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NO. 85661-3

SUPREME COURT OF THE STATE OF WASHINGTON

AUTOMOTIVE UNITED TRADES ASSOCIATION, a non-profit trade
association,

Appellant,

v.

THE STATE OF WASHINGTON; CHRISTINE GREGOIRE, in her
official capacity as Governor of the State of Washington; LIZ LUCE, in
her official capacity as Director, Washington State Department of
Licensing,

Respondents.

**RESPONDENT STATE OF WASHINGTON'S
ANSWER TO AMICI BRIEFS**

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I. INTRODUCTION

A. Amici Share AUTO's Misunderstanding Of Well-Established Principles Governing The Application Of Tribal Sovereign Immunity

Amici contend that two exceptions to sovereign immunity apply in this matter. First, they allege the Tribes are not immune from suits such as this that seek only prospective equitable relief. Washington Oil Marketers Association (WOMA) Brief at 9-12. In addition, they argue that individual tribal officers are not immune where, as here, the only relief sought is prospective and limited to state law claims. *Id.* at 10 n.1.

Amici's theories demonstrate a marked misapprehension of well-established principles governing sovereign immunity. Similar to the flaws in AUTO's briefing, the errors of Amici flow from their misinterpretation of the holdings of several cases, failure to consider the complete holding of others and consistent refusal to recognize binding authority contrary to their arguments.

The overwhelming weight of authorities from the U.S. Supreme Court, Ninth Circuit, and Washington State have established principles of sovereign immunity that the trial court correctly applied in ruling that the sovereign immunity of the Tribes prevented joinder of the Tribes to this action. Having correctly found the Tribes to be indispensable who could not be joined to this action, the trial court was within its discretion in

ordering dismissal of the action under CR 19. *Mudarri v. State*, 147 Wn. App. 590, 196 P.3d 153 (2008); *Dawavendewa v. Salt River Project Agri. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002).

II. LAW AND ARGUMENT

A. The Tribes Are Immune From Suits Such As This That Seek Prospective Equitable Relief

Amici's argument that the Tribes are not immune from suits seeking prospective declaratory and injunctive relief is based on two Fifth Circuit cases. WOMA Brief at 9-12, citing *Comstock Oil & Gas Inc. v. Ala. & Coushatta Indian Tribes of Texas*, 261 F.3d 567 (5th Cir. 2001); *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999). Amici's reliance on these cases is misplaced as they are isolated outliers predicated on a misreading of the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). *Santa Clara Pueblo*, as recognized by numerous other courts including the Ninth Circuit, provides that tribes are immune from all suits (absent Congressional abrogation or tribal waiver) regardless of the type of relief sought. *Santa Clara Pueblo*, 436 U.S. at 59; *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005).

Tribal sovereign immunity is absolute and "comprehensively protects recognized American Indian tribes from suit absent explicit and

‘unequivocal’ waiver or abrogation.” *Wright v. Colville Tribal Enterprise Corp.*, 159 Wn.2d 108, 115, 147 P.3d 1275 (2006), quoting *Santa Clara Pueblo*, 436 U.S. at 59. Tribal sovereign immunity has been compared at times with state sovereign immunity and the principles from that doctrine have been imported into the arena of tribal sovereign immunity. *Burlington North R.R. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991). One of these is the narrow exception to state sovereign immunity announced in *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). *Id.*¹

Ex parte Young provides that a state official acting in his or her official capacity is not shielded by the state’s sovereign immunity where the plaintiff seeks only prospective equitable relief and the claim is for violation of federal law. *See Pennhurst State Sch. and Hosp. v. Haldeman*, 465 U.S. 89, 100-106, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). The basis of the exception is the need to ensure the continued supremacy of federal law. *Id.* at 105 (“the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to ‘the supreme authority of the United States.’” [internal citations omitted]). As a result, the *Young* exception is limited to cases involving alleged violations of federal law by a state official, and it

¹ Unlike the tribes in this case, the Defendant State of Washington has waived many aspects of its sovereign immunity. *See* RCW 4.92.090.

does not apply where the only claims asserted are state law claims. *Id.* at 105-06; *Blackfeet Tribe*, 924 F.2d at 901 (“tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of **federal** law.” [emphasis added]).

The Supreme Court in *Santa Clara Pueblo* acknowledged the applicability of *Young* to tribal sovereign immunity. In that case, the plaintiffs sued both the tribe, as well as a tribal official, alleging violations of the federal Indian Civil Rights Act (ICRA) and seeking declaratory and injunctive relief. *Santa Clara Pueblo*, 436 U.S. at 51. The Court dismissed the suit against the tribe on the basis of its sovereign immunity, concluding the ICRA did not waive that immunity. *Id.* at 59. However, citing *Young*, the Court acknowledged that the individual tribal officer could be sued for prospective equitable relief due to the presence of federal claim.² *Id.*

The Fifth Circuit cases relied on by Amici are based on a misreading of *Young* and *Santa Clara Pueblo*. *TTEA* involved an action seeking declaratory and injunctive relief against a tribe and tribal officials. In concluding the suit was not barred by sovereign immunity, the court relied on *Young*. *TTEA*, 181 F.3d at 680 (“sovereign immunity does not

² The Court subsequently dismissed the suit against the tribal officer on other grounds – that Congress had not through the ICRA implicitly authorized the suit. *Santa Clara Pueblo*, 436 U.S. at 59-72.

preclude declaratory or injunctive relief **against state officials.**” [emphasis added]). However, *TTEA* failed to make the critical distinction – one made by the Supreme Court in *Santa Clara Pueblo* and recognized by other courts - that the *Young* exception does not waive sovereign immunity as to suits against the sovereign itself, but rather only as to suits against officials of the sovereign. As explained by one court:

[T]ribal sovereign immunity, when in place, bars *any* suit against a tribe, regardless of the type of relief sought by the plaintiff. In *Santa Clara Pueblo*, the respondents brought an action for declaratory and injunctive relief against the Pueblo and its Governor. The Court’s analysis did not turn on the type of relief sought; rather the Court simply looked for an express waiver of immunity and, finding none, concluded that the suit against the Pueblo was barred. Were tribal sovereign immunity a bar only to actions seeking monetary damages as the plaintiffs contend, certainly the *Santa Clara Pueblo* Court would have reached a different result.

Dauids v. Coyhis, 869 F. Supp. 1401, 1407 (E.D.Wisc. 1994) (emphasis in original) (internal citations omitted).

The Fifth Circuit is alone in its conclusion that a tribe’s sovereign immunity does not shield it from suits seeking declaratory and injunctive relief. This holding runs directly contrary to *Santa Clara Pueblo*, as recognized by several other circuits, including the Ninth Circuit that bar all suits against a tribe, regardless of the nature of the relief sought. *See e.g., Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 928 (7th Cir. 2008);

Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991) (tribal sovereign immunity “extends to suits for declaratory and injunctive relief.”); *Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm’n*, 969 F.2d 943, 948 n.5 (10th Cir. 1992).³

B. *Ex Parte Young* is Not Applicable Here Because AUTO Makes Only State Law Claims

Amici appear to argue that the *Young* exception to sovereign immunity is available even in cases such as this that include only state law claims. This is simply incorrect.

It is the paramount obligation of all domestic sovereigns - states and tribes - to comply with federal law as the supreme law of the land. U.S. Const., art. IV, § 2. The supremacy of federal law is reflected in the *Young/Blackfeet Tribe* exception to sovereign immunity, which permits individual state and tribal officials to be sued for violations of federal law. *See e.g., Pennhurst*, 465 U.S. at 105 (“Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.”); *Blackfeet Tribe*, 924 F.2d at 901 (“tribal sovereign immunity does not bar a suit for prospective relief against tribal

³ It should be noted that the *TTEA* court also referenced a solo concurrence authored by Justice Stevens in which he suggested that tribal sovereign immunity may not bar claims for prospective equitable relief. *TTEA*, 181 F.3d at 680, citing *Oklahoma Tax Comm’n v. Potawatomi Indian Tribe*, 498 U.S. 505, 515, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991). However, “this view was not shared by any other member of the Court and was implicitly rejected in the majority opinion’s discussion of alternative remedies.” *Citizen Band Potawatomi Indian Tribe*, 969 F.2d at 948 n.5.

officers allegedly acting in violation of **federal** law.” [emphasis added]). Because the entire basis of the *Young/Blackfeet Tribe* doctrine is to ensure federal supremacy over lesser sovereigns, it cannot be used to permit state or tribal officials to be sued for violations of purely state law. As the Supreme Court explained:

When a plaintiff alleges that a state official has violated state law the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.

Pennhurst, 465 U.S. at 106.

Neither Amici nor AUTO can escape *Pennhurst* and *Blackfeet Tribe*. And, indeed, each case cited by them in which a tribe or its officials was subject to the injunctive jurisdiction of a court is a case either involving a waiver of the tribe's sovereign immunity or a federal claim. Finally, there is no state law corollary permitting injunctions against tribal officials in order to secure their compliance with state law. Further, because tribal sovereign immunity is rooted in federal law, a state could not adopt a provision waiving tribal sovereign immunity without running

afoul of the supremacy clause. See *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 154; 100 S. Ct. 2069, 65 L. Ed 2d 10 (1980); *Wright*, 159 Wn.2d at 114-16 (tribal immunity bars application of state employment discrimination law to tribal enterprises); *North Sea Products, Ltd. v. Clipper Seafoods Co.*, 92 Wn.2d 236, 239, 595 P.2d 938 (1979) (indirect state law garnishment action against Lummi Tribe barred by tribal immunity).

C. Amici Fail To Grasp The Distinction Between Individual And Official Action As It Relates To The Immunity Of Tribal Members

Citing the decision in *Puyallup Tribe*, Amici argue that tribal sovereign immunity can be subordinated to state law by simply naming a tribal official as an "individual." WOMA Br. at 10 n.1, citing, *Puyallup Tribe, Inc. v. Dep't of Game of State of Washington*, 433 U.S. 165, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977). The decision in *Puyallup Tribe* arose from a dispute over the jurisdiction of the State to enjoin tribal members from overfishing steelhead in violation of state conservation laws. *Puyallup Tribe*, 433 U.S. at 171. The Puyallup Tribe and the individual defendant members of the Tribe argued that the Medicine Creek Treaty granted them unlimited rights to take fish from the Puyallup River.

At the outset of its discussion the Supreme Court noted:

This case, however, is a suit to enjoin violations of state law by individual tribal members fishing off the reservation. As such, it is analogous to prosecution of individual Indians for crimes committed off reservation lands, a matter for which there has been no grant of exclusive jurisdiction to federal courts.

Puyallup Tribe, 433 U.S. at 171.

The Court then applied well-established law in explaining that the sovereign immunity of the Puyallup Tribe barred any action to enjoin the Tribe or its members in their official capacity for violation of state law. However, individuals who were not acting as tribal officials were subject to state law. *Id.* at 172-73; *see also, United States v. Oregon*, 657 F.2d 1009, 1013 n.8 (9th Cir. 1981) (tribal sovereign immunity “extends to tribal officials when acting in their official capacity and within their scope of authority” but “individual tribal members, however, enjoy no such immunity.”).

This case does not come close to exploring the potentially blurry boundary between official and individual actions. In this case, AUTO sought to name tribal members solely on the basis of the members’ signing the fuel tax agreements on behalf of their respective tribes and in an effort to invoke application of the *Young/Blackfeet* doctrine. CP at 344-45 (listing tribal members sought to be joined as defendants and describing each as “an official of the . . . Tribe who, having signed a fuel tax compact

with the Governor, may have an interest in this case.”). The members’ signing of the agreements was plainly an official act of the tribes and, as such, is protected by tribal sovereign immunity. Indeed, AUTO’s attempts to join the tribal officials as defendants for the sole purpose of defeating sovereign immunity is just the sort of “ploy” and “attempted end run” around sovereign immunity condemned by other courts. *Dawavendewa*, 276 F.3d at 1160.

III. THE TRIBES ARE INDISPENSABLE PARTIES IN THIS ACTION AND AMICI’S ANALYSIS OF THAT ISSUE RUNS CONTRARY TO RELEVANT AUTHORITY

Amici engage in the four factor indispensability analysis of CR 19(b) and argue that the Tribes are not indispensable. WOMA Br. at 14-20. Their analysis, like AUTO’s, is fatally flawed and inconsistent with the numerous other court decisions, which have uniformly concluded that where a lawsuit would have the practical effect of eviscerating a tribe’s contractual rights, the suit must be dismissed because of the tribe’s sovereign immunity. *See Mudarri*, 147 Wn. App. 590 (citing numerous cases); *Wilbur*, 423 F.3d at 1104.

Amici’s erroneous analysis begins at its outset with their claim that the Court of Appeals’ decisions in *Mudarri* and *Matheson* are distinguishable because the plaintiffs in both cases “directly” attacked the state-tribe agreements at issue there. WOMA Br. at 15; *see also*,

Association of Washington Business (AWB) Br. at 5-6 (both briefs citing *Mudarri v. State*, 147 Wn. App. 590, 196 P.3d 153 (2008); *Matheson v. Gregoire*, 139 Wn. App. 624, 161 P.3d 486 (2007)). The *Mudarri* court, however, expressly ruled that indirect attacks on state-tribal agreements, which encompass AUTO's constitutional claims here, are subject to analysis – and dismissal - under CR 19. *Mudarri*, 147 Wn. App. at 606.

The crux of Amici's indispensability analysis is their contention that prejudice to the absent tribes can be avoided by shaping the relief provided to AUTO. WOMA Br. at 16-18. Specifically, Amici suggest the court can: 1) Join as co-defendants the individual tribal members who signed the agreements; 2) Require the State Defendant to limit the use of fuel tax revenues to highway-related purposes; and 3) Require the State to enforce the Agreements.⁴ *Id.* There are several problems with Amici's argument.

First as noted above, the individual tribal officials who signed the Agreements cannot be joined as defendants as they, too, are immune from suit. *See Dawavendewa*, 276 F.3d at 1160. In addition, AUTO has never requested the relief urged by the Amici, seeking instead an order completely prohibiting the payment of fuel tax refunds to the Tribes. CP 360 (prayer for relief in AUTO's Second Amended Complaint). Courts

⁴ Amici do not indicate what specifically the court should order the State to do to enforce the Agreements.

will not consider argument raised only by amici. *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984) (rejecting amici's argument that court should adopt a particular *in camera* review procedure since that was not raised by the parties).

Second, as Amici themselves admit, the State is already required to, and is already in fact, seeking to enforce the Agreements. *See e.g.*, App. D to brief of Washington Policy Center (WPC) (describing State's demand that the Yakama Tribe return \$11 million in fuel tax refunds due to the Tribe's failure to comply with the audit requirement of the State-Yakama fuel tax agreement). The statutory authority to enter into fuel tax Agreements with the Tribes specifies that the Agreements require the Tribes to spend any fuel tax proceeds remitted by the State, or their equivalent, on "highway-related purposes." RCW 82.36.450(3)(a). And, as Amici themselves note, the Agreements "require the tribes to limit remitted-fuel-tax spending to '[p]lanning, construction, and maintenance of roads, bridges, boat ramps; transit services and facilities, transportation planning; police services; and other highway-related purposes.'" WOMA Br. at 17 (quoting CP at 257, 267).

Even if the Court were to consider Amici's suggestion that it issue an order requiring the State to take some action to enforce the Agreements, Amici's argument would have to be rejected. Such an order

would take the form of a writ of mandamus issued to Director Luce of the Department of Licensing. However, even assuming the requirements of RCW 7.16 *et seq.* were satisfied, the writ could not issue. There are no provisions in the Agreements or in the statutes authorizing the Agreements that require Director Luce or any other state official to take any particular action if it is thought that the Tribes are not in compliance with the Agreements. Whether to do so, therefore, lies within the sound discretion of Director Luce and mandamus will not lie where the duty is discretionary. *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774 (2010), “we have placed strict limits on the circumstances under which we will issue the writ to public officers and held that ‘mandamus may not be used to compel the performance of acts or duties which involve discretion on the part of a public official.’”).

Amici’s indispensability analysis is simply erroneous. As the numerous cases cited in the State’s prior briefs demonstrate, where, as here, the practical impact of a lawsuit would deprive a tribe of its contract rights and the tribe cannot be joined, the action must be dismissed pursuant to CR 19. State’s Br. at 13-28.

IV. AMICI'S ALLEGATIONS OF INEQUITIES RESULTING FROM THE AGREEMENTS HAVE A TENUOUS FACTUAL BASIS AND ARE IRRELEVANT TO A CR 19 ANALYSIS

Several of the Amici in this matter focus on alleged inequities they claim flow from the Agreements. These allegations have, at best, a questionable factual basis. More importantly, however, the well-established doctrine of tribal sovereign immunity that required dismissal of this action reflects a policy determination that where, as here, the relief sought would have the practical effect of nullifying tribal contract rights, the suit must be dismissed to preserve and protect tribal sovereignty.

The Amici suggest that the Tribes are using some portion of the fuel tax proceeds to somehow assist tribal retailers in undercutting the prices offered by non-tribal gas stations. *See e.g.*, WPA Br. at 4 (“some tribes appear to be using Motor Vehicle Funds to manipulate the retail gasoline market”); WOMA Br. at 2. The Amici offer no substantive evidence of this (e.g., a completed study from a disinterested, neutral entity), but only anecdotal news articles and an incomplete study claiming that gas is cheaper at tribal stations than non-tribal stations. *See e.g.*, WPA Br. at 4 (detailing findings from internal study they admit is “not complete” and citing news stores based on anecdotal reports).

In addition, Amici offer no evidence that the price differential, assuming it exists, is caused by the Tribes' misuse of the fuel tax refunds. In the absence of any reliable evidence from a disinterested party or other neutral source, it is just as likely that any price differences can be explained by greater efficiencies achieved by tribal retailers (due, for example, to fewer regulations) as claimed by the Tribes. App. A to WPA Br.

The inadequate factual basis of Amici's allegations is particularly important because Amici seek to use their allegations to have this Court issue a decision that would run directly contrary to black-letter law from numerous jurisdictions, including this one, on tribal sovereignty and CR 19. As demonstrated in the numerous cases cited in the State's substantive briefing, courts have consistently recognized that dismissal under CR 19 due to tribal sovereignty lawsuits such as this is the required outcome despite the fact that the plaintiffs will, after dismissal, have no judicial remedy. State's Br. at 24 and cases cited therein. As the Ninth Circuit recently noted, dismissal under Rule 19 is a "common consequence of sovereign immunity" and the courts "have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002); see also, *Wichita & Affiliated*

Tribes of Okla. v. Hodel, 788 F.2d 765, 781 (D.C. Cir. 1986) (“the doctrine of tribal immunity reflects a societal decision that tribal autonomy predominates over other interests.”).

Finally, it should be noted that although persons and entities such as AUTO and Amici who object to the fuel tax agreements incorrectly claim to have no remedy, more accurately, they do not have their *preferred* remedy – a judicial remedy. The remedy for AUTO and their Amici supporters is legislative.

It is the Legislature that authorized the Agreements and created many of the rules to which AUTO and Amici object (e.g., RCW 82.36.450(4) providing that information received from the tribes is not subject to public disclosure). As the Legislature authorized the Agreements, the Legislature presumably can renegotiate the rules relating to them. Indeed, at least one Amici acknowledges that AUTO and Amici can take their complaints to the Legislature and seek a remedy there through a change in the law. National Federation of Independent Business, et al. Br. at 7.

V. CONCLUSION

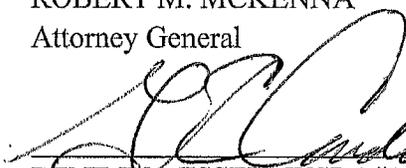
Congressional recognition of tribal sovereign immunity reflects a policy decision that inherently circumscribes judicial remedies. This case is fundamentally no different than the numerous cases cited by the State

applying tribal sovereign immunity, including the necessity of occasionally dismissing lawsuits under CR 19 when the relief sought would impact the contractual rights of a tribe.

The tribal court correctly applied well-established law and acted within its discretion in dismissing this action. The rulings of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of August, 2011.

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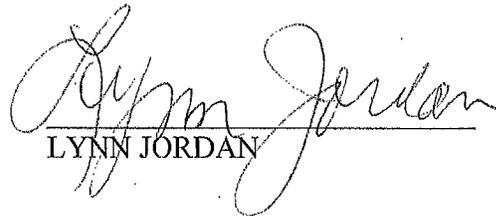
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I certify under penalty of perjury in accordance with the laws of the State of Washington that on the date below *Respondents' Brief* and this *Certificate of Service* were filed in the Washington State Supreme Court according to the Court's Protocols for Electronic Filing, as a PDF attachment, at the following e-mail address: Washington State Supreme Court (Supreme@courts.wa.gov).

And that I served a copy of *Respondents' Brief* and this *Certificate of Service* on counsel for Appellant at the address below by U.S. Mail, and by e-mail as a PDF attachment:

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