

NO. 76534-1

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SUPREME COURT OF  
THE STATE OF WASHINGTON

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PERMANENT OFFENSE, SALISH VILLAGE HOMEOWNERS  
ASSOCIATION, AND G. DENNIS VAUGHAN,

Appellants,

v.

PIERCE COUNTY et al.,

Respondents

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DIRECT APPEAL FROM THE FINAL RULINGS OF THE SUPERIOR  
COURT OF THE STATE OF WASHINGTON FOR KING COUNTY  
AFTER REMAND BY THE STATE SUPREME COURT,

Honorable Mary Yu, Presiding, (King County Case No. 02-2-25125-5)

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**APPELLANTS' STATEMENT OF GROUNDS FOR  
DIRECT REVIEW [RAP 4.2 AND 12.9(a)]  
AND  
REQUEST FOR ACCELERATED REVIEW**

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**STATEMENT OF RAP 4.2 AND 12.9(a) GROUNDS FOR  
DIRECT REVIEW BY THE SUPREME COURT**

Since December 5, 2002 — the effective date of Initiative 776 (I-776) — the trial court below has twice entered “final” judgments in the same case declaring I-776 repugnant to the Washington State Constitution.<sup>1</sup> This Court accepted review of the first trial court judgment, and reversed in *Pierce County et al., v. State of Washington, et al.*, 150 Wn.2d 422, 78 P.3d 640 (2004). Following remand from this Court, the trial court again declared I-776 unconstitutional, a decision which prompts this request for direct review. Because the trial court did not comply with this Court’s decision in *Pierce County et al., v. State*, supra, review by this Court is independently supported by RAP 12.9(a), in addition to RAP 4.2.

The Appellants (Permanent Offense, Salish Village Homeowner’s Association, and G. Dennis Vaughan) will be referred to collectively herein in abbreviated form as “Citizens.” Respondent Central Puget Sound Regional Transit Authority will be referred to in abbreviated form as “Sound Transit.”

**I. NATURE OF CASE AND DECISION**

A. THE RULINGS BELOW: The trial court decided constitutional and other questions, significant portions of which include important issues of first impression:

1. The trial court declared, for the second time, that I-776 is repugnant to Wash. Const. Art. One § 23, this time for “impairing valid public contracts” of Sound Transit.

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<sup>1</sup> All trial court decisions were made by the Honorable Mary Yu, King County Superior Court Judge. Appellants will abbreviate references to the State Supreme Court’s prior partial review by referring to it as the Supreme Court’s “Phase I Review.”

2. The trial court declared that a new Washington municipal corporation (Sound Transit), formed by elected leaders of counties (King, Pierce and Snohomish), but without voter approval of the formation of the new municipal corporation, complies with statutory and constitutional requirements.

3. The trial court declared that the State Legislature can constitutionally delegate to county elected leaders the power to create a new municipal corporation (Sound Transit) to assume transportation functions formerly the responsibility of counties, including the power to endow Sound Transit with all the powers of an independent general purpose government. These delegated powers include, but are not limited to, creating new debt limits beyond the voter-approved debt limits of each county and the power to contract new debt (municipal bonds) supported solely by that new debt limit.

4. The trial court declared, even if its rulings described in paragraphs 2 and 3 immediately preceding were incorrectly decided on the merits, that the doctrine of "laches" prohibited the Citizen Defendants from controverting Sound Transit's claims that its bonds were "valid public contracts" whose "impairment" renders I-776 constitutionally repugnant.

5. The trial court refused to enter a final judgment dismissing or accurately disposing of those Plaintiffs' claims reversed and rejected by this Court in *Pierce County et al., v. State of Washington, et al.*, supra.

6. In its summary judgment ruling, the trial court accepted disputed factual allegations and inferences of moving party Sound Transit's experts as verities, and improperly concluded as a matter of law that I-776 impaired the contract rights of purchasers of Sound Transit Series 1999 municipal bonds.

B. TWO-PHASED REVIEW: On March 21, 2003, this Court entered a ruling in *Pierce County, et al. v. The State of Washington, et al.* (Supreme Court Case No. 73607) accepting direct accelerated review of the trial court's decisions existing at that time. At that time, the trial court had:

- 1) ruled that I-776 was facially unconstitutional for violating Wash. Const. Art. Two § 19 (single subject expressed in title);
- 2) ruled that I-776 violated Wash. Const. Art. One § 23 (impairing contract rights of purchasers of King County's bonds); and
- 3) declined to decide any other pending Plaintiff claims, including a claim by Intervenor Plaintiff Sound Transit similar to the Wash. Const. Art. One § 23 claim of Plaintiff King County, which the trial court did decide.

In the Phase I review proceeding, the Respondents' briefs raised a number of alternative theories thought to support the trial court's decision that I-776 was unconstitutional. In *Pierce County et al., v. State*, supra, this Court reversed the trial court's decisions, rejected the Respondents' alternative claims, and remanded to the trial court for further proceedings consistent with this Court's decision.<sup>2</sup> Though the trial court in Phase I declined to decide numerous claims, it entered a "final judgment" with the result that Sound Transit's "bond impairment" claim was not reviewed by this Court in conjunction with its Phase I Review of all other claims. Therefore at the same time, Sound Transit's Wash. Const. Art. One § 23 claim languished in Superior Court until after this Court's reversal and remand.

On remand, the trial court declined to enter judgment dismissing the

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<sup>2</sup> Those "alternative" claims included every claim left undecided by the trial court in the Phase I summary judgment proceeding, except Sound Transit's "bond impairment claim."

claims rejected by this Court in *Pierce County et al., v. State*, supra. The trial court also ruled by order (but no judgment) that King County's fees repealed by I-776 but collected pursuant to the trial court's earlier temporary and permanent injunctions be refunded—but without interest. The sole claim included in the trial court's judgment following remand was the trial court's decision to grant Sound Transit's claim that I-776 was unconstitutional.

These Citizen Appellants had objected strenuously during Phase I Review, and previously to the Trial Court, that the failure to decide all claims would necessitate two appeals to this Court in order to resolve common King County and Sound Transit constitutional challenges to I-776. Citizens' objections were both accurate and prophetic, with the consequence that:

- 1) for more than two years (following December 5, 2002, the effective date of I-776) and for more than a year (following this Court's reversal in *Pierce County et al., v. State*, supra), Sound Transit has exercised taxing authority withdrawn by I-776 to levy and spend approximately \$5 million monthly of Motor Vehicle Excise Tax (MVET) collected without the benefit of any court order; and
- 2) by forcing a second request for direct review, Sound Transit generates a second and independent opportunity to oppose direct review, this time of important constitutional questions of first impression peculiar to it.

It may be that Sound Transit will not oppose this request for direct review by Citizens. If it does however, this Court must ignore its opposition, for the constitutional issues in this review — unlike those in Phase I Review — include important constitutional issues of first impression in this State. Any Respondent's strategy to profit from the procedural complexity it

engineered should be rejected. Moreover, failure of the trial court to comply with this Court's decision in *Pierce County et al., v. State*, supra, requires review by this Court, and by no other court. RAP 12.9(a).

B. INITIATIVE MEASURE No. 776 (I-776): I-776, an initiative to the people, was approved by the voters in the November 2002 general election, and became effective on December 5, 2002. The purpose of I-776 was to establish uniform annual license fees statewide at \$30.00 for cars, recreational vehicles, motorcycles, and light trucks. To accomplish this uniformity, I-776 repealed various state taxes. Because the State Legislature had previously delegated local option taxing authority to various local governments, I-776 repealed the delegation of a portion of that local option taxing power, to the extent necessary to assure the uniform \$30.00 license fee.<sup>3</sup>

I-776 also repealed the delegation of MVET taxing power contained in RCW 81.104.160(1). So far as the record shows, Sound Transit was the only local government in the State of Washington exercising RCW 81.104.160(1) taxing authority at the time I-776 passed.

Sound Transit claims to have included in its "pledge" to purchasers of its 1999 Series bonds a promise to continue to levy the MVET (together with RCW 81.104.170 sales tax) at a fixed rate over the life of the bonds.<sup>4</sup> The record shows that over the 30-year life of the bonds Sound Transit's fixed obligation to bondholders is \$738 million (i.e., \$350 million principal + \$388 million interest). The record also shows that Sound Transit pledged to "levy"

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<sup>3</sup> The MVET is collected by the State at the time of licensing, and is based on vehicle value.

<sup>4</sup> Sound Transit "pledged" all of its tax revenues, but no project-generated revenue such as tolls or fares to be generated by the projects to be developed from the bond sale. The bonds are therefore not "revenue bonds" as that concept has previously existed in state law.

— over the 30-year life of the bonds (conservatively calculated in 2003 dollars unadjusted to reflect projected tax base growth and inflation) — \$8.1 billion dollars in local option tax revenues (i.e., \$60 million MVET + \$210 million sales tax annually for thirty years). The resulting “tax revenue-to-debt ratio” is approximately 11-to-1, but Sound Transit did not agree to pay the entire tax revenue to retire its bonds. Stated differently, Sound Transit retained discretion to spend 91% of its tax revenues for purposes other than bond retirement.

Elimination of MVET taxing authority by I-776 will reduce Sound Transit’s local option tax revenues by approximately \$60 million annually which, over the thirty-year life of the bonds (using the same 2003 assumptions) will reduce total Sound Transit taxes levied and collected to \$6.3 billion dollars (\$210 million sales tax for 30 years) resulting in a tax revenue-to-debt ratio of 8.5-to-1. In other words, even with loss of the power to levy the MVET, Sound Transit still generates revenues such that it will be able to spend approximately 88% of the collected taxes for purposes other than RCW 81.104.180 bond retirement.<sup>5</sup> It is this reduced delegation of taxing power from \$8.1 billion to \$6.3 billion which the trial court ruled to have unconstitutionally “impaired” the contractual rights of Series 1999 bond purchasers in violation of Washington Constitution Article One § 23.

C. SOUND TRANSIT: Sound Transit is a unique creature in the State of Washington, claiming to be the sole “regional transit authority” that has been, or can be, formed pursuant to RCW 81.112.030. Sound Transit’s

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<sup>5</sup> I-776 did not affect Sound Transit’s ability to replace the MVET revenues with additional sales tax revenues, authority which Sound Transit has only partially utilized.

Complaint sought a declaratory judgment that I-776 was unconstitutional:

- 1) Its Complaint alleged, as it must, that Sound Transit is a properly formed and lawfully existing municipal corporation under the laws of the State of Washington. This is an allegation denied by the Citizens.
- 2) Its Complaint alleged, as it must, that it had issued "valid" bonds. This is an allegation denied by the Citizens.
- 3) Its Complaint alleged, as it must, that I-776 "impaired the rights of purchasers" of its valid bonds. This is an allegation denied by the Citizens.
- 4) Its Complaint alleged that if *any* impairment was found to exist, that I-776 was wholly inoperative for the entire life of the 30-year bond contracts without regard to the question of whether or not "pledged" local option taxes (including the MVET) were actually committed to bond retirement. Again, this is an allegation denied by the Citizens.

The first two elements of Sound Transit's claim — #1 and #2 set out immediately above — raised questions of whether Sound Transit was, or was not, formed in accordance with statutory and constitutional requirements and if not, could its bond contracts be considered valid public contracts within the meaning of Wash. Const. Art. One § 23.

1. Statutory Requirements: As originally enacted in 1992, RCW 81.112.030 explicitly required that the RTA (Regional Transit Authority Sound Transit) submit a ballot proposition to the voters ratifying Sound Transit's formation. In 1993, the State Legislature purported to amend RCW 81.112.030 by eliminating the requirement for voter approval. It did so in a State appropriations act, which Citizens' claimed violated Washington Constitution Article Two § 19 "logrolling" restrictions, rendering the purported

bill amendment void, with the result that the statutory requirement for voter approval of RTA formation had not been eliminated, and still stands. In 1994, the State Legislature amended RCW 81.112.030 a second time to eliminate a requirement that a ballot proposition be submitted to the voters to approve Sound Transit's "transportation plan." Sound Transit argued — and the trial court agreed — that this second amendment (which was silent about voter approval of agency formation) "cured" the 1993 logrolling. Citizens pointed out that this 1994 amendment was silent about voter ratification, an explicit and necessary requirement to effect a "ratification" of the illegal 1993 logrolling and the absence of which constituted an independent and separate violation of Wash. Const. Art. Two § 37, rendering the 1994 amendment ineffective and void as well. The end result, Citizens argued, was that the RCW 81.112.030 statutory requirement for voter ratification of Sound Transit's formation stood, and the fact that Sound Transit has failed to comply with the statutory requirement was a "formation" flaw contrary to the allegations of Sound Transit's Complaint. Sound Transit is therefore unable to establish legal authority to contract, a necessary element that must be proven by any plaintiff (Sound Transit) in a Wash. Const. Art. One § 23 "impairment" claim, where the claim is based on a public contract.

2. Constitutional Requirements: In addition to the statutory requirement for voter ratification of Sound Transit's formation, Citizens argued that the State Legislature lacked constitutional authority to delegate to County local elected leaders the power to form independent local general purpose governments to assume existing county transportation functions. Citizens argued that the Legislature cannot delegate power it does not have. The power to

form municipal corporations is denied the Legislature by Wash. Const. Art. Eleven § 10. The Legislature thus lacked power to delegate such power to other elected leaders. Moreover, the Legislature purported to delegate to county leaders the power to grow non-voted increases in local debt limits by the artifice of simply legislatively spinning off new independent governments, a subversion of prohibitions contained in Wash. Const. Art. Eight §§ 1 and 6. Even if the 1993/1994 legislative amendments were not independently void, they rendered RCW 81.112.030 facially unconstitutional.<sup>6</sup>

Citizens maintain that the remedy for an improperly formed government is to cure the formation defect in the only way possible — by submitting the question to the affected voters. When and if approved, the new agency can reaffirm its contracts. But I-776 can not be said to have impaired the future contracts of Sound Transit, and Sound Transit’s Complaint for declaratory relief adjudging I-776 unconstitutional must be denied on that basis.

Though the trial court appeared to decide some, but not all, of these “formation” and “validity” questions on the merits, it applied the doctrine of “laches” to dismiss Citizens’ defenses to Sound Transit’s claims. The trial court also ruled, even though Sound Transit was not obligated to use the great bulk of the revenues to retire its bonds, that Sound Transit’s pledge to levy taxes at a fixed rate for 30 years was such a “pledge” as is authorized by RCW 81.140.180 even though (1) RCW 81.104.180 only authorizes a pledge of “revenues,” not of “tax rates,” and (2) RCW 81.104.180 requires that pledged

<sup>6</sup> The delegation of authority to incur debt is quite a different matter from a delegation of authority to grow debt limits. The former is limited by voter-approved limits. The latter subverts voter-approved debt limits. Similarly, voter-approved debt can be approved by simple majority (51%), but Wash. Const. Art. Eight § 6 requires that an increase in agency debt limits must be approved by a super majority (i.e., 3/5<sup>ths</sup>) of the voters.

revenues be used to retire the bonds.

The trial court also rejected Citizens' arguments that:

- 1) a pledge to tax without a pledge of the tax revenue — if authorized by RCW 81.104.180 — violates Wash. Const. Art. Seven §§ 1 and 9 or Art. Eleven §§ 10 and 12; and
- 2) a local government cannot preempt the State's sovereignty on questions of tax policy by the artifice of "pledging-to-levy" all of its previously authorized taxing power without regard to the amount of actual debt putatively secured, without regard to the actual and reasonable expectations of the contracting parties, and without regard to the undisputed fact that the great bulk of the revenues are actually intended for other purposes.

Finally, having found that I-776 "impairs" the contract rights of Sound Transit's 1999 bond purchasers, the trial court ruled that the entire MVET — in addition to the additionally pledged sales tax revenues — must be levied and collected until the last of the Series 1999 bonds is retired in 2028, a span of 360 months. The trial court required this despite the fact that Sound Transit collects "pledged" local option tax revenues (in 2003 dollars) of \$22.5 million monthly (i.e., \$5 million MVET plus \$17.5 million sales tax). At that rate, sufficient local option taxes are collected by Sound Transit in just 33 months to have fully funded the entire gross \$738 million bond debt, both principal and interest owed over the entire 30 years. Using Sound Transit's own revenue projections, sufficient revenues would be collected in only 31 months.<sup>7</sup> Had the trial court required Sound Transit to deposit those

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<sup>7</sup> Only 31 months because the debt is fixed, but the actual tax revenues increase even though collected at a constant rate, due to growth and inflation.

“pledged” local option tax revenues in a fund dedicated to retiring the entire 1999 Series bonds, the account would have accumulated (between December 5, 2002 to the end of June 2005) the entire \$738 million needed to pay the entire 30-year debt owed the 1999 Series bond purchasers.

The record shows that, while this litigation has unnecessarily crawled through two trial court phases, Sound Transit has been paying debt service on the bonds (interest only) at the rate of \$1.4 million per month, has been collecting \$22.5 million per month in “pledged” local option taxes, and has been free to spend the unencumbered \$21.1 million for other purposes. I-776 reduced Sound Transit’s unencumbered monthly revenues from \$21.5 million monthly to \$16.1 million monthly, without affecting the rights of bond purchasers. The unencumbered \$21.5 million has been available, in any event, to cure any perceived impairment created by I-776, which must be enforced commencing July 1, 2005 at the latest, Citizens argue.

## **II. ISSUES PRESENTED FOR REVIEW**

### **A. Does I-776 impair "valid" Sound Transit bond contracts in violation of Washington Constitution Article One § 23 ?**

1. **No.** Citizens argue that Sound Transit was not authorized by RCW 81.104.180 to make the type of revenue pledge it purports to have made. Sound Transit's pledge is therefore invalid.
2. **No.** Citizens argue that Sound Transit was not authorized to make valid contracts because:
  - a. Sound Transit was never formed by voter approval as is required by state statute (RCW 81.112.030). The 1993 amendment to that statute to eliminate citizens' statutory voting rights was enacted in violation of Wash. Const. Art. Two § 19 and was void. The 1993 constitutional violation was not “cured” by a subsequent 1994 amendment, which did not intend a “cure” and which was itself enacted in violation of Wash. Const. Art. Two § 37;

- b. Sound Transit was never formed by voter approval as is required by the Washington State Constitution;
  - c. Having failed to satisfy statutory and constitutional requirements, Sound Transit’s putative formation was void, and its putative public contracts are invalid;
  - d. Sound Transit’s putative debt is not incurred within a constitutionally required debt limit; and
  - e. The equitable doctrine of “laches” did not prevent Citizens’ defense to Sound Transit’s constitutional challenge. The doctrine of laches was never pled nor proved by supporting facts. It does not apply.
3. **No.** Citizen’s argue that the financial framework surrounding the purchase of 1999 Series bonds contemplated reductions in bond purchaser “security” — far in excess of the funds affected by I-776 — because:
- a. All contracting parties were charged with notice of the limitations of RCW 81.104.180, which were violated by the putative contract, as Sound Transit would have it construed;
  - b. The bond contract provided Sound Transit the right to use 10/11<sup>th</sup> of the putative pledged revenues free from security rights of purchasers and for purposes other than bond retirement;
  - c. The bond contract provided Sound Transit discretion to dilute the security putatively pledged to bond purchasers;
  - d. The contract allowed Sound Transit to withdraw pledged tax revenues approximating those eliminated by I-776 repeal of MVET authority;
  - e. No purchaser of municipal bonds could reasonably have contemplated that a relatively small bond issue of \$350 million, with \$738 million total debt service, would be irrevocably secured with a pledge of 100% of the issuer’s tax revenues totaling \$8.1 billion over 30 years. At the least, the resolution of this dispute involved factual disputes that should not have been decided by summary judgment.
4. **No.** Citizens argue that valid important public policy interests justify any nominal contract impairment thought to be created by I-776.
5. **No.** Citizens argue that it is not necessary for a state law, which has been found to impair a public contract, to provide substitute security in order to avoid being stricken down. Where additional taxing authority to the repealed MVET already exists, and where that security substantially exceeds the contractually required tax revenue-to-debt ratio of 2-to-1, the

statute is saved without the need for providing additional security.

**B. If I-776 impairs valid contracts, is it necessary — in order to avoid the impairment — to restrain enforcement of I-776 until the last bond is paid in 2028 ?**

**No.** Citizens argue that any conceivable contract impairment claim evaporates when sufficient pledged revenue is collected to fully pay the contractual debt service. The trial court was required to enforce the valid state law to the extent it does not impair the contract and after June 30, 2005 no impairment continues to exist under any theory.

**C. Is the trial court required to enter a superior court Judgment of Dismissal of the claims reversed and rejected by this Court ?**

**Yes.** Citizens argue that this Court remanded with instructions to the trial court for further action consistent with this Court’s decision. Those instructions required entry of a judgment of dismissal of all of Plaintiffs' rejected claims. The trial court refused to comply.

**D. Were the State of Washington and King County required to pay interest to vehicle owners from whom fees and taxes were illegally collected in violation of I-776 ?**

**Yes.** The amount was liquidated, and prejudgment interest was owed.

**E. If Citizens succeed in defending I-776 in this appeal, are they entitled to an award of “taxpayer” attorney fees and costs ?**

**Yes.** Citizens, alone, will have been responsible for preserving the validity of I-776 or accelerating its effective date of enforcement with the result that they will have prevented the improper collection and disbursement of public funds.

**III. GROUNDS FOR DIRECT REVIEW**

**A. The trial court held that I-776, a statute duly enacted by the people pursuant to the powers reserved to them by the Constitution, is repugnant to the Washington State Constitution.**

This case meets the requirements of RAP 4.2(a)(2) for direct review. RCW 2.06.030(c) also requires that all cases where the validity of all or any portion of a statute is called into question on the grounds of repugnancy to the

Constitution of the State of Washington “shall” be appealed directly to the Supreme Court. Accordingly, this case also meets the requirements of RAP 4.2(a)(1). In addition, as noted above, the trial court decided issues which are issues of first impression.

**B. This case involves fundamental and urgent issues of broad public import on issues of first impression which require prompt and ultimate determination.**

This case meets the requirements of RAP 4.2(a)(4). It involves the validity of a measure enacted by the People which has received, and continues to receive, broad public attention. Depending on the result of the appeal, millions of dollars of MVET taxes either will or will not be refunded, will or will not continue to be collected. Rights, obligations and limitations affecting hundreds of thousands of vehicle owners and past and future contracting power of Sound Transit are involved. Sound Transit has ignored I-776 since its December 5, 2002 effective date, collecting \$5 million of MVET revenue every month and will continue to collect them until this Court finally decides the issues. Interest will accrue, either at the expense of taxpayers (as the trial court has ruled) or at the expense of Sound Transit. A decision to not retain direct review will unnecessarily enlarge that needless loss. The public interest questions are far broader than the rights and obligations of the parties in this suit extending to citizens, legislators, local governments and persons doing business with State and local government. What the Legislature has attempted in RCW 81.112.030 (creating municipal governments and growing debt limits without voter approval), it will surely be tempted to repeat. This is the only appellate court with the clout to definitively provide guidance to

the Legislature, and whose decisions have undeniable statewide reach. It is equally important that this Court not embrace a retreat from its existing decisions that the courts can not impose an equitable time bar (laches) to save void legislation. Finally, though this Court may believe that Wash. Const. Art. One § 23 questions have been exhaustively evaluated, this case shows otherwise. The record shows that Sound Transit's 1999 Series bond transaction was cleverly crafted to meet the most superficial requirements of this Court's Const. Art. One § 23 jurisprudence, while creating no meaningful purchaser rights to restrict Sound Transit's revenue access, in order to insulate Sound Transit's own taxing power from policy changes required by the sovereign. The outcome of this appeal will guide tax relations between the sovereign and local governments plus the form of tax pledges made to municipal bond purchasers across the State for the foreseeable future.

**C. Review of the trial court's refusal to comply with this Court's decision in *Pierce County v. State* requires direct review by this Court.**

#### **IV. CONCLUSION / REQUEST FOR ACCELERATED REVIEW**

The same considerations that require direct review by this Court create the need for accelerated review. This is not a routine case meriting only routine consideration. It raises urgent issues meriting extraordinary attention. Direct review should be retained and the Court should accelerate its disposition.

DATED this 22nd day of February 2005.

  
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