

No. 85971-0

SUPREME COURT OF THE STATE OF WASHINGTON

AUTOMOTIVE UNITED TRADES ORGANIZATION, a Washington
nonprofit corporation, TOWER ENERGY GROUP, a California
corporation,

Appellants,

v.

STATE OF WASHINGTON; and JIM MCINTYRE, WASHINGTON
STATE TREASURER,

Respondents.

BRIEF OF *AMICUS CURIAE*
WASHINGTON ENVIRONMENTAL COUNCIL

Ken Lederman, WSBA # 26515
Steven J. Gillespie, WSBA # 39538

Attorneys for Amicus Curiae

FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Facsimile No.: (206) 447-9700

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I. INTRODUCTION

The 18th Amendment means what it says - no more and no less. It applies only to taxes on the distribution, sale, or use of motor vehicle fuel intended to be used for highway purposes and expressly excludes “taxes or excises not levied primarily for highway purposes.” Appellants in this case, collectively “AUTO,” concede that the Hazardous Substances Tax (“HST”) is not levied for highway purposes, but assert nonetheless that because the pollutants subject to the HST includes motor vehicle fuel, the HST must fall within the 18th Amendment. AUTO asks this Court to ignore the 18th Amendment’s plain language, with the result that the State’s popular and efficacious toxics cleanup program would lose the vast majority of its funding - money linked to the very products that directly pollute our environment. Nothing in law or logic compels this result.

Moreover, this Court should not even allow AUTO to complain of the constitutionality of the HST. AUTO chose not to assert its rights for 24 years while a complex and expensive regulatory infrastructure was developed and operated successfully. Even if the HST violates the 18th Amendment, AUTO has waived its right to assert its current challenge.

The Washington Environmental Counsel (“WEC”), one of Washington’s oldest environmental organizations, wrote the initiative that

created the Model Toxics Control Act (“MTCA”), which relies primarily on HST funds. Since 1988, when the MTCA initiative passed with 56% of the popular vote, regulators, landowners, developers and polluters alike have relied on the MTCA, to great effect, as the regulatory and funding mechanism to clean up toxic pollution in the state. AUTO’s challenge would eliminate the bulk of MTCA funding - that portion of the HST that falls upon “motor vehicle fuel” - and end the MTCA’s largely successful efforts to ameliorate and prevent toxic pollution. The WEC, and all Washington citizens who are entitled to a clean and healthful environment, rely upon the HST, and the Court should affirm the trial court’s decision.

II. STATEMENT OF THE CASE

A. Washington Environmental Council and History of the MTCA and the HST

WEC has worked to protect the State’s environment since 1969 and now has over 3,500 member households and over 60 organizational members. One of WEC’s signature accomplishments was to draft, sponsor, and organize of the campaign for the adoption of Initiative 97, which created the MTCA (Chapter 70.105D RCW), the state version of the federal Superfund (the Comprehensive Environmental Response, Compensation, and Liability Act or “CERCLA”). WEC also participated in the rulemaking that implemented the MTCA. Over 200,000 citizens

signed the petition supporting the MTCA initiative to the Legislature, which referred both the MTCA and an alternative to the fall 1988 ballot. On November 8, 1988, 56% of voters approved the MTCA.¹

From the beginning, the MTCA included the HST. *See* CP 344-346 (portions of the 1988 voter pamphlet, including text of initiative). The HST was a key provision of Initiative 97. Section 1 of the initiative, now codified at RCW 70.105D.010(2), states that:

The main purpose of chapter 2, Laws of 1989 [Initiative 97] is to raise sufficient funds to clean up all hazardous waste sites and to prevent the creation of future hazards due to improper disposal of toxic wastes into the state's land and waters.

(Emphasis added). The HST, which pre-dated the MTCA,² was the mechanism provided to fulfill this purpose, and the HST has been and remains the primary source of funding for the MTCA.

To the best of WEC's knowledge, no one has ever challenged the constitutionality of the HST, and AUTO did not make any effort to assert its legal claims earlier.³ Yet after 24 years of tax collections catalyzed the development of an effective cleanup program and the remediation of

¹ *See* Washington Secretary of State, "Initiatives to the Legislature, 1914 - 2009," published at http://www.sos.wa.gov/elections/initiatives/statistics_initleg.aspx.

² *See* Laws of 1987, 3rd Ex. Sess., Ch. 2 §§ 22, 23, 44-48.

³ AUTO's testimony in front of the Washington State Legislature in 2010 establishes that it knew about its potential claims over two decades ago, and decided to do nothing. CP 121-122.

thousands of contaminated properties throughout the State, AUTO now asserts that the HST is unconstitutional.

III. ARGUMENT

Like the gas tax, the HST is a classic user fee. The link between petroleum products and pollution from petroleum products is well-established, and the HST provides a mechanism by which the parties that benefit economically from possession of such petroleum products pay for the cleanup of the pollution that inevitably results from the use and presence of petroleum products in Washington.

The HST is not, and never has been, a tax on sale, distribution, or use of motor vehicle fuel. Neither is it a tax levied for highway purposes. It simply does not come within the ambit of the 18th Amendment, and AUTO has abandoned its ability to argue otherwise. The Court should allow the HST to continue funding the important work of remediating toxic pollution.

A. AUTO Misinterprets the 18th Amendment

1. **The Plain Language of the 18th Amendment Exempts the HST**

The starting point of constitutional interpretation is the language itself. *Washington Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004); accord *Tesoro Refining and Marketing Co. v.*

State, Dept. of Revenue, 164 Wn.2d 310, 317-18, 190 P.3d 28 (2008) (applying same rule to interpretation of statute and administrative rule). If the language, set in context, is unambiguous, the Court gives effect to the language according to its plain meaning. *Washington Water Jet*, 151 Wn.2d at 477; *Locke v. City of Seattle*, 162 Wn.2d 474, 482, 172 P.3d 705 (2007) (“Where the text of a constitutional provision is plain, the court must give the language its reasonable interpretation without further construction.”).

The 18th Amendment reads, in relevant part:

[A]ll excise taxes collected by the State of Washington 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. . . .

Provided, That this section shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway purposes

Wash. Const. Art. II § 40 (emphasis added). This language is unambiguous - to come within the purview of the 18th Amendment, a tax must be on the sale, distribution, or use of motor vehicle fuel. However, under the proviso, even if an excise tax does fit these categories but is not levied primarily for highway purposes, it does not come within the ambit

of the 18th Amendment. There is only one place to find the purpose for which a tax is levied - statements of legislative intent.

a. The HST is Not a Tax on the Sale, Distribution, or Use of Motor Vehicle Fuel

The language of the HST speaks for itself - the HST is imposed on the privilege of possessing hazardous substances, not on their sale, distribution or use. RCW 82.21.030(1). The definition of “hazardous substances” includes petroleum products. RCW 82.21.020(1)(b). “Possession” is defined as control of a hazardous substance located within the state, where “control” means “the power to sell or use a hazardous substance or to authorize the sale or use by another.” RCW 82.21.020(3).

AUTO misreads *Tesoro*, which does not state that “possession” equals “sale.” Rather, possession equals the power to sell or use—a very different concept. *Tesoro* at 317.⁴ *Tesoro* did not say, as AUTO alleged, that the tax liability accrues at the moment of sale or use. *See* AUTO Opening Brief at 18. In keeping with the plain language of the regulation, *Tesoro* squarely held that the tax liability accrues upon possession of a hazardous substance, even if that possession lasted only 30 seconds. *Tesoro* at 321.

⁴ For example, possessing the power to kill is very different from actually killing - one is routine and routinely ignored, while the other is rare and provokes severe consequences.

Despite AUTO's attempts to import a different meaning from case law, nowhere does the HST equate the possession with the actual "sale, distribution, or use" of any hazardous substance, including petroleum products. A reviewing court must give effect to all the language used in a statute. *See, e.g., Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Yet if AUTO correctly asserts that the power to sell is the equivalent of actual sale, the HST needlessly included the phrase "power to." Laws are enacted against the backdrop of existing laws, and the drafters of the HST must have been aware of the 18th Amendment restriction on taxes levied on "sale." *See, e.g., State v. Torres*, 151 Wn. App. 378, 385, 212 P.3d 573 (2009). Because the "power to sell or use" is the *sine qua non* of "possession," the HST cannot also be a tax on the "sale or use" of motor vehicle fuel.

b. The HST is Not Levied for Highway Purposes

The proviso of the 18th Amendment exempts taxes not levied primarily for highway purposes, and AUTO concedes (at footnote 6 of its opening brief) that the HST is not levied for highway purposes. This circumstance does not, as AUTO alleges, create an exception that swallows the rule, for the "rule" of the 18th Amendment is this - where an excise tax is levied on the sale, distribution, or use of gasoline, and the

revenue from that tax is intended for highway purposes, the revenue must be held in a separate account. AUTO speculates that under the proviso, the legislature could impose an ordinary gas tax for purposes other than highway, without violating the 18th Amendment. However, that particular horrible has not been paraded before the Court and need not be considered.

AUTO asserts that the State's reading of the proviso is too broad, and would allow the legislature to thwart the purpose of the 18th Amendment by taxing gasoline indirectly. *See* AUTO Reply Brief at 11-15. This argument depends on the faulty premise that the HST is a tax of the sale, distribution, or use of motor vehicle fuel. However, even if it were, the question would be how the broad language of the enacting clause interacts with the equally broad language of the proviso. AUTO's reasoning reduces the scope of the proviso to the point where it excludes nothing covered by the enacting clause. This interpretation is improper, for "[a] constitutional or statutory proviso is a restraint or limitation upon, and not an addition to, that which precedes it." *State v. Collins*, 94 Wash. 310, 313, 162 P. 556 (1917). To have any effect at all, the proviso must exclude some taxes that would otherwise fall within the enacting clause.

The Attorney General addressed this very question in a thoughtful opinion cited by the State. CP 174-182 [AGO 2001 No. 2]. In that opinion, the Attorney General weighed the cases and concluded that the state could, consistent with the 18th Amendment, impose a sales tax on the sale of gasoline and deposit the revenue into the general fund. CP 181. Unlike the HST, the sales tax would actually be a tax on the sale of motor vehicle fuel, but because its purpose is to provide money to the general fund, the AGO concluded that it would fall within the proviso. *Id.*

The Court should adopt the analysis of the Attorney General's well-reasoned opinion, which was necessarily accepted by the trial court. The questions presented by this case are not nearly as close as the sales tax question for a simple reason - the HST is not a tax on the sale of motor vehicle fuel, so the HST is not implicated by the 18th Amendment.

2. The Legislature can Levy an Excise Tax on the Wholesale Value of a Commodity

AUTO argues that the fact that the HST is based on the wholesale value of the hazardous substance, rather than the volume, renders the HST a hidden tax on the sale of motor vehicle fuels. *See* AUTO Reply Brief at 10-11. AUTO argues that the HST must be a backdoor tax on motor vehicle fuel for highway purposes, reasoning that if the legislature actually intended the HST to address pollution, it would have pegged the HST to

the volume of the fuel possessed rather than the wholesale value of the fuel. In essence, AUTO argues that the legislature either intended a gas tax or it erred in its selection of legislative remedies.

This argument has many flaws, most notably that **the gas tax itself taxes the volume, not the value, of gasoline.** See RCW 82.36.025. In fact, the AGO called taxing volume rather than value “the chief distinguishing characteristic of a gas tax.” CP 180 (AGO No. 2 2001 at 7). Regardless, the incidence of the HST falls on the possession of hazardous substances, without regard to how the possessor intends to recoup its costs. It applies regardless of whether the substances are ever sold at retail, or whether they are ever actually used or sold at all.

Additionally, the suggestion that the HST exists to serve any purpose other than toxics cleanup is risible. Although legislative intent is often elusive, the Washington legislature plainly stated its intent in this case:

It is the intent of this chapter to impose a tax only once for **each hazardous substance possessed in this state** and to tax the first possession of all hazardous substances, including substances and products that the department of ecology determines to present a threat to human health or the environment.

RCW 82.21.010, *accord* RCW 70.105D.010(2) (purpose of MTCA). The legislature neither suggests nor implies that the HST is imposed “for

highway purposes.” Indeed, the MTCA requires that all monies raised under the HST be deposited into the state toxics control account. RCW 70.105D.070. The purpose of that toxics control account, not surprisingly, is declared in state law to be the cleanup of hazardous substances, the protection of the environment, and all the other stated goals and objectives of MTCA. RCW 70.105D.010. There can be no legitimate dispute that the purpose of the HST and the MTCA has nothing to do with highways.

Finally, the choice of what metric to use is one of legislative prerogative. In essence, AUTO criticizes the legislative wisdom behind the HST, arguing that the HST could be more effective for its stated purpose if it were tied to volume rather than value. But simply disagreeing with the wisdom of the HST does not mean the legislature intended anything other than what it said. After all, the legislature could have selected any number of mechanisms for funding. The legislature could tie the HST to the retail value, rather than the wholesale value, and take advantage of the markup. It could tie the HST to the polluting capacity of the hazardous substance, taxing benzenes and dioxins at three times the rate of methane. Or it could select (in its legislative wisdom) what it believes to be an easily workable solution—tax possession of

products that were probably bought at wholesale, that may or may not be sold at retail, on the wholesale price.

The HST is plainly neither a gas tax, nor levied for highway purposes. It is a tax on possession—not sale, distribution, or use, but possession—of all hazardous substances, for the purpose of addressing toxic pollution. The HST simply does not implicate the 18th Amendment.

B. AUTO Slept on its Rights

Time may not turn an unconstitutional law into a constitutional one, but the passage of time can eliminate a party's ability to challenge that law. AUTO president Tim Hamilton was present at the enactment of MTCA and testified that he believed at the time that the new law was unconstitutional based on the same faulty 18th Amendment analysis. CP 121-122. It matters not that Tim Hamilton was "a gas station operator" and not a lawyer - the fact remains that 24 years ago, AUTO possessed every fact and argument that supports AUTO's current constitutional challenge.

In the analogous circumstance of the discovery rule, a statute of limitations begins to run as soon as a would-be plaintiff discovers facts that support a legal action, regardless of whether she realizes the potential legal implications. *See, e.g., Gevaart v. Metco Const., Inc.*, 111 Wn.2d

499, 502, 760 P.2d 348 (1988) (“[T]he discovery rule does not require knowledge of the existence of a legal cause of action.”). Yet for 24 years, AUTO did nothing while a successful toxics cleanup regulatory program developed and matured. The WEC’s members, indeed all Washington residents, have come to rely on the HST to protect them from the severe environmental harm that inevitably arises when hazardous substances are released into the environment in Washington State. After acknowledging and observing this critical program for the past two decades, AUTO cannot now assert that the HST is unconstitutional.

1. Laches Precludes AUTO’s Inexcusable Delay

Laches is:

inexcusable delay in asserting a right; an implied waiver arising from knowledge of existing conditions and an acquiescence in them; such neglect to assert a right as, taken in conjunction with lapse of time more or less great, and other circumstances covering prejudice to an adverse party, operates as a bar in a court of equity; such delay in enforcing one’s rights as works disadvantage to another.

Edison Oyster Co. v. Pioneer Oyster Co. et.al, 22 Wn.2d 616, 628, 157 P.2d 302 (1945) (citing 21 C.J. 210 *et seq.*, §211). The equitable defense of laches requires: (1) knowledge, or a reasonable opportunity to discover, of facts constituting a cause of action; (2) unreasonable delay by plaintiffs; and (3) damages or prejudice resulting from plaintiffs’ delay in bringing

the action. *Davidson v. State*, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991). Several Washington court decisions have collapsed the first two elements of knowledge and unreasonable delay into a single element of “inexcusable” delay.⁵ See, e.g., *Buell v. City of Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972).

In Washington, laches may foreclose a late constitutional challenge to a state statute. *Clark County P.U.D. No. 1 v. Wilkinson*, 139 Wn.2d 840, 847-48, 991 P.2d 1161 (2000); *State v. Howell*, 92 Wash. 540, 545, 159 P. 777 (1916). In *Howell*, the plaintiff claimed that the Apportionment Act of 1901 violated article 2 of the state Constitution. *Howell*, 92 Wash. at 541. After ruling on the constitutional issue, the court wrote:

But even if it were concluded that the act of 1901 was such a departure from the requirements of the Constitution as to disclose a willful disregard of its provisions, we think it now too late for the relator to raise the question. The act complained of has stood uncontradicted for more than 15 years.... Persons who conceive that the Legislature has acted in disregard of the mandates of the Constitution must therefore act promptly else they will be held to have waived their right to act at all.

Id. at 545 (emphasis added); see also *Bylinski v. City of Allen Park*, 169 F.3d 1001 (6th Cir. 1999) (discussed below).

⁵ The federal standard of review for a laches claim is nearly identical. See, e.g., *Apache Survival Coalition v. United States*, 21 F.3d 895, 905 (9th Cir. 1994).

In the determination of whether AUTO's delay was excusable, the main component of the analysis is prejudice. *Cf. Wilkinson*, 139 Wn.2d at 848-49. Prejudice can include reliance upon the AUTO's failure to act, or can arise through AUTO's lengthy delay in asserting the claim. *See Waldrip v. Olympia Oyster Co.*, 40 Wn.2d 469, 477, 244 P.2d 273 (1952).

2. Allowing a Late Challenge Will Harm the WEC

The State has explained how AUTO's inexcusable delay will harm the State. WEC agrees with the State's position and wishes to emphasize how AUTO's delay will cause significant prejudice to the members of the WEC, and all Washington citizens, who have a "fundamental and inalienable right to a healthful environment." RCW 70.105D.010(1).

The HST generated \$130,190,000 in fiscal 2008. As required by statute, this revenue was split between two accounts – the state toxics control account funding Ecology's statewide Toxics Cleanup Program, and the local toxics control account to assist local governments in the clean up toxic sites within their jurisdiction.⁶ RCW 70.105D.070(2) and (3); *see also* CP 413 (Washington Department of Ecology, Model Toxics

⁶ In 2008, HST receipts were the sole source of funds in the local toxics control account. CP 465. Ecology distributes this money to local governments for the investigation and cleanup of publicly owned contaminated sites. CP 468. Of the approximately \$70 million deposited into the account in FY 2008, Ecology awarded over \$61 million in grants and loans to local governments. *Id.* If the local toxics account receives no further HST revenue, then local governments may find themselves unable to pay for cleanups they are legally required to perform.

Control Account: Fiscal Year 2008 Annual Report, Ecology Publication 08-09-048, at 4 (Apr. 2010)).⁷ A portion of the revenue went to other agencies, for example, allowing law enforcement officials to clean up the chemicals from methamphetamine labs. *Id.* at 46, CP 463.

Since the MTCA was enacted, Ecology has identified nearly 11,000 contaminated sites across the state. *Id.* at 6. These include large, complex sites such as Bellingham Bay and the Lower Duwamish Waterway, as well as smaller, simpler sites such as gasoline stations and dry cleaners. More than half of these contaminated sites have already been cleaned up or otherwise require no further action. *Id.* Another 25%, or about 2,750 sites, are currently being cleaned up. *Id.* The rest – over 2,500 identified contaminated sites – have yet to be remediated.

The funding provided by the HST has allowed Ecology to build the Toxics Cleanup Program into Ecology's third largest program. The Program employs almost 170 people, and has developed the physical and institutional infrastructure needed to support their highly technical environmental cleanup mission. *See* CP 499 (Washington Department of Ecology, Budget & Program Overview 2009-2011, Ecology Publication 09-01-014, at 4 (Dec. 2009)). The HST allowed Ecology to perform

⁷ The 2008 report is the most recent published report.

cleanup activities at 671 high-priority contaminated sites as of 2008. *See* CP 424. The HST also allowed Ecology to provide assistance to the 3,438 individuals and businesses who volunteered to clean up their own sites. CP 426.

Ecology is statutorily required to be involved at every stage of the cleanup process, from the discovery of contamination through long-term monitoring that usually follows remediation.⁸ Without HST receipts, Ecology could not continue the cleanup work mandated by existing law. Unless the state continues to collect the HST, Ecology will not have enough money to complete the cleanup of the remaining contaminated sites across the state.⁹

For the past two decades, the members of WEC have relied on the funding from the HST to ensure that Ecology will continue to perform the work necessary to prevent hazardous waste from threatening drinking water resources, harming land resources and surface waters, impeding the economic viability of farms and businesses, and damaging property

⁸ *See, e.g.*, RCW 70.105D.030(2)(d) (site investigations); WAC 173-340-320 (site hazard assessments); WAC 173-340-350(4) (remedial investigation reports and feasibility studies submitted to Ecology); WAC 173-340-380 (Ecology issues cleanup action plan).

⁹ It is not realistic to expect the federal government, which has its own budget problems, to assume Ecology's role in the remediation of contaminated sites. Even if the Environmental Protection Agency could afford to address the thousands of identified contaminated sites, it lacks authority to address one of the most common contaminants found at those sites - petroleum. *See* 42 U.S.C. § 9601(14) (definition of "hazardous substance" under CERCLA excludes petroleum). EPA cannot oversee the cleanup of any sites polluted as a result of in-state possession of petroleum or petroleum by-products.

values. *See* RCW 70.105D.010(2); .010(3); .010(6). To invalidate the HST now, after 24 years in existence, would expose WEC members to releases of hazardous substance contamination, including petroleum contamination and oil spills, for which no public funding source will be available to assist with the remediation. Furthermore, invalidation of the HST would remove a vast majority of the public funding needed to prevent hazardous substances from being released into our land and water resources. *See, e.g.*, CP 441.

3. AUTO's Delay is Inexcusable

A quarter of a century is simply too long to wait to assert any legal claim, much less a claim against an environmental tax collected solely to benefit the public interest. AUTO had ample opportunity to assert its claim anytime in the past 24 years. AUTO argues that it relied on the assertions of WEC that the HST passed constitutional muster, but it defies common sense for AUTO to claim that it relied on the assertions of its ideological opponent. *See* AUTO Opening Brief at 33; AUTO Reply Brief at 3.

The Court should follow the wise direction of the Sixth Circuit Court of Appeals, which struck down a similar dilatory action by taxpayers attempting to stop an environmental tax several years after its

initial enactment and enforcement. *Bylinski*, 169 F.3d 1001. In *Bylinski*, municipalities had levied taxes to fund the remediation of illegal discharges into Michigan waterways. The plaintiffs sought a refund of tax payments and injunction of further collections. *Bylinski*, 169 F.3d at 1002. However, the plaintiffs did not file their claim until three years after implementation of the tax levies, by which time the remedial projects were 85 percent completed or contracted, and approximately \$220 million in bonds had already been sold. *Id.*

The trial court held that laches barred the plaintiffs' claims, even though plaintiffs sued only 3 years after the taxes were first collected. *Bylinski v. City of Allen Park*, 8 F. Supp. 2d 965, 972 (E.D. Mich. 1998). Noting the significant change in condition that had occurred during the plaintiffs' delay, the trial court held that the challengers had failed to meet their equitable obligation to bring their claims in a timely manner. *Id.* at 972-73. The Sixth Circuit upheld the U.S. District Court's decision:

In this case, the district court found that the plaintiffs had waited to initiate their action until after the municipal bonds to finance the court-ordered sewer project had been authorized, issued, and sold. As noted above, by the time the hearing occurred, the project was 85 percent complete, at a cost of over \$200 million. The court further found that the plaintiffs had ample notice of the defendants' intent to implement the consent decree through the financing agreements contained in that order and yet did not file suit until three years after they received their first assessment.

Finally, the court found that the defendants were obviously prejudiced by the delay, given the outlay of funds already expended and the near-completeness of the entire project. With this conclusion, we also agree.

Bylinski, 169 F.3d at 1002-1003.

Here, AUTO waited for 24 years to challenge the HST. In the interim, a strong and successful program has been developed to provide the resources and expertise to protect WEC's membership and the citizens of Washington from the deleterious effects of hazardous substances, including petroleum products. *See* RCW 70.105D.020(10)(d). As in *Bylinski*, AUTO has no excuse for its delay in asserting its claims, despite having direct knowledge of the issue.

IV. CONCLUSION

The HST has generated hundreds of millions of dollars annually to fund the state's successful efforts to address toxics cleanup sites. The HST is not, and never has been, a tax on sale, distribution, or use of motor vehicle fuel. Neither is it a tax levied for highway purposes. It simply does not come within the ambit of the 18th Amendment, and AUTO has abandoned its ability to argue otherwise.

To invalidate the HST now would destroy the foundation of a pollution-prevention and remediation program that has been carefully constructed over the past two decades, and would expose the members of

WEC to unnecessary risks to their health and to their healthful environment. Nothing in the plain language of the Washington Constitution compels such a prejudicial and inequitable result, and AUTO's dilatory behavior waives whatever argument it could have made.

The Court should affirm the trial court's ruling.

RESPECTFULLY SUBMITTED this 30th day of March, 2012.

FOSTER PEPPER PLLC



Ken Lederman, WSBA # 26515
Steven J. Gillespie, WSBA # 39538
Attorneys for *Amicus Curiae WEC*