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WASHINGTON STATE SUPREME COURT

GARFIELD COUNTY TRANSPORTATION AUTHORITY; et al.,

Appellants,

WASHINGTON ADAPT; TRANSIT RIDERS UNION; and CLIMATE
SOLUTIONS,

Appellants/Intervenor-Plaintiffs,

v.

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

CLINT DIDIER; PERMANENT OFFENSE; TIMOTHY D. EYMAN;
MICHAEL FAGAN; JACK FAGAN; and PIERCE COUNTY,

Respondents/Intervenor-Defendants.

***AMICUS CURIAE* BRIEF OF INTERNATIONAL
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I. INTRODUCTION

In 2019, Washington voters approved Initiative 976 (I-976),¹ which significantly reduces both state and local funding for transportation. Shortly after passage, Appellants/Plaintiffs² challenged the initiative, alleging numerous constitutional defects. The constitutional defects identified by the Appellants/Plaintiffs include the violation of Article XI, Section 12 of the Washington Constitution because I-976 strips municipalities of revenue authority that the legislature had vested with them—authority they had already exercised. Appellants’ Opening Br. 64–81. The importance of local control and the critical role fiscal authority plays in ensuring meaningful home rule underpin this constitutional claim, and this fiscal authority is particularly important in the context of local transportation revenue.

II. IDENTITY AND INTEREST OF *AMICI*

Amici submit this brief in support of Appellants/Plaintiffs. *Amici* local government law professors are scholars who study and teach state and local government law. They have an interest in properly construing

¹ Initiative Measure No. 976 (filed Mar. 19, 2018), https://sos.wa.gov/_assets/elections/initiatives/finaltext_1519.pdf.

² King County, City of Seattle, Washington State Transit Association, Association of Washington Cities, Port of Seattle, Garfield County Transportation Authority, Intercity Transit, Amalgamated Transit Union Legislative Council of Washington, Michael Rogers, City of Burien, and Justin Camarata.

state constitutional provisions, especially as these provisions affect the authority of local governments to levy taxes and collect fees. They are listed below, with their institutional affiliations provided for informational purposes only.

Richard Briffault is the Joseph P. Chamberlain Professor of Legislation at Columbia Law School, where his teaching, research and writing focus on state and local government law. With Laurie Reynolds, he is co-author of the textbook *State and Local Government Law* (West Academic Pub., 8th ed. 2016).

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Darien Shanske is a Professor of Law at the University of California, Davis, School of Law, where he teaches and writes about state and local government law, state and local tax law, and public finance.

Rick Su is a Professor of Law at the University at North Carolina School of Law, where he teaches local government law and immigration. His research focuses on preemption and the relationship between localities, the states, and the federal government.

Paul A. Diller is a Professor of Law at Willamette University College of Law and the director of its certificate program in law and government. He teaches and writes in the field of local government law, with an emphasis on state-local conflict.

Amici International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

III. STATEMENT OF THE CASE

Amici adopt and incorporate here the Statement of the Case provided by Appellants/Plaintiffs to this Court in their Opening Brief. Appellants' Opening Br. 3–12.

IV. ARGUMENT

A. Home Rule Strengthens Democracy By Allowing Those Closest to the Governed to Make Policy Decisions.

Home rule strengthens democracy. The United States Supreme Court has frequently praised constitutional federalism because it “allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by fostering competition for a mobile citizenry.” *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2673, 192 L. Ed. 2d 704 (2015) (internal quotations and citations omitted). As scholar Richard Briffault has observed, “[t]he Court’s normative concerns with responsiveness to diverse needs in a heterogeneous society, innovation and experimentation, and citizen involvement in democratic processes apply even more to local governments than to states.” Richard Briffault, *The Challenge of the New Preemption*, 70 *Stan. L. Rev.* 1995, 2018–19 (2018).

In this sense, home rule reflects the values of federalism within state constitutions.

As a result of home rule and other state allocations of authority, local governments are much more than just administrative agents of the state. Rather, local officials and local voters respond to local concerns.

Because local governments are closest to those governed, they are often best situated to identify the needs and interests of their constituents. Further, this local tailoring allows policies to reflect the diversity of political opinions within states. *See* Paul Diller, *Intrastate Preemption*, 86 B.U. L. Rev. 1113, 1124 (2007) (discussing home rule authority).

Home rule also fosters participation in the democratic process. Grassroots and community organizations that might not be well represented at the state level have opportunities to be heard in city and county council meetings. *See* Paul A. Diller, *Why Do Cities Innovate in Public Health? The Implications of Scale and Structure*, 91 Wash. U. L. Rev. 1219, 1257–58 (2014).

Further, legal authority allows local governments to engage in policy experimentation, allowing them to serve as the laboratories of democracy so appropriately lauded by Justice Brandeis. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 387, 76 L. Ed. 747 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the

federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”). The number and diversity of local governments allows them to engage in significant policy experimentation. Successful experiments can be replicated by both other local governments and at the state, or even federal level. Cities in the nineteenth century, for example, pioneered many civil service reforms, including competitive bidding. See Richard Briffault, *Our Localism: Part I-the Structure of Local Government Law*, 90 Colum. L. Rev. 1, 15 (1990). More recently, cities have taken the lead in ensuring workers have access to paid sick leave. Early adopters like San Francisco (2006), Washington, D.C. (2008), and Seattle (2011) adopted paid sick leave ordinances, and paid sick leave laws have since been adopted by both city and state governments. Local Progress, *Pol’y Brief: Paid Sick Leave* 18 (2019), <https://localprogress.org/wp-content/uploads/2019/01/Paid-Sick-Leave.pdf>.

The COVID-19 pandemic underscores the important role played by local governments in responding to critical policy challenges. Early alarms from the Seattle & King County Public Health Department, for example, helped contain the COVID-19 outbreak in Washington state and alerted the rest of the country to community transmission of the virus. Charles Duhigg,

Seattle's Leaders Let Scientists Take the Lead. New York's Did Not, The New Yorker (Apr. 26, 2020), <https://www.newyorker.com/magazine/2020/05/04/seattles-leaders-let-scientists-take-the-lead-new-yorks-did-not>.

Constitutional home rule provides the legal framework for ensuring local governments have the legal authority to address local concerns and critical policy issues.

B. Fiscal Authority is Critical to Ensuring Meaningful Local Control.

Local policy authority, however, requires sufficient financial resources to be meaningful. Without adequate revenue authority, local governments cannot deliver the public goods and services chosen by local voters.

Constraints on local fiscal authority undermine democratic accountability. When local voters are unhappy with the fiscal decisions of their elected officials, they naturally seek to hold them accountable. However, it may be difficult for voters to understand the role of *state* decisions, including decisions made in statewide referenda, in determining the extent of *local* service provision. This is particularly true in a case like this one, where, in Seattle, local voters approved the taxes and fees at issue, only to have those decisions overridden by a statewide referendum.

Similar considerations undergird the anti-commandeering doctrine that protects the states as a matter of federal constitutional law. As the U.S. Supreme Court observed, “[w]hen Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred.”

Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1477, 200 L. Ed. 2d 854 (2018); *see also N.Y. v United States*, 505 U.S. 144, 169, 112 S. Ct. 2408, 2424, 120 L. Ed. 2d 120 (1992) (“[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished . . .”).

Further, mobility may obviate the need for the state to impose fiscal constraints. As Professor Richard Briffault explains, “the ability of mobile residents and firms to flee a high-tax jurisdiction to a low-tax neighbor, along with local electoral control, provides a significant check on local taxing decisions.” Richard Briffault, *Home Rule for the Twenty-First Century*, 36 *Urb. Law.* 253, 270 (2004). Granting local governments

fiscal authority empowers local communities, but within significant non-legal constraints.

Some state courts have explicitly recognized the central role that revenue plays in local home rule authority. *See Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St. 3d 599, 606, 1998-Ohio-339, 693 N.E.2d 212, 217 (Ohio 1998) (stating that constitutional home rule means “municipalities were entitled to exercise, fully and completely, ‘all powers of local self-government’” and that “[a]mong those powers is the power of taxation”) (citation omitted).

Although Washington has not included taxation as a home rule power, *see Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 365–66, 89 P.3d 217, 221 (2004) (en banc), the Washington Constitution explicitly recognizes the need for local fiscal authority. Const. art. VII, § 9 (“The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.”); Const. art. XI, § 12 (“The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations,

or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes.”).

Interpreting a provision of the Missouri Constitution that parallels Article XI, Section 12 of the Washington Constitution,³ the Missouri Supreme Court recognized the state legislature’s “power to determine the kind of taxes the city may impose” but also affirmed the importance of local taxation. *Coleman v. Kansas City*, 353 Mo. 150, 161, 182 S.W.2d 74, 77, (Mo. 1944) (en banc). As that court observed, cities “cannot exist without taxes and, in that sense, the mandatory duty is upon the General Assembly to vest in the city the power to levy and collect taxes of some kind.” *Id.* Interpreting parallel constitutional language,⁴ California’s

³ The Missouri Constitution of 1875, Art. 10, § 10 (“The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.”). The current Missouri Constitution, adopted in 1945, contains only the first clause of this provision. Mo. Const. art. X, § 10(a) (“Except as provided in this constitution, the general assembly shall not impose taxes upon counties or other political subdivisions or upon the inhabitants or property thereof for municipal, county or other corporate purposes.”).

⁴ The California Constitution of 1879, Art. XI, § 12 (“The Legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.”). In 1970, California repealed Art. XI in its entirety and replaced it with a revised article, as proposed by the California Constitutional Revision Commission. Kourtney Burdick, et al., *The Origins of California*

Supreme Court went even further. The California court held that this constitutional language, in conjunction with the California Constitution’s authorization of city charters, implied independent taxing authority for the state’s charter cities. *See Sec. Sav. Bank & Tr. Co. v. Hinton*, 97 Cal. 214, 219, 32 P. 3, 4–5 (Cal. 1893) (“[T]he legislature is *prohibited* from imposing taxes upon counties, cities, towns, or other municipal corporations, for municipal purposes. It must therefore follow that in authorizing freeholders’ charters, which the legislature cannot change or amend, the power of taxation being essential to municipal existence, that power is necessarily implied.”) (emphasis in original).

Appreciating this constitutional design, this Court has recognized the importance of legislative grants of taxing authority. *Watson v. City of Seattle*, 189 Wn.2d 149, 166–67, 401 P.3d 1, 10 (2017) (“The ‘home rule’ principle seeks to increase government accountability by limiting state-level interference in local affairs. This is particularly important with respect to local taxation authority.”) (internal citations omitted). Given the important role of fiscal authority within the home rule system, Washington courts liberally construe legislation that grants first class cities taxing

City Power, Western City (Jan. 1, 2008), <https://www.westerncity.com/article/origins-california-city-powers>.

authority. *See id.* at 167, 10; *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 343, 662 P.2d 845 (1983).

As discussed below, the legislature granted such fiscal authority over vehicle license fees and taxes, and I-976 undermines local fiscal authority by overriding the decisions of local voters and local elected officials in the funding of local transportation investments.

C. Local Revenue Authority Is Especially Important During Economic Downturns.

While local revenue authority is always important, it is particularly important during recessions and periods of economic recovery. When state budgets decline, states often reduce the intergovernmental transfers they provide to local governments at a time when both local tax assessments and collections are in decline and the human services needs of local residents are increasing. This “local squeeze,” as the Pew Research Center has termed this convergence, places tremendous pressure on local budgets. Pew Charitable Trusts American Cities Project, *The Local Squeeze: Falling Revenues and Growing Demand for Services Challenge Cities, Counties, and School Districts* 5–8 (June 2012), https://www.pewtrusts.org/-/media/assets/2012/06/pew_cities_local-squeeze_report.pdf.

During the Great Recession, Washington state managed to avoid the steep cuts to intergovernmental aid seen in other states. Governing, *Where Local Revenues from State Governments are Declining*, <https://www.governing.com/gov-data/finance/local-government-intergovernmental-revenues-from-states.html> (last visited June 4, 2020). However, Washington currently face declines in revenue that exceed last decade's economic downturn. Unofficial estimates reported in May suggest that the state faces a \$3.8 billion shortfall in the current two-year budget cycle, and another shortfall of over \$3 billion in the 2021–2023 budget cycle. Joseph O'Sullivan, *Unofficial Numbers Show \$7 Billion Hit to Washington State Revenue Through 2023 From Coronavirus Downturn*, Seattle Times, (May 5, 2020, 7:31 PM), <https://www.seattletimes.com/seattle-news/politics/unofficial-numbers-show-7-billion-hit-to-washington-state-revenue-through-2023-from-coronavirus-downturn>.

At the same time, local governments are bracing for dramatic revenue declines. For example, Seattle estimates that it will face a budget gap of between \$210 million and \$300 million. Daniel Beekman, *Seattle Projects Coronavirus Crisis Could Knock \$210M to \$300M Hole in City Budget*, Seattle Times, (Apr. 22, 2020, 11:36 AM), <https://www.seattletimes.com/seattle-news/politics/coronavirus-crisis->

could-knock-210-million-to-300-million-hole-in-seattles-budget-city-says/. By comparison, the budget gap the city faced in 2009 was only \$44.3 million. Pew Charitable Trusts Philadelphia Research Initiative, *Tough Decisions and Limited Options: How Philadelphia and Other Cities are Balancing Budgets in a Time of Recession 2* (May 18, 2009), https://www.pewtrusts.org/-/media/assets/2009/05/18/final_budget-brief.pdf (budget gap reported in 2009 dollars). While recessions always require state and local governments to balance declining revenues against rising human service needs, the current COVID-recession is particularly challenging for state and local budgets. In particular, governments must shoulder increased public health spending and additional costs to deliver services in a way that ensures adequate social distancing.

Adequate revenue authority, whether legislatively delegated or constitutionally guaranteed by home rule provisions, provides local governments and local voters the choice to raise revenue to offset a portion of this shortfall. Cities often implement significant budget cuts during recessions because they lack the legal authority to raise tax revenue. *Id.* at 8. Research suggests such public sector budget cuts prolong recessions. *See, e.g.,* Josh Bivens, *Why is Recovery Taking So Long--And Who's To Blame?* (Aug. 11, 2016), <https://www.epi.org/files/pdf/110211.pdf>.

In the current fiscal climate, I-976's role in limiting local fiscal authority is even more pronounced. I-976 prevents local voters and local governments from making decisions for themselves about how to prioritize the needs for local funding for transportation against the increasing financial struggles facing their residents.

D. Local Transportation Budgets Create Particular Specific Interests in Stable Funding.

I-976 significantly restricts local transportation revenue through its cap on locally-imposed vehicle fees and the elimination of statutory authority to obtain voter approval for higher fees. I-976, §§ 2, 6. The State concedes that local governments will lose \$58 million annually as a result of these changes. Resp't/Cross-Appellant Br. 10. Local governments currently use their vehicle license fee revenue to support a variety of transportation projects, including road and sidewalk maintenance and public transportation services. Lopossa Decl., CP 1780–1801; Simmons Decl., CP 1809–1836; VerBoort Decl., CP 239–287. This revenue supplements the over 18 percent of local general revenue spent on transportation projects. Washington State Dep't of Transp., *Washington Transportation Plan, Phase 2 – Implementation 2017-2040, Appendix B: Technical Memorandum #2, Transportation Funding B7* (2018),

<https://washtransplan.com/wp-content/uploads/2018/05/WTPPhase2-2017-web-AppendixB.pdf>.

Washington cities and counties, like local governments across the country, have “major investment responsibilities within the national transportation system: they maintain the most roadway mileage in the country, they operate most of the country’s transit systems, and they own and operate most seaports and airports.” Adie Tomer & Joseph W. Kane, The Brookings Institution, *Localities Will Deliver the Next Wave of Transportation Investment* (Jan. 2018)

<https://www.brookings.edu/research/localities-will-deliver-the-next-wave-of-transportation-investment/>. Local governments need “durable revenue” sources to meet these responsibilities. *Id.*

Further, budgeting for transportation requires significant long-term planning. *See* Fed. Highway Admin., *Financial Planning for Transportation Asset Management: An Overview*, U.S. Dep’t Transp. 7–8 (Feb. 2015), <https://www.fhwa.dot.gov/asset/plans/financial/hif15018.pdf> (“Short-term budgets, such as biennial budgets, viewed in isolation fail to capture the accruing long-term needs of such infrastructure assets. They fail to show the long-term consequences of reduced funding of maintenance and preservation activities within the biennium.”).

This need for long-term planning increases local governments' reliance interest in existing transportation revenue streams. I-976 fails to address this reliance interest. The Initiative limits local revenue for transportation funding without providing alternative revenue authority or any transitional state aid. The possibility of such immediate losses of local funds makes long-term planning for transportation funding difficult, if not impossible.

I-976 overrides the decisions of both local elected officials and local voters about the need to raise local revenue to support local transportation budgets. Local majorities in King, Whatcom, Thurston, Jefferson, Island and San Juan Counties rejected the Initiative itself. Wash. Sec. of State Elections Div., *Nov. 5, 2019 General Election Results* (Nov. 5, 2019), <https://results.vote.wa.gov/results/20191105/Turnout.html> (click through for individual county results). Even more importantly, local officials and local voters had already approved the increased vehicle incensing tax and fee levels that are repealed by the initiative. For example, in 2014 voters in Seattle approved increased vehicle license fees and taxes to fund expansion of public transportation. Mike Lindblom, *Metro Bus Service to Get Boost with Passage of Prop. 1*, *Seattle Times* (Nov. 4, 2014, 10:41 PM), <https://www.seattletimes.com/seattle-news/metro-bus-service-to-get-boost-with-passage-of-prop-1/>. In

abrogating these local preferences, the Initiative undermines local fiscal authority and, more broadly, undermines the constitutional home rule authority guaranteed by the Washington Constitution.

V. CONCLUSION

Local fiscal authority ensures meaningful home rule and is especially important in the context of local transportation budgets. Washington law recognizes the importance of both home rule and fiscal authority. This constitutional support for fiscal authority should inform this Court's consideration of Appellants/Plaintiffs' claim that I-976 violates article XI, Section 12 of the Washington Constitution. I-976 erodes local fiscal authority at a time when local governments desperately need such authority to ensure local budgets reflect the preferences of local voters.

RESPECTFULLY SUBMITTED this 5th day of June, 2020.

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DECLARATION OF SERVICE

I, Heidi Main, hereby declare under penalty of perjury under the laws of the State of Washington that on this 5th day of June, 2020, I caused the foregoing document to be filed with the Supreme Court of Washington via electronic filing and that a true and correct copy of the same was served through the Washington State Appellate Courts’ Portal on the following:

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SIGNED in Bellingham, Washington on this 5th day of June, 2020.

s/ Heidi Main
Heidi Main

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