No. 83349-4

J.M. JOHNSON, J. (dissenting)—The majority fails to uphold an express provision of our state constitution forbidding the use of motor vehicle fund (MVF) moneys for any nonhighway purpose, including public transportation. The sworn duty of this court is not to rewrite or avoid the constitution but rather to enforce it.

When the people of Washington established the State's government, "they wrote their own constitution, a basic law to always guide all public officers in the performance of their functions. *And they placed upon the courts the solemn obligation of keeping that constitution inviolate*. *The constitution was written to be obeyed, not evaded or by-passed.*" *State ex rel. Hamblen v. Yelle*, 29 Wn.2d 68, 91, 185 P.2d 723 (1947) (emphasis added) (Schwellenbach, J., dissenting).

The majority opinion also disregards this court's determinative

precedent that forbids the use of constitutional motor vehicle funds for public transportation. "The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit[;] . . . no judicial system could do society's work if it eyed each issue afresh in every case that raised it." *Planned Parenthood v. Casey*, 505 U.S. 833, 854, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (citing Benjamin Cardozo, The Nature of the Judicial Process 149 (1921)). For these reasons, I dissent.

1. *The Constitution Prohibits the Use of MVF to Fund Public Transportation*

The Washington Constitution provides that all fees collected

> as license fees for motor vehicles and all excise taxes collected . . . on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used *exclusively* for highway purposes.

Wash. Const. art. II, § 40 (emphasis added). This same provision then goes on to explain the term "highway purposes," expressly enumerating specific authorized types of expenditures. *Id*. Though the provision authorizes the use of the MVF to fund the operation of ferries (a part of the Washington highway system), it does not recognize expenditures for bus, train, light rail, or any other type of public transportation. Applying the traditional

interpretive canons, the Washington Constitution prohibits the use of money from the MVF to fund public transportation—including light rail. "Under the statutory canon expressio unius est exclusio alterius, the express inclusion in a statute of situations in which it applies implies that other situations are intentionally omitted." *In re Det. of Strand*, 167 Wn.2d 180, 190, 217 P.3d 1159 (2009).

2. *Direct Precedent Prohibits Using the MVF to Fund Public Transportation*

Were any question left after considering the text of the state constitution, this court specifically decided this same issue in *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969). In *O'Connell*, we held that public transportation is *not* a "highway purpose" under article II, section 40. This court stated that the "construction, ownership, operation, or planning" of a public transportation system is not "a highway purpose, within the meaning of [article II, section 40]."). *Id.* at 560. Thus, this court held that the state constitution prohibits an appropriation from the MVF to fund public transportation projects. *Id*. ("We are convinced that it was no more the intent of the framers to provide subsidies for the planning, constructing, owning or operating of public transportation systems, however beneficial

such a use of the funds might be to the state and its citizens.").

The majority concedes that "[s]ection 204(3) . . . appropriates $300,000 from the 'motor vehicle account' to fund 'an independent analysis of methodologies to value the reversible lanes on Interstate 90 to be used for high capacity transit . . . ." Majority at 9 (quoting Laws of 2009, ch. 470, § 204(3)). In other words, the legislation at issue appropriates MVF moneys to value land for the ultimate purpose of high capacity transit – a form of public transportation. Both the text of the state constitution and our holding in *O'Connell* prohibit using the MVF to fund *any stage* of public transportation projects, including preparation and planning. Strict adherence to traditional canons of interpretation and well-settled precedent leads to the conclusion that the appropriation at issue is unconstitutional.

3. *The Majority's Flawed Analysis*

The majority pays little attention to the text of the constitution and unconvincingly attempts to distinguish the holding of this court in *O'Connell*. The majority suggests that *O'Connell* provides "limited guidance" because that expenditure was for the Department of Transportation (DOT) and not for a "third party." Majority at 16.

The majority's attempt to distinguish *O'Connell* is unpersuasive. Article II, section 40 prohibits the use of the MVF for *all nonhighway purposes* regardless of whether the appropriation goes directly to DOT, a municipality, or a private third party. Article II, section 40 prohibits the State *simpliciter* – whether DOT, the legislature, or any other governmental entity – from using the MVF for nonhighway purposes. The constitutional analysis under article II, section 40 does not change depending on *who receives* the appropriation. The constitution does not tolerate money laundering to avoid its mandates.

Besides distinguishing *O'Connell*, the majority argues that because statutes authorize the transfer of highway lands, a valuation for land transfer is necessarily a highway purpose. Majority at 17. There are several flaws with this argument. First, the surplus land statutes relied on by the majority to support this argument do *not* authorize transfer of bridge lanes currently needed or used for highway purposes.[1] The residents of this state currently

[1] The majority cites to four statutes that it claims authorize DOT to transfer highway land. Majority at 17 n.6. However, these statutes only authorize DOT to transfer land that is *no longer needed or used* for highway purposes. *See* RCW 47.12.120 (authorizing rental of lands "not presently needed" for highway purposes); RCW 47.12.063(2) (authorizing sale of property "no longer required for transportation purposes . . .); RCW 47.12.080 (authorizing transfer of "unused" property); RCW 47.12.283(1) (authorizing sale of property "no longer required for highway purposes . . .).

need and use the bridge lanes on Interstate 90 for highway purposes, and thus the statutes relied on by the majority do *not* authorize their transfer. Ask drivers stuck on this bridge at rush hour whether any lanes are "surplus."

Second, even if statutes authorize DOT to transfer surplus land to Sound Transit, it is inconsequential because the constitution prohibits this transfer. Article II, section 40 is a constitutional provision. If a statute violates the state constitution, this court must declare it a nullity. *See Moody v. United States*, 112 Wn.2d 690, 693, 773 P.2d 67 (1989).

This court's primary role is to be guardian of the law and final arbiter of the state constitution. *See In re Salary of Juvenile Dir.*, 87 Wn.2d 232, 241, 552 P.2d 163 (1976) ("Both history and uncontradicted authority make clear that "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'"" (alteration in original) (quoting *United States v. Nixon*, 418 U.S. 683, 703, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803)))).

In its final argument, the majority claims support from *State ex rel. Washington State Highway Commission v. O'Brien*, 83 Wn.2d 878, 523 P.2d

190 (1974). In *O'Brien*, we granted a writ of mandamus to the state treasurer to compel expenditure of MVF moneys for the construction of park-and-ride facilities in the metropolitan Seattle area. *O'Brien*, 83 Wn.2d at 883. In granting the writ, we noted that our decision in *O'Connell* was consistent. *Id*. *O'Brien* dealt with park-and-ride facilities that served motorists who transfer to other vehicles that operate on state highways. *Id.* In contrast, *O'Connell* had dealt strictly with public transportation, a prohibited expenditure. *Id*. As we stated in *O'Brien*:

> [*O'Connell*] concerned the use of highway funds for the financing of a public transportation system, including busses, *trains* or other carriers, each holding a number of passengers, which may travel upon highways or *rails* or *water* or *through the air*. We properly held that such a use of funds was not for a highway purpose contemplated by [article II, section 40].

Id. (emphasis added). Indeed, the *O'Brien* opinion specifically identified railway public transportation as a nonhighway purpose under article II, section 40. *Id*. Under *O'Brien*, park-and-ride facilities both relieve congestion and constitute a valid highway purpose – public transportation projects do not. The majority miraculously transforms *O'Brien*'s affirmation of the constitutional prohibition on appropriating money from the MVF for railway public transportation into authority for its directly contrary holding.

O'Connell held that the state constitution prohibited legislation appropriating funds for any nonhighway purpose – to include public transportation. *O'Connell*, 75 Wn.2d at 560. *O'Brien* affirmed this conclusion. *O'Brien*, 83 Wn.2d at 883. Here, the Engrossed Senate Substitute Bill 5352, 61st Leg., Reg. Sess. (Wash. 2009) (ESSB 5352), at section 204(3) appropriates constitutionally dedicated funds to public transportation purposes. Under our precedent, the appropriation is unconstitutional.

4. *Sound Transit's Flawed Argument*

Like the majority's analysis, Sound Transit's argument is unavailing. Sound Transit argues that the expenditure "authorized by section 204(3) does not violate article II, section 40 because the appropriation was to value the lanes to determine how much to *repay* the motor vehicle fund, not to *fund* any portion of the plan to construct light rail." Majority at 10. Constitutional prohibitions on the legislature's power to *spend* money equally apply to its power to *lend* money. The fact that Sound Transit claims an intention to reimburse the MVF for the expenditure provides no constitutional justification for the expenditure in the first place.

Consider an analogy from elsewhere in our constitution. Like article II, section 40's prohibition on the expenditure of MVF moneys for nonhighway purposes, article IX, section 2 of the Washington Constitution requires that common school funds "'shall be exclusively applied to the support of the common schools.'" *Mitchell v. Consol. Sch. Dist. No. 201*, 17 Wn.2d 61, 65, 135 P.2d 79 (1943) (emphasis omitted) (quoting Wash. Const. art. IX, § 2). Suppose the legislature appropriated common school funds to value school property for later transfer to Sound Transit? Could Sound Transit (or the legislature) render such an appropriation constitutional by a simple agreement to later reimburse the common school fund?

The answer is obviously "no," and I am confident the majority (and the public) would quickly dismiss such flawed reasoning in the context of public education. Unfortunately, the disparate treatment of these two constitutional prohibitions does not stem from the constitutional text. While diverting funds from public education is a serious matter, apparently diverting funds from the constitutional state highway fund is not. This distinction does not arise from the constitution or law but simply arises from value judgments – an invalid basis on which to decide cases if our state is to be governed by "a

government of *laws* not of *men*." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 177, 71 S. Ct. 624, 95 L. Ed. 817 (1951) (Douglas, J., concurring).

Conclusion

"[B]eneficent aims, however great or well directed, can never serve in lieu of constitutional power." *Carter v. Carter Coal Co.*, 298 U.S. 238, 291, 56 S. Ct. 855, 80 L. Ed. 1160 (1936). Ignoring this fundamental principle of constitutional jurisprudence, the majority disregards its obligation to follow the state constitution because some prefer railway transit to the highway use of a bridge built with state highway funds. "But it should go without saying that the vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown v. Bd. of Educ.*, 349 U.S. 294, 300, 75 S. Ct. 753, 99 L. Ed. 1083 (1955). For all of these reasons, I would hold that the appropriation in ESSB 5352, section 204(3), is unconstitutional.

The people adopted a constitutional provision in article II, section 40, prohibiting the use of vehicle fees and excise taxes for anything other than highway purposes. In the wake of this constitutional provision, gas taxes

have continued to rise and license fees, though limited by initiative, raise millions of dollars for the state. The people have tolerated or authorized such taxes in the past predicated on the constitutional promise that the revenues collected by the state through such taxes and fees will be used exclusively for highway purposes. Because the legislature has broken that constitutional promise and the majority declines to enforce it, I dissent.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Richard B. Sanders, Justice Pro