☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: October 18, 2019
Time: 9:00 AM
Judge: Hon. Jack Nevin
Department 6

State Of Washington
Pierce County Superior Court

Taylor Black, Anne Black, Jerry King, Rene King, Roger Struthers, Mary Louise Struthers, and Frank Maietto, individually and on behalf of a class of all persons similarly situated,

Plaintiffs,

v.

Central Puget Sound Regional Transit Authority, and State Of Washington,

Defendants.

No. 19-2-11073-8

Reply To State of Washington In Support of Motion For Preliminary Injunction

Ard Law Group PLLC
P.O. Box 11633
Bainbridge Island, WA 98110
Phone: (206) 701-9243

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Ard Law Group PLLC

P.O. Box 11633
Bainbridge Island, WA 98110
Phone: (206) 701-9243

I. Introduction

Plaintiffs' Motion for a Preliminary Injunction challenges the continued collection of a tax that is calculated based on a valuation table that is no longer valid law. In its Opposition to Plaintiffs' Motion, the State presents no defense of its continued non-compliance with RCW 82.44.035, but instead focuses on the type of relief that the Plaintiffs seek, and attempts to show that Plaintiffs are not entitled to injunctive relief.

This Reply Brief will demonstrate the following:

(1) The State misstates the nature of the relief requested in this case, and presents no defense of its current practice;

(2) Because of the State's assertions, evaluating the scope of the injury for purposes of the third element of the test for a preliminary injunction cannot be limited to the named plaintiffs; and

(3) The State has admitted it must necessarily incur the logistical difficulties it identifies because it currently does not comply with any law; citing them does not justify continued non-compliance.

II. Argument

The State effectively concedes the unconstitutionality of the challenged Act. Instead it focuses on the supposed balance of minimal harm to plaintiffs and extraordinary expense and difficulty to the state. Both sides of its equation are wrong. **First**, an injunction in this case presents no additional trouble, expense, or difficulty to the state. It has already admitted that it complies with no statute at all, and therefore must reprogram the DRIVES system in any event. Despite two statutes mandating use of 1996 schedules, the state uses 1999 schedules.[1] It cannot continue its non-compliance; the only question is how soon it starts work to remedy its errors. Thus, the trouble, expense, and difficulty it faces cannot be laid at the feet of the individual plaintiffs here. **Second**, while it asserts that the relief from an injunction would amount to only a few dollars, it

[1] Obviously, those two statutes are the subject of the two companion challenges discussed in all the moving papers.

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P.O. Box 11633
Bainbridge Island, WA 98110
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admits that complying with an injunction would necessarily result in identical relief flowing to the entire class. According to CPSRTA's estimates, that relief amounts to over $85,000 every single day. In just two days, that would exceed the asserted cost of reprogramming. The true balance weighs overwhelmingly in favor of relief.

A. The State Misstates The Relief Requested In This Case And Effectively Concedes The First Element Of The Preliminary Injunction.

In their Opposition, the State claims that Plaintiffs have failed to establish a clear right to have their taxes determined by RCW 82.44.035. The State characterizes this case as a challenge to the constitutionality of a statute that permits the State to collect an MVET based on the 1999 valuation schedule, the conduct it currently engages in. But there is no such statute.

Instead of pointing to a statute that would justify the use of the 1999 schedule—or any statute or case that would justify ignoring RCW 82.44.035—the State simply assumes that it may continue doing what it is doing, and places the burden on the Plaintiffs to show that there is some constitutional infirmity in its practice. But the State has already admitted that it does not follow any statute at all in calculating MVET values under either MVET. It does not use RCW 82.44.035, and it does not use the 1996 tables required by the statues challenged in this and the companion case. Thus, the State ***must*** begin reprogramming its DRIVES system, no matter what.

The State treats the earlier filed challenge to the 0.8% ST3 MVET as though it were addressing the same issue as the question raised here. *See, e.g.*, State Oppo. at 5:6-7 ("Just last year, another judge from this Court rejected that very argument made by these same plaintiffs.") The State asks this Court to conclude that its defense to RCW 81.104.160(1), as enacted in 2015, under different circumstances and with slightly different language, provides a defense here. Its earlier defense does not apply here.

In the earlier ST3 case, Plaintiffs argued that the statute authorizing the ST3 MVET was constitutionally infirm under Art. II § 37. As noted in the Motion, the State and CPSRTA defended that enactment on various grounds that are completely inapplicable here. They argued, for example, that the 2015 legislature knew that by requiring use of the 1996 valuation schedules in

Ard Law Group PLLC
P.O. Box 11633
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2015, it meant that CPSRTA would continue levying tax using the same valuation schedules it was then using. That, of course, is not true. As they were forced to admit, CPSRTA has not used the 1996 schedules since 1999. And even if it were true, it has no bearing on the sentence challenged here, enacted in 2010. The State and CPSRTA also defended the 2015 enactment of RCW 81.104.160(1) on the grounds that it used the word "notwithstanding," which they argued excuses compliance with, or satisfies the requirements of, Art. II § 37. That word does not appear in the sentence challenged here; that defense is inapplicable.

It is not Plaintiffs' obligation to point out to the Court a rationale the State might have for why its prior defense applies here. The State fails to offer its own rationale, and that is sufficient for Plaintiffs to prevail. Because the State does not point to any statutory authority to use the 1999 schedules in use, nor defend the constitutionality of the statute it is ignoring, it has effectively admitted it has no defense on the merits of the first prong of the test for a preliminary injunction.

To repeat, there is no statute (other than RCW 82.44.035) to which the State or CPSRTA can point that they can use to calculate the ST1 MVET. The State offers no such statutory authority, nor any authority for its use of the 1999 schedules currently in DRIVES. In its opposition, CPSRTA explicitly disclaims any reliance on RCW 81.104.160(3). Instead, it CPSRTA asks this Court to declare that RCW 82.44.035 is unconstitutional.

If the State has an answer to why it should not be following RCW 82.44.035 in the calculation of the ST1 MVET, it had an opportunity to explain its reasons in its Opposition. Having failed to do so, it effectively concedes the first element of the test for a preliminary injunction.

B. The State Cannot Rely On Individual Injury To Oppose A Preliminary Injunction.

The State spends the majority of its brief objecting to the preliminary injunction on the basis of a claimed lack of substantial or irreparable injury on the part of the individual plaintiffs. The State claims that in order to establish substantial injury, the Plaintiffs should demonstrate that they face substantial harm from the conduct of the defendants. Oppo. Brief, 5:13-14. In particular, they claim that the payment of taxes is not substantial injury as a matter of law where the refund of the

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tax is an available remedy, citing *Tyler Pipe Indus. Inc. v. Dep't of Rev.*, 96 Wash. 2d 785, 638 P.2d 1213 (1982).

But *Tyler Pipe* is not analogous to the taxes imposed in this case. While the Plaintiffs' motion to certify a class will be heard at a later date, the State on its own initiative said it would oppose a similar class in the ST3 case, based on the assertion that it cannot grant relief to individual plaintiffs without providing the same relief to the entire class of taxpayers who are required to pay the MVET as a condition of registering their vehicles:

> Refunds for the MVET are controlled by RCW 82.44.120 and RCW 46.68.010. Pursuant to RCW 46.68.010(2), overpayments that are $10 or more must be refunded even absent a request from the vehicle owner. Thus, Plaintiffs' requested injunctive relief and the designation of a class are unnecessary as the statute itself, and the statute of limitations, addresses how overpayments are handled.

State's Opposition to Summary Judgment in the ST3 case, 6:2-6. Unlike the *Tyler Pipe* case, on which the State heavily relies, it is impossible, as the State admits, for the named Plaintiffs in this case to represent only themselves. The relief they request would of necessity—and by the State's own admission—require the State to revise the method of calculating the tax obligation for **all** taxpayers who reside in the regional transit district. Because relief can only flow to all taxpayers or to none, the determination of whether there is "substantial injury" should also be based on the actual effect of relief, which will, by the State's admission, necessarily flow to all taxpayers, not merely to the individual, named plaintiffs. Instead, the question of "substantial injury" should be based on whether the effect on the entire class of taxpayers satisfies that standard.

Thus, while the State argues that the harm to any individual plaintiff can be estimated at $18.75 (State's Oppo., 7:21), CPSRTA estimates that continued non-compliance with RCW 82.44.035 will generate $223 million in the decade between now and 2028. CPSRTA Oppo., 17:3-4. $223.1 million over ten years amounts to injury of ***over $85,000 per day*** that would be redressed by ordering relief.[2] Because the State admits that if it complied with an injunction, the relief would

[2] Each calendar year has 260 working days. Dividing the asserted $223.1 million by 2600 yields $85,807 per day of overtaxing.

Ard Law Group PLLC
P.O. Box 11633
Bainbridge Island, WA 98110
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flow to the entire class, the benefit of an injunction and harm to the plaintiffs must be measured on that basis.

C. Difficulty Of Legal Compliance Does Not Excuse Doing So.

Having treated the Plaintiffs' request for relief as though it were a matter for individual determination, the State then treats the issue of compliance as though it were class-wide. The balance of the State's brief is devoted to describing the difficulties in bringing its tax collection into compliance with the law. But the State faces this difficulty no matter what, because, as it admitted to the Supreme Court, it does not now comply with the law. It ***must*** take these steps to come into compliance. No aspect of the difficulty it identifies can be avoided, at all, under any circumstances. It must begin taking the steps to reprogram its computers, because it is not complying with any law at all—not RCW 81.104.160(1), challenged in the companion case; not RCW 81.104.160(3), challenged here, and not RCW 82.44.035, the governing statute. Because it must incur the trouble and expense it complains of, that trouble cannot be weighed against Plaintiffs' right to relief.

Plaintiffs do not ask this Court for an order of impossibility, such that the State must immediately revert to using RCW 82.44.035 by the close of business on October 18, 2019. Plaintiffs acknowledge that a remedy in this case will require additional time, and Plaintiffs are willing to engage in a reasoned discussion with the State as to the proper sequencing of adopting a lawful method of calculating and collecting the ST1 MVET. But the State has offered no explanation of why it should be allowed to collect the tax that it is now collecting. It is authorized by no statute that exists in the Revised Code of Washington. And it offers no position as to whether RCW 81.104.160(3)—which prescribes the use of the 1996 valuation schedule—is the law that applies to its collection of the ST1 MVET. Either RCW 81.104.160(3) is the law—in which case the State must revise its calculation and collection schedule to conform to that law; or else RCW 81.104.160(3) is not the law, in which case the only valid statute governing the valuation of vehicles is RCW 82.44.035.

Plaintiffs are not asking this Court to order an impossible remedy. But it is surprising to hear the chief law enforcement officer of the State to ask the Court to deny a motion for a preliminary

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injunction on the ground that it will require six months to conform its practices to a law that has been in existence for thirteen years, which it does not follow now, and which it apparently has no intention of ever following absent the court order it opposes.

In short, because the Plaintiffs have established that the State (and CPSRTA) are acting in violation of the law, this Court should order compliance "with all deliberate speed." The only possible question opened by this Motion is which schedule must be substituted for the schedule in use. The State offers no defense of the statute calling for the 1996 schedules, leaving only RCW 82.44.035 as the available schedule. The very fact that the State claims that it cannot immediately comply with the law, and that there will be logistical difficulties posed by the transition from their current practices to ones that conform to the law, only accentuates the need for preliminary injunctive relief. Coupled with the fact that the State must change its practices, and must incur the difficulties it identifies, the exact shape of the equitable relief to be granted will depend upon further proceedings that are consistent with the law and practical realities.

III. Conclusion

The Attorney General of Washington, the state's chief law enforcement agency, fails to point to any justification for continuing to collect taxes using a valuation schedule which has no statutory basis. The State's codefendant, CPSRTA, explicitly disclaims reliance on existing statutes and attempts to excuse its own non-compliance with RCW 82.44.035 by attacking the constitutionality of that statute. Plaintiffs respectfully request this Court to enter an Order that would preliminarily enjoin the defendants from further non-compliance with the law.

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Ard Law Group PLLC
P.O. Box 11633
Bainbridge Island, WA 98110
Phone: (206) 701-9243

October 16, 2019.

ARD LAW GROUP PLLC

By: _____
Joel B. Ard, WSBA # 40104
ARD LAW GROUP PLLC
P.O. Box 11633
Bainbridge Island, WA 98110
(206) 701-9243
Joel@Ard.law
Attorneys for Plaintiffs

ALBRECHT LAW PLLC

By: _____
Matthew C. Albrecht, WSBA #36801
David K. DeWolf, WSBA #10875
421 W. Riverside Ave., Ste. 614
Spokane, WA 99201
(509) 495-1246
Attorneys for Plaintiffs

Certificate Of Service

I certify under penalty of perjury under the laws of the United States of America that on October 16, 2019, I served the foregoing via email per agreement between the parties on the following:

Paul Lawrence paul.lawrence@pacificalawgroup.com Matthew Segal matthew.segal@pacificalawgroup.com Jessica A. Skelton jessica.skelton@pacificalawgroup.com Sydney Henderson sydney.henderson@pacificalawgroup.com Pacifica Law Group 1191 Second Avenue, Suite 2000 Seattle, WA 98101 Desmond Brown desmond.brown@soundtransit.org Natalie Anne Moore natalie.moore@soundtransit.org Mattelyn Laurel Tharpe mattelyn.tharpe@soundtransit.org CPSRTA 401 S. Jackson St. Seattle, WA 98104 Attorneys for Defendant CPSRTA	Dionne Padilla-Huddleston dionnep@atg.wa.gov Joshua Weissman Joshua.Weissman@atg.wa.gov Brendan Selby Brendan.Selby@atg.wa.gov Jennifer Bancroft jenniferp4@atg.wa.gov LALSeaEF@atg.wa.gov Attorney General's Office Licensing & Administrative Law Division 800 Fifth Avenue, Suite 2000 Seattle, WA 98104 Attorneys for Defendant State of Washington

Ard Law Group PLLC

By _____

Joel B. Ard, WSBA # 40104
Ard Law Group PLLC
P.O. Box 11633
Bainbridge Island, WA 98110
(206) 701-9243
Joel@Ard.law
Attorneys for Plaintiffs