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No. 93079-1

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SUPREME COURT  
OF THE STATE OF WASHINGTON  
COURT OF APPEALS NO. 47681-9-II

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WASHINGTON STATE  
SUPREME COURT  
h/h

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

*Respondents,*

v.

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

*Petitioners.*

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SUPPLEMENTAL BRIEF OF AMICUS CURIAE WASHINGTON  
STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN  
SUPPORT OF THE STATE OF WASHINGTON, *ET AL.*'s  
POSITION ON THE MERITS

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 ORIGINAL

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## I. STATEMENT OF ISSUE PRESENTED

Whether, in a case in which plaintiff taxpayers assert one or more claims under 42 U.S.C. § 1983 in state court against a state government agency related to revenue issues, and where the agency invokes the comity doctrine of *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), and *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995), and their progeny, whether the adequacy of state remedies is measured by procedural criteria.

## II. STATEMENT OF THE CASE

Your amicus adopts the statement of the case set forth in the Supplemental Brief of Employment Security Department, et al, dated December 2, 2016.

## III. ARGUMENT

All agree, and the court below held, that comity bars the instant lawsuit if there is an adequate remedy under state law. Indeed, *National Private Truck Council, supra*, expressly so held: “Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases when there is an adequate remedy at law.” *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n, supra*, 515 U.S. at 588.

In their briefing to this Court, Respondents Washington Trucking Associations, et al. (“Washington Trucking”), make the same mistake the

court below made. While the controlling comity cases, like *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981), make quite clear that the state remedy is viewed procedurally, not substantively, the court below did not appear to take that view to heart, and thus Washington alone mis-judges the comity doctrine, in this context, based upon substantive differences between the state remedy and remedies available otherwise under 42 U.S.C. 1983.

Washington Trucking for obvious reasons uses hyperbole and invective as an alternative to analysis on this subject, and declares that your amicus is misreading the applicable cases. However, a brief review of those cases belies the Washington Trucking effort.

The recent case of *Wal-Mart Puerto Rico, Inc. v. Juan C. Zaragoza-Gomez*, 174 F. Supp. 3d 585 (D. P.R. 2016), affirmed by the First Circuit, *Wal-Mart Puerto Rico, Inc. v. Zaragoza-Gomez*, 834 F.3d 110 (1st Cir. 2016), supports the Department and WSAMA's position. *Wal-Mart* is an odd case, in which, due to the Territory's insolvency, the taxpayer would literally never receive a refund. See 174 F.Supp. 3d at 610-618. Accordingly, the court found that the state remedy was inadequate.

However, in so holding, the court made clear that "inadequacy" is not based on the question whether any precise § 1983 remedy is available

or not (the court pointing out that in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981), the state remedy was adequate even though the state remedy did not provide for interest with the refund of state taxes under the state remedial scheme, 174 F.Supp. 3d at 635). However, there must be some *actual* remedy available, not a merely hypothetical one as in Puerto Rico, at that time. 174 F.Supp. 3d at 635-636.

The same is not true here. The remedies identified by Petitioner are actually available. The court below held that certain remedies were indeed barred by the principle of noninterference, as outlined in *National Private Truck* and *Rosewell*

Other state court holdings follow the *Rosewell* principle. For example, the Nebraska Supreme Court had to decide whether a local improvement assessment was actionable under § 1983 in a case in which the taxpayers sought punitive damages and other relief that would not have been available to them under the system existing at the state level to challenge a special assessment. The court held that the state system *was* “adequate,” in a discussion that bears attention:

Courts measure the adequacy of a state remedy by procedural, not substantive criteria. *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). Thus, the “state remedy need not be identical to section 1983 remedies.... It need not be the best remedy available ... the most convenient remedy ... or equal to or comparable with federal remedies.” (Citations omitted.) *General Motors*

*Corp.*, 143 N.J. at 348, 671 A.2d at 566. Rather, a state remedy is adequate if it provides the taxpayer with the opportunity for a “ ‘full hearing and judicial determination” ‘ at which [he or] she may raise any and all constitutional objections to the tax.”“ *Rosewell*, 450 U.S. at 515 n. 19. See, also, *Kerr*, *supra*; *General Motors Corp.*, *supra*.

*Francis v. City of Columbus*, 267 Neb. 553, 559, 676 N.W.2d 346, 352 (2004). The Nebraska Supreme Court then identified two procedures available, only one of which is discussed in the following passage:

Nebraska provides a taxpayer of a city of the first class at least two adequate methods for challenging a special tax assessment for street improvements. First, under § 16–637, a taxpayer can recover any part of a special tax that it believes to be illegal, inequitable, or unjust if it (1) pays the tax under protest before it becomes delinquent; (2) provides notice to the city treasurer that it intends to sue to recover the tax, giving enough detail to advise the city of the “exact nature” of the grievance; and (3) brings suit within 60 days of paying the tax and providing notice. A special tax assessment which violates the federal Constitution is illegal, and thus a claim that a special tax assessment violates the federal Constitution can be raised and adjudicated in § 16–637 claims. Further, that § 16–637 allows for only a refund and not injunctive or declaratory relief does not render it inadequate. *National Private Truck Council, Inc. v. Oklahoma Tax Comm’n*, 515 U.S. 582, 587, (1995) (“[a]s long as state law provides a ‘ ‘clear and certain remedy,’ ‘ ... the States may determine whether to provide predeprivation process (e.g., an injunction) or instead to afford postdeprivation relief (e.g., a refund)”). Nor does the relatively short timeframe within which the taxpayer has to determine whether to protest the tax and file suit render § 16–637 inadequate. This is so because “individuals who wish to challenge the assessment of a state tax are immediately aware of the precise nature and amount of their injury on the date the assessment is

rendered.” *Jade Aircraft Sales, Inc. v. Crystal*, 236 Conn. 701, 709–10, 674 A.2d 834, 838 (1996).

*Francis v. City of Columbus, supra*, 267 Neb. at 560, 676 N.W.2d at 353 (2004). Thus a short window for requesting a refund and the apparent unavailability of punitive damages did *not* render the Nebraska procedure “inadequate.”

Thus although the Respondents claim that your amicus has somehow mischaracterized holdings or misdescribed the decisions from other states, for twenty-plus years state courts have had no trouble applying the *Rosewell* command that the adequacy of state remedies should be viewed procedurally, not substantively. The court below, which up to that point had rendered a perfect analysis, simply overlooked the fact that the adequacy of the state remedy does not depend upon the question whether there is a precise analog for the sought-after remedy in the refund cases.

The court below thus simply made a mistake. WSAMA respectfully requests this Court to correct that mistake.

#### IV. CONCLUSION

Based upon the foregoing, Amicus Curiae Washington State Association of Municipal Attorneys respectfully requests this Court to reverse the decision below, on the grounds stated.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of December,

2016.



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*Petitioners.*

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**CERTIFICATE OF SERVICE**

I, April Engh, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on December 5, 2016, I emailed to The Supreme Court for the State of Washington at

[supreme@courts.wa.gov](mailto:supreme@courts.wa.gov) the following documents for filing:

1. Motion Of The Washington State Association Of Municipal Attorneys For Leave To File Supplemental Brief Of Amicus Curiae In Support Of The State Of Washington, *et al.*'s Position On The Merits;
2. Declaration Of Milton G. Rowland In Support Of Washington State Association Of Municipal Attorneys For Leave To File Supplemental Brief Of Amicus Curiae In Support Of The State Of Washington, *et al.*'s Position On The Merits;
3. Supplemental Brief of Amicus Curiae Washington State Association of Municipal Attorneys in Support of The State Of Washington, *et al.*'s Position On The Merits; and
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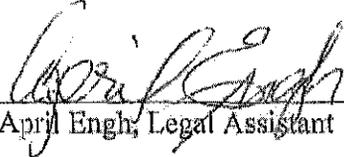
Additionally, I certify and declare that on the 5th day of December, 2016, I delivered a true and correct copy of the foregoing documents to the following persons *via Email and U.S. Mail, postage prepaid*:

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SIGNED at Spokane, Washington, this 5th day of December, 2016.

  
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Attached for filing on behalf of Milton G. Rowland, please find the following:

1. Motion Of The Washington State Association Of Municipal Attorneys For Leave To File Supplemental Brief Of Amicus Curiae In Support Of The State Of Washington, *et al.*'s Position on the Merits;

2. Declaration Of Milton G. Rowland In Support Of Washington State Association Of Municipal Attorneys For Leave To File Supplemental Brief Of Amicus Curiae In Support Of The State Of Washington, *et al.*'s Position on the Merits;
3. Supplemental Brief of Amicus Curiae Washington State Association of Municipal Attorneys in Support of The State Of Washington, *et al.*'s Position on the Merits; and
4. Certificate of Service.

Thank you, April.

April Engh

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