article II, section 28(6) and article XII, section 22. Apps.' Reply at 45. We therefore note again (see our response brief at 49 n.11) that Appellants raised those sections of the Washington Constitution for the first time in their *reply* in support of their motion for summary judgment (CP 2143) and their *response* to the motion for reconsideration filed jointly by the State and Pierce County (CP 2335). Appropriately, the superior court did not address appellants untimely claims regarding those constitutional provisions, and neither the claims nor the provisions are properly before this

³ Peterson did not pursue his article I, section 12 argument before this Court. *See* 460 P.3d at 1083.

Court on appeal. *See Snohomish County v. Anderson*, 124 Wn.2d 834, 839, 881 P.2d 240 (1994) (declining to review constitutional claim not made as part of the original claim of unconstitutionality). *See also State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452, 454 (1999) (citing general rule that issues not raised in the trial court may not be raised for the first time on appeal).

3. Appellants have not demonstrated that I-976's reliance on Kelley Blue Book is unreasonable

Because I-976 implicates no privilege cognizable under article I, section 12, there is no need to address the second step of the two-step inquiry set out in *Grant County II*. *See Ass'n of Wash. Spirits & Wine Distribs.*, 182 Wn.2d 342, 359-63, 340 P.3d 849 (2015). But even if a privilege were implicated there is no violation of article I, section 12 because, under the second step of the *Grant County* analysis, it was reasonable for the People to choose a valuation method that is widely known by the public, widely accepted for purposes of private transactions, and widely recognized as a fair assessment of vehicle value.

Appellants rely on a pre-*Grant County* case addressing the equal protection component of article I, section 12, arguing as if *Grant County* had not been decided. In *City of Seattle v. Rogers*, 6 Wn.2d 31, 106 P.2d 598 (1940), the Court invalidated a city ordinance that criminalized all

unlicensed charitable solicitations except by the Seattle Community Fund.⁴ The Court began its analysis by observing that “the ordinance is regulatory, practically prohibitory, in its nature, and not a revenue measure.” *Id.* at 35. But the Court found that the ordinance operated discriminatorily, and the Court struck it down because the discrimination was arbitrary, “without any reasonable basis.” *Id.* at 38 (quoting *Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S. Ct. 337, 55 L. Ed. 369 (1911)).

The Court in *Rogers* did not consider whether a cognizable privilege was present, as is required under the first step of the test articulated in *Grant County II*. It simply held that the challenged ordinance was discriminatory because it arbitrarily excluded one entity from regulation and possible criminal sanctions. Even if *Rogers* addressed what constitutes a privilege or immunity, which it did not, it is distinguishable from this case. I-976 is not a regulatory measure, and the reference in Section 8 to the Kelley Blue Book is neither arbitrary nor lacking any reasonable basis. Under the test set out in *Grant County*, there is no article I, section 12 violation.

⁴ In any event, *Rogers* is not an influential decision. It has been cited by the majority in only one case (and then only in dictum): *Adams v. Hinkle*, 51 Wn.2d 763, 322 P.2d 844 (1958) (holding that a state statute that criminalized the unlicensed sale of comic books violated the First Amendment).

4. Appellants lack standing to bring a claim under article I, section 12

Appellants lack standing to raise a claim under article I, section 12, for the reasons given in the State’s Br. at 51-52. They have not alleged that *they* will be harmed by the operation of Sections 8 and 9, but point instead to costs incurred by the State, and to their general interest in challenging provisions they consider to be unconstitutional. Apps.’ Reply at 54-56. That is not enough. To have standing to bring a constitutional challenge, they must show *they* are harmed by “the particular feature of the statute which is claimed to be unconstitutional”—by the direction in Section 8 to use the Kelley Blue Book. *Kadoranian ex rel. Peach v. Bellingham Police Dep’t*, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992). They do not show any such harm to themselves.

In a final effort to set aside the standing requirements, Appellants deny that their interest is in preserving their own tax base. Apps.’ Reply at 55. That denial amounts to a virtual concession that the direction in Section 8 to use the Kelley Blue Book does not cause them any “actual damage or injury” sufficient to support standing for their article I, section 12 challenge. *Kadoranian*, 119 Wn.2d at 191. They have not shown that *they* are directly affected by Section 8. *Federal Way Sch. Dist. 210 v. State*, 167 Wn.2d 514, 528, 219 P.3d 941 (2009) (“[A] party must be directly affected by a statute

to challenge its constitutionality” and must show that it is “being affected or denied some benefit.”).⁵

B. If the Court Were to Conclude That Sections 8 and 9 of Initiative 976 Violate Article I, Section 12, Those Sections Are Severable From the Remainder of the Initiative

For the reasons given above and in the State’s earlier brief (adopted by Pierce County on this issue), this Court should reverse the trial court’s ruling that sections 8 and 9 of I-976 violate article I, section 12 of the Washington Constitution. Should the Court disagree, it should affirm the trial court’s decision to sever sections 8 and 9 and allow the remainder of I-976 to take effect, for the reasons given in State’s Br. at 52-54.

Appellants dispute the significance of *League of Education Voters v. State*, 176 Wn.2d 808, 295 P.3d 743 (2013), for this analysis. The distinctions they attempt to draw are unpersuasive. Like I-976, the initiative in that case contained a severability clause. *Id.* at 827. Like the ballot title for I-976, the ballot title for that initiative explicitly referenced the provision that the Court severed (or would sever here, if violative of article I, section

⁵ To be clear, Appellants’ interest in protecting their tax base is at the core of this lawsuit. Virtually every argument they have made in this case—starting with their original complaint (*see* CP 1-7, 9-11) and their motion for a preliminary injunction (*see* CP 380-391, 416-420), and continuing through their briefing on appeal (*see* Apps.’ Op. Br. at 6-8, 64-91)—references the financial harm they and others will suffer if I-976 goes into effect. Whether that interest supports standing for any other constitutional claim made by Appellants is irrelevant here, since they disclaim that interest as a basis for standing to bring their article I, section 12 claim, and since they have not shown that *they* are harmed by Section 8.

12).⁶ Like Appellants' arguments here, those opposed to severing the challenged provision in *League of Education Voters* argued that it could not be severed because the measure would not have passed without the severed provision. *Id.* at 827-28. Severability is permissible here just as it was in *League of Education Voters*.

III. CONCLUSION

The Court should reverse the trial court's ruling that Section 8 of I-976 violates article I, section 12 of the Washington Constitution and allow Sections 8 and 9 of I-976 to take effect along with the rest of I-976.

RESPECTFULLY SUBMITTED this 12th day of June 2020.

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⁶ See Initiative 1053, Ballot Title, <https://www.sos.wa.gov/elections/initiatives/people.aspx?y=2010>.

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