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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 RESPONDENT STATE OF WASHINGTON

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ORIGINAL

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I. INTRODUCTION

For three reasons, Automotive United Trades Organization and Tower Energy Group (collectively AUTO) cannot carry their burden to establish that Amendment 18 requires Hazardous Substance Tax revenues to be applied to highway use. First, Amendment 18 states that it applies to all excise taxes on motor vehicle fuel and all other state revenue “intended to be used for highway purposes.” The Hazardous Substance Tax is not intended to be used for highway purposes. It is levied specifically to address the threat to human health and the environment created by the presence of hazardous substances in the state. RCW 82.21.010, .030(2). It is thus not subject to Amendment 18.

Second, Amendment 18 expressly states that it “shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway purposes.” Contrary to AUTO’s assertions, this proviso does not swallow the enacting clause. Rather, it gives effect to the Amendment’s purpose of prohibiting diversion of gas tax and other revenue *specifically enacted for highway purposes* to other uses. AUTO’s contention that this applies only to taxes and fees existing in 1944 is refuted by the plain language and the history of the Amendment.

Finally, AUTO’s claim is untimely. AUTO was aware of the Hazardous Substance Tax when it passed in 1988, negotiated a similar tax that was placed on the same ballot, and made a deliberate decision not to

challenge the Hazardous Substance Tax after it was adopted by the voters. AUTO's intimate knowledge of the Tax, coupled with its 22-year delay in filing suit, establish that the suit was not brought within a reasonable time under the Uniform Declaratory Judgment Act (UDJA) and that the suit is barred by the doctrine of laches.

II. ISSUES PRESENTED

1. Amendment 18 states that taxes on the sale, distribution or use of motor vehicle fuel and all other revenue intended to be used for highway purposes must be used for highway purposes. Does Amendment 18 apply to an excise tax on the possession of hazardous substances (including motor vehicle fuels), which is intended to be used to address harm to human health and the environment?

2. AUTO was aware of the Hazardous Substance Tax when it passed 23 years ago and deliberately chose not to challenge it at that time. Is AUTO's challenge to the tax time barred in light of AUTO's knowing and willful 22 year delay in filing suit?

III. STATEMENT OF THE CASE

A. Constitutional and Statutory Background

Amendment 18 to the Washington State Constitution requires that state taxes and revenue intended to be spent on highway purposes must be used only on highway purposes. The amendment states, in pertinent 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

Const. art. II, § 40 (amend. 18).

The Hazardous Substance Tax is a tax on hazardous substances, including petroleum products. The tax is imposed on the privilege of possession of a hazardous substance within the state. RCW 82.21.030(1).

A hazardous substance is defined, in pertinent part, as:

(a) Any substance that, on March 1, 2002, is a hazardous substance under section 101(14) of the federal comprehensive environmental response, compensation, and liability act of 1980 . . .

(b) Petroleum products;

(c) Any pesticide product required to be registered under section 136a of the federal insecticide, fungicide and rodenticide act . . . and;

(d) Any other substance, category of substance, and any product or category of product determined by the director of ecology by rule to present a threat to human health or the environment if released into the environment. . . .

RCW 82.21.020(1) (emphasis added).

The tax is imposed on the first use of substances that “present a threat to human health or the environment.” RCW 82.21.010. To further

protection of human health and the environment, revenues from the tax are deposited into two toxics control accounts to carry out the purposes of the Model Toxics Control Act, including cleanup, management, and regulation of hazardous waste. RCW 82.21.030(2); RCW 70.105D.070.

The Hazardous Substance Tax and Model Toxics Control Act were enacted by the people of this state in 1988, through Initiative 97. The Initiative replaced a similar cleanup program and tax that was enacted by the legislature in October 1987. *See* Laws of 1987, 3rd Ex. Sess., ch. 2. Like the current Hazardous Substance Tax, the prior tax was intended to fund cleanup of contaminated sites and also applied to petroleum and petroleum products, including motor vehicle fuels. *Id.*, § 2(6)(f). On the 1988 ballot, the 1987 legislation ran alongside Initiative 97 as Alternative Measure 97B as a referendum to the people. CP at 90-112. Fifty six percent of voters chose Initiative 97 over the legislative alternative. CP at 317, n.1. The current tax has been on the books since 1988.

AUTO negotiated the legislative alternative that ran alongside Initiative 97. CP at 121. After the alternative was defeated in favor of Initiative 97, AUTO opted not to challenge the tax for fear that doing so would be "bad sportsmanship." CP at 122.

B. Procedural History

On March 23, 2010, 22 years after the enactment of the tax, AUTO filed a lawsuit in King County Superior Court claiming that the tax violates Amendment 18.

AUTO's lawsuit was dismissed for lack of standing. CP at 113-15. In an effort to cure its standing defects and establish taxpayer standing for one of its members (Tower Energy Group), AUTO sent a letter to the Attorney General asking that he take action against the alleged constitutional violation. CP at 116-17. On behalf of the Attorney General, Washington's Solicitor General declined AUTO's request, responding: "[a]fter reviewing your letter, the statute at issue, the 18th Amendment, and related cases, I cannot conclude that [a constitutional violation is] presented in this instance." CP at 118-19.

After adding Tower Energy Group as a co-plaintiff, AUTO re-filed its claims against the Hazardous Substance Tax. The parties filed cross motions for summary judgment on the constitutional issues. The State moved to dismiss the suit based on AUTO's 22-year delay in filing. King County Superior Court granted summary judgment to the State on both the constitutional and timeliness issues. CP at 682-84. AUTO then filed a petition for direct review with this Court.

IV. ARGUMENT

A. Standard Of Review

Appellate courts review summary judgment orders de novo, engaging in the same inquiry as the trial court. *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 737, 844 P.2d 1006 (1993). Summary judgment is affirmed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56. The burden is on the moving party to demonstrate that summary judgment is proper. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

In this case, this burden must be viewed in relation to the heavy burden AUTO faces in establishing that the Hazardous Substance Tax is unconstitutional. Statutes are presumed constitutional, and parties challenging constitutionality “must demonstrate . . . unconstitutionality *beyond a reasonable doubt.*” *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 808, 982 P.2d 611 (1999) (emphasis added) (quoting *Belas v. Kiga*, 135 Wn.2d 913, 920, 959 P.2d 1037 (1998)). This standard is not an evidentiary one; rather, it reflects the fact that, because statutes establish the will of the people, courts are “hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.” *Island Cy. v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). Furthermore, the legislature’s (or in this case the people’s) powers in matters of taxation are unrestrained except where

prohibited expressly or by fair inference. *Heavey*, 138 Wn.2d at 808-09 (citations omitted). As a result, AUTO's burden is substantial, and any doubt as to whether the statutory scheme passes constitutional muster must be resolved in favor of the State.

B. The Plain Language Of Amendment 18 Does Not Require That Hazardous Substance Tax Revenues Be Deposited Into The Motor Vehicle Fund

Where the language of an enactment is “plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation.” *Heavey*, 138 Wn.2d at 809 (quoting *W. Petroleum Imp., Inc. v. Friedt*, 127 Wn.2d 420, 423-24, 899 P.2d 792 (1995)). The Hazardous Substance Tax is a special excise tax on the first in-state possession of hazardous substances that was enacted for the purpose of cleaning up contaminated sites. Thus, the purpose of the Hazardous Substance Tax, the activity taxed by the Hazardous Substance Tax, and the subject of the Hazardous Substance Tax are all outside the scope of a plain language reading of Amendment 18's enacting clause. As a result, the Hazardous Substance Tax is outside the scope of Amendment 18 and deposit into the Motor Vehicle fund is not required.

1. The purpose of the Hazardous Substance Tax places it outside a plain reading of Amendment 18.

Amendment 18's plain language shows that the purpose of a tax has a critical bearing on whether it falls within the Amendment's reach. Specifically, Amendment 18 requires that motor vehicle license fees, excise taxes on the sale, distribution, or use of motor vehicle fuel, and other revenue *intended to be used for highway purposes* be placed into a special fund and used exclusively for highway purposes. Const. art. II, § 40. Additionally, and as discussed in greater detail below, the proviso to Amendment 18 exempts from the enacting clause any "revenue from general or special taxes or excises *not levied primarily for highway purposes. . .*" Const. art. II, § 40, cl. 2 (emphasis added). Thus, by its plain terms, Amendment 18 contemplates that there may be taxes on motor vehicle fuels that are not intended for highway purposes.

From a practical standpoint, it makes sense that taxes on the sale, distribution, or use of motor vehicle fuel be reserved for highway purposes because the sale, distribution and use of motor vehicle fuels creates the need for building and maintaining roads. In contrast, the purpose of the Hazardous Substance Tax is to address and prevent the harms caused by the hazardous properties of certain materials, including "petroleum products." Because this purpose is distinct from the need for maintenance and construction of roads and highways, the Hazardous Substance Tax

falls outside the scope of Amendment 18 and, therefore, Hazardous Substance Tax funds are not required to be used for highway purposes.

2. The Hazardous Substance Tax is assessed on possession of petroleum products, not on sale, distribution or use.

Next, the *activity* subject to the Hazardous Substance Tax is not the activity contemplated by Amendment 18. Amendment 18 encompasses *sale, distribution or use* of motor vehicle fuels. In contrast, the activity encompassed by the Hazardous Substance Tax is the privilege of possessing a hazardous substance. RCW 82.21.030(1). This is so because the Hazardous Substance Tax is concerned with the dangers and costs inherent in the mere presence of certain substances in the state. Thus, while the *ability* to sell or use a hazardous substance is the proper metric for determining when a substance is “possessed,” the applicability of the Hazardous Substance Tax is untethered from *actual* sale or use. *See* RCW 82.21.020(3).

AUTO’s assertion that “privilege of possession” is just “sale, distribution, or use” in disguise is incorrect and relies on a misconstruction of its cited authorities. App. Br. at 17-19. AUTO mainly relies upon this Court’s decision in *Tesoro Refining and Marketing Company v. Department of Revenue*, 164 Wn.2d 310, 190 P.3d 28 (2008). But, *Tesoro* does not support AUTO’s claim that sale or use is the “lynchpin” of the Hazardous Substance Tax. Although *Tesoro* did discuss “possession”

within the context of the Hazardous Substance Tax, nowhere in *Tesoro* did the Court state that tax liability attaches at the time of “sale or use.” Instead, the Court recognized what is evident from the statute: the *power* to sell or use a hazardous substance is used as a touchstone to indicate “possession,” not the *actual* sale or use of such substances. *See id.* at 316-17. The Court’s only discussion of Tesoro’s use of refinery gas was in its summary dismissal of Tesoro’s argument that the short life-span of the gas was insufficient to exercise “legally significant control.” *Id.* at 321 (“The fact Tesoro uses refinery gas contradicts the argument that Tesoro lacks sufficient control over refinery gas to fall within RCW 82.21.030.”). In fact, even Tesoro conceded that its practice of discarding refinery gas into the atmosphere—unquestionably neither a use nor a sale—was subject to Hazardous Substance Tax. *Id.* at 317. As a result, *Tesoro* does not stand for the proposition for which it is cited.

AUTO’s citation to regulations applicable only to those who create hazardous substances similarly does not support its position. App. Br. at 18-19. AUTO cites WAC 458-20-252: “[m]anufacturers, refiners, and processors who possess hazardous substances are required to report the tax and take any available exemptions and credits only at the time that such hazardous substances are withdrawn from storage for purposes of their sale, transfer, remanufacture, or consumption.” WAC 458-20-252(8)(c).

This rule only sets out when a certain category of persons or entities subject to the tax must *report* the tax and any credits. The rule does not purport to specify that applicability of the tax is tied to actual “sale or use.” *See id.* Indeed, as AUTO itself acknowledges, the tax must be immediately reported by manufacturers or refiners when subject substances are withdrawn for sale, use, or consumption regardless of whether such sale, use, or consumption actually takes place. App. Br. at 18-19.

Furthermore, the rule makes sense from an efficiency standpoint because of the credits that may be available to manufacturers and refiners under the rule.¹ Because manufacturers and processors do not always know the purpose of a particular substance, it makes sense to require reporting of the tax, and any credits, due at the time such decisions are made. As the Court of Appeals in *Tesoro* noted:

[WAC 458-20-252(8)(c)] provides a convenience to refiners with respect to the due date of the possession-based tax. Until a refiner sells or consumes a product, the refiner may not know whether the substance is entitled to an exemption or credit under RCW 82.21.040 or WAC 458-20-252 . . . [WAC 458-20-252(8)(c)], titled “how and when to pay tax,” relates to timing. If the refiner removed the hazardous substance from storage and failed to put it to a

¹ For example, a credit is available to manufactures and refiners of hazardous substances who use such substances as ingredients in creating additional substances that may also be subject to the Hazardous Substance Tax. WAC 458-20-252(5)(a). Because taxed parties must provide adequate documentation to establish tax credits, such a rule also ensures that the paper trail is “fresh” when it comes to taxed parties’ claimed credits.

use that qualified for an exemption or credit, the tax would immediately become due.

Tesoro Refining & Mktg. Co. v. Dep't of Revenue, 135 Wn. App. 411, 427, 144 P.3d 368 (2006). This “convenience . . . with respect to due date” does not change the nature of the tax and its concern with the presence—not the use—of hazardous substances in the state. *See id.*

Thus, under relevant authorities, even those cited by AUTO, one may be subject to the Hazardous Substance Tax even if completely divorced from the actual sale, distribution, or use of target substances. Because mere “possession” is distinct from actual “sale, distribution, or use,” the Hazardous Substance Tax falls outside of the plain language and obvious purpose of Amendment 18.

3. The subject of the Hazardous Substance Tax places it outside of a plain reading of Amendment 18.

Finally, the *subject* of the Hazardous Substance Tax places it outside the scope of Amendment 18. Amendment 18 applies to excise taxes on “motor vehicle fuel.” However, the Hazardous Substance Tax is significantly broader than Amendment 18’s limited language. As noted, the Hazardous Substance Tax attaches to the possession of over 12,000 substances, including “petroleum products” (of which gasoline and other fuels are a further subset). CP at 185. Under a plain reading of Amendment 18, a tax aimed at possession of any of the entire spectrum of hazardous substances is not a tax aimed at “motor vehicle fuel.”

AUTO uses the fact that the Hazardous Substance Tax falls most heavily upon petroleum products to suggest that the tax is really aimed at motor vehicle fuel. App. Br. at 19, 21. However, that is not a basis to declare the tax unconstitutional. 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. Additionally, there is no evidence to suggest that the voters intended the Hazardous Substance Tax to constitute an end-run around Amendment 18 by re-enacting the gas tax under another guise.

In sum, the most natural, non-forced reading of Amendment 18 is that it prevents the diversion of excise taxes aimed at motor vehicle fuel and levied because of the burden placed on the highway system by the use

of such fuels. Because the Hazardous Substance Tax is a tax on the activity of possessing any one of over 12,000 substances, and enacted for the purpose of dealing with the hazardous properties of such substances, the tax is outside of the scope of Amendment 18's enacting clause.

C. The Context And Background Of Amendment 18 Further Shows That It Was Not Intended To Encompass Taxes Other Than Those Enacted For Highway Purposes

The history of the Amendment is consistent with its plain language and further supports the conclusion that the Hazardous Substance Tax does not fall under the plain and natural meaning of the Amendment as it was understood by its framers and voters. Instead, framers and voters intended that the gas tax and other sources of revenue enacted for highway purposes be protected from diversion.

Similar to today, the "gas tax" was a very specific and identifiable item in 1944: the Motor Vehicle Fuel Tax. This tax was first imposed in 1921, more than two decades before the adoption of Amendment 18. By 1944, the tax applied a rate of five cents per gallon on motor vehicle fuel "sold, distributed, or used" in the state. Laws of 1921, ch. 173, § 2; Laws of 1933, ch. 58, § 5. Revenues from the gas tax were, and have always been, deposited into the Motor Vehicle Fund. *See* Laws of 1921, ch. 173, § 5; RCW 82.36.410. Although often erroneously cited as being created by Amendment 18, the legislature established the Motor Vehicle Fund as a permanent fund contemporaneously with the enactment of the gas tax in

1921. Laws of 1921, ch. 96, § 18. From its inception, Motor Vehicle Fund expenditures (and, thus, the gas tax) were restricted to highway and road construction purposes. *See id.*

Amendment 18's application to "excise taxes . . . on the sale, distribution or use of motor vehicle fuel" thus refers, quite specifically, to the gas tax. In 1944, the Motor Vehicle Fuel Tax was an excise tax imposed on the sale, distribution, or use of motor vehicle fuels. Laws of 1933, ch. 58, § 5. Amendment 18 was aimed precisely at excise taxes imposed on the "sale, distribution, or use" of such fuels.

In 1944, voters had specific reasons to be concerned with the use of gas tax revenues. Despite the statutory restriction on the use of Motor Vehicle Fund revenues, in the 1930s and early 1940s the legislature began diverting funds from the account (and thus the gas tax) to non-highway purposes. *See, e.g.*, Laws of 1933, ch. 192, § 2 (appropriating \$5,566,966 from the Motor Vehicle Fund to various Washington educational facilities). In fact, the Voters' Pamphlet for Amendment 18 decried that "[b]etween 1933 and 1943 in this state, in excess of \$10,000,000 of *your gas tax money* was diverted away from street and highway improvement and maintenance for other uses." CP at 172 (emphasis added).

Adding to this concern, Congress passed the Hayden-Cartwright Act in 1934, eliminating the provision of federal funding for road projects to states using their gas tax revenues for non-highway purposes.

23 U.S.C. § 126(a) (1964); *see also* Chad D. Emerson, *All Sprawled Out: How the Federal Regulatory System Has Driven Unsustainable Growth*, 75 Tenn. L. Rev. 411, 439 (2008). Importantly, the Act did not require states to sweep in all possible taxation on motor vehicle fuels.² 23 U.S.C. § 126(a) (1964). However, by threatening to withhold millions of dollars of federal highway money for diversions of gas taxes already on the books, Hayden-Cartwright proved a powerful incentive for states to lock-in their *existing* gas taxes. *See* Owen D. Gutfreund, *Twentieth-Century Sprawl: Highways and the Reshaping of the American Landscape*, 32-33 (2004).

Given the overlay of Hayden-Cartwright and the legislature's prior diversions, the predominant concerns regarding the gas tax in 1944 were that: (1) the tax was being diverted for purposes other than those for which it was enacted, and (2) such diversions seriously imperiled Washington's receipt of federal highway dollars. Thus, the natural and most obvious import of Amendment 18, as would have been understood by the framers and voters, is that the Amendment was aimed specifically at preserving the gas tax and all other revenue the legislature intended for highway use.

² Hayden-Cartwright provided that: "Federal aid for highway construction shall be extended only to those states that use at least the amounts provided by law on June 18, 1934, for such purposes in each State from State motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators of all kinds for the construction, improvement, and maintenance of highways. . . ." 23 U.S.C. § 126(a) (1964). The fact that Hayden-Cartwright only required the preservation of existing gas taxes also lends support to the conclusion that Amendment 18 was enacted to do precisely that.

AUTO argues that a statement in the 1943 Voter's Pamphlet referencing diversions of the gas tax indicates intent to perpetually earmark all revenue from gasoline for highway purposes. In fact, an examination of the Voter's Pamphlet in context establishes the opposite conclusion. The gas tax was a tangible item when this statement was made, and diversions of the gas tax had been occurring. Thus, when the Pamphlet spoke in 1943 of diversions of "your gas tax money," the reference meant just that: diversions of *the gas tax*, not additional taxes that also fell upon motor vehicle fuel but were levied for purposes other than highway use. In fact, as discussed below, Washington's business and occupation (B&O) tax unquestionably applied to sales of motor vehicle fuel in 1944; however, the resulting B&O revenues were not applied to highway purposes. Laws of 1935, ch. 180, §§ 4, 211. There is no indication that Amendment 18's framers and voters were concerned about B&O taxes from the sale of motor vehicle fuels being used for purposes other than highway purposes.³

The history of Amendment 18 does not support AUTO's broad claim that the enacting clause was intended to cover all possible taxes on motor vehicle fuel, irrespective of purpose. To the contrary, this history cuts against a broad interpretation of the enacting clause. Any doubts

³ Washington's B&O tax still applies to motor vehicle fuel sales. See RCW 82.04.250. To the best of the State's knowledge, no portion of Washington's B&O revenues have ever been applied to highway purposes.

must be resolved in favor of the Hazardous Substance Tax. *See Heavey*, 138 Wn.2d at 808.

D. Amendment 18's Proviso Grants Legislative Authority To Enact Taxes On Motor Vehicle Fuel Not Levied For Highway Purposes

Even if this Court agrees with AUTO's expansive reading of Amendment 18's enacting clause, the proviso to the Amendment grants the legislature authority to enact additional taxes on motor vehicle fuels when not levied for highway purposes. Because the tax falls squarely within the proviso, AUTO's claims would still fail.

By its plain terms, the proviso to Amendment 18 exempts certain revenue from the enacting clause, including "revenue from general or special taxes or excises not levied primarily for highway purposes. . . ." Const. art. II, § 40, cl. 2. While the proviso does not itself operate as a substantive enactment, the proviso "place[s] exceptions outside of the preceding enacting clause" such that their deposit into the Motor Vehicle Fund is not required. *Heavey*, 138 Wn.2d at 812-13.

Here, there is no dispute that the Hazardous Substance Tax is a special excise tax that is not levied primarily for highway purposes. *See generally* Chapter 82.21 RCW. Thus, the Hazardous Substance Tax falls squarely within the plain and unambiguous language of the proviso, and deposit into the Motor Vehicle Fund is not required.

AUTO attempts to avoid the plain language of the proviso and the undisputed nature of the Hazardous Substance Tax by claiming that effectuating the proviso would “dismantle” Amendment 18. App. Br. at 12. AUTO also claims that the proviso was intended only to preserve certain taxes in existence at the time of the Amendment’s adoption in 1944 and that the Hazardous Substance Tax would have been viewed as a “gas tax” by the framers and voters of Amendment 18. AUTO is incorrect on all counts.

First, *all* portions of Amendment 18 can be fully effectuated without any one provision swallowing the remainder. As discussed above, the most logical reading of Amendment 18—as would have been understood by its framers and voters—is that it was enacted to prevent diversion of the gas tax and other revenue specifically intended for highway purposes. Because the proviso broadly excludes taxes not levied for highway purposes, the proviso is properly viewed as expressly calling out this limited scope. As this Court stated in *Heavey*, “[o]ne can give full effect to the proviso . . . and simply conclude that *it was incorporated so as to preclude a misinterpretation of the enacting clause that would extend beyond its intended purview.*” *Heavey*, 138 Wn.2d at 811-12 (citation and internal quotations omitted) (emphasis added). With this in mind, and within the specific context of motor vehicle fuel, all portions of Amendment 18 can be effectuated thusly: the Amendment protects the gas

tax while preserving the ability of the legislature (or in this case, the people) to enact *other* taxes on motor vehicle fuel for *other* purposes.

Rather than swallowing the enacting clause, this reading reflects the very real protections provided by Amendment 18. It minimizes neither the impact nor the import of its anti-diversionary goal. There is no question that Amendment 18 locks in Washington's gas tax (i.e., Motor Vehicle Fuel Tax), which generates roughly \$1 billion per year for highway uses.⁴ No diversions of the 1921 gas tax have occurred since Amendment 18 was enacted, and the Amendment has repeatedly thwarted attempts to use gas tax revenues for activities outside Amendment 18's definition of "highway purposes." *See, e.g., State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969); *Auto. Club of Wash. v. City of Seattle*, 55 Wn.2d 161, 346 P.2d 695 (1959).

Such protection is the opposite of a "dismantling." Amendment 18 prohibits the legislature from diverting the gas tax. It does not prohibit leaving the gas tax untouched and enacting a separate tax on a different activity (possession) to address the voter's intent to dedicate funds to a problem wholly unrelated to highway purposes. To hold otherwise ignores the plain language of the proviso and distorts Amendment 18 beyond its intended purview.

⁴ *See* CP at 296, ¶ 4 (citing to Revenue's 2010 Tax Reference Manual available at: http://dor.wa.gov/content/aboutus/statisticsandreports/2010/tax_reference_2010/default.aspx).

Next, AUTO's assertion that the proviso merely preserved existing taxes fails on the face of the proviso and would require the Court to simply read language out of Amendment 18. App. Br. at 13-14. As AUTO points out, only three taxes possibly fell within Amendment 18's enacting clause at the time of its adoption in 1944: gas tax, the motor vehicle excise tax (MVET), and B&O tax intended to be used for highway purposes. The gas tax, as the specific target of the enacting clause, is obviously not exempted by the proviso. This leaves only the MVET and the B&O tax.

As this Court recognized in *Heavey*, Amendment 18's reference in the proviso to "any excise tax imposed on motor vehicles or the use thereof in lieu of a property tax" refers "quite specifically" to the MVET. *Heavey*, 138 Wn.2d at 807 n.2. *Heavey* also recognized the folly of attempting to place the MVET within both the general exemptions contained in the first part of the proviso and the specific exemption that follows. *Id.* As a result, of the three taxes in place in 1944, and possibly falling within the reach of the enacting clause, only the B&O tax is unaccounted for by the enacting clause or the specific exemption in the latter part of the proviso.

While the portion of the B&O tax applied to sales of motor vehicle fuel arguably falls within Amendment 18's enacting clause, it is a *general* tax, not levied for highway purposes, falling within the broad exemptions in the first portion of the proviso. Because the B&O tax is a general tax,

and because there were no special taxes on motor vehicle fuels in 1944 (aside from the gas tax itself), the only reasonable conclusion to be drawn from Amendment 18's exemption of "general *or special* taxes or excises" is that, at a minimum, the framers contemplated some future special taxes (such as the Hazardous Substance Tax) that would otherwise fall within Amendment 18's restrictions, but were to be exempted because they were not enacted for highway purposes.⁵ A reading that interprets the proviso as merely preserving the MVET and the B&O tax: (1) improperly renders the proviso's reference to special taxes meaningless, (2) ignores the express language of the proviso, and (3) constitutes exactly the sort of "subtle and forced construction" of Amendment 18 this Court has cautioned against. *See id.* at 811 (quoting *O'Connell*, 75 Wn.2d at 558).

E. AUTO's Arguments That The Hazardous Substance Tax Is A "Gas Tax" Are Unavailing

AUTO advances two additional arguments to support its theory that the Hazardous Substance Tax is a gas tax in disguise. None of these arguments overcome the plain language and history of Amendment 18.

⁵As is evident by the proviso's targeted exemption of the MVET, the framers of Amendment 18 understood how to narrowly identify an existing tax for preservation. *See* Const. art. II, § 40, cl. 2.

1. Authority cited by AUTO actually supports the State's position that the Hazardous Substance Tax is not a gas tax.

The 2001 Attorney General Opinion cited by AUTO supports the State's argument that the Hazardous Substance Tax does not fall under what the framers and voters understood as a gas tax in 1944. App. Br. at 14-15. The Opinion examined a proposal to extend the state sales tax to motor vehicle fuel. In determining whether such a move would violate Amendment 18, the Opinion framed the question under the proviso similar to what is currently before the Court: i.e., whether the tax in question (a gasoline sales tax) would constitute a "gas tax" as the framers of the Amendment and voters would have understood it in its natural meaning. CP at 179-80.

The Opinion first repudiated the same dismissive view of the proviso now advanced by AUTO:

It has been suggested that the fundamental non-diversionary purpose of Amendment 18 would be thwarted if the proviso were interpreted to permit any general, special, or excise taxes on motor vehicle fuel to be used for non-highway purposes, even if the taxes were not levied primarily for highway purposes. *This suggestion overstates the importance of the non-diversionary purpose of the 18th Amendment.*

Id. at 178 (emphasis added). In reaching this conclusion, the Opinion noted that the proviso was an "equally important part of [Amendment 18]" that cannot be disregarded in favor of the enacting clause. *Id.* at 178-79.

The Opinion went on to focus on the volume-based nature of the State's gas tax, finding that "the chief distinguishing characteristic of a gas tax, as understood at the time Amendment 18 was enacted, is that it is a tax measured by the volume of the gas as opposed to its value." *Id.* at 180. The Opinion ultimately concluded that it would not violate Amendment 18 to extend the state sales tax (a value-based tax) to motor vehicle fuel and use the resulting revenues for non-highway purposes. *Id.* at 181. By this measure, the Hazardous Substance Tax is not a gas tax because, like the sales tax at issue in the 2001 AGO, the Hazardous Substance Tax is levied based upon the wholesale value of target substances, not their volume. *See* RCW 82.21.030(1).

In addition to the distinction between volume-based and value-based taxes, however, there is an even more fundamental metric that takes into account the proviso's express use of the language "not levied primarily for highway purposes." Specifically, the use of this language in the proviso (and the enacting clause) again makes clear that the *purpose* of a tax is crucial in determining whether a tax is a "gas tax." Thus, it can be said that the defining characteristic of a gas tax is that it is a tax levied upon motor vehicle fuel specifically for highway purposes. This has always been the case with Washington's gas tax, at the time of its enactment in 1921, at the time of Amendment 18's adoption in 1944, and continuing today. In contrast, the Hazardous Substance Tax is, and has

always been, a tax levied only at the hazardous properties of a large swath of substances, including motor vehicle fuels. As a result, the Hazardous Substance Tax falls under the plain and unambiguous language of the proviso. Revenues from the Hazardous Substance Tax are not required to be deposited into the Motor Vehicle Fund.⁶

2. Amendment 18 is easily distinguished from the anti-diversionary provisions of both the Idaho and Oregon constitutions.

AUTO cites decisions by the supreme courts of Idaho and Oregon interpreting their own anti-diversionary amendments: App. Br. at 21-24 (citing *V-1 Oil Co. v. Idaho Petroleum Clean Water Trust Fund*, 128 Idaho 890, 920 P.2d 909 (1996); *Auto. Club of Or. v. State of Or.*, 314 Or. 479, 840 P.2d 674 (1992); and *Rogers v. Lane Cy.*, 307 Or. 534, 771 P.2d 254 (1989)). These decisions have no precedential value⁷ and fail to provide even persuasive authority because the Idaho and Oregon constitutional amendments at issue in those cases are facially distinct from Washington's Amendment 18.

The Oregon amendment restricts to highway purposes “[a]ny tax levied on . . . the storage, withdrawal, use, sale, distribution, importation,

⁶ Although the State does not comment on the propriety of dedicated funds, such funds, and in particular *constitutionally* dedicated funds, have been criticized as “unwise fiscal policy.” *Heavey*, 138 Wn.2d at 814 (Talmadge, J., concurring). As such, the taxing flexibility inherent in Amendment 18 is appropriately viewed as a common-sense approach that preserved an existing funding source for highway purposes while allowing *additional* taxes on motor vehicle fuel for other purposes.

⁷ See *State v. Wadsworth*, 139 Wn.2d 724, 740, 991 P.2d 80 (2000).

or receipt of motor vehicle fuel or any other product used for the propulsion of motor vehicles” Or. Const. art. IX, § 3a. The Idaho amendment broadly sweeps in “proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways” Idaho Const. art. VII, § 17. Neither provision contains any excepting or limiting language. *See* Idaho Const. art. VII, § 17; Or. Const. art. IX, § 3a.

By contrast, Washington’s Amendment 18 is considerably narrower in scope than either the Oregon or Idaho provisions. The first and most obvious distinction between Amendment 18 and its counterparts is that Amendment 18 contains a proviso that limits the reach of the enacting clause by expressly exempting a range of other revenues. Thus, Amendment 18 provides a flexibility that neither the Idaho nor Oregon courts were faced with when interpreting their respective, and facially rigid, anti-diversionary amendments. This lack of flexibility unquestionably played a crucial role in the Idaho and Oregon decisions. For example, the Court in *Automobile Club* stated: “The people of Oregon have directed that *all* government revenues from motor vehicle fuel taxes be expended for specified highway purposes; we must honor that direction.” *Auto. Club*, 314 Or. at 488. The people of Washington did not direct the same in Amendment 18.

Amendment 18 also differs from the Idaho and Oregon amendments because neither the Idaho nor the Oregon amendments are concerned with the purposes behind taxes or fees. *See* Idaho Const. art. VII, § 17; Or. Const. art. IX, § 3a. By contrast, and as discussed above, Amendment 18 applies expressly to taxes and fees that are (or were) actually levied for highway purposes. Thus, neither the Idaho nor the Oregon courts were presented with anti-diversionary amendments targeted by purpose, as is Washington's Amendment 18.

In sum, because the Idaho and Oregon amendments broadly sweep in categories of revenue without regard to intent and without any limiting language, cases interpreting these amendments are of no value in interpreting Amendment 18. AUTO's reliance on them is misplaced. AUTO has failed to meet its heavy burden of demonstrating that the Hazardous Substance Tax is unconstitutional.

F. AUTO's Lawsuit Was Properly Dismissed Because It Was Untimely Filed

1. The application of limitations principles to the present lawsuit is warranted by the facts of the suit.

The State argued, and the trial court agreed, that AUTO's lawsuit is untimely because: (1) it was not filed within a reasonable time under the UDJA; and (2) it is barred by the doctrine of laches. CP at 683. AUTO argues that this is akin to allowing an unconstitutional act to become

constitutional over time. App. Br. at 25-29. However, AUTO exaggerates the import of the trial court's decision.

The State's timeliness arguments are not made in a vacuum but are premised on the fact that AUTO was not only aware of the Hazardous Substance Tax when it passed in 1988, but actually negotiated a similar tax and made a deliberate decision not to challenge the tax after it passed. The extent of AUTO's knowledge is reflected in the recent testimony of AUTO's president to the legislature, where he stated in pertinent part:

I sat atop of this building at one o'clock in the morning and negotiated a tax called the Hazardous Substances Tax, there almost 25 years ago And now I want to end with a thing called the 18th Amendment and how we ended up to where we are today. We reached an agreement in 1988 that we would have a legislative alternative called 97B and 97. Everybody knew, just like this invoice shows, that there's a gas tax. This is the golden goose. The golden goose is my gas stations, okay, and the diesel pump. So why did we not have a challenge to this before? Because we wanted an alternative to run alongside the environmental community's initiative 97. And we decided—and I was in the middle of the hallway out here when it was decided that it would be bad sportsmanship to run an alternative. And if we lost and the public chose 97, which it did, that we then filed a challenge and undid all of the tax. So there was an agreement made. Some of us weren't all sober, but we made it. And we said we would go forward, we'll accept this as the vote of the people, and we did, and no one has challenged it to this day.

CP at 121-22. AUTO's intimate knowledge of the tax coupled with its 22 year delay in filing suit led the trial court to conclude that the suit is time barred.

Such a result is not akin to forever barring an appropriate constitutional challenge. However, courts should not presume that the State has violated the constitution for an extended period of time and should not lightly undertake decisions that could upset decades of reliance on existing law. *See, e.g., Heavey*, 138 Wn.2d at 807-08 (Court noted with skepticism that the practical effect of Heavey's arguments in that case was that the legislature was violating Amendment 18 for an extended period). In this sense, allowing a timeliness defense based on a particular set of facts should be no different than applying the doctrines of judicial restraint to constitutional challenges.

For example, in the case of *DeNino v. State*, the Court dismissed a constitutional challenge to the Natural Death Act based on lack of justiciability. *DeNino v. State ex rel. Gorton*, 102 Wn.2d 327, 330-32, 684 P.2d 1297 (1984). The Natural Death Act allowed individuals to provide directives to their doctors authorizing the withholding of life-sustaining procedures and required the directive to state that its terms will have no effect during the course of a pregnancy. *Id.* at 328. Ms. DeNino challenged this provision under the UDJA on the basis that it violated her constitutional right to privacy. The Court dismissed the case on the basis

that Ms. DeNino was neither pregnant nor terminally ill and, therefore, the Court was not presented with a live dispute. *Id.* at 331. In dismissing the case, the Court noted that important constitutional rights in and of themselves are not grounds for overriding justiciability requirements. *Id.* at 332.

The Court reached a similar result in the more recent case of *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 27 P.3d 1149 (2001). There, the plaintiff sought a declaratory judgment that a vehicle dealer licensing statute violated the Commerce Clause and the First and Fourteenth Amendments of the United States Constitution. *Id.* at 405-06. The Court affirmed dismissal of the suit on the basis that at least two of the four justiciability requirements were not met.⁸ *Id.* at 411-416.

AUTO cites *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 960 P.2d 919 (1998) for the proposition that constitutional challenges can be filed several years after a law passes. App. Br. at 27, 31. However, the Court did not address the issue of timeliness in *DeYoung* because no party raised a timeliness defense. Therefore, *DeYoung* is not helpful to AUTO.

⁸ See also *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994) (dismissing on justiciability grounds a constitutional challenge to state spending and tax limits in Initiative 601); *Wash. Beauty College, Inc. v. Huse*, 195 Wash. 160, 80 P.2d 403 (1938) (dismissing on justiciability grounds a constitutional challenge to educational requirements for obtaining a hairdresser's license).

The *O'Brien* case cited by AUTO is similarly unhelpful. App. Br. at 28-29 (citing to *O'Brien v. Wilson*, 51 Wash. 52, 97 P. 1115 (1908)). *O'Brien* stands for the proposition that public school lands cannot be acquired by private parties through adverse possession. *O'Brien*, 51 Wash. at 58. It does not, as AUTO claims, stand for the broad proposition that “[a] statute of limitations may only apply if its application does not subvert or contravene the Constitution.” App. Br. at 28.

Because the State’s timeliness arguments are specific to the facts of this case, the extreme examples presented by AUTO will never come to pass. App. Br. at 27-28. An individual who is affected by a racially exclusionary ordinance would not be barred from bringing an action because the plaintiff’s cause of action would not accrue until the plaintiff himself is affected. A criminal defendant impacted by an allegedly unconstitutional statute would not be barred from challenging that statute because the defendant’s cause of action would not accrue until she is charged under the statute.

Unlike AUTO’s examples, AUTO’s cause of action accrued 23 years ago. AUTO then waited 22 years to file suit. AUTO’s claim should be time barred because AUTO did not file within a reasonable time under the UDJA and/or AUTO is barred by laches. Either theory supports dismissal.

2. AUTO's claim was not brought within a reasonable time under the UDJA.

Because the UDJA does not contain an explicit statute of limitations, actions for declaratory judgments must be brought within a "reasonable time." *Brutsche v. City of Kent*, 78 Wn. App. 370, 376-77, 898 P.2d 319 (1995). In determining what constitutes a reasonable time, the Court of Appeals has drawn an analogy to statutes of limitation for similar actions as prescribed by "statute, rule of court, or other provision." *Id.* (citation omitted). For example, in a case seeking declaratory judgment that a special assessment was unconstitutional, the Court of Appeals found that one year constituted a reasonable time within which to challenge the assessment by likening it to an action to recover a property tax, which is subject to a one year statute of limitations. *Cary v. Mason Cy.*, 132 Wn. App. 495, 504, 132 P.3d 157 (2006).

This Court has not yet applied the "reasonable time" rule to actions under the UDJA, but it has done so in cases involving writs of certiorari. *See, e.g., Clark Cy. Pub. Util. Dist. 1 v. Wilkinson*, 139 Wn.2d 840, 847, 991 P.2d 1161 (2000); *Akada v. Park 12-01 Corp.*, 103 Wn.2d 717, 718-19, 695 P.2d 994 (1985). For statutory writs, the Court held that "[a] reasonable time within which to apply for a statutory writ is the analogous statutory or rule time period" *Clark Cy. Pub. Util. Dist. 1*, 139 Wn.2d at 847. For constitutional writs, the petition is time barred if the plaintiff

unreasonably delayed seeking the writ as determined by laches principles (as discussed below). *Id.* at 848.

At the trial level, the State identified the three year statute of limitations for misappropriation of public funds as the most analogous time period. RCW 4.16.080(6). This was based on AUTO's assertions that Hazardous Substance Tax revenues are unlawfully deposited into the toxics control accounts rather than into the Motor Vehicle Fund. CP at 4. AUTO's complaint also specifically names the State Treasurer as the public officer in trust of those revenues. CP at 1-2.

AUTO argues that misappropriation of public funds is not a proper analogue, but identifies no alternative. App. Br. at 31. The only other reasonable alternative appears to be an action for a refund of the excise tax, which is subject to a four year statute of limitations. RCW 82.32.060(1). Regardless of which analogue is used, a 22 year delay is unreasonable.

AUTO also argues that any time bar is inappropriate when constitutional claims are at stake. App. Br. at 29-31. However, appellate courts have had no difficulty applying a time bar under the UDJA in cases involving constitutional challenges. *Cary*, 132 Wn. App. at 502 (one year statute of limitations applies to constitutional challenge to property assessment); *Brutsche*, 78 Wn. App. at 380 (30 day statute of limitations applies to constitutional challenge to zoning ordinances). *See also Feil v.*

E. Wash. Growth Mgmt. Hearings Bd., No. 84369-4, slip op. at 7-8 (Wash. Aug. 18, 2011) (constitutional challenge to county development regulations filed too late to be considered).

Last, AUTO argues that the Court cannot impose a reasonable time rule without impermissibly grafting words onto the UDJA. App. Br. at 32. However, the Court has already done exactly that by creating a reasonable time rule in the context of statutory writs of certiorari, discussed *supra*. Contrary to AUTO's arguments, it is not absurd for courts to impose limits on filing lawsuits when the legislature has been silent on the issue. Furthermore, *Brutsche* was decided by the Court of Appeals in 1995 and the legislature has not amended the UDJA to undo its holding, thereby signaling legislative acquiescence. See, e.g., *Buchanan v. Int'l Brotherhood*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980) (legislature's failure to amend a statute after judicial construction can be presumed to indicate acquiescence in the judicial interpretation of the statute).

AUTO's lawsuit was not appealed within a reasonable time. This is true whether "reasonable time" is determined through analogy to a similar action or by application of laches principles. Either way, the superior court properly dismissed the suit as untimely under the UDJA.

3. AUTO's lawsuit is barred by the doctrine of laches.

Laches is an equitable defense based on estoppel. *Davidson v. State*, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991). The defense is "an

implied waiver arising from knowledge of existing conditions and acquiescence in them.” *Buell v. City of Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972) (citing *Pierce v. King Cy.*, 62 Wn.2d 324, 382 P.2d 628 (1963)). Laches can apply when a party “had knowledge or a reasonable opportunity to discovery that he had a cause of action” *Lopp v. Peninsula Sch. Dist.* 401, 90 Wn.2d 754, 760, 585 P.2d 801 (1978).

Laches consists of two elements: (1) inexcusable delay; and (2) prejudice.⁹ *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 241, 88 P.3d 375 (2004). In determining whether delay is inexcusable, the Court can look at various factors including analogous statutory or rule limitations periods. *Clark Cy. Pub. Util. Dist. 1*, 139 Wn.2d at 848-49. However, the main component of the doctrine is the resulting prejudice to the defendant and others. *Id.* at 849. The defendant has the burden of showing whether and to what extent prejudice has resulted because of the delay. *Id.*

a. AUTO was aware of the tax when it passed and made a deliberate decision not to challenge it.

AUTO’s delay in bringing suit is both long and inexcusable. AUTO waited 22 years to file suit despite the fact that AUTO was aware

⁹ Many older cases cite three elements of laches: (1) knowledge; (2) unreasonable delay; and (3) damage to the defendant. *See, e.g., Buell*, 80 Wn.2d at 522. The two-part test appears to collapse the first two elements of knowledge and unreasonable delay into one element of “inexcusable” delay.

of its legal claims even before the tax took effect in 1988. Despite this knowledge, AUTO acquiesced by choosing not to challenge the tax.

AUTO argues that it did not become aware of constitutional issues with the tax until recently. App. Br. at 32-33. This is contradicted by the admission of AUTO's president that he was aware of potential Amendment 18 claims in 1988, but chose not to challenge the tax at that time. CP at 121-22.

AUTO also argues that it made a political decision to respect the voters' will by foregoing a constitutional challenge, App. Br. 36, but that this period of acquiescence ended when the legislature proposed an increase to the tax and diverted tax revenues to the general fund. *Id.* This argument is irrelevant. The record is clear that AUTO knew of the tax, recognized that there was a potential Amendment 18 challenge to the tax, and chose not to challenge the tax for 22 years. This delay is inexcusable, thereby satisfying the first element of laches.

b. The State is prejudiced by AUTO's 22-year delay in filing its lawsuit.

The State is considerably prejudiced by AUTO's delay. After the voters passed Initiative 97, significant portions of the environmental programs built in reliance on Hazardous Substance Tax revenues deal directly with the polluting legacy of petroleum products. At least 85 percent of the more than 11,000 contaminated sites are contaminated with

some form of petroleum products, including motor vehicle fuels. CP at 184, ¶ 5. Many of these sites are businesses of the type AUTO purports to represent. For example, at least 13 percent of all cleanup sites are associated with current or former retail gas stations. CP at 184-85, ¶ 6. There is thus a direct nexus between petroleum products, contaminated sites, and the Hazardous Substance Tax funds used to support clean up of these sites.

In the decades following enactment of Initiative 97, the State instituted a major response to contamination across the state, including contamination from motor vehicle fuels. Pursuant to the Initiative, 47.1 percent of the total tax receipts are deposited into the State Toxics Account. *See* RCW 70.105D.070(2). Revenues from this account fund numerous programs by state agencies charged with cleaning up contaminated sites, improving hazardous waste management, and preventing future hazardous substance contamination.¹⁰ CP at 189, ¶ 6; 201-242 (Ex. 1 at 6-47).

For example, the State Toxics Account funds 19-23 percent of Ecology's total operating budget. CP at 296, ¶ 6. The majority of the funds are used by Ecology's Toxics Cleanup and Hazardous Waste Programs to investigate and clean up contaminated sites, ensure permit

¹⁰ While the Department of Ecology is the primary recipient, other agencies include State Patrol, Health, Parks, Natural Resources, and Agriculture. CP at 227-242.

compliance on existing sites, and provide technical assistance to businesses to avoid future contamination. CP at 188-89, ¶¶ 3, 5. Over the past 10 years, 59-71 percent of the Toxics Cleanup Program has been funded by the State Toxics Account. CP at 296-97, ¶ 7. This voter-enacted program and the environmental protections it provides would be decimated if its primary source of funding is significantly depleted. CP at 297, ¶ 8; 188-89, ¶ 5.

State Toxics funding is also used to wholly fund Ecology's program to respond to and clean up oil and hazardous materials spills. CP at 297-97, ¶ 7. The Department of Agriculture uses State Toxics Account revenues to establish programs aimed at eliminating stockpiles of unusable pesticides and preventing future stockpiles from being created. CP at 227-29. And, there are many other environmental functions of state government that are almost exclusively or partly funded by the State Toxics Account. CP at 201-242.

The remainder of Hazardous Substance Tax revenue, 52.8 percent, is allocated to the Local Toxics Account. *See* RCW 70.105D.070(3). These funds are provided to local governments to fund a wide range of activities related to hazardous substances, including cleanup actions, waste recycling and reduction programs, and removal of derelict or abandoned vessels. CP at 189, ¶ 7. Some of the more significant and well-known cleanup actions funded by Local Toxics revenues include the Lower

Duwamish Waterway (Seattle), Bellingham Bay, the Thea Foss Waterway (Tacoma), and the Ephrata landfill site. CP at 189-90, ¶ 8. These cleanup actions are important not only because they protect human health and the environment, but also because they allow for the redevelopment and re-use of previously contaminated properties, thereby providing an economic boon to the surrounding communities. CP at 190-91, ¶¶ 10-11.

If AUTO were to prevail, funding for clean up and prevention of contamination—at both the state and local level—would be drastically reduced, including clean up of leaking motor vehicle fuels from underground storage tanks such as those at gas stations. CP at 188-89, ¶ 5. The programs described above have been developed at the voters' behest and in reliance on the Hazardous Substance Tax as a source of funding. The future viability of these programs depends on this source of continued funding. CP at 191, ¶ 12. The State is therefore heavily prejudiced in that AUTO allowed over 20 years of programs to be developed around, and in reliance on, the Hazardous Substance Tax prior to filing suit. The second element of laches is met.

c. Case law does not prevent laches from barring a constitutional challenge under appropriate circumstances.

AUTO cites two court of appeals cases for the proposition that laches cannot bar a constitutional challenge App. Br. at 33-34 (citing *Swartout v. City of Spokane*, 21 Wn. App. 665, 586 P.2d 135 (1978) and

Citizens for Responsible Gov't v. Kitsap Cy., 52 Wn. App. 236, 758 P.2d 1009 (1988)). However, neither case stands for the proposition for which it is cited. *Swartout* involved invalidation of a city ordinance that was passed in violation of city charter procedures. *Swartout*, 21 Wn. App. at 673-74. In dicta, the *Swartout* court articulated the general principle that an invalid ordinance can be challenged at any time, but the court then proceeded to apply laches and concluded that the plaintiff's challenge to the ordinance was not barred because the suit was promptly filed after the ordinance passed. *Id.* at 674-75.¹¹

The *Citizens for Responsible Government* court stated in dicta the narrow principle that zoning regulations that are void can be challenged at any time. *Citizens for Responsible Gov't*, 52 Wn. App. at 239. However, the court found no similar bar to voidable (as opposed to void) ordinances and concluded that the superior court had properly dismissed an untimely lawsuit challenging a zoning ordinance on procedural grounds. *Id.* at 239-41. The court also cited *Swartout* for the proposition that laches can bar a challenge to even a void act if there is a public interest in the finality of the government action being challenged. *Id.* at 240, n.2. *See also Swartout*, 21 Wn. App. at 674 (citing *LaVergne v. Boysen*, 82 Wn.2d 718,

¹¹ AUTO misquotes *Swartout* as stating “[g]enerally a void statute is of no effect and may be successfully attacked at any time.” App. Br. at 34. The actual quote is “[g]enerally, a void *legislative act* is of no effect and may be successfully attacked at any time.” *Swartout*, 21 Wn. App. at 674 (emphasis added).

721, 513 P.2d 547 (1973) (applying laches based on public interest in finality of elections and need for school districts to prepare their budgets with full knowledge of available funds)). Neither case stands for the proposition that laches can never bar a constitutional challenge.¹²

AUTO also argues that it brings this case “in the public interest” which should weigh against the application of laches. App. Br. at 35-36 (citing *Lopp*, 90 Wn.2d at 758-59). However, the *Lopp* court held that laches *can* bar a public interest lawsuit. *Id.* at 759. To reach this conclusion, the Court reasoned that laches must be decided on a case-by-case basis, and that the public interest needs to be balanced against the harm caused by the delay in bringing the suit. *Id.* The Court ultimately concluded that laches should bar a challenge to a special election that was filed one month after the election because of resulting harm to the school district that relied on the results of the election to solicit and receive a favorable bid on its bonds. *Id.* at 761. Under the circumstances, the Court found that the lawsuit had “more potential for harm to the public interest than good.” *Id.* at 761-62.

Similar circumstances exist here. Washington voters, by a large margin, approved the Hazardous Substance Tax while simultaneously

¹² Similarly, the Attorney General opinion cited by AUTO is unhelpful to its argument because it simply restates the general proposition that a void ordinance has no force and effect and can be challenged at any time. App. Br. at 34 (citing to AGO 2002 No. 7).

rejecting a measure that would have resulted in lower taxation of petroleum products. CP at 90-112. Thus, voters knowingly chose to have the tax apply to a full range of petroleum products.

AUTO argues there is no prejudice to the State because the State could still use the tax revenues for roads. App. Br. at 37. However, the voters did not choose to use the tax for roads. They chose to use it for environmental programs, including clean up of petroleum-contaminated sites. As noted above, entire environmental programs have been created in reliance on the Hazardous Substance Tax as their funding source. Heavily contaminated industrial properties have been cleaned up and returned to productive economic use. CP at 190-91, ¶¶ 10-11. Contaminated school yards have been cleaned up so that children may safely play there. CP at 209-10. The dangerous chemicals at hundreds of methamphetamine labs have been addressed to eliminate danger to the public. CP at 220. State Patrol firefighters have been trained to respond to and reduce the risks from combustion of hazardous materials. CP at 242. These and many other environmental functions of government would be diminished or eliminated altogether if the funding source for these functions is depleted.¹³ The public and voters' interest is furthered by barring this lawsuit rather than allowing it to move forward.

¹³ Although Hazardous Substance Tax revenue is critical to the continued viability of numerous environmental programs, the revenues from the tax are relatively small when compared to the revenues derived from the gas tax which is used for roads.

d. Tower Energy Group is in privity with AUTO.

AUTO argues that Tower Energy Group should not be barred even if AUTO is. App. Br. at 33. However, the record below demonstrates that Tower Energy Group is in privity with AUTO. In AUTO's original suit, Tower submitted a declaration as a member of AUTO that pays the tax. CP at 667-68. After the court dismissed the case for lack of standing, AUTO filed a taxpayer lawsuit letter with the Attorney General's Office and then re-filed the action as a taxpayer action, adding Tower as a plaintiff to help solidify standing. CP at 3-4. Under these facts, laches is appropriately applied to both plaintiffs. *Boyle v. Oleson*, 58 Wash. 670, 674-75, 109 P. 203 (1910) (if a party is barred by laches, those in privity are also barred).

Furthermore, even if the facts did not demonstrate Tower's privity with AUTO, Tower should be found to be in privity based on its membership in AUTO. "One of the relationships that has been deemed 'sufficiently close' to justify a finding of privity is that of an organization or unincorporated association filing suit on behalf of its members." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*,

Whereas the Hazardous Substance Tax netted \$127,055,000 in revenues in 2009 and constituted 0.8 percent of all state tax revenues, the gas tax netted \$965,721,000 in the same year, constituting 6.2 percent of state tax revenues. See CP at 296, ¶ 4 (citing to Revenue's 2010 Tax Reference Manual available at: http://dor.wa.gov/content/aboutus/statisticsandreports/2010/tax_reference_2010/default.aspx). The relief AUTO seeks could result in the defunding of numerous environmental programs in exchange for no more than modest increases in road-related revenues.

322 F.3d 1064, 1082 (9th Cir. 2003). Washington appellate courts have applied this principle to bar members of an association from individually pursuing claims that were previously pursued by the association, and vice versa. *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Ind.*, 78 Wn. App. 707, 716, 899 P.2d 6 (1995) (trade association was in privity with its employer members in claims involving alleged miscalculation of workers' compensation benefits); *Bergh v. State*, 21 Wn. App. 393, 404, 585 P.2d 805 (1978) (individual fishermen were in privity with the gillnetters trade association in action involving tort claims based on shortened fishing season).

The specific facts of this case and Tower's membership in AUTO demonstrate that Tower and AUTO are in privity. The case was appropriately dismissed against both plaintiffs.

G. Even If Successful On The Merits, AUTO Is Not Entitled To Attorneys' Fees

AUTO asks for attorneys' fees under the "common fund" theory in the event that it prevails on its Amendment 18 claim. AUTO's request should be denied because AUTO fails to meet the narrow circumstances required for an award of fees under this theory.

This Court has "consistently refused to award attorneys' fees as part of the cost of litigation in the absence of a contract, statute, or recognized ground in equity." *Seattle Sch. Dist. 1 v. State*, 90 Wn.2d 476,

540, 585 P.2d 71 (1978). Here, however, AUTO claims that the “common fund” theory entitles it to an equitable award of attorneys’ fees. In general, this theory provides that “a court may, in its discretion, allow counsel fees to a complainant who has maintained a successful suit for the preservation, protection, or increase of a common fund” on the rationale that the complainant “has brought ‘benefit’ to the fund.” *Grein v. Cavano*, 61 Wn.2d 498, 505, 379 P.2d 209 (1963).

In support, AUTO cites to this Court’s decision in *Weiss v. Bruno*, 83 Wn.2d 911, 523 P.2d 915 (1974), which recognized a variation on the common fund concept even when there is no specific, identifiable “fund” from which to draw. The Court based its award upon four “narrow and very limited circumstances”:

(1) a successful suit brought by petitioners (2) challenging the expenditure of public funds (3) made pursuant to patently unconstitutional legislative and administrative actions (4) following a refusal by the appropriate official and agency to maintain such a challenge.

Id. at 914 (emphasis added).¹⁴ This exception has been narrowly construed. *See Seattle Sch. Dist. 1*, 90 Wn.2d at 545. AUTO’s request for fees fails under this theory.

To begin with, even if AUTO prevails on the merits of its claim, AUTO’s request for fees fails the third prong of the *Weiss* formulation: the

¹⁴ AUTO misrepresents the *Weiss* standard by omitting the word “patently” from its formulation of the third requirement. *See App. Br.* at 38.

Hazardous Substance Tax is not a patently unconstitutional provision. The tax has been in effect and unchallenged for 23 years. When the tax was challenged, it presented a case of first impression with regard to a constitutional provision that has been in place since 1944. In examining the novel question presented by this case, one court determined that the Hazardous Substance Tax did not violate Amendment 18. CP 619-20. Furthermore, the Solicitor General, on behalf of the Attorney General, was also asked to examine the issue before AUTO filed its present action. After an independent review of AUTO's arguments, the tax, Amendment 18, and relevant case law, the Solicitor General concluded that the Hazardous Substance Tax did not violate Amendment 18. CP 118-19. Finally, while not answering the specific question presented by this case, the 2001 Attorney General Opinion concluded that value-based taxes on motor vehicle fuel (as is the Hazardous Substance Tax) do not violate Amendment 18 when not used for highway purposes because they do not resemble the "gas tax" as voters would have understood in 1944. CP 180-181. In short, three independent analyses of the Hazardous Substance Tax demonstrate that the tax does not violate Amendment 18. Even if this Court disagrees, the closeness of this question establishes that the Hazardous Substance Tax is not "patently" unconstitutional.

Next, the common fund theory requires that the party seeking recompense protect, enhance, or create a fund. *Seattle Sch. Dist 1.*, 90

Wn.2d at 544-45. In this case, AUTO claims that the relief it seeks is to have the portion of Hazardous Substance Tax from motor vehicle fuels placed into the Motor Vehicle Fund. App. Br. at 44. However, it is not clear that the Court can grant this relief without impermissibly rewriting the statute that directs Hazardous Substance Tax funds to be paid into the toxics control accounts. The more likely relief is that the State would be ordered not to collect the tax at all from motor vehicle fuels. This would do nothing to protect or enhance the Motor Vehicle Fund.

Finally, even if AUTO could meet its burden under *Weiss*, the only “fund” from which AUTO can seek payment is incapable of making the award. The “fund” AUTO claims to protect is the Motor Vehicle Fund. As AUTO itself points out, Motor Vehicle Fund monies may only be expended for “highway purposes” as that term is expressly defined by Amendment 18. Paying an award of attorney’s fees is not a highway purpose. *See Auto. Club of Wash.*, 55 Wn.2d at 167, 171 (payment of tort judgment against the State violated Amendment 18 because “construction, operation, maintenance, or betterment” of State’s highway system must be construed in the literal sense, not “as an accounting concept”). Thus, awarding AUTO’s attorney’s fees in this case would violate Amendment 18.

For these reasons, if AUTO were to prevail, the Court should decline its request for attorney’s fees.

V. CONCLUSION

The plain language of Amendment 18's enacting clause does not apply to the Hazardous Substance Tax, which is not a "gas tax" as would have been contemplated by the voters and framers of the Amendment. Even if the enacting clause applies, the Hazardous Substance Tax is exempted by Amendment 18's proviso. Finally, AUTO unreasonably delayed in bringing its claim and its claim should be denied as untimely. Based upon the foregoing, the State respectfully requests that summary judgment be affirmed.

RESPECTFULLY SUBMITTED this 26th day of September,
2011.

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