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**SUPREME COURT OF THE STATE OF WASHINGTON**

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AUTOMOTIVE UNITED TRADES ORGANIZATION,

Appellant,

v.

STATE OF WASHINGTON, JAY INSLEE, PAT KOHLER,

Respondents.

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**BRIEF AMICUS CURIAE OF INDIAN TRIBAL GOVERNMENTS  
PARTY TO FUEL TAX AGREEMENTS (AS AMENDED)**

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## **IDENTITY AND INTEREST OF THE AMICI TRIBES**

The Confederated Tribes of the Chehalis Reservation, the Jamestown S’Klallam Tribe, the Kalispel Tribe of Indians, the Nisqually Indian Tribe, the Port Gamble S’Klallam Tribe, the Puyallup Tribe of Indians, the Shoalwater Bay Indian Tribe, the Skokomish Indian Tribe, the Spokane Tribe of Indians, the Squaxin Island Tribe, the Stillaguamish Tribe of Indians, the Suquamish Tribe, the Swinomish Indian Tribal Community, the Tulalip Tribes, and the Upper Skagit Indian Tribe (the “Amici Tribes”) submit this brief in support of Respondents. Each Tribe is party to a fuel tax agreement that Appellant Automotive United Trades Organization (“AUTO”) seeks to derail through this action.

The Amici Tribes possess unique knowledge and information regarding the background and implementation of the agreements, and submit this brief to protect their substantial interests in them. Under the agreements, tribal retailers pay state tax on all fuels they purchase, and the State refunds a percentage of those tax revenues to tribal governments, which use the refunds for road and bridge construction, police and transit services, and other transportation-related projects. AUTO seeks to enjoin payment of the refunds, and in doing so, threatens the ability of tribal governments to fund important transportation projects and services on and near their reservations. *See Auto. United Trades Org. v. State*, 175 Wn.2d

214, 224, 285 P.3d 52 (2012) (“*AUTO P*”) (explaining that AUTO “effectively seeks to erode the contracts by preventing the tribes from receiving their bargained-for benefit.”). AUTO’s arguments would have this Court impose unprecedented constraints on the Legislature’s authority to craft state tax policy, and should be rejected.

### STATEMENT OF THE CASE

The Amici Tribes adopt the State’s statement of the case and procedural history. *See* State Br. at 3-16.

### ARGUMENT

#### **I. The Fuel Tax Refunds Support Important Tribal Transportation Projects and Services.**

##### **A. The Legislature Intended the Refunds to Support Infrastructure Improvements in Indian Country.**

There is a significant transportation infrastructure deficit in Indian country. There are more than 150,000 miles of federal, tribal, state and local roads serving Indian communities in the United States.<sup>1</sup> More than 80 percent of the federal roads are in unacceptable condition.<sup>2</sup> Nearly two-thirds of all these roads remain unpaved, and one-quarter of the bridges are deficient.<sup>3</sup> The system is chronically underfunded, with per-mile

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<sup>1</sup> Bureau of Indian Affairs, Div. of Transp., *Who We Are*, <http://tinyurl.com/ljtxnl>.

<sup>2</sup> *Id.*

<sup>3</sup> Statement of John R. Baxter, Assoc. Adm’r for Fed. Lands, Fed. Highway Admin., U.S. Dep’t of Transp., *Field Hrg. on Tribal Transp. Issues Before the Comm. on Indian Affairs, U.S. Senate* at 2 (Oct. 15, 2010), <http://tinyurl.com/q666atr>.

maintenance spending less than 15 percent of that spent on state roads.<sup>4</sup> It is unsurprising then that American Indian pedestrian injury and highway fatality rates are the highest of any racial or ethnic group in the country.<sup>5</sup>

Erasing this infrastructure and public safety deficit is critical to providing Indians and non-Indians with safe, efficient access to and across Indian reservations. Improved transportation systems and services are also essential for economic development in tribal communities, where unemployment remains stubbornly high—nearly 50 percent by some measures.<sup>6</sup> Tribal government transportation spending flows into surrounding communities, and reservation road improvements increase regional connectivity. These shared benefits are especially significant in rural areas, where most Indian reservations are located.<sup>7</sup>

In 2007, the Washington Legislature recognized the critical role of tribal governments in addressing the unique infrastructure needs in Indian country. When the fuel tax amendments, SB 5272, were under consideration, state and tribal representatives supported the legislation and expressed the desire to cooperate in transportation development.<sup>8</sup>

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<sup>4</sup> Nat'l Congress of Am. Indians, *Tribes & Transp.: Policy Challenges & Opportunities* at 2 (2013), <http://tinyurl.com/q2gtfac>.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 9-11.

<sup>8</sup> See Testimony of Sharon Whitehead, Deputy Dir., Dep't of Licensing, and Marty Loesch, Swinomish Indian Tribal Comty., *Senate Transp. Comm. Hrg.*, Jan. 24, 2007, [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2007010156](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2007010156).

Legislators were well aware of the need to improve transportation on Indian reservations.<sup>9</sup> According to the Senate Bill Report, “[i]t is important that the tribes have access to funding for transportation infrastructure that can and will be used in partnership with local and state transportation projects.” AUTO Reply Br., App. C at 3. The passage of SB 5272 represents the Legislature’s strong commitment to meet that need.

Tribal governments must use fuel tax refunds or equivalent sums on “Planning, construction, and maintenance of roads, bridges, and boat ramps; transit services and facilities; transportation planning; police services; and other highway-related purposes.” RCW 82.36.450(3)(b), 82.38.310(3)(b). A few examples since 2007 show that the refunds have led to exactly the kind of transportation efforts the Legislature envisaged:

- The Puyallup Tribe and the City of Puyallup worked together to install a signal/traffic controller and connect 25 traffic signals on a major urban road, improving traffic flow.<sup>10</sup>
- In suburban Snohomish County, the Tulalip Tribes paid design, engineering, and construction costs for a new, wider overpass across Interstate 5 and to improve highway access ramps, serving Tulalip-Marysville area residents and businesses.<sup>11</sup> CP 806.

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<sup>9</sup> *Id.* (comments of Senate Transp. Comm. Chair Mary Margaret Haugen).

<sup>10</sup> Puyallup Tribe of Indians, *Summary Transp. Expenditures*, <http://tinyurl.com/kwjvvl>.

<sup>11</sup> Tulalip Tribes of Wash., Resolution Nos. 2013-298, 2014-282, 116th St. Interchange Bridge Deck Construction, Attach. 1 to Apr. 8, 2015 Letter from Deputy Commissioner Walter M. Burton RE: *Auto. United Trades Org. v. The State of Wash.*; *Jay Inslee, et al.*, Cause No. 89734-4, available on file at the Washington State Law Library.

- In rural Jefferson County, the Jamestown S’Klallam Tribe and State Department of Transportation cooperated in a safety and mobility project on heavily traveled U.S. Highway 101. CP 801.
- In Skagit County, the Swinomish Indian Tribal Community worked with federal, state, and county agencies to build a new road from State Highway 20 that serves local businesses. CP 805.

**B. AUTO’s Claim that the Tribes’ Use of the Fuel Tax Refunds Violates the 18<sup>th</sup> Amendment Has No Merit.**

The list of statutorily authorized uses of tribal fuel tax refunds is broader than the scope of “highway purposes” under the Washington Constitution, Article II, Section 40 (the “18<sup>th</sup> Amendment”). *Compare* RCW 82.36.450(3)(b), 82.38.310(3)(b) *with, e.g., State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 562-63, 452 P.2d 943 (1969) (planning for public transportation system is not an 18<sup>th</sup> Amendment highway purpose).

Indeed, AUTO conceded in the court below that tribal governments’ use of the fuel tax refunds is *not* constrained by the 18<sup>th</sup> Amendment. *E.g.*, CP 400 (“AUTO does not dispute that *if* the disbursements are valid fuel tax refunds under the 18th Amendment, they may be provided . . . without [highway purposes] spending restrictions.”). AUTO’s flip-flop in this Court mischaracterizes the statutory requirement. *E.g.*, AUTO Reply Br. at 26 (“[T]he tribes are violating the 18<sup>th</sup> Amendment . . . by spending MVF proceeds on non-highway purposes.”).

Moreover, AUTO's claim that tribal projects have gone beyond statutory limits is not relevant to its claim that the State's conduct is unconstitutional. Statutes authorizing contracts or intergovernmental agreements do not become unconstitutional if one party breaches an agreement. If any tribe's compliance with its agreement were an issue, it would be an enforcement matter for the Department of Licensing ("DOL") but would not affect the constitutionality of the underlying statutes.

Nor does the record support AUTO's allegation that the agreements enable tribal retailers to undercut nontribal retailers' fuel prices. AUTO Op. Br. at 18. The State submitted a declaration from economist and petroleum markets expert Dr. Keith Leffler, who found no evidence that tribal prices were consistently lower than those of competitors. CP 384-85. On the contrary, many nontribal retailers—especially low-margin "hypermarketers" such as Costco, Fred Meyer, and Safeway—sell at prices below those of the tribal stations. CP 385-86. He also found no evidence of subsidization using tax refunds. CP 384-87. Instead, he found that price variations reflect "standard economic factors" such as location, competition, the role of ancillary sales such as tobacco, and pricing strategy. CP 385-86. A 2015 report from the National Association of Convenience Stores ("NACS") similarly found that prices vary widely due to complex factors, including wholesale price volatility,

fuel delivery terms, the brand and grade of fuel, and sales volumes.<sup>12</sup>

Noting the rise of the hypermarketers, NACS concluded that “fuels retailing is not for the faint of heart,” explaining that since 1994, while demand for fuels has increased, the total number of filling stations has decreased from more than 200,000 to just over 150,000.<sup>13</sup>

## **II. AUTO’s Claim that the Payments Are Not Refunds Authorized by Law Would Unduly Constrain Legislative Power.**

The payments to the tribes are “refunds authorized by law.” Wash. Const. Art. II, § 40(d). The Legislature has plenary power over taxation matters except as limited by the constitution. *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 808, 982 P.2d 611 (1999). Under the 18<sup>th</sup> Amendment, the Legislature has broad power to authorize refunds directly to taxpayers as well as to issue refunds that are “spent for the benefit of the affected taxpayers.” *Wash. Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 228, 290 P.3d 954 (2012) (“*WOHVA*”).

### **A. The Refunds Benefit Taxpayers in Indian Country.**

Taxes are paid on all fuels purchased and sold by the tribes. The tribes must acquire all fuels from state-licensed suppliers and distributors. RCW 82.36.450(3)(a), 82.38.310(3)(a). That is, they must purchase fuel for which 100 percent of state taxes have already been remitted to DOL.

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<sup>12</sup> Nat’l Ass’n of Convenience Stores, *2015 Retail Fuels Report* at 17-20 (Feb. 2015), <http://tinyurl.com/natyhvv>.

<sup>13</sup> *Id.* at 20, 30.

*E.g.*, CP 286. Then they must submit invoices showing “the amount of State Motor vehicle fuel taxes and Special fuels taxes paid or included in the price of the fuel.” *E.g.*, CP 60, 286. DOL remits refunds only if the tax is “actually paid or included in the price.”<sup>14</sup> *E.g.*, CP 60-61.

It is beyond dispute that these refunds directly benefit the tribes.<sup>15</sup> The statutes require tribal governments to use the refunds or equivalent sums for qualifying transportation-related purposes. *Supra* at 4. These projects and services are critical to reservation infrastructure, economic development, and public safety. *Supra* at 2-4. It is also beyond dispute that these refunds benefit the Indian and non-Indian fuel consumers who purchase and use the tax-burdened fuels from tribal stations (i.e., the specific fuels for which tax refunds are paid). These consumers necessarily drive on and benefit from the tribal transportation infrastructure and services supported by the refunds, regardless of whether they live on the reservation, regularly come to the reservation to do business, or merely stop at the tribal station to fill up their tanks.

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<sup>14</sup> Contrary to AUTO’s claim, AUTO Reply Br. at 10, tribal members and businesses are *not* eligible for further tax refunds on fuels for which refunds have already been paid to tribal governments under the agreements. *E.g.*, CP 61.

<sup>15</sup> The Legislature plainly views the tribes as taxpayers. The compacting statutes treat information received by the State from the tribes and tribal retailers as personal information under RCW 42.56.230(3)(b), now codified at (4)(b), which exempts from public inspection and copying “[i]nformation required of any *taxpayer* in connection with the assessment or *collection of any tax* if the disclosure of the information to other persons would . . . violate the *taxpayer’s* right to privacy or result in unfair competitive disadvantage to the *taxpayer*.” (emphases added). *See* RCW 82.36.450(4), 82.38.310(4).

These targeted benefits plainly satisfy this Court's precedent.<sup>16</sup> *E.g., WOHVA*, 176 Wn.2d at 228-29, 235-40 (considering spending restrictions on refund and upholding refund to Interagency Committee for Outdoor Recreation to benefit off-road vehicle, nonmotorized, and nonhighway recreational users). Indeed, there is "nothing in [the 18th Amendment] that specifically prohibits the legislature from dispersing the 'refund' as it sees fit." *Nw. Motorcycle Ass'n v. State Interagency Comm. for Outdoor Recreation*, 127 Wn. App. 408, 416, 110 P.3d 1196 (2005).

**B. AUTO's Legal Incidence Argument Asks the Court to Set Aside Its Precedent and Invalidate a Host of Refunds.**

AUTO's contention that the payments to the tribes cannot be refunds because the legal incidence purportedly falls on suppliers has no merit. First, the question of who in the chain of distribution actually bears the legal incidence of the tax for purposes of tribal immunity (a question controlled by federal law) has not been adjudicated and is not presently before the Court.<sup>17</sup> Second, the Washington courts have repeatedly upheld fuel tax refunds distributed directly to persons, or for the benefit of

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<sup>16</sup> While the question was not squarely before it, this Court's CR 19 decision suggests its understanding that the payments to the tribes are indeed refunds. *AUTO I*, 175 Wn.2d at 220 ("Under most of these compacts, the tribes have agreed to comply with certain statutory requirements in exchange for the State's *refunding* 75 percent of the state fuel taxes on fuel purchased by the tribes or tribal retailers.") (emphasis added).

<sup>17</sup> AUTO cannot litigate the tax immunity of the tribes under federal law when they are not parties to this case. To determine where the legal incidence of a tax actually falls, moreover, requires a detailed analysis of the tax scheme as written and applied. *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250, 1257-62 (W.D. Wash. 2005). Those issues have not been briefed, nor have they been fully developed through discovery.

persons, regardless of whether those persons bear the legal incidence of the tax. *WOHVA*, 176 Wn.2d 225; *Nw. Motorcycle*, 127 Wn. App. 408.

Most fuel tax refunds are disbursed for the benefit of users of tax-burdened fuel, regardless of where the legal incidence falls. *E.g.*, RCW 82.36.285 (providers of transportation services to persons with special needs); 82.36.275 (urban transportation systems); 82.36.290 (fuels used in manufacturing, cleaning, or dyeing); 82.38.180 (special fuels used for nonhighway purposes or outside the state); 46.09.520 (off-road and nonhighway vehicle users); 46.10.510 (snowmobile users); 82.36.415 (aircraft fuel users). For example, the indirect refunds paid to the Interagency Committee for Outdoor Recreation upheld in *WOHVA* clearly are not made to the persons who actually bear the incidence of the tax.

Like the fuel tax agreements at issue here, many of these statutes provide refunds “whether such vehicle fuel tax has been paid either directly to the vendor from whom the motor vehicle fuel was purchased or indirectly by adding the amount of such tax to the price of such fuel.” RCW 82.36.275; *see also* RCW 82.36.280, .285, .290 (same). These statutes make clear that the Legislature does not believe the constitution hamstring its authority in the novel manner that AUTO urges. *See WOHVA*, 176 Wn.2d at 240 (citing presumption of constitutionality); *Island Cnty. v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998) (same).

Third, AUTO's suggestion that the 18<sup>th</sup> Amendment limits refunds to persons who are immune from taxation as a matter of law is mistaken. AUTO Op. Br. at 28 ("Refunds are designed to return taxes erroneously or illegally collected . . ."). Refunds paid to urban transportation systems and to providers of transportation services for persons with special needs are not made because the taxes are illegally collected. *Supra* at 10. They are made because the Legislature has decided that it is good policy.

AUTO would have this Court deem unconstitutional virtually every statutory refund. Under AUTO's construction, when the Legislature sought to shift the legal incidence of the fuel tax upstream to suppliers, it was constitutionally bound to repeal each of these refunds. AUTO Reply Br. at 13. Conversely, if the Legislature desires to provide refunds to individual consumers, it is constitutionally compelled to shift the legal incidence of the tax downstream, thereby surrendering the collection and enforcement efficiency gained by imposing the tax at the supplier level.

There is no basis in this Court's precedent for such a radical restriction of legislative authority. The 18<sup>th</sup> Amendment was adopted to ensure that citizens benefit from safe and well-maintained transportation infrastructure. The refunds at issue here fall squarely within this purpose. "Taxes paid on motor vehicle fuels" should be given its "ordinary meaning" rather than construed in "any technical sense." *Auto. Club of*

*Wash. v. City of Seattle*, 55 Wn.2d 161, 167, 346 P.2d 695 (1959).

AUTO's legal incidence argument (a lawyer's concept foreign to the ordinary person) turns this rule of construction on its head.<sup>18</sup>

### **III. The Legislature Properly Delegated Authority to the Governor to Enter the Fuel Tax Agreements.**

For more than 40 years, this Court has recognized that the Legislature may delegate authority to the Executive Branch, so long as the legislation "provide[s] standards or guidelines which indicate in general terms what is to be done and the administrative body which is to do it" and "adequate procedural safeguards exist to control arbitrary administrative action and the abuse of discretionary power." *Barry & Barry, Inc. v. State Dep't of Motor Vehicles*, 81 Wn.2d 155, 163-64, 500 P.2d 540 (1972).

#### **A. The Statutes Provide a Clear Statement of Policy.**

AUTO asserts, erroneously, that the statutes unconstitutionally delegate authority because the Legislature did not provide sufficient guidelines. AUTO Br. at 46. The statutes authorize the Governor to enter into an agreement with any federally recognized tribe with a reservation in the state that provides mutually agreeable terms regarding tribal immunities or preemption of state fuel taxes. RCW 82.36.450(1),

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<sup>18</sup> AUTO's claim that the refunds are not "authorized by law" because they are unconstitutional is circular. AUTO Reply Br. at 15. It also ignores the statutes that authorize the agreements. RCW 82.36.450(1), 82.38.310(1). As four justices of the Court previously observed, any argument "that the agreements lack legislative authorization" has no merit. *AUTO I*, 175 Wn.2d at 244 (Fairhurst, J., dissenting).

82.38.310(1). The statutes incorporate by reference refund agreements already in force as of May 15, 2007, and explain that the new agreements may use a similar refund methodology. RCW 82.36.450(2), 82.38.310(2). The agreements must include provisions requiring the purchase of only tax-paid fuel from licensed suppliers; the use of refunds only for designated purposes; and audits or other means to ensure compliance. RCW 82.36.450(3), 82.38.310(3). The legislation plainly specifies “what is to be done and the administrative body which is to do it.”

AUTO’s sole argument to the contrary is that the statutes are permissive because the State “may” enter into agreements. AUTO Br. at 46. But the Legislature undeniably has the power to delegate discretionary authority to the Governor utilizing permissive “may” language. *See, e.g., McGee Guest Home, Inc. v. Dep’t of Soc. & Health Servs.*, 142 Wn.2d 316, 326, 12 P.3d 144 (2000). Further, the legislation is not permissive, as it requires that each agreement include specific provisions. And because the agreements are a product of arm’s-length negotiations with sovereign governments that cannot be compelled to enter them, it was necessary for the Legislature to give the Governor discretion and flexibility. *See Barry & Barry*, 81 Wn.2d at 162 (holding that Legislature has “power to determine the amount of discretion an administrative agency should exercise in carrying out the duties granted to it”).

**B. Judicial Review and Statutory Record Keeping, Reporting, and Audit Requirements Provide Procedural Safeguards.**

AUTO's claim that the compacting process lacks procedural protection is contradicted by these very proceedings, which established that the agreements are subject to independent judicial review. *See Brown v. Vail*, 169 Wn.2d 318, 331, 237 P.3d 263 (2010) (noting that challenged agency action "is subject to judicial review, as made plain by our review of this case"). And its bald assertion that "it would be dangerous precedent for this Court to hold that the availability of the judicial process is a sufficient safeguard over an agency's abuse of power," AUTO Reply Br. at 27, runs headlong into numerous decisions by this Court that hold to the contrary. *See McGee*, 142 Wn.2d at 326; *McDonald v. Hogness*, 92 Wn.2d 431, 446, 598 P.2d 707 (1979).

The statutes include additional procedural protections, including (1) the requirement that compacting tribes submit to audits to ensure compliance; (2) public disclosure of the agreements and public record documents relating to the agreements; and (3) annual reports by DOL to the Legislature regarding agreement negotiations and implementation.

The audit process is rigorous. Each month, tribal retailers must send DOL a copy of every fuel purchase invoice. *E.g.*, CP 60. Each is individually numbered and details the amount and type of fuel, date and

place of delivery, price and taxes paid, and the distributor who delivered the fuel. The State can cross-check the tribal records with those of the state-licensed distributors and seek access to the original invoices, which tribes must retain. *E.g.*, CP 61-62. Only after the payment of tax is confirmed does a tribe receive a refund. Then the tribal government must make and retain records to document the use of the refunds or equivalent amounts for authorized purposes. *Id.*

The audits are done by independent, certified public accountants. *E.g.*, CP 148, 159. DOL notifies the tribes of what information the audits must include and what records the auditors must review, and the auditors certify they have records to verify the required elements. CP 1405, 1408. The auditors follow the standards of the American Institute of Certified Public Accountants applicable to “agreed purpose audits.” *E.g.*, CP 593, 599. Under the standards, audit procedures should produce evidence “to provide a reasonable basis for the finding or findings expressed.”<sup>19</sup> The standards contain procedures to ensure that all relevant records are made available.<sup>20</sup> Reliance on internal tribal auditors or staff is limited, and it is “inadequate” for the auditor to merely repeat the findings of others.<sup>21</sup> At

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<sup>19</sup> Am. Inst. of Certified Pub. Accountants (AICPA) *Attestation Standards-Agreed-upon Procedures Engagements* at 1338 (AT § 201.16), <http://tinyurl.com/l2vkqy9>.

<sup>20</sup> *Id.* at 1345 (AT § 201.37, .39).

<sup>21</sup> *Id.* at 1337-39 (AT § 201.15, .18, .22, .23).

the close of this process, the auditor produces a certification of compliance that is forwarded to DOL. CP 1401.

AUTO's claim that the agreements are hidden from scrutiny is also misleading. AUTO Br. at 47. The agreements are a matter of public record, State Br. at 42-43, so AUTO has ample opportunity to scrutinize the fruits of the State's negotiations with the tribes. *See, e.g., McDonald*, 92 Wn.2d at 446-47. Moreover, the State's negotiation and implementation records are subject to Washington's public records laws. The statutes authorizing the agreements merely confirm that the information tribes and tribal retailers disclose "shall be deemed to be personal information under RCW 42.56.230(3)(b) [now codified at (4)(b)]." RCW 82.36.450(4), 82.38.310(4). The "personal information" exemption protects against disclosure that would "violate the taxpayer's right to privacy or result in unfair competitive disadvantage to the taxpayer." RCW 42.56.230(4)(b); *see also West v. Dep't of Licensing*, 182 Wn. App. 500, 331 P.3d 72 (2014).

Nor is there any support for AUTO's claim that the agreements fail for lack of "legislative scrutiny." AUTO cites no precedent requiring explicit procedures for post-enactment legislative scrutiny, and this Court repeatedly has upheld legislative delegations without any hint at such a requirement. *See, e.g., Barry & Barry*, 81 Wn.2d at 163; *McDonald*, 92

Wn.2d at 446-47. In any event, the legislation explicitly provides for ongoing “legislative scrutiny” by requiring the State to submit annual reports to the Legislature “on the status of existing agreements and any ongoing negotiations with tribes.”<sup>22</sup> RCW 82.36.450(6), 82.38.310(6).

#### **IV. Cooperative Fuel Tax Agreements Are an Effective Tool for State and Tribal Governments.**

According to AUTO, state-tribal tax issues must be a zero-sum game. It is wrong. Unilateral tax policies imposed by states create animosity and foster disputes because tribal governments then cannot impose their own taxes. Double taxation is not a viable option because tribal businesses will attract virtually no consumers unless they operate at a substantial loss. *E.g.*, *Michigan v. Bay Mills Indian Cmty.*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 2024, 2043-44 (2014) (Sotomayor, J.); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 116 (2005) (Ginsburg, J., dissenting).

A 2005 Federal Highway Administration study found that, given “uncertainty associated with litigating state excise taxation schemes, legal analysts have begun to recommend state-tribal tax compacts as an alternative, mutually beneficial resolution to tax disputes.”<sup>23</sup> Indeed, the U.S. Supreme Court has repeatedly recognized that compacting is an

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<sup>22</sup> AUTO’s claim that the compacts “have no mechanism for their termination” has no basis. AUTO Op. Br. at 48. Even if such a requirement existed, it would be satisfied by dispute resolution provisions allowing termination by the State. *E.g.*, CP 62-63, 73-74.

<sup>23</sup> Fed. Highway Admin., *Am. Indian Sales of Motor Fuel: Assessment of Reporting & Policy Recommendations* § 1.6.3 (2005), <http://tinyurl.com/pnd4ntp>.

effective and equitable way for states and tribes to resolve disputes and meet their respective needs. *See, e.g., Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991); *Dep't of Taxation & Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 77 (1994); *Nevada v. Hicks*, 533 U.S. 353, 393 (2001) (O'Connor, J., concurring in part and concurring in judgment).

AUTO's arguments hinge on the mistaken view that the Supreme Court's decision in *Wagnon*, 546 U.S. 95, was a panacea that eliminated the need for fuel tax agreements. It was not. Before the Court's decision, 11 states had entered into such agreements with tribal governments.<sup>24</sup> By 2013, eight years after the *Wagnon* decision, that number had increased to 14.<sup>25</sup> Thus, far from encouraging states to abandon cooperative agreements, *Wagnon* underscored their importance.

Washington's experience is illustrative. In 2003, the Squaxin Island Tribe and Swinomish Indian Tribal Community challenged the fuel taxes as applied to tribal retailers, arguing that the legal incidence fell on tribal retailers and that the taxes were thus void under federal law. Although the Legislature, at that time, intended to impose the incidence on individual consumers, its intent was not dispositive, and the federal court

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<sup>24</sup> Fed. Highway Admin., *Am. Indian Sales of Motor Fuel: Assessment of Reporting & Policy Recommendations*, App. A, Summary Results (table), <http://tinyurl.com/ny5vjfg>.

<sup>25</sup> Fed'n of Tax Adm'rs Motor Fuel Tax Section, *Survey of Native Am. Issues* (2013), <http://tinyurl.com/nzyxxem>.

agreed that the incidence fell on tribal retailers. State Br. at 5-6; *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250, 1257 (W.D. Wash. 2005).

Following this decision, all sales by tribal and tribal-member retailers on tribal lands were 100 percent immune from state fuel tax. The Legislature's response was twofold. First, it made amendments that sought to shift the incidence of the tax upstream to fuel suppliers, importers, and blenders. State Br. at 7-9. Second, it authorized the Governor to negotiate new fuel tax agreements with tribes that would refund to tribal governments a share of fuel taxes paid by tribal retailers. *Id.* at 9-12.

The compacting provision addressed not only the Legislature's desire to fund tribal transportation infrastructure, but also the uncertainty that would remain without such agreements. While the Legislature intended to move the legal incidence upstream, whether it actually did so is a separate question. *See Squaxin Island*, 400 F. Supp. 2d at 1257-62. Regardless of where the incidence might fall, any tribe without an agreement would have a strong incentive to challenge the amended scheme or to take steps so that the incidence falls on tribal businesses.

At the time of the *Squaxin Island* decision, the plaintiff tribes had already taken steps necessary to become fuel blenders. 400 F. Supp. 2d at 1254; CP 918. Similarly, tribes could import bulk fuels or sell fuels at wholesale from racks within their reservations. This infrastructure already

exists. For example, within the Puyallup Indian Reservation, there are two marine oil terminals, a terminal rack, an oil refinery, a refinery rack, and an interstate fuel pipeline.<sup>26</sup> If a court ultimately concluded that following the 2007 amendments the legal incidence falls on suppliers, importers, and blenders, such tribal sales would be 100 percent tax immune.

*Wagnon* thus was not the silver bullet that AUTO claims. Its contention that after *Squaxin Island* the Legislature could either shift the legal incidence of the tax upstream or authorize the fuel tax agreements—but could not do both—is not a constitutional argument. It is a challenge to the Legislature’s policy judgment. The fuel tax agreements successfully negotiated by the State and the Amici Tribes reflect the shared decision to work together both to improve the quality of public roads and safety in Indian country, and to support the State’s own transportation programs.

## CONCLUSION

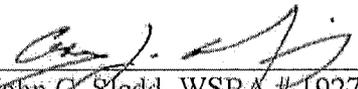
For the foregoing reasons, the Amici Tribes request that the Court affirm the order of the Superior Court granting the State’s motion for summary judgment and denying AUTO’s motion for summary judgment.

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<sup>26</sup> U.S. Oil and Refining, <http://tinyurl.com/oplghta>; Targa Sound Terminal, <http://tinyurl.com/mfl9bt3>; Olympic Pipeline, *Pipelines Hazard* at 1-3 (2010), <http://tinyurl.com/op9vx3z>; Puyallup Indian Reservation, <http://tinyurl.com/m9ngm8a>. The location of the pipeline route and terminals on the Puyallup Tribe’s Reservation are shown on Washington Utilities and Transportation Commission and commercial online maps, Attach. 2 to Apr. 8, 2015 Letter from Deputy Commissioner Walter M. Burton RE: *Auto. United Trades Org. v. The State of Wash.*; *Jay Inslee, et al.*, Cause No. 89734-4, available on file at the Washington State Law Library.

DATED this 15<sup>th</sup> day of April, 2015.

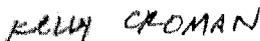
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 15, 2015, I emailed a courtesy copy and deposited with the U.S. postal service a true and accurate copy of the BRIEF AMICUS CURIAE OF INDIAN TRIBAL GOVERNMENTS PARTY TO FUEL TAX AGREEMENTS (AS AMENDED) and the AMICUS CURIAE INDIAN TRIBAL GOVERNMENTS' LETTER TO THE STATE LAW LIBRARIAN PURSUANT TO DEPUTY COMMISSIONER BURTON'S LETTER DATED APRIL 8, 2015, to the persons required to be served in this matter whose names and addresses appear below:

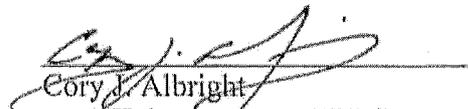
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Good Afternoon:

Please find attached the **Brief Amicus Curiae of Indian Tribal Governments Party to Fuel Tax Agreements (As Amended)** to be filed today in the following matter:

*Automotive United Trades Organization v. The State of Washington; Jay Inslee, et al.*, Cause No. 89734-4.

Thank you,

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