

No. 83349-4

SUPREME COURT
OF THE STATE 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,

and

CENTRAL PUGET SOUND
REGIONAL TRANSIT AUTHORITY,

Intervenor.

BRIEF OF PETITIONERS

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

George Kargianis, WSBA #286
Kristen L. Fisher, WSBA #36918
Law Offices of
George Kargianis, Inc., P.S.
701 5th Avenue, Suite 4785
Seattle, WA 98104
(206) 838-2528

Attorneys for Petitioners

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

10 MAR 25 AM 10:18

BY RONALD R. CARPENTER

h
h

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii-iv
A. INTRODUCTION	1
B. ISSUES PRESENTED BY PETITION AGAINST STATE OFFICER.....	2
C. STATEMENT OF THE CASE.....	3
(1) <u>Identification of the Petitioners</u>	3
(2) <u>Interstate 90</u>	3
(3) <u>History of Interstate 90 and the Effort to Transfer Its Two Center Lanes to Sound Transit for Light Rail</u>	5
(4) <u>Procedural History</u>	17
D. SUMMARY OF ARGUMENT	17
E. ARGUMENT	19
(1) <u>This Court Has the Authority to Issue a Writ of Mandamus and Should Do So Here</u>	19
(a) <u>Mandamus under Article IV, § 4</u>	19
(b) <u>Prudential Reasons for the Court to Decline to Exercise Original Jurisdiction</u>	24
(2) <u>The 18th Amendment Limits the Expenditure of Motor Vehicle License Fees and Fuel Excise Tax Revenues to Highway Purposes and Light Rail Is Not a “Highway Purpose”</u>	30

(3)	<u>WSDOT May Not Do Indirectly What the 18th Amendment Bars It Directly from Doing</u>	45
(4)	<u>Petitioners Are Entitled to Their Reasonable Attorney Fees</u>	50
F.	CONCLUSION	52
	Appendix	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Andrews v. Munro</i> , 102 Wn.2d 761, 689 P.2d 399 (1984)	21
<i>Automobile Club of Wash. v. City of Seattle</i> , 55 Wn.2d 161, 346 P.2d 695 (1959).....	34, 35
<i>Baker v. Seattle-Tacoma Power Co.</i> , 61 Wash. 578, 112 P. 647 (1911).....	51
<i>Branson v. Port of Seattle</i> , 152 Wn.2d 862, 101 P.3d 67 (2004)	24
<i>Brown v. Owen</i> , 165 Wn.2d 706, 206 P.3d 310 (2009)	20, 22
<i>Citizens Counsel Against Crime v. Bjork</i> , 84 Wn.2d 891, 529 P.2d 1072 (1975).....	21
<i>City of Spokane v. Taxpayers of City of Spokane</i> , 111 Wn.2d 91, 758 P.2d 480 (1988).....	25
<i>Delaney v. Board of Spokane County Comm'rs</i> , 161 Wn.2d 249, 164 P.3d 1290 (2007).....	22
<i>Dep't of Ecology v. State Finance Comm'n</i> , 116 Wn.2d 246, 804 P.2d 1241 (1991).....	19
<i>Diversified Indus. Dev. Corp. v. Ripley</i> , 82 Wn.2d 811, 514 P.2d 137 (1973).....	25
<i>Erection Co. v. Dep't of Labor & Indus.</i> , 121 Wn.2d 513, 852 P.2d 288 (1993).....	27
<i>First Covenant Church v. City of Seattle</i> , 114 Wn.2d 392, 787 P.2d 1352 (1990), <i>vacated</i> , 499 U.S. 901 (1991), <i>reinstated on remand</i> , 120 Wn.2d 203, 840 P.2d 174 (1992).....	25
<i>First United Methodist Church of Seattle v. Hearing Exam's for Seattle Landmarks Preservation Board</i> , 129 Wn.2d 238, 916 P.2d 374 (1996).....	24
<i>Flanders v. Morris</i> , 88 Wn.2d 183, 558 P.2d 769 (1977).....	21
<i>Gerberding v. Munro</i> , 134 Wn.2d 188, 949 P.2d 1366 (1998).....	22
<i>Grein v. Cavano</i> , 61 Wn.2d 498, 379 P.2d 209 (1963)	51
<i>Holt v. Morris</i> , 84 Wn.2d 841, 529 P.2d 1081 (1974).....	19
<i>Lane v. City of Seattle</i> , 164 Wn.2d 875, 194 P.3d 977 (2008)	29
<i>Nollette v. Christianson</i> , 115 Wn.2d 594, 800 P.2d 359 (1990).....	25

<i>Northwest Motorcycle Ass'n v. State Interagency Comm. for Outdoor Recreation</i> , 127 Wn. App. 408, 110 P.3d 1196 (2005), <i>review denied</i> , 156 Wn.2d 1008 (2006).....	36, 37
<i>O'Connor v. Matzdorff</i> , 76 Wn.2d 589, 458 P.2d 154 (1969).....	20
<i>Sane Transit v. Sound Transit</i> , 151 Wn.2d 60, 85 P.3d 346 (2004).....	7
<i>Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council</i> , 129 Wn.2d 787, 920 P.2d 581 (1996), <i>cert. denied</i> , 520 U.S. 1210 (1997).....	5, 31
<i>Seattle Bldg. & Constr. Trades Council v. City of Seattle</i> , 94 Wn.2d 740, 620 P.2d 82 (1980).....	5
<i>State ex rel. Albright v. City of Spokane</i> , 64 Wn.2d 767, 394 P.2d 231 (1964).....	34
<i>State ex rel. Barlow v. Kinnear</i> , 70 Wn.2d 482, 423 P.2d 937 (1967).....	21
<i>State ex rel. Bugge v. Martin</i> , 38 Wn.2d 834, 232 P.2d 833 (1951).....	35
<i>State ex rel. Burlington Northern, Inc. v. Wash. State Utilities & Transp. Comm'n</i> , 93 Wn.2d 398, 609 P.2d 1375 (1980).....	23
<i>State ex rel. Distilled Spirits Inst., Inc. v. Kinnear</i> , 80 Wn.2d 175, 492 P.2d 1014 (1972).....	25
<i>State ex rel. Garber v. Savidge</i> , 132 Wash. 631, 233 P. 946 (1925).....	20
<i>State ex rel. Heavey v. Murphy</i> , 138 Wn.2d 800, 982 P.2d 611 (1999).....	33, 35
<i>State ex rel. O'Connell v. Slavin</i> , 75 Wn.2d 554, 452 P.2d 943 (1969).....	<i>passim</i>
<i>State ex rel. State Capitol Comm'n v. Lister</i> , 91 Wash. 9, 156 P. 858 (1916).....	34
<i>State ex rel. Wash. State Highway Comm'n v. O'Brien</i> , 83 Wn.2d 878, 523 P.2d 190 (1974).....	36
<i>To-Ro Trade Shows v. Collins</i> , 144 Wn.2d 403, 27 P.3d 1149 (2001), <i>cert. denied</i> , 535 U.S. 931 (2002).....	24
<i>Walker v. Munro</i> , 124 Wn.2d 402, 879 P.2d 920 (1994).....	22
<i>Wash. Fed'n of State Employees, Council 28, AFL-CIO v. Office of Fin. Mgmt.</i> , 121 Wn.2d 152, 849 P.2d 1201 (1993).....	31

<i>Wash. State Bar Ass'n v. State</i> , 125 Wn.2d 901, 890 P.2d 1047 (1995).....	21
<i>Wash. State Highway Comm'n v. Pacific Northwest Bell Telephone Co.</i> , 59 Wn.2d 216, 367 P.2d 605 (1961).....	35, 36
<i>Wash. State Labor Council v. Reed</i> , 149 Wn.2d 48, 65 P.3d 1203 (2003).....	21
<i>Weiss v. Bruno</i> , 83 Wn.2d 911, 523 P.2d 915 (1974).....	52

Federal Cases

<i>Abbott Labs. v. Gardner</i> , 387 U.S. 136 (1967).....	26
---	----

Other Cases

<i>Automobile Club of Oregon v. State</i> , 840 P.2d 674 (Or. 1992)	43, 45
<i>Contractors Ass'n of West Va. v. West Va. Dep't of Pub. Safety, Div. of Pub. Safety</i> , 434 S.E.2d 357 (W. Va. 1993).....	40
<i>In re Opinion of the Justices</i> , 85 N.E.2d 761 (Mass. 1949).....	40
<i>New Hampshire Motor Transport Ass'n v. State</i> , 846 A.2d 553 (N.H. 2004)	41
<i>Opinion of the Justices</i> , 132 A.2d 440 (Me. 1957).....	40
<i>Rogers v. Lane County</i> , 771 P.2d 254 (Or. 1989).....	44
<i>State ex rel. Moon v. Jonasson</i> , 299 P.2d 755 (Idaho 1956).....	39
<i>State Highway Comm'n v. West Great Falls Flood Control & Drainage District</i> , 468 P.2d 753 (Mont. 1970).....	40
<i>Thompson v. Bracken County</i> , 294 S.W.2d 943 (Ky. 1956).....	39-40

Constitutions

N.H. Const. part II art. 6-a	42
Washington Constitution, article II § 40.....	45, 52

Statutes

RCW 7.16.160	21, 23
RCW 7.16.290-.300	21

RCW 46.68.070	32
RCW 47.05.021(3).....	4
RCW 47.06.140	4
RCW 47.12.063	48
RCW 47.12.120	48, 49
RCW 47.12.125	48
RCW 47.17.140	4
RCW 47.24.020(2).....	4
RCW 47.52.010	4

Rules and Regulations

RAP 16.2.....	17
RAP 16.2(g)	53
WAC 468-30-060.....	49
WAC 468-30-110.....	49
WAC 468-30-110(7).....	48

Other Authorities

http://www.bettertransport.info/pitf	7, 13
http://www.bettertransport.info/pitf/soundtransitcentrallinkopsplan.7.29.08.pdf	7
http://www.soundtransit.org/x1290.xml	8
http://www.wsdot.wa.gov/NR/rdonlyres/2D30E991-6159-4F2A-A84B-284622643B79/0/I90CenterRoadwayStudy.pdf	14
http://www.wsdot.wa.gov/projects/i90/twowaytransit	28
Mike Lindblom, “Sea-Tac Station Boosts Light Rail Use,” Seattle Times, January 12, 2010.....	7
Mike Lindblom, “Who Will Ride Sound Transit Light-Rail Trains?” Seattle Times, May 17, 2009	7
Robert F. Utter, <i>Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights</i> , 7 U. Puget Sound L. Rev. 491 (1984).....	34

A. INTRODUCTION

The State of Washington Department of Transportation (“WSDOT”)¹ proposes to transfer the two center lanes of Interstate 90 to the Central Puget Sound Regional Transit Authority (“Sound Transit”) for its East Link Light Rail Transit Project (“East Link Project”). WSDOT is barred from doing so under the provisions of the 18th Amendment to the Washington Constitution, article II § 40,² as interpreted by this Court in *State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969) (rail transportation is not a highway purpose under the 18th Amendment).

Any appropriation by the Legislature from the Motor Vehicle Fund (“MVF”) (created by the 18th Amendment) to facilitate the transfer of the center lanes of Interstate 90 for light rail also violates the 18th Amendment because light rail is not a highway purpose.

Petitioners anticipate that WSDOT and Sound Transit will argue there is no actual loss of lanes on Interstate 90 from the transfer of the two center lanes to Sound Transit for light rail because, with the restriping of the roadway, the same number of lanes will still be available to general traffic. This is misleading. *Any loss* of roadway built with moneys from

¹ The Governor and the WSDOT Secretary would participate in such a decision. For convenience, the petitioners will refer to the State of Washington and its officers as WSDOT, unless the context requires specific reference to the State or one of its officers.

² Article II, § 40 and the 18th Amendment are used interchangeably in this brief.

the MVF and used for light rail is still lost to a highway purpose under the 18th Amendment.

Petitioners also anticipate that WSDOT and Sound Transit will contend that WSDOT may sell or lease the two Interstate 90 center lanes to Sound Transit. However, WSDOT cannot accomplish indirectly what the 18th Amendment forbids it to do directly. It cannot use MVF moneys for a non-highway purpose through the device of selling or leasing a highway facility, and there is no good faith basis for WSDOT to claim that Interstate 90 is no longer a vital highway corridor or that the two center lanes are no longer needed for highway purposes.

B. ISSUES PRESENTED BY PETITION AGAINST STATE OFFICER

1. Should WSDOT be prohibited from entering into any agreement with Sound Transit to allow exclusive use of two center lanes of Interstate 90 for rail when those lanes were built, at least in part, with funds from the MVF created by the 18th Amendment to Washington's Constitution?

2. Should WSDOT be prohibited from expending 18th Amendment-restricted funds pursuant to ESSB 5352, Section 204(3), which appropriated such funds to establish a valuation of the Interstate 90

center lanes in preparation for transferring the lanes to Sound Transit for exclusive light rail use?

3. Are the petitioners entitled to an award of attorney fees under the common fund exception to the American Rule on attorney fees?

C. STATEMENT OF THE CASE

(1) Identification of the Petitioners

The petitioners are citizens and taxpayers; some of them reside on the east side of Lake Washington in King County and others reside in eastern Washington. Pet. at 2-3. Petitioner Eastside Transportation Association is a nonpartisan, nonprofit corporation organized under the laws of the State of Washington whose purpose and mission is to encourage the informed and active participation of citizens in government; to promote and increase citizens and governmental officials' understanding of major public transportation issues. *Id.* at 3. All of the petitioners are affected by any decision to transfer the center lanes of Interstate 90 to Sound Transit for light rail. *Id.* at 2-3.

(2) Interstate 90

Interstate 90 is a component of the national system of interstate highways. AF 1.³ Its construction and maintenance was financed by

³ The Agreed Facts are hereinafter referred to as "AF" with reference to the paragraph in which the facts appear. WSDOT and Sound Transit insisted upon certain

federal highway funds and state MVF moneys. AF 7, 9. Interstate 90 is designated as a state route in RCW 47.17.140 and is a limited access facility as defined in RCW 47.52.010. AF 1.⁴ As a limited access facility, title to Interstate 90 is vested in the State of Washington, which has full jurisdiction, responsibility and control over it pursuant to RCW 47.24.020(2). AF 2.

Interstate 90 is a key corridor for movement of people and freight. AF 3. It is used by trucks moving freight across Washington State and between the United States, Asian, and Pacific markets, among others, using port facilities located along Seattle's waterfront harbor. AF 3. It serves as the only connection between Mercer Island and Bellevue and Seattle, Exhibit C at 2, and during an average weekday carries approximately 142,500 vehicles per day, according to the WSDOT. AF 3. King County Metro and Sound Transit operate local and regional bus service on Interstate 90, connecting Seattle, Mercer Island, and communities east of Lake Washington. AF 12.

"agreed" facts to which the petitioners do not agree. Specifically, AF 19-21 are not agreed to by the parties and should not be included in the Agreed Facts.

⁴ Interstate 90 is also a designated highway of statewide significance pursuant to RCW 47.05.021(3). Under that provision, as part of the interstate highway system, Interstate 90 is "needed to connect major communities across Washington and support the state's economy." The Legislature deemed Interstate 90 to be of importance to the *whole state of Washington*, not just commuters on Sound Transit. RCW 47.06.140. The loss of the two Interstate 90 center lanes to Sound Transit, an agency serving only a portion of the central Puget Sound basin, is a loss to the entire state.

In the vicinity of Lake Washington, Interstate 90 extends from Bellevue across the East Channel Bridge to Mercer Island and two floating bridges (the Homer M. Hadley Memorial Bridge and the Lacey V. Murrow Memorial Bridge) to an interchange with Interstate 5. AF 3. Across Lake Washington, Interstate 90 currently operates with three general purpose lanes in each direction and a two-lane reversible center roadway flowing in the peak direction from Mercer Island through the Mt. Baker Tunnel to Seattle. AF 10. The primary peak flow direction is westbound in the morning and eastbound in the afternoon. AF 11. The center roadway is restricted to High Occupancy Vehicles (“HOV”), including buses, carpools, vanpools, but it also handles general traffic destined to and from Mercer Island. *Id.*

(3) History of Interstate 90 and the Effort to Transfer Its Two Center Lanes to Sound Transit for Light Rail

The construction of Interstate 90 across Lake Washington was the subject of numerous political and legal battles dating from the late 1950s forward, as this Court recounted in *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 743-45, 620 P.2d 82 (1980). *See also*, AF 4. The conflict between the various jurisdictions affected by Interstate 90 was resolved by the December 21, 1976 Memorandum of Agreement (“MOA”). AF 5. The MOA, to which Sound Transit was not a party,

emphasized the importance of Interstate 90 to the Puget Sound region and the entire state of Washington. Ex. A at 2-3. The MOA specifically provided for an eight-lane configuration for Interstate 90 with three general purpose lanes in each direction and two reversible lanes. *Id.* at 3-4. For the other two lanes, the MOA provided for transit, carpool, and Mercer Island traffic use either on a reversible or two-way directional mode, *id.* at 4, and stated that those lanes were “designed for and permanently committed to transit use.” *Id.* However, the description of the lanes as “transit lanes” was actually a misnomer:

The parties agree that the transit lanes shall operate initially in a two-way directional mode, at no less than 45 mph average speed, with the first priority to transit, the second to carpools, and the third to Mercer Island traffic. In the direction of minor flow, the transit lane shall be restricted to busses. The parties further agree that the initial operation of the East Channel bridge shall consist of only three general purpose auto lanes in each direction in addition to the transit lanes. In addition, there will be an acceleration lane from the South Bellevue Interchange which will terminate prior to the exit ramp at the East Mercer Interchange. The subsequent mode of operation of the facility shall be based upon existing needs as determined by the Commission in consultation with the affected jurisdictions, pursuant to paragraph 14 of this agreement. That determination will consider efficient transit flow, equitable access for Mercer Island and Bellevue traffic, and traffic-related impacts on Seattle.

Id. at 4-5.⁵ The United States Department of Transportation approved this configuration in 1978. AF 6. Construction on the project was completed in 1993. AF 3.

Sound Transit was formed in 1993 by King, Pierce and Snohomish counties to plan, build and operate a high-capacity transit system within the region's most heavily travelled corridors. AF 13.⁶

⁵ It is also important to note what the MOA did not do. It did not commit the two so-called transit lanes to exclusive transit use, given their commitment to carpools and general Mercer Island traffic. The only reference to rail transportation on Interstate 90 was the following:

The I-90 facility shall be designed and constructed so that conversion of all or part of the transit roadway to fixed guideway is possible.

Id. at 5. In fact, the loss of the two center lanes to light rail means that they will be lost to buses for public transportation and other high occupancy vehicles like car pools.

⁶ The history of Sound Transit's failure to deliver on its promises for light rail and its massive cost overruns is detailed in this Court's decision in *Sane Transit v. Sound Transit*, 151 Wn.2d 60, 85 P.3d 346 (2004) (21-mile line scaled back to 14 miles; 13 years to construct rather than 10 years as promised; cost escalation from \$1.8 billion (in 1995 dollars) to \$4.164 billion).

Light rail ridership has been underwhelming and Sound Transit's estimates have been a moving target. Sound Transit estimated 26,610 daily riders between the Airport and downtown Seattle by 2010 and 45,000 by 2020. Mike Lindblom, "Who Will Ride Sound Transit Light-Rail Trains?" *Seattle Times*, May 17, 2009. This would represent a 1% reduction in South End congestion. *Id.* Sound Transit's own Link Light Rail Project Central Link Operations Plan of July 29, 2008 (Revision 4) estimated ridership at 32,600. <http://www.bettertransport.info/pitf/soundtransitcentrallinkopsplan.7.29.08.pdf>. But Sound Transit has averaged under 15,000 daily ridership to date. Mike Lindblom, "Sea-Tac Station Boosts Light Rail Use," *Seattle Times*, January 12, 2010.

Similarly, although Sound Transit's 2009 budget envisioned that light rail fare box revenue would be \$3 million, actual collections in 2009 were \$2.426 million. Light rail operational costs in 2009 were \$21.4 million. Despite a long range Sound Transit goal of 40% recovery of operating costs from fare box revenues, the actual results for 2009 were 11%. <http://www.bettertransport.info/pitf>.

The portion of Interstate 90 at issue here is comprised of three independent features: a three-lane eastbound outer roadway, a three-lane westbound outer roadway, and one two-lane barrier separated reversible center roadway. The center roadway is commonly referred to as the “I-90 express lanes.” See page S-1 of WSDOT/Sound Transit’s I-90 Two-Way Transit and HOV Operations Final EIS, <http://www.soundtransit.org/x1290.xml> (“FEIS”).

Interstate 90 was to be used for transit services to the communities east of Lake Washington. Beginning in 1998, Sound Transit initiated preliminary engineering and environmental analysis to study two-way transit and HOV operations on the Interstate 90 corridor across Lake Washington. AF 14-15, 18. WSDOT, Sound Transit and Federal Highway Authority found in the FEIS that traffic volumes on Interstate 90’s general purpose lanes exceeded 90 percent of the available capacity during both peak periods and in both directions. FEIS at S-6.

In September 2004, the Federal Highway Administration issued a Record of Decision selecting a preferred alternative (“R-8A”) for the Interstate 90 two-way transit and operations project. AF 17. That Record of Decision was based upon the approved Final Environmental Impact Statement for the Interstate 90 corridor project, as the Record of Decision itself states at 1.

The Record of Decision for the R-8A alternative, AF 17, is important for the Court's understanding of how WSDOT and Sound Transit have warped the public process to obtain the transfer of Interstate 90's center lanes. The R-8A configuration is described in the Record of Decision at 9-12.

R-8A provided for ten, not eight, lanes for general vehicular traffic.⁷ R-8A provides for the restriping of Interstate 90 with narrower lanes. This configuration would have HOV lanes on the outside roadways and retain the existing reversible lanes in the center roadway, with both center lanes operating in the same direction, westbound in the morning and eastbound in the afternoon. AF 18. The Record of Decision specifically promised that this alternative "will retain the existing reversible operations in the center roadway. . ." Record of Decision at 9. Single occupancy vehicles would be allowed to use the center roadway between Rainier Avenue and Island Crest Way.

⁷ The petitioners anticipate that WSDOT and Sound Transit will claim that the transfer of the two center lanes of Interstate 90 will implement R-8A and will continue to allow for 8 lanes of general vehicular traffic. This is inaccurate. Instead of 10 lanes for vehicular traffic, there will be 8 after the transfer. Of the eight lanes remaining, 2 will be dedicated to HOV traffic. All Mercer Island traffic will then be wedged into the general purpose lanes.

Importantly, R-8A did not specifically indicate that light rail over Interstate 90 was the preferred means of delivering public transit services. In fact, R-8A did not refer to light rail at all.

The thrust of R-8A was congestion reduction in the Interstate 90 corridor, emphasizing the continued importance of general vehicular traffic on Interstate 90. Record of Decision at 10-11. The selection of the R-8A configuration promised improved travel times in the Interstate 90 corridor:

Among the alternatives, Alternative R-8A has the greatest effect in minimizing impacts to other users and transportation modes and would greatly improve conditions as compared to the No Build Alternative:

- For other freeway users, Alternative R-8A is predicted to result in the lowest travel times for both the AM and PM peak periods.
- Alternative R-8A would reduce the existing approximately 8 hours of congestion to less than 2 hours (remaining at less than 2 hours by year 2025), unlike the other alternatives which maintain or increase hours of congestion as compared to the No Build Alternative.
- Alternative R-8A would have the greatest reduction in person hours of travel of all alternatives, a reduction of 15% in year 2005 and 32% in year 2025 as compared to the No Build Alternative.
- Alternative R-8A would reduce the delay for persons traveling on transit by the greatest percentage as compared to all alternatives.
- Alternative R-8A would have the lowest delay for persons traveling in the general purpose lanes of all alternatives.

Record of Decision at 11.

Sound Transit and the signatories to the 1976 MOA entered into a 2004 amendment to the 1976 MOA. AF 16.⁸ The 2004 amendment to the MOA committed the parties to the earliest possible conversion of center roadway to two-way High Capacity Transit operation based on outcome of studies and funding approvals.” Exhibit C at 3. High Capacity Transit was then defined for the first time in the Amendment to the MOA as “a transit system operating in dedicated right-of-way such as light rail, monorail or a substantially equivalent system.” AF 16, Exhibit C at 2. The 2004 Amendment committed WSDOT to provide the center roadway to Sound Transit for light rail use. However, this commitment, contrary to the actual terms of the R-8A configuration approved by the Federal Highway Administration in its Record of Decision, was adopted without consideration of alternatives and without the public process attendant upon the selection of the R-8A configuration. The 2004 Amendment to the MOA, in effect, hijacked R-8A for light rail.⁹

In 2006, Sound Transit determined to construct and operate a light rail system that connected downtown Seattle, Mercer Island, Bellevue and

⁸ As Sound Transit was not a party to the 1976 MOA, it is difficult to understand how it had the authority to participate in its amendment.

⁹ This action defeated the congestion reduction thrust of R-8A and eliminated the benefit from the addition of two additional lanes for general vehicular traffic.

Redmond via Interstate 90.¹⁰ The plan called for running light rail on the center roadway of Interstate 90 between Seattle and Mercer Island to the exclusion of all forms of vehicular traffic. AF 25.

After initially defeating a proposal to authorize tax increases for roads and transit services, Proposition 1 in November 2007,¹¹ Sound Transit resubmitted a transit-only funding package¹² in November 2008, and the voters¹³ approved that package with funding for Sound Transit to

¹⁰ Governor Christine Gregoire sent a letter dated July 13, 2006 to John Ladenburg, chair of the Sound Transit board, expressing her commitment to allowing Sound Transit to use the Interstate 90 corridor for high capacity transit. Although the Governor allegedly had no preference as to the mode of such transportation in the Interstate 90 corridor, she directed WSDOT Secretary Douglas MacDonald not to participate in the Sound Transit board's vote on that agency's preferred choice of mode for high capacity transit in the center lanes of Interstate 90. AF 22. The Governor, nevertheless, made her actual preference clear:

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.

Id.

¹¹ The measure was defeated on a vote of 56% to 44% in the Sound Transit service area of Pierce, King, and Snohomish Counties.

¹² Exhibit E to AF 23 is noteworthy as it was a document prepared by Sound Transit in the midst of the campaign for Proposition 1, evidencing how Sound Transit used its extensive public resources in that campaign to influence voter opinion.

¹³ The petitioners anticipate that Sound Transit will contend that this Court should follow the "will of the people" expressed in the 2008 vote on Proposition 1. Apart from the fact that it took Sound Transit two tries to ascertain the "will of the people" on light rail expansion, it is important to note that not all people who use or are benefitted by Interstate 90 voted on light rail, and certainly have not voted on the transfer of Interstate 90's center lanes.

construct light rail between Seattle and Mercer Island, Bellevue and Redmond. AF 23.¹⁴ In December 2008, Sound Transit released a draft environmental impact statement proposing a light rail extension, known as the East Link Project, that would cross Lake Washington in the center roadway lanes of Interstate 90 and would operate in a dedicated right-of-way between Seattle and Redmond along an 18-mile long corridor. AF 25. The East Link Project would require exclusive dedication of the Interstate 90 center roadway lanes to Sound Transit for light rail, either through sale or lease of the center roadway, to the exclusion of all forms of vehicular traffic. AF 28. Under the proposed configuration of Interstate 90 to accommodate the East Link Project, the current roadway would be re-striped to make the shoulder and general purpose lanes narrower in order to add an HOV lane to the outside roadway, but the two center lanes of Interstate 90 would be permanently lost to general vehicular traffic. AF 29. Capacity during peak commute periods would be reduced from six lanes (three general purpose and two reversible lanes

The voters in November 2008 were confined to limited portions of King, Pierce, and Snohomish counties. Conversely, voters throughout the entire state of Washington voted their approval of the 18th Amendment.

¹⁴ John Niles and Jim McIsaac, opponents of the measure, argued that it authorized imposition of \$107 billion in taxes, making it the largest local government tax increase in Washington state history, and one of the largest local government tax increases in America. <http://www.bettertransport.info/pitf>.

and one HOV) to four lanes (three general purpose and one HOV). AF 29.¹⁵

To advance the East Link Project, the 2009 Legislature inserted provisions in the 2009 transportation budget, ESSB 5352, conducive to the project and the transfer of Interstate 90 to Sound Transit. AF 30. Section 204(3) of the bill appropriated \$300,000 from the MVF created under the 18th Amendment “for an independent analysis of methodologies to value the reversible lanes on Interstate 90 to be used for high capacity transit pursuant to sound transit proposition 1 approved by voters in November 2008 and further provides:

The independent analysis shall be conducted by sound transit and the department of transportation, using consultant resources deemed appropriate by the secretary of the department, the chief executive officer of sound transit, and the cochair of the joint transportation committee. It shall be conducted in consultation with the federal transit and federal highway administrations and account for applicable federal laws, regulations, and practices. It shall also account for the 1976 Interstate 90 memorandum of agreement and subsequent 2004 amendment and the 1978 federal secretary of transportation’s environmental decision on Interstate 90. The department and sound transit must provide periodic reports to the joint transportation committee, the sound transit board of directors, and the

¹⁵ According to WSDOT, placing light rail on Interstate 90 will reduce overall vehicle capacity, including freight capacity, and increase travel time for drivers crossing Lake Washington on Interstate 90. WSDOT’s Interstate 90 Center Roadway Study, July 2006, <http://www.wsdot.wa.gov/NR/rdonlyres/2D30E991-6159-4F2A-A84B284622643B79/0/I90CenterRoadwayStudy.pdf>.

governor, and report final recommendations by November 1, 2009.

Id. Section 306(17) set December 1, 2009 as the deadline for the completion of negotiations between WDOT and Sound Transit for the sale or lease of the center roadway of Interstate 90, stating:

The legislature is committed to the timely completion of R-8A 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.

*Id.*¹⁶

WSDOT moved forward with the valuation process. The Legislature paid moneys out of MVF for the services of allegedly independent consultants on the valuation of the Interstate 90 center lanes. AF 31. Alan Merkle of the Stoel Rives firm and Stephen DiJulio of the Foster Pepper firm served in that capacity. The consultants opted for a valuation methodology that was favorable to Sound Transit, confining the

¹⁶ Sound Transit and WSDOT established a "work plan" to implement Section 204(3) and Section 306(17), which representatives of WSDOT and Sound Transit presented to the Joint Transportation Committee ("JTC") at its May 26, 2009 public meeting. This work plan confirmed that WSDOT and Sound Transit understood Section 306(17) to mean they had a duty to reach an agreement regarding compensation for the transfer of the center roadway to Sound Transit. Pursuant to the work plan, WSDOT 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.

valuation to the portion of Interstate 90 paid for with state funds, and largely ignoring the replacement cost for lanes on Interstate 90. They instructed the appraisers accordingly.

The appraisers then prepared valuations according to the consultants' instructions for valuation. AF 31-32.¹⁷ Ultimately, the land value set by the appraiser was \$31.6 million. Exhibit H at 53. The appraiser found a value of \$70.1 million for the State's fee interest in the land. Exhibit I.

WSDOT and Sound Transit entered into a contract, which they described as a "term sheet" on January 20, 2010 setting forth their agreement for the transfer of Interstate 90's two center lanes to Sound Transit. AF 34. That so-called "term sheet" outlined the agreement between WSDOT and Sound Transit. Exhibit K. Sound Transit would have the right to "lease" the "air rights" for the center lanes for 40 years, with an option to renew for 35 years. *Id.* at 2.¹⁸ Under that agreement,

¹⁷ Any objective observer would be troubled by those instructions which provide that for the two center lanes of Interstate 90, which were erected at the cost of billions of dollars to the taxpayers, that the valuation be confined to only the portion paid from MVF moneys – allegedly about \$175 million. Yet, despite the obviously greater cost to Washington taxpayers to replace the two lanes in 2010, an era without the 90-10 federal match that was available in the 1970s-1980s, the appraisers concluded the value of an easement across Interstate 90 was either 0, \$6.6 million, or \$69.2 million, depending upon the valuation methodology.

¹⁸ Given the extended duration of the proposed lease, Sound Transit received the right to use the center lanes for virtually their full useful life, making the transaction more in the nature of a sale.

given the credits extended by WSDOT to Sound Transit for constructing light rail pursuant to R-8A and certain “land bank” credits, Sound Transit will pay nothing to the MVF for even the small amount attributed by the appraisers to the value placed on the two Interstate 90 center lanes.

(4) Procedural History

In July, 2009, the petitioners filed the present action against Governor Gregoire and WSDOT Secretary Paula Hammond in this Court invoking its original jurisdiction under article IV, § 4 of the Washington Constitution and RAP 16.2. WSDOT answered and moved to dismiss the petition. Sound Transit answered and moved to intervene in the action. Sound Transit opposed WSDOT’s motion to dismiss. By a ruling dated September 3, 2009, the Commissioner transferred these motions to the full Court and directed the petitioners to respond to WSDOT’s motion to dismiss, which the petitioners did. Ultimately, this Court retained the case by its order entered on December 4, 2009. The Court also granted Sound Transit’s motion to intervene at that time. Pursuant to the Court’s December 4 order, the parties developed agreed facts.

D. SUMMARY OF ARGUMENT

The core facts in this case are largely conceded:

1. Interstate 90 was constructed at least in part with MVF moneys.

2. The Legislature appropriated funds from the MVF for the valuation of Interstate 90's center lanes to implement their transfer to Sound Transit for light rail, a non-highway purpose.

3. WSDOT and Sound Transit have completed negotiations regarding the consideration to be paid by Sound Transit for exclusive use of the Interstate 90 center lanes for light rail.

4. WSDOT will provide the two center lanes of Interstate 90 to Sound Transit for light rail use, specifically the East Link Project.

5. The 2004 amendment to the MOA committed WSDOT to transfer the two center lanes of Interstate 90 to Sound Transit, as Governor Gregoire's July 13, 2006 letter to Sound Transit and the WSDOT-Sound Transit "term sheet" now confirms.

The two center lanes of Interstate 90 were built with MVF moneys and article II, § 40 of the Washington Constitution bars the direct or indirect use of MVF money for a non-highway purpose like Sound Transit's East Link Project. This Court has concluded that light rail is not a highway purpose. Similarly, the Legislature could not appropriate funds in the 2009 transportation budget to facilitate the transfer of the two center lanes of Interstate 90 to Sound Transit for its non-highway purpose.

This Court has jurisdiction to issue a writ prohibiting WSDOT, from transferring the two Interstate 90 center lanes to Sound Transit.

The petitioners are entitled to an award of attorney fees under the common fund exception to the American Rule on fees.

E. ARGUMENT

(1) This Court Has the Authority to Issue a Writ of Mandamus and Should Do So Here

The petitioners anticipate that WSDOT or Sound Transit will contend that this Court should not issue a constitutional writ of mandamus under article IV, § 4 of the Washington Constitution, or that the Court should employ prudential principles to avoid addressing the petitioners' 18th Amendment arguments. By granting original jurisdiction, the Court has seemingly rejected such arguments previously advanced in WSDOT's motion to dismiss the petitioners' action. The petitioners, however, offer a brief discussion of why this Court has the authority to issue a writ of mandamus here, and why it should decline to adopt any prudential limitations on its authority such as standing, ripeness, or justiciability.

(a) Mandamus under Article IV, § 4

This Court's original jurisdiction under article IV, § 4 over writs directed to state officers is discretionary, *Dep't of Ecology v. State Finance Comm'n*, 116 Wn.2d 246, 251, 804 P.2d 1241 (1991); *Holt v. Morris*, 84 Wn.2d 841, 845-46, 529 P.2d 1081 (1974), but this Court will exercise this jurisdiction to address important issues of public rights,

including the constitutionality of statutes. *State ex rel. Garber v. Savidge*, 132 Wash. 631, 633, 233 P. 946 (1925). *See also, O'Connor v. Matzdorff*, 76 Wn.2d 589, 592, 458 P.2d 154 (1969) (“We have said that we will assume original jurisdiction when the application involves the ‘interest of the state at large, or of the public, or when it is necessary in order to afford an adequate remedy.’”); *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (mandamus is appropriate for issues involving constitutionality of a statute or the expenditure of public funds). Where, as here, the issues involve the constitutionality of a statute and matters relating to the expenditure of public funds, this Court appropriately exercises its original jurisdiction.

Petitioners meet the standards for issuance of a writ prohibiting WSDOT’s Secretary and/or Governor Gregoire from taking any action pursuant to ESSB 5352 and the WSDOT-Sound Transit term sheet with respect to the transfer of any portion of Interstate 90 to Sound Transit for the purpose of a rail transit system because (1) such action is unconstitutional under article II, § 40 and constitutes an impermissible diversion or conveyance of Interstate 90 for non-highway purposes; and (2) the Legislature is not authorized to construe the meaning of “highway purposes” as used in article II, § 40 to include rail.

While a constitutional writ of prohibition¹⁹ will usually issue against a state officer only if the officer's challenged act is judicial or quasi-judicial in nature, *Citizens Counsel Against Crime v. Bjork*, 84 Wn.2d 891, 529 P.2d 1072 (1975),²⁰ a constitutional writ of mandamus is broader and will issue against a state officer to compel the performance of an act which the law imposes as a duty for that officer, *Flanders v. Morris*, 88 Wn.2d 183, 191-92, 558 P.2d 769 (1977), or, more critically for this case, to prohibit the exercise of a mandatory duty. *Wash. State Labor Council v. Reed*, 149 Wn.2d 48, 55, 65 P.3d 1203 (2003) ("mandamus is an appropriate remedy where a petitioner seeks to prohibit a mandatory duty.").

¹⁹ The constitutional writs of mandamus and prohibition are distinguishable from their statutory counterparts. See RCW 7.16.160 (mandamus); RCW 7.16.290-300 (prohibition).

²⁰ The law on whether the constitutional writ of prohibition may only issue as to judicial or quasi-judicial officers is far from clear. This Court has historically issued writs of prohibition to non-judicial and non-quasi-judicial officers. See, e.g., *State ex rel. Barlow v. Kinnear*, 70 Wn.2d 482, 423 P.2d 937 (1967) (Court issued writ of prohibition to prevent enforcement of Tax Commission order that a county board of equalization meet and reduce assessed valuations of all real property in certain school districts as order violated Seventeenth Amendment); *Andrews v. Munro*, 102 Wn.2d 761, 689 P.2d 399 (1984) (Court issued writ to prevent Secretary of State from processing or certifying proposed referendum); *Wash. State Bar Ass'n v. State*, 125 Wn.2d 901, 890 P.2d 1047 (1995) (Court issued writ of prohibition to prevent PERC from assuming jurisdiction over a labor dispute between the WSBA and its staff because statute conferring such jurisdiction upon PERC was unconstitutional as a violation of the separation of powers). The Court issued constitutional writs of prohibition in these cases without discussing its authority under article IV, § 4 of our Constitution to do so.

This Court has frequently articulated the view that a constitutional writ is only available to address a mandatory duty of a state officer. *Brown*, 165 Wn.2d at 724; *Gerberding v. Munro*, 134 Wn.2d 188, 195, 949 P.2d 1366 (1998); *Walker v. Munro*, 124 Wn.2d 402, 408-09, 879 P.2d 920 (1994). In *Walker*, this Court noted that the breach of duty may be continuing in nature. *Id.* at 408.

In *Brown*, this Court discussed the nature of the state officer's mandatory duty, summarizing the test as follows: "A mandatory duty exists when a constitutional provision or statute directs a state officer to take some course of action." 165 Wn.2d at 724. The *Brown* court also distinguished between ministerial or discretionary duties, and mandatory duties. *Id.* at 724-26.

WSDOT contended in its motion to dismiss that no mandatory duty is involved in this case so that writs may not issue.²¹ But WSDOT is wrong because the actions challenged by petitioners involve mandatory duties.

First, there is no question that the deposit of fuel tax revenues in the MVF and their expenditure only for highway purposes are *mandatory* duties for the executive and legislative branches under article II, § 40.

²¹ The threshold determination of whether a duty exists, the performance of which can be compelled by writ of mandamus, is a question of law. *Delaney v. Board of Spokane County Comm'rs*, 161 Wn.2d 249, 253, 164 P.3d 1290 (2007).

Further, the expenditure of MVF moneys for a valuation study is required under the plain language of Sections 204(3) of the 2009 transportation budget which appropriates \$300,000 from the MVF to pay for an analysis of valuation methods “to value the reversible lanes on Interstate 90 *to be used for high capacity transit.*” (emphasis added). Similarly, there is no question that Interstate 90 was built and maintained, at least in part, with MVF moneys. AF 7, 9. WSDOT is under a *mandatory duty* not to expend MVF moneys for non-highway purposes.

This case is remarkably similar to *State ex rel. Burlington Northern, Inc. v. Wash. State Utilities & Transp. Comm’n*, 93 Wn.2d 398, 609 P.2d 1375 (1980). There, this Court issued a statutory writ of mandamus under RCW 7.16.160 to prevent disbursements from the railroad regulatory fee account to pay for judgments in tort cases involving railroad grade crossing accidents. This Court held that a writ of mandamus was appropriate to prevent the expenditure of public moneys from the account at issue for an illegal purpose, and to compel reimbursement of the improper expenditures. *Id.* at 410-11. A writ should issue from this Court to bar the Governor and the WSDOT Secretary from violating their mandatory duty not to expend MVF funds for non-highway purposes.

(b) Prudential Reasons for the Court to Decline to Exercise Original Jurisdiction

WSDOT has pleaded that the present case is not justiciable or ripe for resolution. It argued in its motion to dismiss the petitioners' petition that there is no "certainty" that the transfer of the two center lanes of Interstate 90 will occur. WSDOT's argument would border on the frivolous, if it chooses to advance it. Sound Transit has also argued the petitioners lack standing.

Justiciability and ripeness are analogous doctrines in Washington cases and, indeed, are all too often discussed simultaneously. *See, e.g., First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Preservation Board*, 129 Wn.2d 238, 253-54, 916 P.2d 374, 382 (1996) (Dolliver, J., dissenting). Justiciability ordinarily concerns whether an issue is judicially cognizable at all; ripeness, on the other hand, is more readily associated with the timing of a court action. The justiciability issue usually arises in the declaratory judgment context.²²

This Court has held that to meet the test of justiciability, there must be:

- (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)

²² Indeed, *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 27 P.3d 1149 (2001), *cert. denied*, 535 U.S. 931 (2002), cited by WSDOT in its motion to dismiss, is another declaratory judgment case. *See also, Branson v. Port of Seattle*, 152 Wn.2d 862, 101 P.3d 67 (2004).

between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract[,] or academic, and (4) a judicial determination of which will be final and conclusive.

Nollette v. Christianson, 115 Wn.2d 594, 599, 800 P.2d 359, 362 (1990) (citing *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137, 139 (1973)). See also, *City of Spokane v. Taxpayers of City of Spokane*, 111 Wn.2d 91, 96, 758 P.2d 480, 482 (1988).

Washington courts may disregard these prudential restraints and choose to resolve issues on the merits rather than permit principles of restraint to prevent the resolution of controversies. In *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1014, 1014 (1972), this Court stated:

Where the question is one of great public interest and has been brought to the court's attention in the action where it is adequately briefed and argued, and where it appears that an opinion of the court would be beneficial to the public and to the other branches of the government, the court may exercise its discretion and render a declaratory judgment to resolve a question of constitutional interpretation.

Ripeness concerns the prematurity of court involvement in an issue. *First Covenant Church v. City of Seattle*, 114 Wn.2d 392, 398, 787 P.2d 1352, 1355 (1990), *vacated*, 499 U.S. 901 (1991), *reinstated on remand*, 120 Wn.2d 203, 840 P.2d 174 (1992). As to the substance of the doctrine, Washington courts have largely applied the federal test of

balancing the fitness of the issues for judicial decision against the hardship to the parties in not deciding a matter. *Id.* at 399 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

In this case, the tests for justiciability and ripeness are met. There is a live controversy that needs to be resolved here. The 2009 transportation budget evidences a legislative intent to proceed with the project. Section 204(3) also specifically states that the valuation *shall account for ... the 2004 Amendment* [to the 1974 MOA]. (emphasis added). That 2004 Amendment to the MOA committed WSDOT to transfer the Interstate 90 center lanes to Sound Transit for exclusive rail use, a non-highway purpose.²³ AF 16; Exhibit C. By specifically referencing the 2004 Amendment to the MOA in section 204(3), the Legislature directed WSDOT to implement the transfer of the center lanes to Sound Transit. Governor Gregoire's July 13, 2006 letter to Sound Transit also recites this commitment. AF 22.

In addition, Section 306(17) of the 2009 transportation budget states that WSDOT "shall complete the process of negotiations with sound transit" and that "[s]uch agreement shall be completed no later than

²³ The 2004 Amendment 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." Exhibit C at p. 3.

December 1, 2009.”²⁴ The Legislature did not restrict the terms “negotiations” and “agreement” to refer solely to a valuation agreement. Obviously, it was the intent of the Legislature that WSDOT negotiate an agreement for the purpose of transferring the lanes to Sound Transit, including but not limited to the amount of reimbursement required. The directives in Section 204(3) and 306(17) are consistent with the Legislature’s statement of intent that it is “committed to ... the construction of sound transit’s east link” and the establishment of exact deadlines in which the valuation and related agreement are to be completed.

WSDOT and Sound Transit hired consultants to produce the independent analysis of the methodologies to value the center lanes of

²⁴ It is well established that the use of the term “shall” in a statute imposes a mandatory duty. In *Erection Co. v. Dep’t of Labor & Indus.*, 121 Wn.2d 513, 852 P.2d 288 (1993), this Court described what “shall” means in a statute. There, the Court reinforced its obligation to give words in a statute their “plain and ordinary meaning unless a contrary intent is evidenced in that statute.” *Id.* at 518. The Court stated:

It is well settled that the word “shall” in a statute is presumptively imperative and operates to create a duty. The word “shall” in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent.

Id. (citations omitted).

Interstate 90. AF 31; Exhibit K at 1.²⁵ Appraisers implemented the consultants' valuation methodologies. AF 32; Exhibit I at 8.

In a December 16, 2009 press release, WSDOT noted that it issued a \$7.6 million contract whose purpose was described as follows:

The I-90 Two-Way Transit and HOV Operations project adds HOV lanes on I-90 between Bellevue and Seattle and improves HOV access in Mercer Island and Bellevue. The new HOV lanes on the outer roadways will introduce 24-hour HOV capacity both eastbound and westbound and *enable Sound Transit to start building light rail across Lake Washington in the center lanes.*

(emphasis added) <http://www.wsdot.wa.gov/projects/i90/twowaytransit>.

WSDOT and Sound Transit have entered into a "term sheet," a contract for the transfer of the two center lanes. AF 34. This only confirms that there is an agreement between those two agencies to transfer Interstate 90's center lanes. As indicated in Exhibit K to the Agreed Facts, the "understanding" between WSDOT and Sound Transit is final and only awaits this Court's decision and certain ministerial acts before the transfer of Interstate 90's two center lanes to Sound Transit will occur. The term sheet is detailed and complete, and will be approved by "the governing bodies" of both governmental agencies:

²⁵ The appropriation of funds for the valuation is itself a violation of the 18th Amendment and a similar appropriation was ruled unconstitutional by this Court. See *O'Connell* (a \$250,000 appropriation from the MVF to Metro Transit for planning, engineering, financial and feasibility studies incident to the preparation of a

This term sheet summarizes the essential terms of the agreements and the modifications of existing agreements that will be entered into by WSDOT and Sound Transit. These terms have been negotiated in good faith and will be endorsed and recommended for approval by the appropriate governing bodies.

Exhibit K at 4.

Finally, although WSDOT did not object to the petitioners' standing in its answer, Sound Transit did. The petitioners have standing to present this petition to the Court. In *Lane v. City of Seattle*, 164 Wn.2d 875, 885, 194 P.3d 977 (2008), this Court stated that standing is satisfied if the party is in the law's zone of interest and suffers some harm. The petitioners fall within the zone of interest created by the illegal use of MVF funds to facilitate the transfer of Interstate 90's center lanes. The decision to transfer those lanes, paid for by MVF moneys, to a non-highway purpose affects them. As taxpayers and users of Interstate 90, they will be harmed by WSDOT's illegal actions to improperly expend MVF moneys and to transfer the Interstate 90 center lanes to Sound Transit for non-highway purposes.

In sum, this Court should exercise its original jurisdiction under article IV, § 4. The issues are ripe and justiciable. This Court should not wait until Interstate 90's center lanes are closed to vehicular traffic and

comprehensive public transportation plan was unconstitutional under the 18th Amendment).

jackhammers are poised to begin the erection of light rail tracks on that facility to decide the constitutional issue posed by this case. The petitioners have standing to challenge WSDOT's actions here. The Court should issue a constitutional writ barring the expenditure of funds from the MVF for the evaluation of the Interstate 90 center lanes, a precursor to their transfer and requiring the reimbursement of any funds illegally expended, and barring the transfer of the two Interstate 90 center lanes. Both actions improperly use MVF moneys for a non-highway purpose.

(2) The 18th Amendment Limits the Expenditure of Motor Vehicle License Fees and Fuel Excise Tax Revenues to Highway Purposes and Light Rail Is Not a Highway Purpose

The 18th Amendment was enacted by the Legislature as HJR in 1943 and submitted to the voters for their approval in the 1944 election. The Washington State Good Roads Association was the proponent of the measure in the 1944 Voters Pamphlet. That organization stated the following rationale for the amendment in the Voters Pamphlet:

At the request of farm, civic, labor, business, officials, motor owners, and Good Roads organizations, the Legislature approved and referred to the voters a Constitutional Amendment to limit definitely the use of gasoline taxes and automobile registration fees to street and highway construction, maintenance and safety. This does not include the excise taxes levied for school purposes.

There are 467 towns and communities in Washington which have no rail service and which are

completely dependent upon highway transportation for their existence.

Their ability to expand, to accommodate new industries, to support bigger payrolls, is dependent upon good roads – upon the ability of trucks, buses and passenger automobiles to transport people and products to and from these communities. By insuring good roads, the amendment will assure the continued existence and prosperity of these communities.

Between 1933 and 1943 in this state, in excess of \$10,000,000 of your gas tax money was diverted away from street and highway improvement and maintenance for other uses. Several hundred miles of good, paved, sale highway would have been built to save money in motor vehicle operation had this special motor tax money been used as it was intended. These were highways and streets we paid for, but didn't get! Now you can stop further diversion.

The proponents' intent was plainly to advance the construction of highways and roads to prevent the diversion of vehicle-related taxes to non-highway purposes. The Attorney General affirmed the central, anti-diversionary policy of the 18th Amendment in AGO 2001 No. 2²⁶ where

²⁶ The petitioners have cited AGOs advisedly in their brief because such authority, while entitled to great weight from this Court, is not binding in the Court's interpretation of the 18th Amendment. *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 802-03, 920 P.2d 581 (1996), cert. denied, 520 U.S. 1210 (1997); *Wash. Fed'n of State Employees, Council 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 164-65, 849 P.2d 1201 (1993).

It is noteworthy however, that WSDOT's present argument so often fly in the face of AGOs issued by its counsel, the Attorney General.

that office opined that a sales tax on gasoline would be problematic. The opinion states:²⁷

The proponents of Amendment 18 did not want gas tax monies diverted to non-highway purposes. We think it unlikely that a court would permit such a diversion. For example, we doubt a court would approve if the Legislature repealed the gas tax and re-imposed the same tax provisions under a different label.

Consistent with the 18th Amendment's anti-diversionary purpose, its language defining "highway purposes" is specific and prescriptive:

All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes.²⁸ Such highway purposes shall be construed to include the following:

²⁷ The concern expressed in the opinion about the manipulation of labels on the tax applies with equal force to a similar manipulation of the leasing provisions in state law by Sound Transit and WSDOT to devote Interstate 90, paid for in part by MVF monies, to a plainly non-highway purpose.

²⁸ The special fund designated by the first sentence of the 18th Amendment to be used exclusively for highway purposes is the MVF, a fund created for the purpose of receiving all license fees for motor vehicles and excise taxes on the sale, distribution or use of motor vehicle fuel. The MVF was codified as RCW 46.68.070, which provides:

There is created in the state treasury a permanent fund to be known as the motor vehicle fund to the credit of which shall be deposited all money directed by law to be deposited therein. This fund shall be for the use of the state, and through state agencies, for the use of counties, cities, and towns for proper road, street and highway purposes, including the purposes of RCW 47.30.030.

(a) The necessary operating, engineering and legal expenses connected with the administration of public highways, county roads and city streets;

(b) The construction, reconstruction, maintenance, repair, and betterment of public highways, county roads, bridges and city streets; including the costs and expense of (1) acquisition of right-of-way, (2) installing, maintaining and operating traffic signs and signal lights, (3) policing by the state of public highways, (4) operation of movable span bridges, (5) operation of ferries which are a part of any public highway, county road or city street;

(c) The payment or refunding of any obligations of the State of Washington, or any political subdivision thereof, for which any of the revenues described in section 1 may have been legally pledged prior to the effective date of this act;

(d) Refunds authorized by law for taxes paid on motor vehicle fuels;

(e) The cost of collection of any revenues described in this section.

Nowhere does the 18th Amendment reference rail transportation as a “highway purpose.”

This Court has adopted particular principles for the interpretation of language in constitutional provisions adopted by the people. The language “should read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction for the purpose of limiting or extending its operation.” *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 811, 982 P.2d 611 (1999) (quoting *State ex rel.*

O'Connell v. Slavin, 75 Wn.2d 554, 558, 452 P.2d 943 (1969). In *Automobile Club of Wash. v. City of Seattle*, 55 Wn.2d 161, 346 P.2d 695 (1959), this Court stated that the words of the 18th Amendment as adopted by the people were “to be understood as their words used in their ordinary meaning and not in any technical sense.” *Id.* at 167. In *State ex rel. State Capitol Comm'n v. Lister*, 91 Wash. 9, 14, 156 P. 858 (1916), in which this Court determined that the State’s contractual obligation to pay interest on bonds from general state tax revenues would constitute “debt” in violation of the constitutional debt limitation, the Court stated:

Constitutions being the result of the popular will, the words used there in are to be understood ordinarily in the sense that such words convey to the popular mind. The meaning to be given to the language used in such instruments is that meaning which a man of ordinary prudence and average intelligence and information would give. Generally speaking, the meaning given to words by the learned and technical is not to be given to word appearing in a constitution.

Id. at 14. See also, *State ex rel. Albright v. City of Spokane*, 64 Wn.2d 767, 394 P.2d 231 (1964); Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 510 (1984).

The plain and ordinary understanding of a “highway purpose” excludes light rail from such a definition in article II, § 40.

The 18th Amendment and the MVF have been construed in a series of cases and opinions of the Attorney General. As early as 1951, in *State ex rel. Bugge v. Martin*, 38 Wn.2d 834, 232 P.2d 833 (1951), this Court held that the use of the MVF moneys was confined exclusively to highway purposes. In that case, the Court held that moneys from the MVF could be used to pay the debt service for the Agate Pass Bridge. In *Automobile Club of Wash., supra*, the Court again held that revenue from the MVF could be used only for highway purposes; the Fund could not be used to satisfy tort judgments because such an expenditure bore no relationship to the construction, operation, maintenance, or betterment of the public highway or bridges of the state. In *Wash. State Highway Comm'n v. Pacific Northwest Bell Telephone Co.*, 59 Wn.2d 216, 367 P.2d 605 (1961), this Court reaffirmed that moneys from the MVF must be used exclusively for highway purposes; the cost of relocating utility facilities located on highway rights-of-way was not an expenditure exclusively for highway purposes. The 18th Amendment's limitation of expenditures to highway purposes was most recently affirmed in *Heavey*. This Court in that case again reaffirmed that the language of the 18th Amendment as to "highway purposes" was unambiguous. 138 Wn.2d at 809-11.

In AGLO 1975 No. 35, the Attorney General opined that MVF moneys could not even be used to fund the State Department of

Transportation except insofar as highway purposes were being fulfilled. MVF moneys could not support any WSDOT administrative efforts in connection with non-highway purposes.

In only a few, isolated instances has this Court approved of the use of MVF moneys for activities that are not traditional highway purposes, as described in the definition of such purposes in article II, § 40 itself. In *State ex rel. Washington State Highway Comm'n v. O'Brien*, 83 Wn.2d 878, 523 P.2d 190 (1974), for example, this Court upheld the use of MVF moneys for the acquisition and construction of “park and ride” facilities. The Court noted that “park and ride” facilities were an integral part of the highway system and enhanced efficient highway utilization. *Id.* at 881. The highway purpose of such facilities is clear given the fact that buses use the highways and people can travel to such facilities, park their cars, and ride on buses *on the highways*.²⁹ This Court specifically distinguished such a highway purpose from the non-highway purpose of rail service. *Id.* at 883. *See also, Northwest Motorcycle Ass'n v. State Interagency Comm. for Outdoor Recreation*, 127 Wn. App. 408, 110 P.3d 1196 (2005), *review denied*, 156 Wn.2d 1008 (2006) (Court of Appeals held that MVF moneys

²⁹ Similarly, highway rest areas for motorists or high occupancy vehicle lanes also fulfill a “highway purpose” as they facilitate the use of highways by wheeled vehicles. This is distinctly different than Sound Transit’s East Link Project, which will prevent wheeled vehicles of *any* sort from using Interstate 90’s two center lanes. With

could be used to construct and maintain nonmotorized recreation trails and facilities).³⁰

The most clear-cut, and controlling, decision on whether light rail is a “highway purpose” under the 18th Amendment is *O’Connell*. There, consistent with this Court’s historic narrow reading of article II, § 40, the Court specifically held that public transportation is not a “highway purpose.” A \$250,000 appropriation to Metro Transit for planning, engineering, financial and feasibility studies incident to the preparation of a comprehensive public transportation plan was unconstitutional under article II, § 40. The Court held that the language of the 18th Amendment was plain and unambiguous, *id.* at 558, noting that the term “highway purposes” was clearly defined in article II, § 40:

But all of the purposes which are listed pertain to highways, roads and streets, all of which are by nature adapted and dedicated to use by operators of motor vehicles, both public and private, and none of them pertain to other modes of transportation, such as railways,

the transfer of the center lanes, buses and carpools will be forced to use the narrowed lanes created by restriping Interstate 90.

³⁰ The Legislature in 1971 provided for a 1% refund on gas taxes for off-road vehicle and recreational facilities. The Legislature in 2003 expanded the use of the “refund” to nonmotorized vehicle trails. The Court of Appeals held that because article II, § 40 specifically authorized refunds on motor vehicle fuels as a highway purpose, a “refund” to a government program, rather than the fuel purchasers, was authorized by article II, § 40. *Northwest Motorcycle Ass’n*, 127 Wn. App. at 415-16. The reasoning of the Court of Appeals is suspect. A refund is generally understood to be a return of a part of the purchase price *to the purchaser*; the court improperly diverted such “refunds” to a fund a program that could not be directly funded as a highway purpose under the language of the 18th Amendment.

waterways, or airways. Nor is there any authorization for the expenditure of these funds for the purchase or maintenance of any type of vehicles for public transportation purposes.

Id. at 558-59. The Court also rejected the notion that a public transportation system was somehow a highway purpose:

What is a public transportation system? It is not a “way” at all, but is a number of buses, trains, or other carriers each holding a number of passengers which may travel upon the highways or may travel upon rails or water, or through the air, and which are owned and operated, either publicly or privately, for the transportation of the public. The mere fact that these vehicles may travel over the highways, or that, as the appellant points out, may relieve the highways of vehicular traffic, does not make their construction, ownership, operation or planning a highway purpose, within the meaning of the constitutional provision.

Id. at 560. The *O’Connell* decision has never been overruled.

In AGLO 57-58 No. 104, the Attorney General similarly concluded that the use of MVF moneys to fund the state’s participation with the federal government in the purchase of rights-of-way to provide sufficient median width in an interstate highway to accommodate rapid rail transit on such rights-of-way was unconstitutional under article II, § 40:

In the situation at hand the purchase of the extra right-of-way would not serve any highway purpose, since such right-of-way would be exclusively for the rapid rail transit system. Therefore, it is the opinion of this office that expenditure of motor vehicle funds for the purpose of additional right-of-way in order for rapid rail transit system

to be built upon the median strip would constitute an expenditure of motor vehicle funds in violation of Amendment 18 of the Washington State Constitution.

Thus, the Attorney General's office has been clear since 1957, long before this Court's decision in *O'Connell*, that rail transit is not a highway purpose for which MVF moneys can be expended under the 18th Amendment.

No matter how much the State or Sound Transit hope to torture the language of article II, § 40 or evade this Court's *O'Connell* decision, the MVF may not be used directly or indirectly to pay for non-highway purposes like Sound Transit's East Link Project. Thus, the Legislature's enactment of § 204(3) of the 2009 transportation budget, designed to facilitate a non-highway use, violates article II, § 40. Similarly, any effort to transfer the center lanes of Interstate 90 to Sound Transit for light rail violates the 18th Amendment.

Other jurisdictions, as the Voters Pamphlet on HJR 4 in 1944 notes, have constitutional provisions akin to article II, § 40. They are also construed *narrowly*. See, e.g., *State ex rel. Moon v. Jonasson*, 299 P.2d 755 (Idaho 1956) (no use of highway funds for advertisement of the state and its tourist resources because Idaho Const. art. VII § 17 provided highway fund revenues be used only for highway purposes and advertisement did not constitute "maintenance"); *Thompson v. Bracken*

County, 294 S.W.2d 943 (Ky. 1956) (repair and maintenance of county road did not qualify for state highway funds restricted by Ky. Const. § 180 and subsequent statute to use in construction and improvement of roads); *Opinion of the Justices*, 132 A.2d 440 (Me. 1957) (relocation of a utility does not constitute “construction” or “reconstruction” of a highway within the meaning of Me. Const. art. 9 § 19); *State Highway Comm’n v. West Great Falls Flood Control & Drainage District*, 468 P.2d 753 (Mont. 1970) (motor vehicle funds appropriately used for flood control under Mont. Const. art. 12 § 1b only because flooding would substantially impact state highways); *Contractors Ass’n of West Va. v. West Va. Dep’t of Pub. Safety, Div. of Pub. Safety*, 434 S.E.2d 357 (W. Va. 1993) (construction of police barracks not directly related to highway maintenance and therefore unconstitutional under W. Va. Const. art. VI § 52, but highway patrol and traffic-related administrative costs were permissible).

At least three states have faced the *precise issue* raised in this case, and rejected an expansive interpretation of “highway” purposes to include commuter rail projects, reaching the same conclusion as did this Court in *O’Connell*.

As long ago as 1949, in *In re Opinion of the Justices*, 85 N.E.2d 761 (Mass. 1949), the Supreme Judicial Court of Massachusetts concluded

that under Massachusetts' constitutional provision limiting the use of fuel taxes and license fees to the payment of "highway obligations," the cost of "construction, reconstruction, maintenance and repair of public highways and bridges," and enforcement of traffic laws, a legislative effort to define the subways, tunnels, viaducts, elevated structures, and rapid transit extensions of Boston's Metropolitan Transit Authority as "public highways or bridges" was unconstitutional. The court concluded that such an effort would not give the constitutional words their natural and obvious sense according to common usage. The court rejected the notion that such structures might positively affect traffic congestion thereby facilitating a highway purpose:

Neither can we think that the facts that the subways, tunnels, viaducts, elevated structures, and rapid transit extensions are for the most part located under or above public ways, and that their use materially contributes to reduce traffic on the surface of the ways, would cause the voting public to regard these structures as in themselves highways or part of highways upon which the Highway Fund could be expended under art. 78 of the Amendments.

Id. at 750-51.

In *New Hampshire Motor Transport Ass'n v. State*, 846 A.2d 553 (N.H. 2004), the New Hampshire Supreme Court rejected use of highway funds for commuter rail. New Hampshire's constitutional provision reserves funds raised from the operators of motor vehicles only for the

construction, reconstruction, and maintenance of public highways...”

N.H. Const. part II art. 6-a. The New Hampshire Department of Transportation (“NHDOT”) expended motor vehicle funds to design and construct a railroad station and a park-and-ride facility, complete construction of the rail project, procure a train, and provide a three-year operating subsidy for the railroad. *Id.* at 764. A coalition of motor vehicle operators and trucking associations challenged NHDOT’s actions, arguing that commuter rail did not fit the definition of “construction, reconstruction, and maintenance of public highways within the State.” *Id.* at 764-65. The New Hampshire Supreme Court reviewed the history and purpose of Part II Art. 6-a, which it said was “restrictive” to prevent the “siphoning” of highway funds for other purposes. *Id.* at 765-67. The court concluded that commuter rail did not fit the narrow constitutional definition:

Giving due consideration to the plain language of the constitutional provision, its legislative history, the 1992 opinion of the Attorney General and our own prior opinions, we hold that Article 6-a was designed to insure that highway funds would be used exclusively for highway purposes and that such purposes do not include railroads. When Article 6-a was adopted, the term “public highways” was understood to include public roads used by motor vehicle traffic. The intention behind Article 6-a was to insure that certain fees and taxes paid by citizens for the privilege of operating motor vehicles on the State’s roadways would be expended only upon those items that benefit the highway system exclusively. The use of

highway funds on the Rail Project falls outside this mandate.

Id. at 558-59. The reasoning of the New Hampshire Supreme Court is sound: funds gathered from motor vehicle operators must be used in a way that benefits those operators, and not for more general public purposes.

In *Automobile Club of Oregon v. State*, 840 P.2d 674 (Or. 1992), the Oregon Supreme Court invalidated an “emission fee” payable along with the registration of certain motor vehicles. The revenues generated by the fee were to be used to fund projects aimed at improving air quality such as public transportation. The Oregon court concluded that the fee was, in fact, a tax. As such, the tax violated Oregon’s constitution which limited the use of such tax revenues to the funding of the improvement, operation and use of public highways. The court stated that various public transportation projects to be funded by the emission fee were impermissible under the Oregon Constitution.

The petitioners anticipate that WSDOT and Sound Transit will claim that the 18th Amendment is not implicated in the transfer of the two Interstate 90 center lanes because, with the restriping of the roadway, no net loss of lanes to traffic will occur. For reasons articulated *supra*, this statement is factually erroneous. Moreover, it misses the mark on the anti-

diversionary policy of the 18th Amendment. Even if WSDOT and Sound Transit were correct about the lanes (and they are not), the fact is *irrelevant*. Any lanes from a facility built at least in part with MVF moneys transferred to Sound Transit for light rail *are still lost to highway purposes*. This violates the 18th Amendment.

In effect, WSDOT and Sound Transit seek to rewrite the prescriptive language of the 18th Amendment as to what constitutes a “highway purpose” and to ignore this Court’s analysis in *O’Connell*. Those agencies argue, in effect, that if the expenditure of MVF moneys ultimately advances what they contend is a purpose that will facilitate traffic flow, it is acceptable to circumvent the 18th Amendment. The Massachusetts Supreme Judicial Court flatly rejected this argument. Similarly, the Oregon Supreme Court considered and rejected such an argument. In *Rogers v. Lane County*, 771 P.2d 254 (Or. 1989), the court held that under Oregon’s counterpart to the 18th Amendment the anti-diversionary policy of that state’s constitutional provision required that projects “primarily and directly facilitate motorized vehicle travel.” *Id.* at 259. The court ruled that the motor vehicle fund could not be used to fund an airport parking facility and covered walkways. The court also rejected a dissenting justice’s formulation that the project need only improve “the operation and use of a highway, road, street, or roadside rest area to satisfy

Oregon's constitution." *Id.* at 263. In *Automobile Club of Oregon*, the Oregon Supreme Court again rejected the *Rogers* dissent's more liberal formulation for a constitutional expenditure when it refused to allow motor vehicle funds to be used for rail transit. 840 P.2d at 490 n.11.

In sum, *O'Connell* controls here. The use of MVF moneys for light rail, a non-highway purpose, violates the 18th Amendment. This Court also should reject the effort of WSDOT and Sound Transit to effectively alter the definition of a "highway purpose" under the 18th Amendment to allow WSDOT to transfer facilities built with MVF moneys when such facilities continue to be needed for highway purposes.

(3) WSDOT May Not Do Indirectly What the 18th Amendment Bars It Directly from Doing

The petitioners here anticipate that WSDOT and Sound Transit will contend that even if article II, § 40 forbids them from using MVF moneys to *directly* pay for light rail, nothing prevents the transfer of the Interstate 90 center lanes to Sound Transit for appropriate "consideration." They are wrong. WSDOT and Sound Transit must resort to this argument because the 18th Amendment, as analyzed by this Court in *O'Connell*, is crystal clear in forbidding the use of Interstate 90, built with MVF money, for light rail. It is unlikely WSDOT or Sound Transit seriously

contemplated the 18th Amendment as they proceeded with their plans to install light rail on Interstate 90.

Interstate 90 was funded, built, dedicated, and operated as an essential part of our interstate highway system. Numerous municipalities are served by Interstate 90. If the transfer here is not prohibited, it would set a precedent for any municipality to put in motion a procedure to obtain a portion of Interstate 90 for an arguably “beneficial” but non-highway purpose. Under this arrangement our highway system, so necessary and essential to our state’s economy and welfare, would be subject to piecemeal dismantling by various municipalities.

Given this Court’s express holding in *O’Connell* and the powerful anti-diversionary policy of the 18th Amendment, WSDOT and Sound Transit cannot escape that policy through a flimsy rationale of “transferring” the two Interstate 90 center lanes by sale or lease. Were the Court to conclude that those agencies could concoct a sale or lease rationale to escape the clear mandate of the 18th Amendment, the Court would simply eviscerate the anti-diversionary policy of our Constitution. Any agency could avoid the mandate of the 18th Amendment that MVF revenues be used only for specified highway purposes by initially using the MVF moneys for a constitutionally legitimate purpose only to then serve a non-highway purpose on the pretext that the facility built with

MVF moneys was somehow no longer needed and could be transferred to another for a non-highway purpose. For example, WSDOT could expend MVF moneys to replace the SR 520 floating bridge over Lake Washington and then “lease” a lane of that bridge to Sound Transit for light rail. WSDOT could build a rest stop on Interstate 5 with MVF moneys and then “lease” the structure to an entrepreneur for a business. The 18th Amendment’s anti-diversionary policy would be frustrated.

Washington’s statutes on the disposition of transportation facilities make clear that the State may not evade its obligation under the 18th Amendment, nor use MVF moneys for a non-highway purpose by means of sale or lease of facilities built with such moneys for non-highway purposes.³¹

First, consistent with the direction in the 18th Amendment,³² real property owned by the State and under WSDOT jurisdiction, such as Interstate 90, may not be sold unless (1) WSDOT determines the property “is no longer required for transportation purposes,” (2) it is in the public

³¹ In AGLO 1975 No. 62, the Attorney General addressed the question of whether local governments could receive properties that were paid for out of MVF moneys and use them for other purposes, and concluded that any efforts to transfer properties acquired with MVF moneys must follow the usual process of surplusing such properties and there must be consideration for the transfer of the property to that local government.

³² Any lease or sale statutes must be read consistently with the strong anti-diversionary policy of the 18th Amendment.

interest to sell the property, (3) WSDOT receives consideration “for land or improvements or for construction of improvements at fair market value.” RCW 47.12.063. There is no way that WSDOT can, in good faith, claim Interstate 90 is no longer required for *transportation purposes*. Even if the two center lanes of Interstate 90 are conveyed to Sound Transit, they are still being used for a “transportation purpose,” light rail, albeit not a highway purpose permitted by article II, § 40. WSDOT specifically found in the May 2004 FEIS a document it co-signed, that traffic volumes on the existing lanes of Interstate 90 already exceed 90 percent of the available capacity during both peak periods in both directions. FEIS at S-6.

Similarly, the two center lanes of Interstate 90 may not be leased in a fashion inconsistent with the 18th Amendment. RCW 47.12.120 provides that WSDOT may lease “any lands, improvements or air space above or below any lands” used for highway purposes, provided that such lands and improvements “are not presently needed.” That latter phrase in RCW 47.12.120 plainly refers to “needed for highway purposes.”³³ RCW 47.12.125 requires that the rentals be deposited in the MVF.

³³ WAC 468-30-110(7) relating to leases of air space makes this clear when it states: “No use of such space shall be allowed which ... impairs the use of the facility for highway purposes.”

The statutory provisions pertaining to the leasing of WSDOT land or facilities are, charitably stated, sketchy at best. RCW 47.12.120 does not describe the process by which WSDOT deems lands to be “not presently needed.” WSDOT’s own regulations in WAC 468-30 do not address this question. The permissible duration of any lease is also not discussed in statute, although the provisions of WAC 468-30-110 appear to contemplate short-term leases. WAC 468-30-060 (90-day rental of improved property). WAC 468-30-110 on the non-highway use of highway property is equally silent on how the decision to lease is made or the lease duration.

No public hearings have been held establishing that Interstate 90’s center lanes are “not presently needed.” There is nothing of record indicating WSDOT has made such a determination. Such a determination is obviously an *essential precondition* to any lease of the lanes and yet the “term sheet” between WSDOT and Sound Transit is silent on this question.³⁴ Exhibit K.

No good faith argument can be offered by WSDOT that Interstate 90 is not presently needed for highway purposes. Interstate 90 is an essential east-west commuter and freight corridor. More, not fewer, lanes

³⁴ This is not surprising. It is likely that the outcry by commuters, the trucking industry, the Port of Seattle, and business interests in Eastern Washington, just to name a few, would be loud and long.

are needed on Interstate 90 to move people and freight.³⁵ Moreover, the present public debate about the need for additional lanes on the proposed replacement structure for State Route 520 only further underscores the vital public need for traffic lanes crossing Lake Washington. WSDOT cannot demonstrate that Interstate 90 is no longer needed for highway purposes, justifying the lease of its two center lanes.

WSDOT has made any real effort to meet the test for “surplusing” the two Interstate 90 center lanes. WSDOT has merely *assumed* it may unilaterally declare that the lanes are not needed, contrary to the reality of statutes on Interstate 90’s statewide significance and its importance for buses, commuters, travelers, and commercial traffic. WSDOT simply cannot demonstrate that the center lanes of Interstate 90 no longer have any value for highway purposes. That proposition is almost laughable.

(4) Petitioners Are Entitled to Their Reasonable Attorney Fees

To the extent the petitioners successfully restrain the illegal expenditure of funds under § 204(3) of the 2009 transportation budget, and ban the unconstitutional expenditure of MVF moneys by forestalling the

³⁵ Mercer Island presently relies on the two center lanes exclusively for access pursuant to the Memorandum of Agreement. AF 5, Exhibit A at 3, 4. The residents of that community, as well as the persons who use the center lanes when delivering goods or utilizing commercial facilities, schools, and other services on Mercer Island, are affected by WSDOT’s decision to transfer Interstate 90’s center lanes to Sound Transit. Interstate 90 is the only direct highway connection between Seattle, Mercer Island and the Eastside.

transfer of the two center lanes of Interstate 90 to Sound Transit, they are entitled to recover their attorney fees under the common fund exception to the American rule.

Washington courts have recognized that where a party brings an action to preserve or create a monetary fund, the party may seek reimbursement of the attorney fees expended from the common fund itself. In *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, 112 P. 647 (1911), this Court allowed attorney fees to a stockholder who brought an action to vacate a sale of property where officers of the corporation and certain stockholders transferred the property to themselves at a profit. Similarly, in *Grein v. Cavano*, 61 Wn.2d 498, 379 P.2d 209 (1963), this Court allowed attorney fees to a party who had brought an action for an accounting of the finances of a Teamsters Union local. The principle is aptly described by this Court in the following fashion:

[A] court may, in its discretion, allow counsel fees to a complainant who has maintained a successful suit for the preservation, protection, or increase of a common fund. The rationale of the rule is that the complainant has brought “benefit” to the fund.

Id. at 505.

AF 3. It is highly doubtful that residents of Mercer Island would believe the two center lanes are no longer necessary.

Fees may even be recoverable in the absence of an identifiable fund if the plaintiff successfully challenges the expenditure of public funds based on patently unconstitutional legislative or administrative actions after an appropriate agency fails to exert the challenge. In *Weiss v. Bruno*, 83 Wn.2d 911, 523 P.2d 915 (1974), the plaintiffs brought an action for a writ of prohibition to prevent expenditure of funds for parochial education in violation of the Washington Constitution. This Court concluded that where a successful suit was brought by petitioners, challenging the expenditure of public funds, made pursuant to patently unconstitutional legislative and administrative actions, an award of fees was appropriate.

Here, the petitioners brought the very same kind of action as in *Baker* and *Grein* when they seek to block expenditure of MVF moneys for the non-highway purpose of valuing the center lanes of Interstate 90 for rail transportation. Their action to bar the illegal transfer of the two center lanes by WSDOT to Sound Transit qualifies for fees under *Weiss*. They are entitled to common fund attorney fees.

F. CONCLUSION

The State's expenditure of funds under § 204(3) of the 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 moneys for the non-highway purpose of § 204(3) of the 2009 transportation budget and from taking or authorizing any action with respect to the transfer of any portion of Interstate 90 to Sound Transit for the purpose of its East Link Project.

Costs in this case, including reasonable attorney fees, should be awarded to petitioners. RAP 16.2(g).

DATED this ~~24th~~ day of March, 2010.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

George Kargianis, WSBA #286
Kristen L. Fisher, WSBA #36918
Law Offices of
George Kargianis, Inc., P.S.
701 5th Avenue, Suite 4785
Seattle, WA 98104
(206) 838-2528
Attorneys for Petitioners

APPENDIX

FEB 09 2010

RECEIVED

NO. 83349-4

SUPREME COURT OF THE STATE OF WASHINGTON

KEMPER FREEMAN, JIM HORN,
STEVE STIVALA, KEN COLLINS,
MICHAEL DUNMIRE, SARAH
RINDLAUB, 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.

AGREED
STATEMENT
OF FACTS

Petitioners Kemper Freeman, Jim Horn, Steve Stivala, Ken Collins, Michael Dunmire, Sarah Rindlaub, Al Deatley, Jim Coles, Brian Boehm, and Eastside Transportation Association (“Petitioners”); Respondents Governor Christine O. Gregoire and Secretary Paula J. Hammond (“State Respondents”); and Intervenor-Respondent Central Puget Sound Regional Transit Authority (“Sound Transit”); agree to the facts stated below, provided that Petitioners object to and are not in

agreement with Paragraphs 8, 19, 20, and 21. The State Respondents and Sound Transit agree to Paragraphs 8, 19, 20, and 21.

The parties' agreement to include these facts in the record does not mean the parties concede the relevance of each fact to the legal issues presented to the Court, and each party reserves its right to contest the relevance of any fact included in this statement. The parties further agree that reference to a specific fact contained in an exhibit does not preclude any party from referring to other facts in that same exhibit. The citation to or reference to a statute does not mean the parties agree on the legal interpretation or application of the statute. This agreed statement sets out judicially noticeable facts for the present proceeding only, and shall not constitute agreement for other purposes.

1. Interstate 90 ("I-90") is established as a state highway route in RCW 47.17.140. I-90 is part of the interstate highway system and is a limited access highway. I-90 has also been designated as a highway of statewide significance pursuant to RCW 47.06.140.

2. RCW 47.24.020(2) states in part that "within incorporated cities and towns the title to a state limited access highway vests in the state, and, notwithstanding any other provision of this section, the department shall exercise full jurisdiction, responsibility, and control to

and over such facility as provided in chapter 47.52 RCW.”; *see also* RCW 47.52.090.

3. I-90 is a component of the United States system of interstate highways. In the vicinity of Lake Washington, the I-90 corridor extends from Bellevue across Mercer Island and two floating bridges (the Homer M. Hadley Memorial Bridge and the Lacey V. Murrow Memorial Bridge) to an interchange with Interstate 5. I-90 moves people and freight between Seattle, Mercer Island, and the Eastside. I-90 is currently the only direct highway connection between Seattle, Mercer Island, and the Eastside. According to WSDOT data, in 2008 during an average weekday, the midspan of I-90 carried approximately 142,500 vehicles per day (132,750 on the outer roadway, and 9,720 from the center lanes). Construction of the I-90 tunnel, road, and bridge structures between Seattle and Bellevue Way was operationally complete in 1993.

4. The initial proposal to build a section of I-90 between Seattle and Bellevue resulted in a conflict between the state and local affected jurisdictions concerning the proposed design and configuration of the highway.

5. On December 21, 1976, following public hearings and litigation, King County, the Cities of Seattle, Mercer Island, and Bellevue, the Municipality of Metropolitan Seattle, and the Washington State

Highway Commission executed a Memorandum of Agreement (“Memorandum Agreement”). A copy of the Memorandum Agreement, dated December 21, 1976, is attached as Exhibit A.

6. On September 20, 1978, U.S. Secretary of Transportation Brock Adams issued a “Decision Document” approving federal funding to construct the proposed I-90 roadway. A copy of the Decision Document on Interstate 90, Seattle, Washington, dated September 20, 1978, is attached as Exhibit B.

7. I-90 was built, in part, with motor vehicle funds required to be deposited into the motor vehicle fund pursuant to RCW 46.68.070.

8. Of the construction costs for the state’s I-90 facility, the United States Department of Transportation paid \$1.035 billion (85.49 %), and the State of Washington paid \$175.7 million (14.51%).

9. Motor vehicle funds, in part, are used to maintain I-90.

10. Across Lake Washington, I-90 currently consists of three general purpose lanes in each direction and a two-lane reversible center roadway flowing in the peak direction between Bellevue Way and the Mt. Baker Tunnel.

11. The primary peak flow direction is westbound in the morning and eastbound in the afternoon. The center roadway is restricted

to High Occupancy Vehicles (“HOV”), including buses, carpools, vanpools, and general traffic destined to and from Mercer Island.

12. King County Metro and Sound Transit operate local and regional bus service across Lake Washington on I-90 connecting Seattle and the Eastside communities.

13. In 1996, Sound Transit, a regional transit authority formed in 1993 under RCW 81.112.030, submitted a ballot proposition to voters in Pierce, King, and Snohomish counties, seeking their approval of Sound Transit’s mass transit system plan – a plan that included regional buses, commuter rail, and light rail. The plan did not provide funding for light rail across I-90.

14. From 1998 to 2004, Sound Transit and WSDOT conducted a planning and environmental review process regarding two-way transit and HOV operation on the I-90 bridge and roadway between Seattle and Bellevue that became known as the Interstate 90 Two-Way Transit and HOV Operations Project.

15. In May 2004, WSDOT, Sound Transit, and the Federal Highway Administration issued a final environmental impact statement for this project identifying R-8A as the preferred alternative for the Interstate 90 Two-Way Transit and HOV Operations Project.

16. In August 2004, the Washington State Transportation Commission, Sound Transit, and the local governments that signed the Memorandum Agreement in 1976, amended the Memorandum Agreement. A copy of the Amendment to the Interstate 90 Memorandum Agreement, dated August 2004, is attached as Exhibit C.

17. On September 28, 2004, the Federal Highway Administration issued a Record of Decision designating R-8A as the selected alternative for the Interstate 90 Two-Way Transit and HOV Operations Project. A copy of the Federal Highway Administration Record of Decision is available online at http://www.soundtransit.org/documents/pdf/projects/bus/i90/I-90_Record_of_Decision_September_2004.pdf.

18. The "R-8A" alternative includes (1) the addition of HOV lanes to the I-90 outer lanes (westbound and eastbound) between Seattle and Bellevue; (2) new I-90 HOV on- and off-ramps on Mercer Island; and (3) improvements to I-90 HOV access at Bellevue Way.

19. WSDOT is proceeding with the project in three separate stages. Stage 1 opened to traffic in October 2008. Sound Transit contributed \$25.8 million to this stage, which under the term sheet between WSDOT and Sound Transit executed January 20, 2010, and

discussed more fully in ¶ 34, would be credited toward compensation to be paid by Sound Transit for use of the center lanes of I-90 for light rail.

20. Stage 2 of the I-90 project is currently being advertised for construction with bids scheduled to be opened on February 10, 2010. Sound Transit has contributed \$2.15 million toward the design work for this stage of the project. Construction for this stage is expected to begin in April 2010. Sound Transit would pay the \$22.9 million estimated construction costs of this work, which under the term sheet between WSDOT and Sound Transit executed on January 20, 2010, and discussed more fully in ¶ 34, would be credited toward compensation to be paid by Sound Transit for use of the center lanes of I-90 for light rail. The lanes are expected to be open to traffic by late 2011.

21. WSDOT has not begun the final design of Stage 3. The design work is tentatively scheduled to begin in early 2010 and be complete by December 2011. The total project cost of Stage 3 is now estimated at \$123.7 million. WSDOT currently has \$10.6 million for design funding. Under the term sheet between WSDOT and Sound Transit executed on January 20, 2010, and discussed more fully in ¶ 34, except for the \$10.6 million design costs to be paid by WSDOT, Sound Transit would pay the cost to construct Stage 3, which under the term

sheet would be credited toward compensation to be paid by Sound Transit for use of the center lanes of I-90 for light rail.

22. On July 13, 2006, Governor Christine Gregoire sent a letter to John Ladenburg, chair of the Sound Transit board. A copy of the letter is attached as Exhibit D.

23. On November 4, 2008, Sound Transit submitted for approval by its voters the *Sound Transit 2 Regional Transit Plan* ("ST 2"). This plan includes light-rail from Seattle to Mercer Island, Bellevue, and Overlake/Redmond. This plan is referred to as East Link. The ST 2 plan, approved by Sound Transit voters, provides for funding to complete the construction of the new I-90 HOV lanes on the outer roadway of the I-90 bridge and highway corridor between Seattle and Bellevue. The ST 2 plan and accompanying Sound Transit Board resolutions are attached hereto as Exhibit E.

24. On November 21, 2008, WSDOT issued a letter to Sound Transit regarding the ST 2 light rail project on I-90. A copy of the letter is attached as Exhibit F.

25. In December 2008, Sound Transit, WSDOT, and the Federal Transit Administration ("FTA") released a draft environmental impact statement ("DEIS") regarding the extension of light rail from Seattle to Mercer Island, Bellevue, and Overlake/Redmond. A copy of the Draft

Environmental Impact Statement, dated December 12, 2008, is available online at <http://www.soundtransit.org/Projects-and-Plans/Projects-By-Service/East-Link-Project/East-Link-DEIS.xml>.

26. The DEIS proposes one route for Segment A of East Link (between Seattle and Bellevue), the Interstate-90 Alternative ("A1"), which would provide for use of the center reversible lanes of I-90 across Lake Washington and Mercer Island for light rail.

27. In Sound Transit Board Motion M2009-41, the Sound Transit Board approved alternative route A1 as the preferred route for Segment A of East Link. Sound Transit Board Motion M2009-41 is available online at <http://www.soundtransit.org/About-Us/Board-of-Directors/Motions/2009-Motions.xml>.

28. East Link would provide for the use of the two I-90 center roadway lanes by Sound Transit for light rail to the exclusion of all other forms of vehicular traffic, with the exception of the HOV ramp between Rainier Avenue and downtown Seattle known as the D2 roadway, which would operate jointly for light rail and bus transit.

29. Under the proposed configuration of the I-90 corridor, the current roadway would be re-striped to make the shoulder and general purpose lanes narrower in order to add an HOV lane to the outside roadway, except in some locations, the 12-foot lane widths are maintained

by widening within the existing right-of-way, in other areas the right lane is 12 feet wide and the other lanes are reduced to 11 feet wide. In the tunnels and on the floating bridges, where it was not feasible to widen, lane widths are narrowed to accommodate the added HOV lane. The number of lanes available for general vehicular use during peak commute periods (and at all other times) would remain three in each direction. The number of HOV lanes would remain at two, but would change from two reversible lanes to one eastbound and one westbound HOV lane at all times.

30. On April 25, 2009, the Washington State Legislature passed Engrossed Senate Substitute Bill 5352 (“ESSB 5352”), which appropriated motor vehicle funds in the amount of \$300,000, for a legislatively defined process to determine the value of the “reversible lanes on Interstate 90 to be used for high capacity transit pursuant to sound transit proposition 1 approved by voters in November 2008.” ESSB 5352, Laws of 200, ch. 470, § 204(3). A copy of excerpts from ESSB 5352, § 204 and § 306, are attached as Exhibit G.

31. After receipt of the report prepared by the consultants engaged to produce the independent analysis required by ESSB 5352, both WSDOT and Sound Transit issued appraisal instructions to an independent appraiser. A copy of the appraisal report prepared for Sound

Transit, pursuant to ESSB 5352, and dated October 15, 2009, is attached as Exhibit H.

32. A copy of the appraisal report prepared for WSDOT, pursuant to ESSB 5352, and dated October 15, 2009, is attached as Exhibit I.

33. A copy of a U.S. Department of Transportation letter to one of the independent valuation consultants engaged pursuant to ESSB 5352, dated December 1, 2009, is attached as Exhibit J.

34. On January 20, 2010, WSDOT and Sound Transit executed a term sheet. A copy of the I-90 Term Sheet is attached as Exhibit K.

RESPECTFULLY SUBMITTED this 8th day of February, 2010.

TALMADGE/FITZPATRICK, PLLC

By: Philip A. Talmadge
PHILIP A. TALMADGE, WSBA #6973
THOMAS M. FITZPATRICK, WSBA #8894
18010 Southcenter Parkway
Tukwila, WA 98188
Telephone: (206) 574-6661

LAW OFFICES OF GEORGE KARGIANIS, INC., P.S.

By: _____
GEORGE KARGIANIS, WSBA #286
KRISTEN L. FISHER, WSBA #36918
701 5th Avenue, Suite 4785
Seattle, WA 98104
Telephone: (206) 838-2528

Attorneys for Petitioners

ROBERT M. MCKENNA
Attorney General

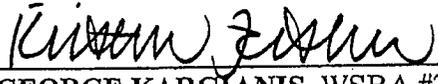
By: _____
BRYCE E. BROWN, WSBA #21230
Senior Assistant Attorney General
PO Box 40113 (7141 Cleanwater Drive SW)
Olympia, WA 98504-0113
Telephone: (360) 753-4962

RESPECTFULLY SUBMITTED this 8th day of February, 2010.

TALMADGE/FITZPATRICK, PLLC

By: _____
PHILIP A. TALMADGE, WSBA #6973
THOMAS M. FITZPATRICK, WSBA #8894
18010 Southcenter Parkway
Tukwila, WA 98188
Telephone: (206) 574-6661

LAW OFFICES OF GEORGE KARGIANIS, INC., P.S.

By:  _____
GEORGE KARGIANIS, WSBA #286
KRISTEN L. FISHER, WSBA #36918
701 5th Avenue, Suite 4785
Seattle, WA 98104
Telephone: (206) 838-2528

Attorneys for Petitioners

ROBERT M. MCKENNA
Attorney General

By: _____
BRYCE E. BROWN, WSBA #21230
Senior Assistant Attorney General
PO Box 40113 (7141 Cleanwater Drive SW)
Olympia, WA 98504-0113
Telephone: (360) 753-4962

RESPECTFULLY SUBMITTED this 8th day of February, 2010.

TALMADGE/FITZPATRICK, PLLC

By: _____

PHILIP A. TALMADGE, WSBA #6973
THOMAS M. FITZPATRICK, WSBA #8894
18010 Southcenter Parkway
Tukwila, WA 98188
Telephone: (206) 574-6661

LAW OFFICES OF GEORGE KARGIANIS, INC., P.S.

By: _____

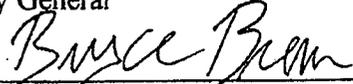
GEORGE KARGIANIS, WSBA #286
KRISTEN L. FISHER, WSBA #36918
701 5th Avenue, Suite 4785
Seattle, WA 98104
Telephone: (206) 838-2528

Attorneys for Petitioners

ROBERT M. MCKENNA

Attorney General

By: _____


BRYCE E. BROWN, WSBA #21230
Senior Assistant Attorney General
PO Box 40113 (7141 Cleanwater Drive SW)
Olympia, WA 98504-0113
Telephone: (360) 753-4962

ROBERT M. MCKENNA
Attorney General

By: 
MAUREEN A. HART, WSBA #7831
Solicitor General
PO Box 40100 (1125 Washington Street SE)
Olympia, WA 98504-0100
Telephone: (360) 753-2536

Attorneys for Respondents Governor
Christine O. Gregoire and Secretary Paula J.
Hammond of the Washington State Department
of Transportation

**CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY**

By: _____
DESMOND L. BROWN, WSBA #16232
Union Station
401 South Jackson Street
Seattle, WA 98104-2826
Telephone: (206) 398-5000

K&L GATES, LLP

By: _____
PAUL J. LAWRENCE, WSBA #13557
MATTHEW J. SEGAL, WSBA #29797
925 4th Avenue, Suite 2900
Seattle, WA 98104-1158
Telephone: (206) 623-7580

Attorneys for Intervenor-Respondent
Sound Transit

ROBERT M. MCKENNA
Attorney General

By: _____
MAUREEN A. HART, WSBA #7831
Solicitor General
PO Box 40100 (1125 Washington Street SE)
Olympia, WA 98504-0100
Telephone: (360) 753-2536

Attorneys for Respondents Governor
Christine O. Gregoire and Secretary Paula J.
Hammond of the Washington State Department
of Transportation

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY

By: 

DESMOND L. BROWN, WSBA #16232
Union Station
401 South Jackson Street
Seattle, WA 98104-2826
Telephone: (206) 398-5000

K&L GATES, LLP

By: _____
PAUL J. LAWRENCE, WSBA #13557
MATTHEW J. SEGAL, WSBA #29797
925 4th Avenue, Suite 2900
Seattle, WA 98104-1158
Telephone: (206) 623-7580

Attorneys for Intervenor-Respondent
Sound Transit

ROBERT M. MCKENNA
Attorney General

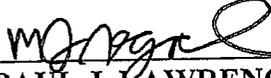
By: _____
MAUREEN A. HART, WSBA #7831
Solicitor General
PO Box 40100 (1125 Washington Street SE)
Olympia, WA 98504-0100
Telephone: (360) 753-2536

Attorneys for Respondents Governor
Christine O. Gregoire and Secretary Paula J.
Hammond of the Washington State Department
of Transportation

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY

By: _____
DESMOND L. BROWN, WSBA #16232
Union Station
401 South Jackson Street
Seattle, WA 98104-2826
Telephone: (206) 398-5000

K&L GATES, LLP

By:  _____
PAUL J. LAWRENCE, WSBA #13557
MATTHEW J. SEGAL, WSBA #29797
925 4th Avenue, Suite 2900
Seattle, WA 98104-1158
Telephone: (206) 623-7580

Attorneys for Intervenor-Respondent
Sound Transit

DECLARATION OF SERVICE

On said day below I deposited in the U.S. Postal Service a true and accurate copy of: Motion for Leave to File Over-length Brief and Brief of Petitioners in Supreme Court Cause No. 83349-4 to the following parties:

George Kargianis
Kristen L. Fisher
Law Offices of George Kargianis
701 5th Avenue, Suite 4760
Seattle, WA 98104-7035

Bryce E. Brown, Jr.
Office of the Attorney General of Washington
Transportation & Public Construction Div.
PO Box 40113
Olympia, WA 98504-0113

Maureen A. Hart
Office of the Attorney General of Washington
PO Box 40100
Olympia, WA 98504-0100

Matthew J. Segal
Paul J. Lawrence
Jessica A. Skelton
K&L Gates LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158

Original 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: March 24, 2010, at Tukwila, Washington.



Christine Jones
Talmadge/Fitzpatrick