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FILED  
COURT OF APPEALS  
2018 MAY 21 AM 10:05

NO. 64452-1

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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PASADO'S SAFE HAVEN, et al.,

Appellants,

v.

STATE OF WASHINGTON and WASHINGTON STATE  
DEPARTMENT OF AGRICULTURE,

Respondents.

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**REPLY BRIEF ON CROSS-APPEAL OF  
RESPONDENTS/CROSS-APPELLANTS**

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## I. INTRODUCTION

The Respondents/Cross-Appellants, State of Washington and Washington State Department of Agriculture (State), reply to that part of Appellants' Rebuttal Brief responding to the State's Cross-Appeal. Appellants, Pasado's Safe Haven, et al., (Pasado's) brought a facial challenge to the constitutionality of the Washington Humane Slaughter of Livestock Act, chapter 16.50 RCW (the Act), and the rules adopted under the Act, chapter 16-24 WAC. The State moved for judgment on the pleadings pursuant to CR 12(c). CP at 333-60. The trial court partially granted the motion, dismissing Pasado's action brought under the Uniform Declaratory Judgments Act, chapter 7.24 RCW (UDJA) for lack of standing. CP at 16. However, the trial court denied the State's motion to dismiss the second count of Pasado's Complaint, finding standing to bring a taxpayer derivative suit. CP at 17-19. After Pasado's appealed, the State filed a cross-appeal, requesting that this Court dismiss Pasado's taxpayer derivative claim because Pasado's taxpayer derivative suit failed to challenge any illegal act of a public official. *See* Respondents/Cross-Appellants Response Brief at 12-15.

## II. SUMMARY OF ARGUMENT

The trial court erred in finding that Pasado's established standing to bring a taxpayer derivative suit. Since Pasado's Complaint did not

include any allegation that a public official engaged in an illegal or unauthorized act, Pasado's failed to properly plead a taxpayer derivative suit. The trial court correctly found that Pasado's failed to meet the standing requirements of RCW 7.24.020 and dismissed Pasado's UDJA claim. However, Pasado's may not take advantage of the "relaxed" standing requirements of a taxpayer derivative suit by merely restating their dismissed declaratory judgment action under the UDJA as a second claim. Thus, the State's CR 12(c) motion to dismiss the taxpayer derivative suit should have been granted.

Pasado's entire suit, including the taxpayer derivative suit, was dismissed on the merits pursuant to the State's motion for summary judgment. CP at 19-20. This does not render the State's Cross-Appeal moot. This Court should decline to expand the circumstances under which a taxpayer derivative suit may proceed because to do so would be contrary to the recognized purpose of such a case and would overrule controlling precedent on the issue of what must be pled in a taxpayer derivative suit. In addition, to expand taxpayer derivative suits to encompass facial challenges to the constitutionality of statutes in the absence of any allegations of injury to the plaintiff would vitiate the statutory standing requirement in the UDJA.

### III. ARGUMENT

#### A. Because Pasado's Complaint Seeks An Order Declaring The Act Unconstitutional On Its Face, UDJA Standing Requirements Apply

Pasado's state that they are "attacking the very lawfulness of the legislative enactment. . . ." Appellants Rebuttal Brief at 8. Thus Pasado's only brought a facial challenge to the constitutionality of the Act and the rules adopted under the Act. Appellants Rebuttal Brief at 7. Although a facial challenge may be pled as a declaratory judgment action, Pasado's must meet the UDJA's statutory standing requirements:

A person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.

RCW 7.24.020.

The doctrine of standing ensures that courts will render judgment on actual disputes between opposing parties with a genuine stake in the resolution. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). "One may not . . . challenge the constitutionality of a statute unless it appears that he will be directly damaged in person or in property by its enforcement." *Id.* at 411-12 (citation omitted). "The kernel of the standing doctrine is that one who is not adversely affected by a statute

may not question its validity.” *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994).

Pasado’s Complaint is devoid of any claim of illegal government action and does not demand that any specific action cease. CP 441-49. Nor does the Complaint allege that they were injured by the Act, which provides for two permissible humane methods for livestock slaughter, including a humane method that accommodates the requirements of the Moslem and Jewish faiths. *See* RCW 16.50.110(3) and RCW 16.50.120. Further, there is no allegation that religious ritual slaughter by licensed slaughterers is even occurring within Washington. Lastly, all commercial packers and slaughterers in the state operate under federal inspection and federal humane slaughter law so enforcement of the state Act is not at issue. Respondents/Cross-Appellants Response Brief at 6.

**B. The Trial Court Erred In Finding That Pasado’s Had Standing To Bring A Taxpayer Derivative Suit When Pasado’s Failed To Challenge An Illegal Act Of A Public Official**

Pasado’s correctly identified the two types of taxpayer suits but misstated the distinction between a “taxpayer suit” and a “taxpayer derivative suit.” Appellants Rebuttal Brief at 15-16. In a “taxpayer suit,” an individual taxpayer may challenge the discretionary decision of government when he or she has a unique right that is being violated in a manner special and different from the rights of other taxpayers. *See*

*American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991). Pasado's did not plead this type of "taxpayer suit" and state that they are "not challenging discretionary decisions" of government. Appellants Rebuttal Brief at 7.

**1. A Taxpayer Derivative Suit Must Challenge An Illegal Or Unauthorized Act Of A Public Official Or Government Body**

The second type of taxpayer suit, the type brought by Pasado's, is a "taxpayer derivative suit." Washington courts recognize taxpayer derivative suits as a mechanism to challenge an illegal act of a public agency or official. "A taxpayer's derivative lawsuit is an action brought by a taxpayer on behalf of himself or herself and as a representative of a class of similarly situated taxpayers to seek relief from illegal or unauthorized acts of public officials." *Wash. Public Trust Advocates v. City of Spokane*, 117 Wn. App. 178, 181, 69 P.3d 351 (2003) (emphasis added). When a taxpayer alleges an illegal or unauthorized act by a public official, Washington courts generally have not required a showing of a direct, special or pecuniary interest in the action. "Every taxpayer is presumed injured if the [government] acts illegally." *Eugster v. City of Spokane*, 139 Wn. App. 21, 28, 156 P.3d 912 (2007). "The recognition of taxpayer standing has been given freely in the interest of providing a judicial forum when this state's citizens contest the legality of official acts

of their government.” *State ex rel. Boyles v. Whatcom Cy. Superior Court*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985) (emphasis added).

The case of *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 937 P.2d 1082 (1997) illustrates the difference between taxpayer challenges to discretionary acts and illegal acts. The plurality opinion found that the plaintiffs were challenging a discretionary governmental decision (a port redevelopment project). *Id.* at 281. The plaintiffs failed to show a unique injury or legal right that was violated, thus they did not have standing. *Id.* at 282. The dissenting opinions opined that the plaintiffs were in fact challenging an unauthorized act, an illegal street vacation, and therefore did not have to allege a personal stake in the matter. *Id.* at 287 and 299. (See also the discussion of *Greater Harbor 2000* in *Kightlinger v. Pub. Util. Dist. No. 1 of Clark County*, 119 Wn. App. 501, 506-07, 81 P.3d 876 (2003)). This Court need not undertake this analysis because Pasado’s states that they do not challenge a discretionary act of government, and indeed, they could not meet the standing requirement for such a challenge. *See Appellants Rebuttal Brief* at 7.

## **2. Pasado's Failed To Properly Plead A Taxpayer Derivative Suit**

To bring a taxpayer derivative suit, plaintiffs must also allege in their complaint that a public official has engaged in an illegal or unauthorized act. Pasado's did not do so; they only raised a facial challenge to the constitutionality of chapter 16.50 RCW. In *Petition by City of Bellingham*, 52 Wn.2d 497, 326 P.2d 741 (1958), the plaintiff did not clearly argue his basis for standing and the court found no standing under the UDJA or to bring a taxpayer action. The court stated,

He has alleged no grounds which would entitle him to bring a declaratory judgment action. He neither alleged nor proved any general damage to the taxpayers; in fact, he made no attempt to prove how the [challenged property transfer] would adversely affect him, either as a taxpayer or otherwise.

*Id.* at 499.

Pasado's incorrectly argued that the only requirement for taxpayer standing is for (1) the taxpayer<sup>1</sup> to ask the Attorney General to file suit and (2) the Attorney General decline to do so. Appellants Rebuttal Brief at 5. Citing *Farris v. Munro*, 99 Wn.2d 326, 330, 662 P.2d 821 (1983), a

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<sup>1</sup> Pasado's asserts that the State does not challenge Pasado's taxpayer status. Appellants Rebuttal Brief at 6. Rather, facts well pled by Pasado's in their Complaint were deemed admitted only for purposes of the motion for judgment on the pleadings and motion for summary judgment below. While Pasado's tax status is not at issue in this appeal, it is not conceded by the State for all purposes.

challenge to the newly enacted State Lottery Act, the trial court erroneously viewed the *Farris* case as defining the standard to establish taxpayer standing. CP at 17. In fact, the *Farris* court did not address the criteria necessary to establish taxpayer standing because the court focused on the threshold issue of the plaintiff's failure to make a demand to the Attorney General,<sup>2</sup> but still recognized that the purpose of a taxpayer derivative suit is to "challenge the legality of the acts of public officers." *Farris* at 329-30 (emphasis added). Further, the *Farris* court expressed no intent to overturn established case law or the standing requirements of RCW 7.24.020.

The trial court also erred in finding that Pasado's had standing to bring a taxpayer derivative suit merely by bringing a facial challenge to the Act. The trial court erred in allowing that count to proceed when Pasado's failed to properly plead a taxpayer derivative action by making no allegation of an illegal or unauthorized act of government. CP at 17. The trial court recognized that the purpose of a taxpayer derivative suit is "to seek relief from illegal or unauthorized acts of public officials or official acts of government." CP at 16. However, the trial court made no

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<sup>2</sup> Despite finding no taxpayer standing, the *Farris* court heard the case on the grounds that it presented an issue of public importance. *Farris*, 99 Wn.2d at 329.

finding that Pasado's had challenged an illegal or unauthorized act of government.

Pasado's admit that they must challenge an illegal act of government but failed to do so in their Complaint. Appellants Rebuttal Brief at 5; CP at 441-49. Paragraph 27 of the Complaint states that Pasado's is challenging "illegal and unconstitutional" acts of government but then lists only nonspecific discretionary tasks of government, including passage of laws by the Legislature, signing bills in to law by the Governor, and enforcement of laws by various law enforcement bodies and state agencies. CP at 445-46. These do not amount to an allegation of illegal action. CP at 442-47.

Pasado's briefing cannot correct the deficiencies of the Complaint. It is not sufficient for Pasado's to allege that the existence of a law "seems to be proof enough of government action" (Appellants Rebuttal Brief at 16) or that government officials "risk engaging" in unlawful acts (Appellants Rebuttal Brief at 8). Nor is it sufficient merely to assert that there are acts "purported to be invalid or illegal" (Appellants Rebuttal Brief at 12) or assert that an "administrative layer" enforces the Act (Appellants Rebuttal Brief at 19).

Nor does Pasado's list of theories titled "secondary executive acts" identify a particular illegal act. Appellants Rebuttal Brief at 13-15. Such

vague allegations do not properly identify an illegal act sufficient to support a taxpayer derivative suit. Facial challenges are expressly disfavored because they often rest on speculation, as illustrated by Pasado's pleadings, and often raise the risk of premature interpretation of statutes on the basis of speculative reasoning. In the United States Supreme Court's decision upholding Washington State's blanket primary law, the Court stated, "[i]n determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008).

**3. This Court Should Not Expand Taxpayer Derivative Suits To Allow Pasado's To Facially Challenge A Statute Without Any Allegation Of An Illegal Or Unauthorized Act Of A Public Official**

The State does not assert that unconstitutional laws cannot be challenged. Pasado's challenged the content, not the results, of the Act thus a declaratory judgment under the UDJA is the proper mechanism to facially challenge the Act. However, Pasado's may not characterize discretionary acts of passage and enforcement of laws as illegal acts by merely asserting they are unconstitutional. Pasado's may not avoid the

standing requirements of the UDJA by attaching the label “taxpayer derivative suit” to their facial challenge to the Act. CP at 448.

Pasado’s argue that because no court has rejected an expansion of taxpayer derivative suits to “general injury” suits, this Court must accept their theory. Appellants Rebuttal Brief at 18. The case law simply does not support Pasado’s position. The review of taxpayer derivative cases in prior briefing shows that all these cases involve allegations that specific government acts were illegal. *See* Respondents/Cross-Appellants Response Brief at 13-15; *see also* CP 285-86, 346-49. As described in this briefing, the State is not aware of any case in which a taxpayer derivative suit was allowed to proceed in the absence of an allegation of an illegal or unauthorized act of a public official. Pasado’s cite no authority for the proposition that taxpayers need not establish standing in order to bring a facial challenge to a statute and may simply characterize the passage of a statute as the illegal act they challenge. *See* Appellants Rebuttal Brief at 9.

The fact that Pasado’s case is not a properly pled taxpayer derivative suit is further demonstrated by an examination of the relief sought by Pasado’s. CP at 448. In a taxpayer derivative suit, the proper remedy is an order of the court requiring that the illegal action by the public official cease. Pasado’s did not request (nor would this Court

grant) a writ requiring the State Legislature cease passage of unconstitutional laws or an injunction against the Governor signing unconstitutional bills into law. Instead, Pasado's requested a declaratory judgment on the constitutionality of the challenged laws, a challenge that may be brought under the UDJA, provided that Pasado's established standing. CP at 448.

Taxpayer derivative suits allow citizens to challenge illegal acts of government. This Court should decline to expand standing to permit taxpayer derivative suits in the absence of any allegation of an illegal act by a public official. As noted above, allowing taxpayer derivative suits for facial challenges to the constitutionality of statutes in the absence of any injury to the plaintiff would be contrary to the purpose of taxpayer derivative suits and would vitiate the statutory standing requirement of the UDJA in RCW 7.24.020.

**C. Pasado's Additional Arguments Related To Standing Of A Nonprofit, Ripeness, And Taxpayer Challenges to Criminal Laws Are Without Merit**

Pasado's raise several arguments in the portion of their Rebuttal Brief devoted to their taxpayer derivative suit which are not strictly related to the State's Cross-Appeal. These arguments are without merit. Pasado's appear to raise an issue of whether a nonprofit organization may serve as a spokesperson for "harmed animals." Appellants Rebuttal Brief at 10.

First, this issue was not raised in the case below thus cannot be raised on appeal. RAP 2.5(a). Second, the case cited, *Farm Sanctuary, Inc. v. Department of Food and Agriculture*, 63 Cal. App. 4th 495, 502, 74 Cal. Rptr. 2d 75, (Cal. App. 2nd Dist. 1998), is not applicable because that case involves standing to challenge an agency's regulation in California and Pasado's action involves a challenge to a Washington statute. Standing to challenge a regulation adopted by a state agency is not at issue.

Pasado's brief cites two federal cases for the proposition that their case is ripe for review. Appellants Rebuttal Brief at 10. However, the Court need not reach the issue of ripeness unless standing is first established. Further, the cases cited by Pasado's involve the ripeness of challenges to specific and particular government acts by parties with standing, not facial challenges to statutes. In *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008), the plaintiff challenged a specific land transaction made by a federal agency in order to avoid an establishment clause challenge to the presence of a memorial cross on federal land.<sup>3</sup> In *Flast v. Cohen*, 392 U.S. 83, 101, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), the federal taxpayer was required "to have personal stake and interest that

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<sup>3</sup> Pasado's cites 502 F.3d 1069 which was amended and superseded on denial of rehearing by *Buono v. Kempthorne*, 527 F.3d 758, (9th Cir. 2008). Appellants Rebuttal Brief at 13. This opinion was recently reversed and remanded by the Supreme Court in *Salazar v. Buono*, \_\_\_ U.S. \_\_\_, 2010 WL 1687118, (April 28, 2010).

impart the necessary concrete adverseness to such litigation so that standing can be conferred” in order to challenge the purchase of textbooks using federal funds for parochial schools. Pasado’s Complaint does not challenge a specific expenditure of funds.

Pasado’s raises another argument on a mischaracterization of the State’s briefing. Pasado’s suggests that the State is distinguishing between civil and criminal laws with respect to the ability to file taxpayer derivative suits. Appellants Rebuttal Brief at 19-21. The State has not made such an argument.

#### **IV. CONCLUSION**

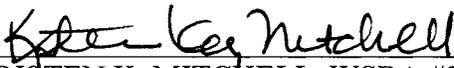
The trial court erred in failing to dismiss Pasado’s taxpayer derivative suit on the State’s motion for judgment on the pleadings. The taxpayer derivative suit should not have been allowed to proceed because Pasado’s did not plead a challenge to an illegal or unauthorized act of a public official, an indispensable element of such a claim.

The State respectfully requests that this Court reverse the trial court’s finding that Pasado’s had standing to bring the taxpayer derivative action. This Court should find that Pasado’s failed to challenge an illegal

act of government thereby failing to establish standing for their taxpayer derivative suit. The State requests that this Court find that the trial court should have dismissed Pasado's taxpayer derivative suit.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of May 2010.

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**CERTIFICATE OF SERVICE**

I certify that I served a copy of the *Reply Brief on Cross-Appeal of Respondents/Cross-Appellants* on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20<sup>th</sup> day of May 2010, at Olympia, Washington.

  
SHIRLEY BURRELL