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SUPREME COURT OF THE STATE OF WASHINGTON

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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.

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
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**Amicus Curiae Brief of Western States Petroleum Association**

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## **I. Identification and Interest of Amicus Curiae**

The Western States Petroleum Association is a non-profit trade association that represents more than twenty companies that explore for, develop, produce, refine and transport petroleum products in the six western states of Arizona, California, Hawaii, Nevada, Oregon and Washington.

Several WSPA members produce petroleum products in the State of Washington; these petroleum products are subject to the “hazardous substance tax” (“HST”) that is at issue in this case. Accordingly, WSPA and its members have a strong interest in the constitutional limitations on the use of revenues derived from the HST.

## **II. Issues Addressed by Amicus Curiae**

1. HST revenues are not being used for cleanup of sites contaminated by petroleum products.
2. HST revenues are being diverted to the State’s general fund.
3. The diversion of HST revenues underscores the importance of the constitutional issues.

## **III. Argument**

### **1. Background: The MTCA Statutory Framework**

The statutory framework of the HST and the Model Toxics Control Act (“MTCA”) is summarized in the Brief of Appellants. *See* Brief of Appellants (“Br. App.”), pp. 2-4. In brief, the HST imposes a tax “on the privilege of possession of hazardous substances in this state” (RCW 82.21.030(1), with “hazardous substances”

defined to include motor vehicle fuels and other petroleum products (RCW 82.21.020(1)(b) and (2)).

Funds collected under the HST “shall be deposited in the toxics control accounts under RCW 70.105D. 070.” *See* RCW 82.21.030(2). Funds in the toxics control accounts “may be used only to carry out the purposes of this chapter [70.105D],” including “[t]he hazardous waste cleanup program required under this chapter.” RCW 70.105D.070(2); *see* RCW 70.105D.070(3)(a).

**2. HST Revenues Are Not Being Used for Cleanup of Sites Contaminated By Petroleum Products.**

In its brief to this Court, the State recognizes that the current HST and its predecessor were “intended to fund cleanup of contaminated sites.” Brief of Respondent State of Washington (“Br. Resp.”), p. 4.

The State goes on to imply that HST revenues are being used predominantly for cleanup of sites contaminated by petroleum products. *See* Br. Resp., p. 13. Thus, the State asserts:

While AUTO is correct that the majority of Hazardous Substance Tax revenues derive from petroleum products, AUTO fails to mention that contamination from petroleum products are by far the largest volume of hazardous substances present in the state and petroleum-contaminated sites constitute the bulk of the state’s cleanup sites. Indeed, 85 percent of Washington’s over 11,000 identified contaminated sites are contaminated with some form of petroleum product, including many sites specifically contaminated with motor vehicle fuel. CP at 184-85.

Thus, the Hazardous Substance Tax focus on petroleum is proportionate to the problem petroleum products cause, which reinforces the point that the Hazardous Substance Tax is a special excise tax that was not enacted primarily for highway purposes.

Br. Resp., p. 13.

The State is wrong in implying that HST revenues are being used predominantly for cleanup of sites contaminated by petroleum products. The statutory language of MTCA itself allows funds in toxic control accounts to be used for a range of activities — including public education, recycling programs, emergency response training, citizen advisory committees, and air pollution reduction, for example. RCW 70.105D.070(2). In recent years, HST revenues have been used to fund a variety of programs unrelated to cleanup of contaminated sites — such as reducing wood stove pollution, removing mercury from motor vehicles, promoting organic composting, and reducing backyard burning. *See, e.g.*, 2011 Wash. Laws ch. 48, § 3027, 3029 (HB 1497, appropriating \$3 million from Local Toxics Control Account for wood stove pollution reduction, and appropriating \$2 million from Local Toxics Control Account for grants to provide alternatives to backyard burning). Regardless of the merits of such programs, they are not related to cleanup of sites contaminated by petroleum products.

### **3. HST Revenues Are Being Diverted To The General Fund.**

Moreover, as noted in the Reply Brief of Appellants, HST revenues in State Toxics Control accounts are being diverted to the state's general fund. Reply Brief of Appellants, p. 4.

In the past three years, the Legislature has diverted more than \$230 million from the State Toxics Control Account and Local Toxic Control Account to the state's general fund programs. *See* 2009 Wash. Laws ch. 564, § 1702, amending 2009 Wash. Laws ch. 4, § 802 (HB 1244, transferring \$75 million from Local Toxics Control

Account to state general fund, and transferring \$2 million from State Toxics Control Account to state general fund, for fiscal year 2009); 2011 Wash. Laws ch. 50, § , amending 2011 Wash. Laws ch. 5, § 801 (HB 1087, transferring \$102 million from Local Toxics Control Account to state general fund, and transferring \$53 million from State Toxics Control Account to state general fund, for fiscal year 2011).

Such diversions of HST revenues deplete the funds available for cleanup of contaminated sites. At the very least, these diversions show that the HST cannot be defended by the State's assertion that the HST's "focus on petroleum is proportionate to the problem petroleum products cause." *See* Br. Resp., p. 13.

Moreover, the diversions of HST revenues to the state general fund violate both MTCA and the Washington State Constitution. MTCA provides that moneys in the State Toxics Control Account and Local Toxics Control Account shall be used only for the purposes set forth in RCW 70.105D, which do not include transfer to the state's general fund. Indeed, the Attorney General's ballot statement for Initiative Measure 97, which enacted the current HST (*see* Br. App., pp. 3-4), expressly informed voters that "52.86 percent of the proceeds of that [HST] tax is made available to local government and 47.14 percent to State government for the hazardous waste cleanup program." CP 95. Needless to say, no mention was made of the possibility that HST revenues could be diverted to the state's general fund.

Article VII, section 5, of the Washington State Constitution expressly bars the diversion of tax revenues from the originally stated purpose of the tax: "No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the

object of the same *to which only it shall be applied.*” See Wash. Const. art. VII, § 5 (emphasis added). Thus, for over a century, courts have recognized that government entities in Washington must state a lawful object of a tax *and* apply revenues from that tax to only such purpose. See, e.g., *Sheehan v. Cent. Puget Sound Reg’l Transit Auth.*, 155 Wn.2d 790, 804, 123 P.3d 88 (2005) (“Article VII, section 5 would render unconstitutional actions taken to divert taxes assessed for those purposes into some wholly unrelated project or fund.”); *Sheldon v. Purdy*, 17 Wash. 135, 141, 49 P. 228 (1897) (tax revenue raised specifically to meet and maintain the current expenses of public schools could not be diverted to the building of new schools).

Thus, HST revenues plainly cannot be diverted to the state’s general fund.

#### **4. The Diversion of HST Revenues Underscores the Importance of the Constitutional Issues**

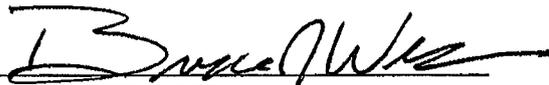
The diversion of HST revenues, both to the general fund and to environmental programs unrelated to cleanup of contaminated sites, underscores the importance of the constitutional issues presented in this case. Without the safeguards of the 18th Amendment and other constitutional protections, the State would be free to impose taxes ostensibly targeting hazardous substances, but then use the revenues collected for purposes wholly unrelated to the products being taxed. Here, for example, the HST revenues are being used for purposes wholly unrelated to either petroleum products or highways. That application of the HST is unconstitutional.

**IV. Conclusion**

For the reasons stated above, this Court should issue a declaratory judgment as requested by Appellants.

RESPECTFULLY SUBMITTED this 30th day of March, 2012.

LUKINS & ANNIS, P.S.

By   
BRYCE J. WILCOX  
WSBA #21728  
Attorneys for Amicus Curiae  
Western States Petroleum Association

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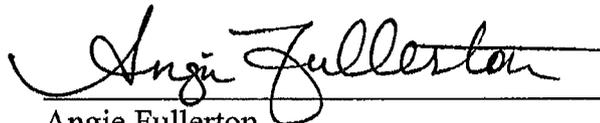
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