No. 93079-1

SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON TRUCKING ASSOCIATIONS, a Washington non-profit corporation; EAGLE SYSTEMS, INC., a Washington corporation; GORDON TRUCKING, INC., a Washington corporation; HANEY TRUCK LINE, INC., a Washington corporation; JASPER TRUCKING, INC., a Washington corporation; PSFL LEASING, INC., a Washington corporation; and SYSTEM-TWT TRANSPORTATION d/b/a SYSTEM-TWT, a Washington limited liability company,

Respondents,

v.

THE STATE OF WASHINGTON, EMPLOYMENT SECURITY DEPARTMENT; PAUL TRAUSE, individually and in his official capacity as the former Commissioner of the Employment Security Department, and JANE DOE TRAUSE, husband and wife and the marital community composed thereof; BILL WARD, individually and in his official capacity, and JANE DOE WARD, husband and wife and the marital community composed thereof; LAEL BYINGTON, individually and in his official capacity, and JANE DOE BYINGTON, husband and wife and the marital community composed thereof; JOY STEWART, a single individual, individually and in her official capacity; and MELISSA HARTUNG, a single individual, individually and in her official capacity; ALICIA SWANGWAN, a single individual, individually and in her official capacity,

Petitioners.

RESPONDENTS' ANSWER TO WSAMA AMICUS MEMORANDUM

Philip A. Talmadge, WSBA #6973
Thomas M. Fitzpatrick, WSBA #8894
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue Southwest
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Aaron P. Riensche, WSBA #37202
OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, WA 98164-2008
(206) 447-7000

Attorneys for Respondents

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A. INTRODUCTION

Ignoring the egregious misconduct of the Employment Security Department ("ESD") here, the Washington State Association of Municipal Attorneys ("WSAMA") argues that taxing authorities like ESD are entitled to virtual immunity from liability under 42 U.S.C. § 1983 for bad faith conduct, no matter how egregious, depriving taxpayers like the petitioners here ("Carriers") of their federal constitutional rights.

The Court of Appeals opinion carefully avoids such an extreme conception of § 1983. It appropriately interpreted 1983 liability consistently with the jurisprudence of this Court and the federal courts. Review is not merited. RAP 13.4(b).

B. STATEMENT OF THE CASE

WSAMA does not take issue with the facts outlined in the Court of Appeals opinion. Memo. at 1. It then overlooks the critical facts that constitute the core federal constitutional violation by the ESD respondents – the intentional, bad faith use of ESD's extensive powers for the politically motivated purpose of restructuring Washington's trucking industry. This was not a mere error in the imposition of unemployment taxes, nor was it a situation of mere "faulty audits." It was far more malevolent than that.[1]

[1] The Court here takes the facts as alleged by WTA and the Carriers as true and must consider any hypothetical facts that sustain their complaint. ESD was required to

ESD was part of an illegal interagency task force, designed to prohibit independent contractors in Washington to appease organized labor in exchange for political support. ESD used its auditing and tax power in bad faith, targeting the trucking industry for "enforcement," in an effort to eliminate the industry's historical use of owner/operators (truck drivers who own their own trucks) as a flexible source of trucking equipment. ESD subjected hundreds of trucking carriers to "audits" in this effort. CP 490. This is an unlawful attempt by ESD to restructure an industry that Congress has specifically prohibited the states from regulating.

Moreover, ESD wielded its audit power improperly, *requiring* its auditors to audit as many trucking companies as they could find and to reclassify every owner/operator as an employee. Its auditors even *intentionally* imposed taxes on remuneration paid to corporations or out-of-state drivers or for equipment rental at the express direction of their superiors at ESD, *knowing* that it is illegal to assess unemployment taxes on

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show, "beyond a reasonable doubt," that WTA and the Carriers could not "prove 'any set of facts which would justify recovery.'" *Futureselect Portfolio Mgmt., Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 962–63, 331 P.3d 29 (2014) (quoting *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007)). The trial court was required to assume the truth of all factual allegations in the complaint and also to take into account hypothetical facts supporting the claim. *Id.* "Therefore, a complaint survives a CR 12(b)(6) motion if *any* set of facts could exist that would justify recovery." *Id.* at 963 (quoting *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)). In addition to the complaint allegations, WTA and the Carriers submitted to the trial court a 23-page set of "hypothetical facts" which could be relied upon in considering the motion to dismiss. *See* CP 479–502.

such payments.[2] In this way, it attempted to strong-arm the industry into submitting to its assessments.

Finally, WSAMA repeats ESD's argument that the administrative process here afforded the Carriers a sufficient process, but that assertion is *belied by ESD's consistent argument* that the Carriers could not complain in the administrative process about its *means* for assessing them. Throughout years of litigation, ESD contended its means and purposes are irrelevant. *See* answer to pet. at 1, 15-18. Thus, according to ESD itself, the APA process afforded the Carriers *no relief* for its conduct in making the rigged audits/assessments against them; their *only* state remedy was for the *results* of the audits/assessments.[3]

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

(1) WSAMA, like ESD, Ignores the Importance of § 1983 to Protect Taxpayer Constitutional Rights

Review is not merited here where the Court of Appeals carefully balanced and distinguished the need for an aggrieved party to exhaust its

[2] Former State Auditor, Brian Sonntag, opined that ESD failed to conform to even the most basic standards expected of state agencies. *See* CP 517–45, 571, 629–36. Sonntag described the administrative appeal process in such cases as "cold comfort" to the taxpayer wronged by the conduct of illegal audits.

[3] ESD's own *repeated* assertions about the remedy afforded the Carriers by state law rendered such a remedy *uncertain* as a matter of law, allowing the Carriers' claims to proceed. *American Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 108 S. Ct. 2, 97 L. Ed. 2d 790 (1987).

administrative remedies with respect to an incorrect assessment of taxes from the extraordinary circumstances where a taxing authority so abuses its broad taxing power that it deprives a taxpayer of its federal constitutional rights for purposes of a § 1983 claim. WSAMA, like ESD, entirely *ignores* the latter category of circumstances. WSAMA essentially argues for *immunity* for taxing agencies from § 1983 liability; it contends, like ESD, that the courts should ignore *how* the taxing authority treated the taxpayer and arrived at its assessment and focus only on the final assessment – the ultimate of an "end justifies the means" argument.

Unacknowledged by ESD or WSAMA, the courts will generally provide remedies for abusive or arbitrary conduct by government officials under 42 U.S.C. § 1983. *See, e.g., Jones v. State*, 170 Wn.2d 338, 242 P.3d 825 (2010) (allowing claims for due process violations and tortious interference where Board of Pharmacy officials allegedly conducted improper investigations resulting in suspension of pharmacist's license); *Tarabochia v. Adkins,*766 F.3d 1115 (9th Cir. 2014) (reversing dismissal of civil rights claim against Washington Department of Fish and Wildlife agents, alleging that agents targeted plaintiffs for investigation for personal

reasons). Indeed, § 1983 is a bulwark to protect citizens from the unconstitutional abuse of their federal constitutional rights.[4]

The Court of Appeals correctly held that abusive, bad faith actions by a taxing authority are actionable under § 1983. First, it is well-established that agencies like ESD must exercise their expansive taxing and auditing authority in *good faith*. *Dep't of Revenue v. March*, 25 Wn. App. 314, 319, 610 P.2d 916 (1979); *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 313-14, 98 S. Ct. 2357, 57 L. Ed. 2d 221 (1978). That is not the case where the taxing authority deliberately misuses that wide power for illicit purpose.[5]

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[4] WSAMA, like ESD, is tone deaf to this fundamental public policy. If WASMA and ESD are correct in their interpretation of § 1983, taxpayers, no matter how egregiously abused by taxing authorities, would have no remedy under § 1983 to prevent such abuse, that is plainly not the law in Washington. If ESD can target the trucking industry to restructure it for political motivations, and the industry has no recourse under § 1983, where doers the line get drawn? In today's supercharged political climate, it is not hard to envision an IRS undertaking "audits" of all prominent Muslim clerics, nor is it impossible to believe that state agencies might decide to "audit" prominent Democratic or Republican opponents of then-current administration. Under ESD and WSAMA's conception, the victims of such government abuse would have no recourse under § 1983. Their "cold comfort" would be the long, expensive administrative process where, even if successful ultimately, they could not be made whole for the expense of resisting their abuse at the hands of public agencies who possess unlimited investigative resources and publicly-paid lawyers. § 1983 claims, long a deterrent of illegally motivated use of the taxing power, would become a toothless tiger.

[5] In *March*, the Court of Appeals emphasized that a taxing agency must use its auditing power consistent with established standards and procedures and may not select a taxpayer for audit invidiously. 25 Wn. App. at 318-19. Certainly political motivations would be just such an invidious basis for auditing a taxpayer. The *hundreds* of audits against the trucking industry after ESD admittedly "targeted" the industry supports the view ESD acted in bad faith.

Plainly, if a taxing authority intentionally imposes illegal taxes on a taxpayer, such conduct is actionable under § 1983 as a violation of the taxpayer's due process rights, notwithstanding ESD's comity argument. *Patel v. City of San Bernardino*, 310 F.3d 1138, 1142 (9th Cir. 2002) (city continued to collect a tax pending appellate review of a trial court decision declaring the tax unconstitutional); Ninth Circuit allowed the taxpayer to pursue a § 1983 claim for damages caused by the knowing imposition of unlawful taxes, relying on U.S. Supreme Court authority holding that "uncertainty regarding a State's remedy may make it less than 'plain.'"); *Sintra v. City of Seattle*, 119 Wn.2d 1, 24, 829 P.2d 765 (1992) (plaintiff could proceed under § 1983 against a taxing authority that enforced a tax it knew to be invalid). WSAMA has no explanation for these cases.

WSAMA does not address the fact that ESD's officials intentionally imposed taxes on the carriers for equipment, *knowing* that was illegal. Indeed, WSAMA utterly fails to acknowledge the substance of the Carriers' claims. Instead, it mischaracterizes those claims, and the basis for the Court of Appeals' opinion, by *repeatedly* arguing that the only ground for finding the state remedy inadequate was the lack of an ability to recover attorney fees and punitive damages. It is telling that WSAMA needs to misrepresent the legal issues in order to shoehorn them into its specious argument.

(2) The Court of Appeals Correctly Applied the TIA and Comity Principles Here

As WSAMA acknowledges, memo. at 2-7, the Court of Appeals relied on established precedent from this Court and the U.S. Supreme Court in determining that the Carriers had a § 1983 claim despite the Tax Injunction Act ("TIA") and the comity doctrine. It faithfully applied the well-settled rule that the TIA and comity apply *only* when state law provides an adequate remedy. Op. at 15-24. Where WSAMA misses the boat is in its implication that the TIA creates an exception to a putative "rule" that the TIA immunizes taxing authorities from § 1983 liability. Memo. at 6. That is contrary to case law and insults the broad protective scope of § 1983 for federal constitutional rights.

Rather, comity does not bar a § 1983 claim where the state cannot offer a plain, speedy, and efficient remedy to allow the taxpayer to uphold its constitutional rights. In so ruling, the Court of Appeals properly applied not only *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 589, 592, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995), but *Hibbs v. Winn*, 542 U.S. 88, 107–08, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004) (an adequate remedy is one that is plain, speedy, and efficient) and

Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 517, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (remedies that are uncertain or unclear are not plain).[6]

The Court of Appeals carefully analyzed the complaint and concluded that the Carriers raised many claims which could be remedied in the state administrative process and others for which the state process provides no remedy. Op. at 19-24. The court concluded that the § 1983 claim is barred as to those claims for which there is a legitimate remedy, but not for those that the administrative process cannot address such as the damages caused by ESD's conduct unrelated to the amount of the assessments. *Id.* at 24.

WSAMA misstates the law when it asserts that a state remedy is "adequate" if there is a state procedure for making their constitutional objections to the tax (memo. at 10), even if *substantively* there is no state law remedy for an egregious violation of taxpayer federal constitutional rights, citing *Rosewell*. Memo. at 7-8. That, simply put, is just nonsense. It leaves taxing authorities free to be just as abusive of taxpayer rights as they choose. Where state law cannot address a claim's merits, the remedy

[6] WSAMA mentions *Capra v. Cook Cty. Board of Review*, 733 F.3d 705 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1027 (2014) in its memorandum at 11, but that case focuses more particularly on the immunity of the tax board, a quasi-judicial adjudicatory body reviewing tax assessments. With regard to comity, the court noted that Illinois law did permit the taxpayers to raise a question about possible political influence in tax cases as part of the state remedy that was adequate, plain, and complete, unlike here where, as ESD contended, its *means* of auditing/assessing the Carriers could not be addressed in the state-remedial process.

is not adequate. *Hillsborough Township v. Cromwell*, 326 U.S. 620, 66 S. Ct. 445, 90 L. Ed. 358 (1946).[7] Here, there was *no state remedy* for many of the Carriers' federal constitutional rights claims. The Court of Appeals properly observed that the administrative process under state law has authority only to correct the amount of the assessment. Op. at 24. The court noted further that the complaint allegations here involve conduct that violated the taxpayers' rights regardless of whether the assessments were valid. *Id.* Because correction of the assessment amount would not provide any redress for these violations, the court properly concluded that the remedy at state law, as to those claims, is not adequate. *Id.*

Like ESD, WSAMA attempts to claim that the Court of Appeals decision is somehow an "outlier" on § 1983. Memo. at 16-18; pet. at 10-11. That is *false*. The Court of Appeals did not base its decision on the lack of § 1983 relief. It based its decision on the fact that the administrative process provides *no* relief for ESD's impropriety alleged here, as the Court of Appeals documented. Op. at 24.

[7] *Hillsborough Township*, a case cited by the *Rosewell* court, is particularly apt to the Carriers' point. The taxpayer asserted that the New Jersey taxing authority singled it out for discriminatory tax assessments. New Jersey's tax administrative body could not address constitutional questions and any remedy afforded the taxpayer under state law did not result in a reduction of the taxpayer's own illegal assessment, but only gave the taxpayer the right to proceed against favored taxpayers to increase their tax assessments. Such a remedy was not plain, adequate, or complete.

This conclusion is well supported by the case law, both in Washington and around the country. *See Hillsborough*, 326 U.S. at 624; *Johnson v. City of Seattle*, 184 Wn. App. 8, 335 P.3d 1027 (2014).[8] These cases provide ample authority for the Court of Appeals' decision here that there is no adequate remedy in an administrative process that cannot address the merits of a claim.

WSAMA, like ESD, claims this analysis is somehow an outlier.[9] It is not. It is WSAMA's argument that is controversial as it creates a free pass for taxing authorities to abuse taxpayers nowhere provided by Congress. It claims the "adequate remedy" analysis is limited simply to a review of the procedures available; if the procedure is "adequate," the remedy is as well, *regardless of whether the procedure can address the*

[8] In *Johnson*, for example, the Washington Court of Appeals held that an administrative process that prevents a party from asserting a valid defense violates that party's procedural due process rights. In the underlying case, the hearing examiner refused to consider a homeowner's "legal nonconforming use" defense to a land-use violation because, under the city code, only the Department could make this determination. *Id.* at 21. Citing *Sintra*, the Court of Appeals therefore allowed the homeowner to maintain a § 1983 claim against the city. *Id.* at 22.

[9] In making this argument, WSAMA cites to a smattering of cases from other jurisdictions. Memo. at 16-18. It deliberately avoids *Washington* § 1983 precedents like *Sintra, Jones,* and *Johnson*, cited by the Court of Appeals, that are contrary to its narrow conception of § 1983's grand constitutional tort. The cases cited by WSAMA do not help it. For example, in *General Motors Corp. v. County of San Francisco*, 81 Cal. Rptr. 2d 544 (Cal. App. 1999), the court *reversed* a judgment in favor of the taxing authority because the remedy available to the taxpayer for a tax violating the Commerce Clause was incomplete; the court ordered a complete remedy for the taxpayer.

taxpayer's claim on its merits. In other words, if the ends are somehow justifiable, that will justify the taxing authority's unconstitutional means.

Wal-Mart Puerto Rico, Inc. v. Zaragoza-Gomez, __ F. Supp. 3d ___, 2016 WL 1183091 (D. P.R. 2016) is particularly relevant to this analysis. There, facing a fiscal crisis, the Commonwealth enacted a confiscatory tax that was blatantly punitive to out-of-Commonwealth corporations like Wal-Mart. The district court analyzed Wal-Mart's tax refund avenues under Puerto Rican law, noting that in such proceedings, the constitutionality of a tax could not be addressed unless by a court. Puerto Rico's taxing authority argued that any § 1983 cause of action by Wal-Mart based on equal protection or Commerce Clause grounds was barred because the Commonwealth offered a "procedure" to a taxpayer like Wal-Mart to challenge the tax's constitutionality, citing *Rosewell.* The district court rejected that argument. *Id.* at *36-38.

WSAMA's extreme argument, like that of Puerto Rico's officials, is unsupported and would eviscerate § 1983's protection of federal constitutional rights. That position is "extreme" and is "based on a vast misreading of the case law." *Id.* at *37 (D. P.R. 2016). This argument, the court explained, "might seem plausible at first blush" only by "reading certain excerpts of case law out of context." *Id.* The court concluded that

procedures are sufficient only insofar as they lead to their desired effect of obtaining real relief from constitutionally injurious actions. *Id.*[10]

WSAMA's argument, like ESD's, relies precisely on the practice of reading certain excerpts of case law out of context that was criticized by the *Wal-Mart* court. The "extreme position" espoused by ESD and WSAMA runs entirely counter to the "broad construction of § 1983" "compelled by the statutory language, which speaks of deprivations of 'any rights, privileges, or immunities secured by the Constitution and laws.'" *Dennis v. Higgins*, 498 U.S. 439, 443, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991) (quoting 28 U.S.C. § 1983). The ESD/WSAMA positions *immunize* taxing authorities from conduct that deprives taxpayers of their right to good faith, fair treatment in the auditing process so long as the result is generally "acceptable."

Under ESD's, and now WSAMA's, analysis, a taxpayer could never complain in the administrative process that a taxing authority's *deliberate*

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[10] The court pointedly noted at *38:

> ... we agree with Dean Chemerinsky that "if a state law provided that a successful challenger to a state tax law could recover a maximum of $1, no matter how much was improperly taken, ... surely that would be enough to justify concluding that the state remedy is not plain or efficient." Erwin Chemerinsky, *Federal Jurisdiction* 788 (6th ed. 2012). Here, as outlined above, due to the Commonwealth's ongoing and future insolvency, and the law and regulations that have been enacted in response, payment of any refund to Wal-Mart PR is uncertain for the foreseeable future. And, if payment is ultimately made, it would take decades to complete. Such a remedy is not plain, speedy, or efficient.

intention to misuse the taxing power to destroy the taxpayer's contractual or business relationships was actionable. That is not the law of § 1983. Review is not merited. RAP 13.4(b).[11]

D. CONCLUSION

WSAMA essentially repeats ESD's demand that taxing authorities receive immunity from § 1983 liability for the intentional deprivation of taxpayer rights, no matter how egregious, in the process of imposing taxes. WSAMA agrees with ESD that courts should ignore *how* assessments are made, and simply consider the final numbers of taxes due. This would allow taxing authorities to engage in illegal conduct with impunity. The Court of Appeals' decision properly rejected ESD's attempt to remove its misconduct from any sort of judicial scrutiny. This common-sense holding is amply supported by controlling decisions of this Court and the United States Supreme Court. There is no reason for this Court to grant review. RAP 13.4(b).

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[11] WSAMA does not specifically address the Carriers' state law tortious interference claims. The Court of Appeals allowed the Carriers' to proceed with their claim for tortious interference. Again, the court's thorough analysis was grounded in this Court's jurisprudence. The elements for tortious interference are well-settled and permit a plaintiff to seek redress for tortious interference where the defendant interferes with a business expectancy for an improper purpose or by improper means. Op. at 25-31 (citing *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 168, 273 P.3d 965 (2012)). Review is not merited on this issue.

DATED this 10th day of August, 2016.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Thomas M. Fitzpatrick, WSBA #8894
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Aaron Riensche, WSBA #37202
Ogden Murphy Wallace PLLC
901 Fifth Avenue, Suite 3500
Seattle, WA 98164
(206) 447-7000
Attorneys for Respondents

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the Respondents' Answer to WSAMA's Amicus Memorandum in Supreme Court Cause No. 93079-1 to the following parties:

Eric D. Peterson, Assistant Attorney General
Office of the Attorney General
Licensing & Administrative Law Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188

Copy also emailed to: lalseaef@atg.wa.gov; lalolyef@atg.wa.gov

Aaron P. Riensche
Ogden Murphy Wallace, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, WA 98164

Milton G. Rowland
Foster Pepper PLLC
618 W. Riverside Avenue, Suite 300
Spokane, WA 99201

Original E-filed with:
Washington Supreme Court
Clerk's Office

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: August 10, 2016 at Seattle, Washington.

Stephanie Nix-Leighton

Stephanie Nix-Leighton, Legal Assistant
Talmadge/Fitzpatrick/Tribe

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Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

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