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No. 85661-3

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SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellant,

v.

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

Respondents.

AMICUS CURIAE MEMORANDUM OF NATIONAL FEDERATION
OF INDEPENDENT BUSINESS, WASHINGTON FOOD
INDUSTRY ASSOCIATION, AND WASHINGTON ASSOCIATION
OF NEIGHBORHOOD STORES IN SUPPORT OF DIRECT
REVIEW

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Association of Neighborhood Stores

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A. Introduction.

The National Federation of Independent Business (NFIB), Washington Association of Neighborhood Stores (WANS), and Washington Food Industry Association (WFIA) ("amici") support plaintiff AUTO's request for direct review by this Court of the dismissal of its action to restrain unlawful disbursement of funds from the Washington State Motor Vehicle Fund.

B. Statement Of Interest Of Amici.

Amici have a particular interest in the expenditure of gasoline tax funds for highway purposes as provided in Wash. Const. Art. II, § 40. Amici's members consist of a wide range of Washington businesses, from small independently owned retailers who must compete with tribal enterprises, to large wholesale distributors who own their own trucking fleets, and are dependent upon adequate state highways and ferry service.

1. National Federation of Independent Business.

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing member businesses in Washington, D.C., and all 50 state capitals. NFIB has 8,000 member businesses in the state of Washington. While NFIB members range from sole proprietor enterprises to

firms with hundreds of employees, the typical NFIB member employs 10 people and reports gross sales of about \$500,000 a year.

Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill its role as the voice for small business NFIB's Small Business Legal Center, a nonprofit, public interest law firm, frequently files amicus briefs in cases that will impact small businesses.

2. Washington Food Industry Association.

The Washington Food Industry Association (WFIA) is a non-profit statewide trade association that represents the interests of the independent grocery industry to ensure a vigorous, competitive and economically healthy food industry. Founded in 1899, WFIA represents both Washington based retailers, some of whom also sell gasoline, as well as wholesale food distributors.

3. Washington Association of Neighborhood Stores.

The Washington Association of Neighborhood Stores represents the interests of local businesses statewide.

C. Issues Presented For Direct Review

1. Should this Court accept direct review and remand for a determination on the merits of AUTO's challenge to RCW 82.36.450 and its implementation by state officers in disbursing funds to Indian tribes from the Motor Vehicle Fund that are not used "exclusively for highway purposes" under Wash. Const. Art. II, § 40?

2. Should this Court review and reverse the trial court's dismissal under CR 19, on the basis that Indian tribes that receive funds under the compacts authorized by RCW 82.36.450 are indispensable parties without whom the action may not "in equity and good conscience" proceed?

D. Argument Why Direct Review Should Be Granted.

1. This Court Should Accept Direct Review Because The Trial Court's Dismissal Under CR 19 Insulates From Judicial Review The Unconstitutional Actions of State Officers.

The trial court's dismissal under CR 12 and CR 19 precludes a decision on the merits of AUTO's challenge under the Washington Constitution to a statute that authorizes payments to the tribes from the Motor Vehicle Fund. The underlying action challenges as violative of Wash. Const. Art II, § 40 the Governor's

authority under RCW 82.36.450 authorizing payments from the Motor Vehicle Fund pursuant to compacts with Indian tribes. AUTO seeks a declaratory judgment that disbursements from the Motor Vehicle Fund are unconstitutional, a writ of prohibition, and injunctive relief preventing disbursement of fuel tax revenue from the Motor Vehicle Fund. Resolution of this issue is of paramount importance to all Washington's citizens, but most particularly to amici, who have an immediate interest in the constitutionally mandated requirement that payments from the Motor Vehicle Fund be used for highway purposes.

The trial court's dismissal under CR 19 insulates from judicial review the allegedly unconstitutional actions by the Governor and the Director of the Department of Licensing, as the Governor's delagee. This case presents novel issues that have never been addressed by this Court. Whether the tribes, who were not named in this action, and against whom no relief is sought, are parties without whom this action may not proceed, is an issue that this Court should decide in the first instance.

This Court has recognized that an "interested party" is not necessarily an indispensable party under CR 19. *Matter of Johns-*

Mansville Corp., 99 Wn.2d 193, 197, 660 P.2d 127 (1983).. The Court has further held that “dismissal under 12(b)(7) is a drastic remedy, and as we prefer trial on the merits, it should be employed sparingly when there is no other ability to obtain relief.” **Gildon v. Simon Properties Group, Inc.**, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006). This Court has not previously applied CR 19 to require dismissal of an action challenging the constitutionality of a state statute on the ground that Indian tribes, who are immune from suit, have an interest that would be impaired were prospective relief to be granted.

Because AUTO is challenging the constitutional authority of the Legislature to authorize, and the Governor and Director to direct, payments to the Tribes from the Motor Vehicle Fund, the trial court’s ruling that the action may not “in equity and good conscience” proceed in the Tribes’ absence is an issue that should be resolved by this Court. See RAP 4.2(a)(4)(5). AUTO’s lawsuit does not challenge the established tribal immunity of the Indian tribes that stand to benefit financially from the compacts. See **Wright v. Colville Tribal Enterprise Corp.**, 159 Wn.2d 108, 147 P.2d 1275 (2006), *cert. dismissed*, 550 U.S. 931 (2007) (tribal

sovereign immunity protects tribes from suit in state court absent waiver). Only the individual tribal officials have been named, and as to them, only prospective relief is sought. See *Matheson v. Gregoire*, 139 Wn. App. 624, 633 ¶ 20, 161 P.3d 486 (2007), *rev. denied*, 163 Wn.2d 1020, *cert. denied*, 129 S.Ct. 197 (2008) (“In cases seeking merely prospective relief, sovereign immunity does not extend to tribal official acting pursuant to an unconstitutional statute.”). As the parties’ briefing illustrates, the decisions among other state courts and the intermediate appellate courts provide some guidance, but are not determinative. See *State ex. rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11, 19 (1995) (Authorizing “writ of mandamus against the Governor of New Mexico, not against any of the tribal officials”); *Mudarri v. State*, 147 Wn. App. 590, 609, 196 P.3d 153, *rev. denied*, 166 Wn.2d 1003 (2009) (barring on sovereign immunity grounds claims that “inherently challenge the validity of the State-Tribe Compact”)

Amici urge this Court to address the threshold interest of joinder under CR 19, so that AUTO’s constitutional challenge to RCW 82.36.450 may be resolved on the merits. An expeditious resolution of this threshold impediment to judicial review is in the

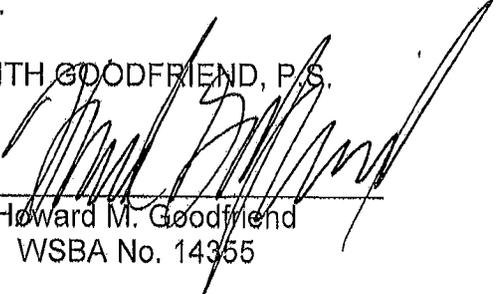
public interest. Only the courts may interpret the scope of the Washington Constitution and determine whether its co-equal branches have complied with it. ***Seattle School Dist. No. 1 of King County v. State***, 90 Wn.2d 476, 496-97, 585 P.2d 71, 83-84 (1978) (“[i]t is emphatically the province and duty of the judicial department to say what the law is’, even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch,” *quoting Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803)) If, as the State has urged, the courts are closed to AUTO, amici, and similarly situated litigants, this Court should definitively say so, so that these parties may focus their efforts in the Washington Legislature to assure proper compliance with Art. II § 40.

E. Conclusion.

This court should grant direct review.

Dated this 5th day of July, 2011.

SMITH GOODFRIEND, P.S.

By: 

Howard M. Goodfriend

WSBA No. 14355

Attorneys for Amici National
Federation of Independent
Business, Washington Food
Industry Association, and
Washington Association of
Neighborhood Stores

DECLARATION OF SERVICE

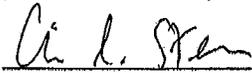
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 5, 2011, I arranged for service of the foregoing Amicus Curiae Memorandum of National Federation of Independent Business, Washington Food Industry Association, and Washington Association of Neighborhood Stores In Support of Direct Review, to the court and to the parties to this action as follows:

| | |
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DATED at Seattle, Washington this 5th day of July, 2011.



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Subject: RE: A.U.T.O. v. State, et al., Supreme Court Cause No. 85661-3

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From: Carrie Steen [<mailto:carrie@washingtonappeals.com>]
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Subject: A.U.T.O. v. State, et al., Supreme Court Cause No. 85661-3

Dear Clerk:

Attached for filing in *A.U.T.O. v. State, et al.*, Supreme Court Cause No. 85661-3, are the following documents: Motion to File Amicus Memorandum In Support of Direct Review, and the Amicus Curiae Memorandum of National Federation of Independent Business, Washington Food Industry Association, and Washington Association of Neighborhood Stores, In Support of Direct Review. The person filing these documents is Howard M. Goodfriend, WSBA No. 14355, email address: howard@washingtonappeals.com.

Regards,

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