The Honorable Jack Nevin
Date: 10/18/19
Time: 9:00 a.m.

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 STATE OF WASHINGTON'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

This Court should deny Plaintiffs' motion for preliminary injunction because it does not satisfy any of the criteria for emergency relief. There is no reason for the court to upend longstanding tax policies while this case is litigated.

The motor vehicle excise tax Plaintiffs challenge was approved by voters and has been collected at the same rate and applied to the same vehicle value depreciation schedule for 20 years. Puget Sound area voters approved a 0.3 percent motor vehicle excise tax in 1996 to fund the Central Puget Sound Regional Transit Authority (Sound Transit). In 1998, voters statewide approved the depreciation schedule that would apply to vehicles subject to the tax.

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Referendum 49, Chapter 321, Laws of 1998. That schedule has been used since its effective date in 1999, yet Plaintiffs claim they need emergency relief while this Court evaluates the merits of their claims.

Plaintiffs have failed to meet their burden of showing a need for emergency relief for five reasons. First, they fail to establish a clear legal or equitable right to have the depreciation schedule in RCW 82.44.035 apply to the motor vehicle excise tax imposed by Sound Transit. Second, they have not established any actual or substantial injury, and payment of a recoverable tax is not, by itself, such an injury. Third, they have not shown that invasion of their rights is imminent. Fourth, the balance of the equities favors the Defendants. Finally, injunctive relief is precluded because Plaintiffs have an adequate legal remedy.

II. STATEMENT OF FACTS

All vehicles in Washington, unless exempt, must be registered yearly with the Department of Licensing (Department). RCW 46.16A.030, RCW 46.16A.040, RCW 46.16A.110. At registration, all applicable fees and taxes must be paid. RCW 46.16A.040(3), RCW 46.16A.110(1). A vehicle owner may renew their registration up to six months in advance of its expiration. Declaration of Jaime Grantham (Grantham Decl.) at ¶ 7. Sixty days in advance of the registration expiration, DOL generates a registration renewal notice, which includes the amount of fees and taxes due to renew the vehicle's registration. *Id.* The Department sends the renewal notice to vehicle owners 45 days in advance of the registration expiration. *Id.*

Voters approved a 0.3 percent motor vehicle excise tax (MVET) in 1996 to fund a Sound Transit transit plan.[1] Beginning in April 1997, and pursuant to its contract with Sound Transit, the Department of Licensing began collecting the 0.3 percent MVET on non-exempt vehicles registered within Sound Transit's taxing district for remittance to Sound Transit. *See*

[1] In 2002, Initiative 776 attempted to repeal the MVET. However, the court in *Pierce County v. State*, 159 Wn.2d 16, 148 P.3d 1002 (2006), held that the initiative measure unconstitutionally impaired Sound Transit's bond contracts. Consequently, the initiative had "no legal effect of preventing Sound Transit from continuing to fulfill its contractual obligation to levy the MVET for so long as the bonds remain outstanding." *Id.* at 51.

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RCW 81.104.190; Declaration of Stephanie Sams (Sams Decl.) at ¶ 4; Declaration of Stephanie Oyler (Oyler Decl.), Ex. A. In 1998, voters statewide amended the depreciation schedule that would apply to vehicles subject to the tax. Referendum 49, Chapter 321, Laws of 1998.

Voters approved an additional 0.8 percent MVET in 2016 to fund an additional Sound Transit transit plan. Since March 2017 and pursuant to its contract with Sound Transit, the Department has collected an additional 0.8 percent MVET and remits the total 1.1 percent MVET revenue monthly to Sound Transit. Sams Decl. at ¶ 4; Oyler Decl., Ex. G.

In determining the amount of MVET to collect upon a vehicle's initial or renewal registration, the vehicle's value is multiplied by the depreciation percentage, which varies by the age and type of vehicle; that amount is then multiplied by the 1.1 percent MVET. *See* RCW 81.104.160(1), (3); Referendum 49, Chapter 321, Laws of 1998. The MVET amount due is calculated by the Department's driver and vehicle technology system called DRIVES.

III. LEGAL STANDARD

An injunction "is a remedy which should not be lightly indulged in, but should be used sparingly and only in a clear and plain case." *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) (citation and internal quotation marks omitted). The well-settled legal standard for a preliminary injunction is:

> A party seeking relief through a temporary injunction must show [1] a clear legal or equitable right, [2] that there is a well-grounded fear of immediate invasion of that right, and [3] that the acts complained of have or will result in actual and substantial injury. Also, since injunctions are within the equitable powers of the court, these criteria must be examined in light of equity, including the balancing of the relative interests of the parties and the interests of the public, if appropriate.

Rabon v. City of Seattle, 135 Wn.2d 278, 284, 957 P.2d 621 (1998) (internal citation omitted). The party moving for an injunction bears the burden of establishing all of the requirements for injunctive relief. *Kucera*, 140 Wn. 2d at 210. A party's failure to establish any one of the three requirements, considered in light of equity, precludes issuance of the injunction. *See id.*

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Further, "The rule in this state is that injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law." *Tyler Pipe Indus., Inc. v., Dep't of Rev.*, 96 Wn.2d 785, 791, 638 P.2d 1213 (1982); *see Kucera*, 140 Wn.2d at 68 (same).

The Plaintiffs' motion for class certification should be denied, as explained in the State's separate response to that motion. Even if class certification were granted, which it should not be, the class must still make out the required showing for an injunction.[2] *See Kucera*, 140 Wn.2d at 67-68 (requirements applied to a plaintiff class). At a minimum, the named plaintiffs should be able to satisfy the requirements of the particular relief sought. *See Hodgers–Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999) (applying analogous federal law to conclude that, "[u]nless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief"). They cannot do that.

IV. ARGUMENT

A. Plaintiffs Fail to Establish a Clear Legal or Equitable Right

Plaintiffs are a proposed class of individuals who pay the MVET imposed by Sound Transit. Compl. at ¶¶ 141-174. They claim to have a clear right to pay the MVET only according to the rates set at RCW 82.44.035. Mot. for Prelim. Inj. at 2. They are wrong.

To evaluate whether plaintiffs have established a clear legal or equitable right for injunctive relief, the Court must examine "the likelihood that the moving party will prevail on the merits," keeping in mind that "[a]n injunction will not be issued in a doubtful case." *Rabon*, 135 Wn. 2d at 285. Further, statutes are "presumed to be constitutional," so "[a] party challenging the statute's constitutionality bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt." *Amalgamated Transit Union Local 587 v. State*,

[2] If no class is certified, a class-wide injunction would be entirely inappropriate. *See Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) (applying analogous federal law to hold that "[an] injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs"); *see also id.* at 727 n. 1 (citing numerous federal cases). In the event the class is not certified, injunctive relief would be available, at most, to the individual named plaintiffs. *See id.* ("narrow tailoring" of injunctive relief to named plaintiffs is particularly appropriate in preliminary injunction context).

142 Wn.2d 183, 205, 11 P.3d 762 (2000), *as amended* (Nov. 27, 2000), *opinion corrected*, 27 P.3d 608 (2001). At the preliminary injunction stage, for example, the showing that a "substantial" constitutional question exists does *not* suffice to demonstrate a clear right. *Tyler Pipe*, 96 Wn. 2d at 793.

Plaintiffs are incorrect that they have "a clear right to limit their tax liability to an MVET calculated using RCW 82.44.035." Mot. for Prelim. Inj. at 8. Just last year, another judge from this Court rejected that very argument made by these same plaintiffs. Declaration of Dionne Padilla-Huddleston, Ex. 1. While Plaintiffs have appealed that decision to the Washington Supreme Court, argument took place just last month, and the Washington Supreme Court has not yet ruled. Plaintiffs cannot escape the fact that the only court to rule on their argument has rejected it. And this Court should decline to issue emergency relief by answering a legal question that is currently pending before the Washington Supreme Court.

B. Plaintiffs Fail to Make a Specific Showing of "Actual or Substantial Injury," and Payment of a Recoverable Tax is Not, By Itself, Such an Injury in Washington

To be entitled to a preliminary injunction, Plaintiffs must show "*in a factually specific way* that the criteria for injunctive relief have been met" as to them. *Kucera*, 140 Wn.2d at 219 (emphasis added). Here, they fail on two separate grounds. First, it is black letter law that there is no irreparable injury in paying taxes that could be refunded if later deemed illegal. And second, even if payment of money could be an irreparable injury in some circumstances, Plaintiffs err by failing to make a factually specific showing as to their own injury.

The first and most fundamental problem with Plaintiffs' claimed injury is that it consists entirely of payment of a refundable tax, which is insufficient as a matter of law under binding authority.[3] In *Tyler Pipe*, the Supreme Court denied a preliminary injunction for lack of "actual and substantial injury," where the plaintiff, Tyler Pipe, failed to "allege[] any special circumstances to justify the issuance of the injunction." 96 Wn.2d at 797. Tyler Pipe "offered no

[3] As discussed below, the MVET is refundable in the event of erroneous collection. *See* RCW 82.44.120.

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testimony in support of its motion for injunctive relief" and offered "no facts" supporting its assertion of irreparable harm. *Id.* at 794. Because it "put nothing into evidence to establish actual and substantial harm," Tyler Pipe was "reduced to argu[ing] that any dollar loss constitutes actual and substantial harm regardless of its impact." *Id.* at 796. Given society's strong interest in efficient taxation (discussed further below), the court held Tyler Pipe "ha[d] not established actual and substantial harm." *See id.*

Plaintiffs have placed themselves in exactly the same position as Tyler Pipe. Plaintiffs' cursory argument as to injury is that "Taxpayers cannot be expected to pay an unlawful tax and hope for a refund at some future date." Plaintiffs' Mot. for Prelim. Inj. at 18. But the Supreme Court rejected exactly that argument in *Tyler Pipe*. *See* 96 Wn.2d at 794-95. There is no substantial injury here, and the motion must be denied.

Second, even if payment of taxes that could later be refunded could demonstrate substantial injury, Plaintiffs here have made no specific showing as to what injury they would allegedly suffer. They have offered no evidence about what vehicles (if any) they own, the value of those vehicles, the amount of MVET owed with respect to those vehicle(s), and when such payment(s) would occur. The Court should not grant a preliminary injunction without a specific showing of the actual injury suffered by the named plaintiffs.

C. Plaintiffs Have Made No Showing That Invasion of Their Rights Is Imminent

Plaintiffs bear the burden of showing a "well-grounded fear of immediate invasion" of a right that they *personally* hold. Plaintiffs ignore the word "immediate." Their argument appears to be that, because Defendants continue to adhere to an allegedly erroneous reading of the law, Plaintiffs will eventually have to pay the MVET again at a rate that is too high when they next renew their vehicle registrations.[4] Plaintiffs have provided no specific argument as to immediacy. *See* CR 7(b)(1) (a motion "shall . . . state with particularity the grounds therefore").

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[4] Plaintiffs also allege that they have paid an excessive rate in the past, but this claim is not strictly relevant to the request for future relief.

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Plaintiffs offer no evidence, for example, as to when they are next scheduled to pay the MVET. Plaintiffs' Motion does not even cite to any declarations of named Plaintiffs or class representatives that might contain this specific information. *See* CR 7(b)(4) ("When a motion is supported by affidavits or other papers, it shall specify the papers to be used by the moving party."). Given the impacts, explained below, on the Department and the public of changing how the 0.3 percent MVET is calculated while the case proceeds on the merits, no showing of the immediacy of Plaintiffs' claims at all is unacceptable.

It will not suffice for Plaintiffs to argue that at least one member of the proposed class can be expected to have to pay the MVET in the near future. If the named plaintiffs seek to represent a class that is entitled to injunctive relief, they should be entitled to that relief themselves. *See Hodgers–Durgin*, 199 F.3d at 1045 (applying analogous federal law).

D. The Balance of the Equities Heavily Favors the Defendants

"[T]he [C]ourt must examine the above three preliminary injunction requirements in light of competing equities." *Nw. Gas Ass'n v. Utils. & Transp. Comm'n*, 141 Wn. App. 98, 122, 168 P.3d 443 (2007). Here, the equities weigh heavily against granting injunctive relief.

Plaintiffs offer absolutely no evidence of the extent of specific harms they will suffer. But even assuming hypothetical facts in their favor (which the Court should not do), their alleged harms are minimal. For example, assuming a car with a depreciated valued of $25,000, the 0.3 percent MVET would be $75. Accepting Plaintiffs' assertion that the MVET would be excessive by about 25 percent, Motion for Preliminary Injunction at 17, the alleged "harm" to the owner would be a temporary deprivation of $18.75. This is not a burdensome amount and any alleged harm from continuing to pay the currently calculated 0.3 percent MVET should be discounted. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) ("[W]here an injunction is asked which will adversely affect a public interest . . . the court may in the public interest withhold relief . . . though the postponement may be burdensome to the plaintiff" (*quoting Yakus v. United States*, 321 U.S. 414, 440 (1944)).

Weighed against the general type of interest Plaintiffs assert, the harm of a preliminary injunction to the State and the public interest would be enormous for multiple reasons. First, the Washington Supreme Court recognizes the State's "strong interest in efficient tax collection," which "has led to a long-standing public policy which disfavors the issuance of injunctions." *Tyler Pipe*, 96 Wn.2d at 796-97. Second, the harm to the State and society is not limited merely to inefficient tax collection. Rather the impacts on the Department and the public if the Department were required to change how it calculates the 0.3 percent MVET are numerous and wide-reaching.

The Department and its agents and subagents use a vehicle and driver technology system called DRIVES to calculate the amount of fees and taxes a vehicle owner must pay on original or renewal registration. Grantham Decl. at ¶ 6. A change to the MVET calculation would require reprogramming DRIVES. Sams Decl. at ¶ 7. Such reprogramming would take six months and cost $115,000. *Id.* at ¶ 8. Thus, if the court were to grant Plaintiffs' request for a preliminary injunction, the Department could not reasonably be expected to implement the injunction terms for six months, and it would come at great expense. In all likelihood, the court will have already issued a decision on the merits of the case before then, potentially rendering the Department's reprograming efforts wasted. If the Plaintiffs ultimately do not prevail, the Department would then have to unwind all of its reprogramming efforts, again involving great time, resources, and expense.

The effort to reprogram DRIVES would be prolonged and expensive for multiple reasons. First, the DRIVES system is currently configured to charge the entire 1.1 percent MVET on the same depreciation schedule. *Id.* at ¶ 9. Changing how DRIVES calculates the 0.3 percent MVET would require the Department to maintain its current process for calculating the 0.8 percent MVET, while also creating a new process for separately calculating the 0.3 percent MVET against a different depreciation schedule. *Id.* Charging the 0.3 percent and the 0.8 percent on different schedules would require significant reconfiguring. *Id.* Second, it requires advanced

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experience to make DRIVES changes; thus the Department would not be able to rely on new hires or contractors to complete the reprogramming. *Id.* at ¶ 12.

In addition to the estimated direct costs and time to implement changes to DRIVES, if the Department were required to shift its resources in this way, it would be to the detriment of its ten currently scheduled large scale efforts not involving DRIVES that are queued up for programming and implementation and ongoing system maintenance. *Id.* at ¶¶ 10-11. This body of work requires software developers and programmers. *Id* at. ¶ 10. In order to implement a change to how DRIVES calculates the 0.3 percent MVET using adequately experienced staff and contractors, the Department would be forced to delay other currently scheduled projects. *Id* at. ¶ 11. This would have cost and public safety impacts, and it risks the Department being out of compliance with state and federal laws. *Id* at. ¶¶ 11, 13.

A preliminary injunction would also greatly impact the registration renewal process for vehicle owners within Sound Transit's district. Most notably, if the Department were required to immediately start calculating the 0.3 percent MVET differently than it currently does, all renewal notices to vehicle owners within the Sound Transit district that have already been sent would be rendered erroneous.[5] Grantham Decl. ¶ 9. In addition, because vehicle owners can renew their registrations up to six months in advance of expiration, vehicle owners within Sound Transit's district that renewed early may have paid the incorrect MVET. *Id.* Even once the programing changes are made to DRIVES, an additional two months will be needed to implement those changes. *Id.* This time is needed so that the renewal notices, which are produced two months in advance of registration expiration, and sent to vehicle owners 45 days prior to registration expiration, incorporate the correct amount of fees due. *Id.* If sufficient implementation time is not allowed, registration renewal notices sent to vehicle owners within the Sound Transit taxing District

[5] Currently, there are approximately 2.5 million vehicles registered within the Sound Transit taxing district. Sams Decl. at ¶ 16. The expected vehicle registration renewals in the Sound Transit taxing district for the next six months are as follows: November 2019—157,000; December 2019—188,000; January 2020—174,000; February 2020—173,000; March 2020—222,000; and April 2020—208,000. *Id.*

will be erroneous. *Id.* This will likely cause customer confusion and inquiries by telephone to the Department, as well in-person questions to agents and subagents, and increased customer wait times for services. *Id.* For an erroneous renewal notice where the vehicle owner renewed by mail, the agent processing the renewal will need to return the renewal and money remitted back to customers for resubmission. *Id.* This delay in processing could extend past renewal expiration putting customers at risk of non-compliance with registration requirements. *Id.*

E. Injunctive Relief is Precluded Because Plaintiffs Have an Existing Adequate Legal Remedy

Even if Plaintiffs were able to establish that the requirements for a preliminary injunction were met, such relief is not available where, as here, there is an adequate remedy at law. *See Tyler Pipe*, 96 Wn.2d at 791.[6] "Courts have generally found remedies to be inadequate in three circumstances: (1) the injury complained of by its nature cannot be compensated by money damages, (2) the damages cannot be ascertained with any degree of certainty, and (3) the remedy at law would not be efficient because the injury is of a continuing nature." *Kucera*, 140 Wn.2d at 69 (citation omitted). None of those circumstances are present here.

First, the alleged monetary loss here is "by its nature" compensable by a remedy at law: a statutory refund. Second, the alleged damages can be determined to the dollar by comparing the rate schedule used by Sound Transit and the Department to the one for which Plaintiffs advocate. Third, the injury, while periodic, is not "continuing." It occurs at most once a year, or when a new car is registered. RCW 46.16A.040(3), RCW 46.16A.110(1). Based on the facts in the record, it is very likely that the risk to the proposed plaintiff class is, at most, the amount of

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[6] The court in *Tyler Pipe* concluded that the normal "adequate remedy" rule did not apply in that case, because the legislature had superseded it by statute as to the particular tax at issue. *See* 96 Wn.2d at 791 ("As noted above, the legislature by excepting constitutional cases from the anti-injunction provision chose not to limit the court's equitable powers in those cases even though the legal remedy may, in fact, be adequate."). The relevant anti-injunction provision, RCW 82.32.150, does not apply to the MVET because the MVET is not imposed under one of the chapters enumerated in RCW 82.32.010, which governs the applicability of RCW 82.32.150, nor do the statutory provisions governing MVET indicate that RCW 82.32.150 applies. Even if the anti-injunction provision did apply, Plaintiffs' argument would be foreclosed under *Tyler Pipe* for lack of substantial injury alleged.

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excess tax charged for their vehicle(s) for a single registration. As explained below, that excess, if established, would be refundable.

RCW 82.44.120 provides "a plain, complete, speedy and adequate remedy at law" for all the proposed plaintiffs. *See Tyler Pipe*, 96 Wn.2d at 791. The statute provides that a refund may be sought by a person who "[i]s not seeking a full refund" and "[b]elieves the amount of the locally imposed motor vehicle excise tax paid was incorrect or too much." RCW 82.44.120(2). It further provides that the "terms and conditions" of the refund are to be determined under RCW 46.68.010. *Id.* § (1). That statute states that a person "who has paid all or part of a vehicle license fee . . . is entitled to a refund if the amount was paid in error." RCW 46.68.010(1).

The Washington Supreme Court has previously held that a statute providing for recovery "in case of an illegal or unjust assessment for taxes" constitutes "a remedy that [is] plain, simple, speedy, adequate, and complete," such that injunctive relief is inappropriate. *See Roon v. King Cty.*, 24 Wn.2d 519, 524, 528, 166 P.2d 165 (1946). The statutory remedy in *Roon* was substantially more onerous than the one here. *See id.* at 524. Here, Plaintiffs have an available remedy for harms incurred pending litigation if they succeed on the merits of their statutory and constitutional claims and the court should conclude that the refund procedure in RCW 82.44.120 provides an adequate remedy under state law.

V. CONCLUSION

Plaintiffs do not satisfy any of the criteria for emergency relief and their motion for a preliminary injunction should be denied. They have not demonstrated a clear legal or equitable right to application of RCW 82.44.035. They have provided no evidence of neither a well-grounded fear of immediate invasion of that right, nor actual and substantial injury. And, in balancing the relative interests of the Plaintiffs and the State, the equities favor the State.

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PROOF OF SERVICE

I, Jennifer K. Bancroft, certify that I caused to be served a copy of **State of Washington's Response to Plaintiffs' Motion for Preliminary Injunction** 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 15th day of October 2019 at Seattle, WA.

JENNIFER K. BANCROFT, Legal Assistant