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No. 94559-4

SUPREME COURT  
OF THE STATE OF WASHINGTON

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MICHAEL GILMORE, a single man,

Petitioner,

v.

JEFFERSON COUNTY PUBLIC TRANSPORTATION BENEFIT  
AREA, d/b/a Jefferson Transit Authority, a municipal corporation,

Respondent.

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AMICUS CURIAE BRIEF SUBMITTED BY WASHINGTON  
COUNTIES RISK POOL, WASHINGTON CITIES INSURANCE  
AUTHORITY, ENDURIS, HOUSING AUTHORITIES RISK  
RETENTION POOL, WASHINGTON SCHOOLS RISK  
MANAGEMENT POOL, AND SOUTHWEST WASHINGTON RISK  
MANAGEMENT INSURANCE COOPERATIVE

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## **I. IDENTITY AND INTERESTS OF AMICUS CURIAE**

This brief is respectfully submitted by the largest risk pools in the State of Washington, which provide risk management services to hundreds of public entities. The Washington Counties Risk Pool (“WCRP”) is a joint self-insurance program authorized by RCW 48.62 and RCW 39.34 through which its 26 member counties have joined together to jointly self-insure, jointly purchase reinsurance or excess insurance for liability and property risks and jointly contract for or hire personnel to provide risk management, claims and administrative services. The Washington Cities Insurance Authority (“WCIA”) is the state’s first and oldest risk pool, made up of over 150 cities, towns, and other special purpose districts. Enduris is comprised of over 500 special utility districts that share risks and reduce public cost. The Housing Authorities Risk Retention Pool (“HARRP”) provides its public housing authority members a cooperative program of indemnification and financial protection against risks of loss relating to the properties and operations of its Members. The Washington Schools Risk Management Pool (“WSRMP”) provides self-insurance and risk management services to more than 90 school districts across the state. The Southwest Washington Risk Management Insurance Cooperative (“SWRMIC”) is a collective of 32 school districts in southwest

Washington that jointly provide claims coverage and risk management services.

All of these risk pools have a strong interest in the fair treatment of government entity defendants in the courtroom and the elimination of improper and prejudicial arguments targeting government entities for punishment solely because of their status as public entities.

## II. STATEMENT OF THE CASE

*Amici* adopt the statement of the case provided by the respondent in its Answer to Petition for Review and Supplemental Brief.

## III. AUTHORITY AND ARGUMENT

### A. **The Court of Appeals correctly determined that plaintiff’s counsel’s closing argument was such flagrant misconduct that a new trial is warranted.**

As regular participants in the defense of public entities, *Amici* ask that the Court reinforce the Legislature’s determination in RCW 4.96.010 that requires government entities to be treated as private persons, and apply Washington common law, which prohibits both “golden rule” arguments from plaintiffs and “save the taxpayer” arguments from public entities. RCW 4.96.010(1) provides that “local governmental entities . . . shall be liable for damages arising out of their tortious conduct . . . to the same extent as if they were a private person . . .”.

Petitioner’s closing argument, urging the jury to find Jefferson Transit liable *because* it is a governmental entity, directly violates this statute. Further, Petitioner’s counsel violated the common law ban on “golden rule” arguments, urging the jury to put itself in the shoes of Petitioner and help him “fight the government.” *See Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 138, 750 P.2d 1257 (1988) (“Golden Rule”) argument is improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on evidence).

The Petitioner asks this Court to rule that plaintiff’s closing argument, enlisting the jury to “fight” a government that kills innocent citizens and treats them like criminals, was merely “technically improper” but nothing flagrant or ill-intentioned or otherwise justifying a new trial. This characterization is unsound.

Public antipathy toward, and distrust of government is at an all-time high, as evidenced not just by survey data, but by threats to government employees. For example, the PEW Research Center recently conducted a survey that found only 20% of Americans say they can trust the government to do what is right always or most of the time.<sup>1</sup> A

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<sup>1</sup> <http://www.people-press.org/2017/05/03/public-trust-in-government-remains-near-historic-lows-as-partisan-attitudes-shift/>

government operated wildlife refuge in Malheur County Oregon was occupied and taken over by anti-government activists for six weeks in 2016, its employees threatened and prevented from coming to work, and its facilities defaced before the activists were finally arrested. Their leaders were acquitted on all charges at trial.<sup>2</sup>

Petitioner’s counsel deliberately capitalized on this anti-government sentiment, accusing Jefferson Transit of trying to “cover up their liability” and perpetuating a fraud, stating:

Do we let the government win? Do we just roll over because we know this is how they’re gonna fight? . . . [Gilmore] can’t fight the government alone. . . We certainly can’t fight the government in this case without you.

(Op at 17).

In Petitioner’s counsel’s rebuttal, counsel talked about how government “murders innocent people” and “gets away with it”, continuing:

But that’s what government does . . . no one holds them accountable . . . [W]hen you fight the government, they impugn your credibility. They call you a liar . . . a cheat . . . a fraud. . . .

But [Gilmore] isn’t willing to roll over . . . [I]f you don’t hold the government accountable . . . they will just keep doing what they’re doing. That they will feel like they can run into anybody in this community and just walk away.

(Op at 17).

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<sup>2</sup> [https://en.wikipedia.org/wiki/Occupation\\_of\\_the\\_Malheur\\_National\\_Wildlife\\_Refuge](https://en.wikipedia.org/wiki/Occupation_of_the_Malheur_National_Wildlife_Refuge)

These arguments exceed the bounds of technical impropriety, employing carefully chosen rhetorical flourishes utilizing the powerful imagery *specifically* prohibited by the spirit and letter of RCW 4.96.010. The Court of Appeals holding that this argument was improper, inflammatory, ill-intentioned and so prejudicial as to be incurable by a jury instruction or admonition from the court should be affirmed.

The Court's discussion in *Warren v. Hart*, 71 Wn.2d 512, 518, 429 P.2d 873 (1967) is instructive. During closing argument in *Warren*, defense counsel argued that the police officers who responded to the scene of a motor vehicle accident were necessarily experts, and because those police officers decided not to issue any citations, that the jury should treat the police officers' decision like a "baby trial" on the driver's negligence and render their verdict accordingly. *Id.* at 516-518. This Court reversed the jury's verdict in favor of the defendant, holding that defense counsel's argument was such flagrant misconduct that no instruction could have cured the prejudicial effect and that the plaintiff's failure to contemporaneously object to this argument did not prevent the plaintiff from seeking a new trial from the trial court nor from raising the issue on appeal. *Id.* at 519.

In this case, plaintiffs' naked appeal to jurors' antipathy toward a governmental defendant was far more flagrant than the conduct at issue in

*Warren*, where this Court rejected defense counsel's improper charge to the jury to abandon its judgment and believe the municipal police officers *because* they were police officers. Thus, Jefferson Transit's failure to object to plaintiff's closing argument should be no impediment to the appellate court's exercise of its supervisory power to review and prohibit flagrant argument designed to capitalize on public prejudice and inflame the jury.

If this Court allows argument charging juries that "only you can stop the government" in violation of the statutory requirement to treat government entities as private persons, then government defendants will regularly face an unfair burden in defending tort claims. This Court should affirm the Court of Appeals by rejecting Petitioner's improper charge to the jury to punish Jefferson County and *not* believe Jefferson Transit *because* it is a government entity.

#### IV. CONCLUSION

The Court of Appeals' ruling that Petitioner's counsel's closing argument was inflammatory and prejudicial to Jefferson Transit's case should be affirmed.

Respectfully submitted this 27th day of November 2017.

s/J. William Ashbaugh  
J. William Ashbaugh, WSBA #21692

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

On November 27, 2017, I arranged for service of the foregoing Amicus Curiae Brief Submitted by Washington Counties Risk Pool, Washington Cities Insurance Authority, Enduris, Housing Authorities Risk Retention Pool, Washington Schools Risk Management Pool, and Southwest Washington Risk Management Insurance Cooperative, to the parties to this action as follows:

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November 27, 2017 - 3:00 PM

## Transmittal Information

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