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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 APPELLANTS

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ORIGINAL

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A. INTRODUCTION

The State of Washington levies, and the Department of Revenue (“State”) collects, an excise tax on motor fuel called the “hazardous substances tax” (“HST”). Proceeds from the tax are used to fund environmental cleanup programs. However, article II, § 40 of the Washington Constitution prohibits the levying of excise taxes on motor fuel except to fund “highway purposes,” which this Court has defined narrowly.

Tower Energy Group (“Tower”) and Automotive United Trades Organization (“AUTO”) sought a declaratory judgment to stop this unconstitutional diversion of motor fuel taxes for non-highway purposes. After cross-motions for summary judgment, the trial court ruled in favor of the State.

The trial court here effectively ruled as a matter of law that the State of Washington may levy a tax on motor fuel and spend the funds on non-highway purposes, as long as the State calls the tax by another name. The ruling allows an ongoing violation of article II, § 40 of the Washington Constitution, which requires taxes on motor fuel to be expended only for highway purposes. The trial court also ruled that there is a statute of limitations on challenging an unconstitutional action, essentially ruling that the unconstitutional act becomes constitutional with the passage of time.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering summary judgment in favor of the State of Washington in its order dated April 8, 2011.

2. The trial court erred in denying summary judgment in favor of AUTO/Tower in its order dated April 8, 2011.

(2) Issues Relating to Assignments of Error

1. Is an excise tax on the possession of petroleum products, which includes motor vehicle fuels, an excise tax on the sale, distribution, or use of motor vehicle fuel subject to the provisions of the 18th Amendment (article II, § 40) of the Washington Constitution? (Assignments of Error 1, 2)

2. Can a state's unconstitutional action ripen into a constitutional one by the mere passage of time? (Assignment of Error 1)

C. STATEMENT OF THE CASE

The HST is an excise tax enacted as part of the Model Toxics Control Act ("MTCA") in 1988. ESB 6440, Laws of 1988, Ch. 112. Later codified as RCW chapter 70.105B, this statute was patterned after the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") mandating cleanup of hazardous substances.

The HST states:

(1) A tax is imposed on the privilege of possession of hazardous substances in this state. The rate of the tax shall be seven-tenths of one percent multiplied by the wholesale value of the substance.

(2) Moneys collected under this chapter shall be deposited in the toxics control accounts under RCW 70.105D.070.

(3) Chapter 82.32 RCW applies to the tax imposed in this chapter. The tax due dates, reporting periods, and return requirements applicable to chapter 82.04 RCW apply equally to the tax imposed in this chapter.

RCW 82.21.030. Revenues from the HST are deposited into state and local toxics control accounts (collectively "STCA"). *Id.*; RCW 70.105D.070(2). Funds in the STCA are used for various purposes, including programs for the safe reduction, recycling, or disposal of hazardous wastes from households, small businesses, and agriculture, hazardous materials emergency response training, and water and environmental health protection and monitoring programs. *Id.*

"Hazardous substances" includes motor vehicle fuels. RCW 82.21.020(1)(d)(2); WAC 458-20-252. That statute defines "petroleum products" as hazardous substances, and defines petroleum products to include "plant condensate, lubricating oil, gasoline, aviation fuel, kerosene, diesel motor fuel, benzol, fuel oil, residual oil, liquefied or liquefiable gases such as butane, ethane, and propane, and every other product derived from the refining of crude oil...." RCW 82.21.020(1)(d)(2).

When it was first enacted, Washington residents felt the cleanup statute was too lenient – particularly with regard to petroleum products. The voters enacted Initiative 97 to replace the Legislature's original version of MTCA. Petroleum products were a central issue in the two measures. CP 91-95.

“Seeping landfills, pesticides, *and petroleum products* can cause cancer and birth defects.” *Id.* (emphasis added). An initiative to maintain the Legislature’s version of MTCA was also on the ballot. *Id.* The Attorney General’s Office ballot title for Initiative 97B, which would have retained the 1987 law, read, “Shall the legislature’s cleanup program...*with less coverage of petroleum*, be retained?” *Id.* (emphasis added). Initiative 97 was approved by the electorate and became effective March 1, 1989, codified as RCW chapter 70.105D. The initiative is now MTCA. *Id.*

As of June 2008, the HST generated approximately \$135 million in revenue to the state and local toxics control accounts. Washington State Department of Ecology, MTCA Fiscal Year 2008 Annual Report. CP 198-99, 243.

AUTO members are involved in Washington’s gasoline supply industry. They operate approximately 250 gasoline stations in Washington. CP 60. While the majority of members are retailers of gasoline, many are wholesale distributors. As wholesalers, AUTO members supply approximately 1,000 stations in the state. *Id.* AUTO members cover the entire distribution chain of motor vehicle fuel with the exception of the refiners. Tower is an AUTO member and a distributor, or “jobber” of motor fuel. CP 61.

Article II section 40 of the Washington Constitution, commonly referred to as the “18th Amendment,” creates a “special fund” for the purpose of receiving

all license fees for motor vehicles and excise taxes¹ on the sale, distribution or use of motor vehicle fuel. The 18th Amendment provides in pertinent part:

All fees collected by the State of Washington as license fees for motor vehicles and all 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.

Wash. const. art. II, § 40. The Legislature codified the 18th Amendment's special fund, named the Motor Vehicle Fund ("MVF"), in RCW 46.68.070.²

No part of HST revenue is deposited into the MVF. CP 199. Lobbyists for organizations other than AUTO had raised the potential back in 1988 that the HST might be constitutionally problematic, but MTCA supporters such as the Washington Environmental Council insisted it was not. CP 656. The 1988 Voters Pamphlet is silent regarding any 18th Amendment implications. CP 90-112.³ The 18th Amendment was not heavily discussed by legislators, proponents,

¹ An excise tax is a tax the state imposes on a taxpayer for exercising a certain right or privilege. 1B K. Kunsch, *Washington Practice* § 72.4 (4th ed.1997).

² RCW 46.68.070 states:

There is created in the state treasury a permanent fund to be known as the motor vehicle fund to the credit of which shall be deposited all monies directed by law to be deposited therein. This fund shall be for the use of the state, and through state agencies, for the use of counties, cities, and towns for proper road, street, and highway purposes, including the purposes of RCW 47.30.030.

³ Recently a bill was introduced in the Legislature to expand and increase the HST. CP 61, 669. The bill proposed a new separate tax, at nearly double the rate of the original HST. CP 674. Proceeds from this new HST would be used for a variety of non-highway purposes, such as storm water runoff mitigation. A substantial portion of the proceeds would be used as general revenue. CP 675.

or opponents of the measure during the debates, and AUTO never saw any legal analysis of the subject until recently. CP 656. Recent abuse and expansion of the HST beyond its original boundaries prompted AUTO to take action and ask this Court to at least review the tax for its constitutionality.

Since the passage of MTCA, AUTO members have paid the HST. CP 61. Some members like Tower pay the tax directly. *Id.* Many pay it in the form of a line-item on the invoice by refiners, either directly to retailer members or to the wholesaler who then line-items it on to the retailers. CP 61.⁴

AUTO/Tower sought declaratory judgment to stop future unconstitutional diversion of motor fuel taxes for non-highway purposes. CP 1-4. After cross-motions for summary judgment, CP 9-59, 63-86, the trial court ruled in favor of the State. 685-90. The trial court concluded that the 18th Amendment did not mandate deposit of HST proceeds into the MVF, and also ruled that AUTO/Tower's constitutional arguments were not timely raised. CP 688.

AUTO/Tower filed timely a notice of appeal to this Court. CP 685.

D. SUMMARY OF ARGUMENT

The 18th Amendment (article II, § 40) of the Washington Constitution requires all taxes on motor vehicle fuels to be paid into a special fund and used exclusively for highway purposes. During the rise of the petroleum age,

⁴ It is important to note that AUTO members and Tower pay the HST not because they are seeking refunds of the tax, but because the State challenged their right to seek declaratory judgment on grounds that they lacked standing.

Washington citizens presciently realized that fuel was a valuable necessity that could be abused by a Legislature seeking ever-increasing sources of revenue. The original purpose and intent of the 18th Amendment was to prevent the Legislature from imposing tax upon tax on this vital commodity and diverting the proceeds from highways to all other purposes (limited only by the Legislature's appetite for revenue and its collective imagination). As such, the 18th Amendment's core anti-diversionary policy cannot be evaded by simply calling a motor vehicle fuel tax by another name.

The HST is an excise tax imposed on motor vehicle fuels, but the funds collected are deposited in a separate fund and are not used for highway purposes. Consequently, the HST as applied to motor vehicle fuel is unconstitutional.

This Court cannot and should not be deprived of its fundamental role as arbiter of the constitution by operation of a statute of limitations or principles of laches. Citizens cannot waive their right to question the constitutionality of laws by failing to recognize the issue in a "reasonable time." To allow such a result would undermine our system of checks and balances, and force this Court to ignore unconstitutional statutes and actions.

E. ARGUMENT

(1) Standard of Review

This Court reviews summary judgment orders de novo, looking at the issues from the same position as the trial court. *Ellis v. City of Seattle*, 142 Wn.2d

450, 458, 13 P.3d 1065 (2000). CR 56 governs summary judgment motions; summary judgment is proper if the court, viewing all facts and reasonable inferences in the light most favorable to the non-moving party, finds no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriate if reasonable persons could reach only one conclusion. *Id.*

When interpreting a statute that imposes a tax, this Court construes the statute strongly against the taxing authority and in favor of the taxpayer. *Vita Food Prods., Inc. v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978); *Department of Revenue v. Hoppe*, 82 Wn.2d 549, 512 P.2d 1094 (1973); *Dravo Corp. v. Tacoma*, 80 Wn.2d 590, 496 P.2d 504 (1972).

(2) Principles of Constitutional Interpretation

Words in the constitution must be given their common and ordinary meaning. *State ex rel. Albright v. Spokane*, 64 Wn.2d 767, 394 P.2d 231 (1964). As for the 18th Amendment itself, where words of the constitution are unambiguous and in their commonly understood sense lead to a reasonable conclusion, they should be read according to their natural and most obvious import, without resorting to subtle and forced construction for the purpose of limiting or extending their operation. *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969). A court should not engraft an exception where none is

expressed in the constitution, no matter how desirable or expedient such an exception might seem. *State ex rel. O'Connell v. Port of Seattle*, 65 Wn.2d 801, 806, 399 P.2d 623 (1965).

The state constitution is not a grant, but a restriction on power. The power of the Legislature to enact all reasonable laws is unrestrained except where, either expressly or by fair inference, it is prohibited by the Constitution. *Clark v. Dwyer*, 56 Wn.2d 425, 431, 353 P.2d 941, 945 (1960). Where the validity of a statute is challenged, the enactment is presumed constitutional. *Id.* The challenger has the burden of proving a violation beyond a reasonable doubt. *Id.*; *Port of Tacoma v. Parosa*, 52 Wn.2d 181, 324 P.2d 438 (1958).

AUTO/Tower are challenging the HST as applied to motor vehicle fuels. An "as applied" challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional. *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000). Holding a statute unconstitutional as applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated. *Id.*

- (3) The 18th Amendment Requires All Taxes Collected On Motor Vehicle Fuel Be Placed In a Special Fund and Used Exclusively For Highway Purposes

In 1944, responding to concern that gasoline excise tax revenues were being diverted from street and highway improvement to non-highway uses, the citizens of Washington enacted article II, § 40 of the Washington Constitution.⁵ This amendment provides that motor vehicle license fees and excise taxes on the sale, distribution, or use of motor vehicle fuel must be used “exclusively for highway purposes.” Washington const. art. II § 40.⁶

The policy underpinning the 18th Amendment is unambiguous: its framers wanted to ensure that that motor vehicle license fees and gasoline taxes are used

⁵ Washington law has a rich tradition of constitutional restrictions on the diversion of revenues from the originally stated purpose of a tax. Wash. Const. art. VII § 5; *see also Lane v. City of Seattle*, 164 Wn2d 875, 881-84, 194 P.3d 997 (2008); *Okeson v. City of Seattle*, 150 Wn.2d 540, 558, 78 P.3d 1279 (2003); *State ex rel. Latimer v. Henry*, 29 Wash. 38, 45-46, 68 P. 368 (1902); *Sheldon v. Purdy*, 17 Wash. 135, 49 P. 228 (1987). The 18th Amendment falls squarely within that tradition.

⁶ Article II, § 40 is very prescriptive as to what constitutes a “highway purpose.” Funds from motor vehicle fuel excise taxes may only be spent on road-related purposes and no others. As early as 1951, in *State ex rel. Bugge v. Martin*, 38 Wn.2d 834, 232 P.2d 833 (1951), this Court held that the use of the MVF monies was confined to highway purposes. *See also, Automobile Club of Washington v. City of Seattle*, 55 Wn.2d 161, 346 P.2d 695 (1959) (MVF could not be used to satisfy tort judgments); *Washington State Highway Commission v. Pacific Northwest Bell Telephone Co.*, 59 Wn.2d 216, 367 P.2d 605 (1961) (cost of relocating utility facilities on rights-of-way not “highway purposes”); *see also, State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969) (maintenance of a public transportation system not a highway purpose); *Heavey*, 138 Wn.2d 800 (deposit of motor vehicle excise tax into state motor vehicle fund not a violation of 18th Amendment).

It is undisputed here that the expenditure of HST revenue is used exclusively to fulfill the purpose of MTCA, which is, equally indisputably, not a highway purpose. MTCA programs focus on environmental cleanup, not highway maintenance. CP 196. The State concedes this issue. CP 65.

Therefore, the HST imposes an excise tax on motor vehicle fuel, the funds from which are not used for “highway purposes” as defined in the 18th Amendment. *See Automobile Club of Washington, supra*. However, the question of whether the HST as structured violates the 18th Amendment is an issue of first impression in Washington.

to construct and maintain the highways, roads, and streets *upon which those taxpayers could drive*. *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 810-11, 982 P.2d 611 (1999). The historical impetus to prevent diversion of gas tax revenue found its source in the terrible state of the highway transportation system in the 1930's. *Rogers v. Lane County*, 307 Or. 534, 539, 771 P.2d 254 (1989). To remedy the problem, a number of states earmarked revenue from gasoline and motor vehicle-related taxes to be used exclusively for highway purposes. *Id.* at 540. Nevertheless, legislatures continued to divert the funds. Washington voters enacted the 18th Amendment to keep motor fuel taxes dedicated to their intended purpose. In so doing, they enunciated an important principle: taxes on the very valuable and indispensable commodity of gasoline should not be diverted to unrelated purposes:

Between 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. Several hundred miles of good, paved, safe highway would have been built to save money in motor vehicle operation had this special motor tax money been used as it was intended. These were highways and streets we paid for, but didn't get! Now you can stop further diversion.

CP 31.

In short, the citizens of Washington were so concerned about the potential for the Legislature to abuse its power to tax motor fuel and divert the proceeds

away from highways that they *amended the Constitution* to stop the practice. Such abuse is exactly what is at issue here.

(4) The Proviso to the 18th Amendment Does Not Permit the Renaming of a Gas Tax to Evade the Enactment Clause

AUTO/Tower anticipate that the State will again raise the 18th Amendment's proviso as authorization for the HST. The State essentially argued to the trial court that the proviso is the ultimate "escape clause" from the 18th Amendment. CP 76. Under the proviso, the State claims, the Legislature may levy any excise tax on motor vehicle fuel that it wishes and spend the funds on any purpose, provided the Legislature *intends* to spend the money on non-highway purposes. *Id.*

Upon first reading, it might appear that the proviso is a classic "exception that swallows the rule." It appears to allow the Legislature to levy general or special taxes or excises on motor fuel as long as the Legislature states its intent to levy them for purposes other than highway purposes.

However, such a reading would essentially dismantle the 18th Amendment, and ignores the historical context in which it was enacted. This Court interprets the Constitution by looking at the issue in question as it existed at the time of enactment of the Constitution and its amendments. *See e.g., Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711 (1989) *amended*, 780 P.2d 260 (1989); *Am. Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 598,

192 P.3d 306 (2008); *Dist. of Columbia v. Heller*, 554 U.S. 570, 584, 128 S. Ct. 2783, 2793, 171 L. Ed. 2d 637 (2008).⁷

At the time of the 18th Amendment's adoption by the voters in 1944, there were three taxes in place that arguably fell within the meaning of the enacting clause: the gas tax, the motor vehicle excise tax, and the business and occupation ("B&O") tax. The gas tax was imposed, beginning in 1921, on distributors who sold liquid fuels in the state. By 1945, the tax had risen to five cents per gallon and was imposed on motor vehicle fuel sold, distributed, or used in the state by a distributor. Laws of 1933, ch. 58, § 5. The second tax was the motor vehicle excise tax ("MVET"). This tax was imposed on the privilege of using a motor vehicle in the state. In 1945, after the passage of the 18th Amendment, this tax was distributed to the general fund, to cities and towns, and to support the common schools. Laws of 1945, ch. 152, § 14. This reflects the Legislature's understanding that the motor vehicle excise tax fell within the proviso and was not required to be used for highway purposes. The third tax was the B&O tax. This tax was imposed on a number of business activities, including the activities of making retail and wholesale sales. Although the measure of the tax was the gross proceeds of sales, the law permitted a deduction for the amount of state and federal gas tax. None of the B&O tax revenue was ever deposited in the motor

⁷ The Washington Attorney General followed this instruction, reading the proviso in the context of the taxes in place at the time of the 18th Amendment's enactment. CP 29.

vehicle fund, either before or after passage of Amendment 18. Laws of 1935, ch. 180, § 211; Laws of 1945, ch. 249, § 10.

The existence of the B&O and MVET taxes time of the 18th Amendment's adoption raised competing concerns: preserving gas tax revenue for highway purposes, but exempting certain taxes that were already in existence that arguably could fall within the language of the enacting clause. Earlier versions of the 18th Amendment that did not include the proviso were soundly defeated in the Legislature. CP 30-31. Thus the proviso was key to the 18th Amendment's adoption. *Id.*

Therefore, in examining new taxes instituted after the adoption of the 18th Amendment, the proper inquiry is whether the tax in question was even envisioned by the voters in 1944, and if so, whether it more closely resembles the gasoline tax, the revenue from which is protected by article II, § 40, or the MVET and B&O taxes, which are not.

In AGO 2001 No. 2, the Attorney General applied this contextual analysis to the extension of the state sales tax to the sale of gasoline, if the revenues were not placed into the MVF. CP 26. The Attorney General warned that the proviso did not permit the Legislature to simply mask a gas tax with a "different label," and thereby overcome the 18th Amendment's enacting clause. CP 31. "We do not believe that the Legislature could use the proviso as a basis to divert revenue from a gas tax, as understood by the framers of Amendment 18 and the voters

who approved it, to a non-highway purpose.” *Id.* Ultimately, the Attorney General concluded that the tax as proposed might violate the 18th Amendment unless altered, because it appeared to resemble the gas tax in place at the time the 18th Amendment was enacted. CP 33.

This Court has also been cautious about reading the proviso too broadly. In *Heavey, supra*. In that case, a taxpayer sought mandamus to prohibit the state treasurer from depositing revenues from the motor vehicle excise tax (MVET) into the motor vehicle fund. *Heavey*, 138 Wn.2d at 804. The taxpayer’s argument was that the 18th Amendment’s proviso listing the MVET as exempt from mandated deposit into the fund was actually a *prohibition* on deposit into the fund. *Id.* at 805. *Heavey* warns that article II, § 40 “should be read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction for the purpose of limiting or extending its operation.” *Heavey*, 138 Wn.2d at 811. The proviso is a limitation on the enacting clause of article II, § 40. In the words of the *Heavey* Court:

[T]he proviso was not intended to enlarge the enactment to which it is appended so as to operate as a substantive enactment itself. Rather, it is a restraint or limitation upon, and not an addition to, that which precedes it. The proviso simply placed exceptions outside of the preceding enacting clause[.]

Heavey, 138 Wn.2d at 812 (citations omitted) (internal punctuation omitted) (footnote omitted). This Court summarized its conclusion about the proviso, stating:

In sum, the language from the enacting clause requires only the deposit of certain revenue into the motor vehicle fund and limits their expenditure. If, as a result of the proviso, this language does not “apply to” or “include” MVET revenue, the logical import of such an exception is that the deposit of MVET revenue into the motor vehicle fund is simply not required and its expenditure not limited by the terms of the enacting clause.

Id. at 812-13.

What can be drawn from this limited analysis of the proviso is that it is a necessary – but narrowly drawn – exception to the 18th Amendment’s stricture on the expenditure of gas tax revenue. It does not swallow up the overall anti-diversionary policy of the 18th Amendment by permitting the Legislature *carte blanche* to give a gas tax another name and divert the resulting revenue to non-highway purposes.

(5) The HST Imposes an Excise Tax on Motor Vehicle Fuel and As Such Must Comply with the 18th Amendment

Applying the language of the HST to the 18th Amendment, it is a gas tax. It is an excise tax imposed on the sale, use, or distribution of motor vehicle fuel.

Although the State will no doubt contend that the HST is written to tax the “possession” and “control” of motor vehicle fuel as opposed to explicitly taxing its “sale, distribution, or use,” what is written into the statute is not controlling. This Court has long held that the “character of a tax is determined by its incidents, not by its name.” *Harbour Vill. Apartments v. City of Mukilteo*, 139 Wn.2d 604,

607, 989 P.2d 542, 544 (1999) quoting *Jensen v. Henneford*, 185 Wash. 209, 217, 53 P.2d 607 (1936).

As far back as 1936 in *Jensen*, this Court rejected the same semantic sleight-of-hand that the State champions here. *Jensen*, 185 Wash. at 217. Several years before *Jensen* was decided, this Court had held an income tax, which is a tax on property, to be unconstitutional because it was graduated. *Id.* at 216. The Constitution requires that taxes on property be uniform and limited. *Id.* The Legislature responded by renaming the tax, calling it a “tax on the privilege of receiving income,” which it claimed was an excise tax, not a property tax. *Id.* This Court admonished that “a legislative body cannot change the real nature and purpose of an act by giving it a different title or by declaring its nature and purpose to be otherwise, any more than a man can transform his character by changing his clothes.” *Id.* at 217. The Legislature is permitted to declare its intended purpose in an act, but courts to decide the nature and effect of that act. *Id.*

Simply calling an income tax a “tax on the privilege of receiving income” did not wash with the *Jensen* court. Calling a tax on the sale use or distribution of substances a tax on their “possession” should not wash here, because the State and this Court have already ruled that “possession” simply means the “power to sell or use” a hazardous substance. *Tesoro*, 164 Wn.2d at 316; WAC 458-20-252. According to the State, “possession” means control of a petroleum product

located within this state and includes both actual and constructive possession. WAC 458-20-252(2)(e). "Control" means the power to sell or *use* a petroleum product or to authorize the sale or *use* by another. WAC 458-20-252(2)(e)(i) (emphasis added). Following the State's own rules defining "possession" as the power to sell or use, this Court in *Tesoro* emphasized that the sale or use of a hazardous substance – not physical possession – is the lynchpin of the HST. *Id.* In that case this Court considered whether refinery gas created and almost simultaneously consumed for fuel in the crude oil refining process was taxable under the statute. The refinery sought a refund of the HST it had paid for temporary possession of a hazardous gas, a byproduct of refining crude oil into various fuels, including gasoline. *Id.* at 315. The refinery argued that its possession of the gas, which it used to partially fuel the refining process itself, was too fleeting to constitute possession under chapter 82.21 RCW. This Court held that the HST may be imposed on the first taxpayer who has the power to *sell or use* a hazardous substance, and concluded that the tax liability accrued not at the moment of possession, *but at the moment of such sale or use.* *Id.* at 321 (emphasis added).

In the Court of Appeals *Tesoro* opinion that was later affirmed by this Court, the Court of Appeals noted that, under WAC 458-20-252(8)(c) the refiner was required to report the tax not merely upon possession, but at the time hazardous substances are withdrawn from storage for purposes of their sale,

transfer, remanufacture, or consumption. *Tesoro Refining and Marketing Co. v. State, Dep't of Revenue*, 135 Wn. App. 411, 427, 144 P.3d 368 (2006).⁸

Thus, the State's own rules, and the *Tesoro* analysis at both the Court of Appeals and this Court make clear that the HST is truly a tax on the sale or use of motor vehicle fuel, not on its mere possession.

Nor can the State credibly claim that the HST is merely a general tax that just happens to touch upon motor vehicle fuel. Despite the State's attempt to describe the HST as a generalized tax that just happens to include gasoline, it does not dispute that the actual application and intent of the tax falls mostly upon gasoline and petroleum products. CP 71, 184. Far from claiming that the impact of the tax on gasoline is *de minimis*, the State admits that ending the diversion of HST revenue to the STCA would "greatly diminish" the fund. CP 191. Arguments surrounding Initiative 97B centered almost exclusively around "big oil" and the petroleum industry, not pesticides and industrial waste. CP 94.

The HST is an excise tax on the sale, use, or distribution of motor vehicle fuel that more closely resembles a gas tax than the B&O tax or the MVET.

⁸ RCW 82.21.030 taxes the first possession of hazardous substances in Washington. Rule 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. For instance, if the refiner produces a hazardous substance, stores it, and then later uses it as an ingredient in a taxable end product, the refiner would not have to pay the tax under rule 252(7)(b) on the ingredient. Rule 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 use that qualified for an exemption or credit, the tax would immediately become due. *Id.*

Looking at the context of The HST as applied to motor vehicle fuel clearly imposes an excise tax on motor vehicle fuel that is indistinguishable from a gas tax. A tax on petroleum products is in fact an “excise tax[] collected by the State of Washington on the sale, distribution or use of motor vehicle fuel” under article II, § 40. The HST levies an excise tax that, as applied to motor vehicle fuel is indistinguishable from a gas tax. Moreover, it is specifically targeted at gasoline and other petroleum products. It is a gas tax. As such, it falls within the enactment clause, not the proviso, and the revenue generated from application of the tax to motor vehicle fuel must used for highway purposes.⁹

In enacting 18th Amendment, Washington citizens made abundantly clear their desire that gas tax funds be used solely for construction and maintenance of the state’s roads and highways. CP 172. To that end, all excise taxes on the sale, distribution or use of motor vehicle fuel are to be paid into the MVF to be used exclusively for highway purposes.

The HST represents an end-run around the 18th Amendment’s constitutional mandate, and imposes a tax on motor fuels under a different guise. The Legislature refers to 82.21 RCW as the hazardous substance act. *Tesoro*, 135 Wn. App. at 416. But calling it such does not mean it is not also a tax on the sale, distribution, or use of motor vehicle fuels. Both the 18th Amendment and the

⁹ It is important to reiterate that AUTO/Tower do not seek to invalidate the HST, do not dispute the Legislature’s authority to levy the HST, and do not want any tax refund. They simply want HST proceeds from motor vehicle fuel to be deposited in the MVF and used for highway purposes.

HST impose an excise tax on motor vehicle fuels, one by its explicit language, and the other as a function of the MTCA. Yet the latter violates the former by depositing funds in the toxics control account, and not in the motor vehicle fund as required by the former. The HST violates the plain language of 18th Amendment as it applies to AUTO members. They pay the HST on motor vehicle fuel, yet the revenue is not applied to highway purposes in Washington. The HST is a tax on the sale, use, or distribution of motor vehicle fuel, yet it does not deposit the revenue into the motor vehicle fund. The funds generated from this gasoline tax constitute the bulk of the revenue from the HST, yet they are diverted to the toxics control account. Consequently, the HST is unconstitutional. The Legislature cannot skirt the requirements of the 18th Amendment by imposing a tax on motor vehicle fuel and dedicating its collections to another purpose, however worthy. The bare legislative enactment of an unconstitutional statute cannot serve to invest the statute with constitutionality. *State ex rel. Munro v. Todd*, 69 Wn.2d 209, 213, 417 P.2d 955 (1966). Something more, in the way of a duly enacted constitutional amendment, must be added. *Id.* Until, and unless, the 18th Amendment is modified, the HST cannot stand.

Two other states with constitutional provisions similar to Washington's 18th Amendment have confronted a question like the one presented here. Idaho addressed the issue in *V-1 Oil Company v. Idaho Petroleum Clean Water Trust Fund*, 920 P.2d 909 (1996) (rehearing denied). *See* Appendix. In *V-1*, the Idaho

legislature passed the Petroleum Clean Water Trust Fund Act (I.C. §§ 41-4908 - 4909) in 1990 to insure owners and operators of petroleum storage tanks against possible releases of petroleum from leaky storage tanks. The funds for this trust came primarily from the imposition of a one cent per gallon "transfer fee" on all petroleum products delivered or stored in Idaho. The charge was imposed upon the first licensed distributor who received the product within the state. Article VII, § 17 of the Idaho Constitution mandates that any taxes on motor vehicle fuels must be used only for highway purposes:

Gasoline taxes and motor vehicle registration fees to be expended on highways. On or after July 1, 1941, the proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state and from any tax or fee for the registration of motor vehicles, in excess of the necessary costs of collection and administration and any refund or credits authorized by law, shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state and the payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purpose whatsoever.

V-1 Oil was a licensed distributor of motor fuels. V-1 Oil sought and obtained a ruling from a district court that the one cent transfer fee was really a tax and that the allocation of the proceeds from the tax violated article VII, § 17 of the Idaho Constitution. Relying on this ruling, V-1 Oil stopped remitting the tax in November 1993. As a result of the failure to pay the tax, the Tax

Commission issued deficiencies. The Tax Commission appealed the district court's ruling.

The Idaho Supreme Court affirmed the district court, determining that the one cent fee was in fact a tax and that the allocation of the proceeds from the tax was unconstitutional. *V-1 Oil*, 920 P.2d at 913. The *V-1 Oil* court had no trouble identifying a tax on petroleum products to be, at least in part, a tax on motor fuel:

The parties do not dispute that the transfer fee is levied, in part, on "gasoline and like motor vehicle fuels" within the meaning of Article VII, Section 17 of the Idaho Constitution. The Idaho Petroleum Clean Water Act defines the terms "petroleum" and "petroleum products" to expressly include "motor gasoline, gasohol, other alcohol blended fuels, diesel fuel, heating oil and aviation fuel." I.C. § 41-4903(23). Moreover, according to the affidavits submitted by V-1 Oil, the only petroleum products relevant to this appeal are diesel fuel and gasoline.

V-1 Oil, 920 P.2d at 913. Washington's MTCA has a similar definition for "petroleum." RCW 70.105D.020; RCW 82.21.020(1)(b)-.020(2); WAC 458-20-252.

Oregon, too, has considered a similar issue in *Automobile Club of Oregon v. State*, 314 Or. 479, 840 P.2d 674 (1992). Oregon's motor vehicle fund amendment reads:

"(1) Except as [otherwise provided], revenue from the following shall be used exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state:

“(a) Any tax levied on, with respect to, or measured by the storage, withdrawal, use, sale, distribution, importation or receipt of motor vehicle fuel or any other product used for the propulsion of motor vehicles; and

“(b) Any tax or excise levied on the ownership, operation or use of motor vehicles.”

Or. Const. article IX, § 3a. The relevant tax at issue was an assessment on motor vehicle fuel contained in underground storage tanks. *Automobile Club*, 840 P.2d at 482. Proceeds from the fund were used to assist gasoline stations in maintaining their tanks to prevent leaks of hazardous substances into the environment. *Id.* at 489. The Oregon Supreme Court concluded that the assessment was actually a tax, and that funding for gas stations was not part of “construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas.” *Id.* at 491.

Thus, the two other states with constitutional provisions similar to Washington’s 18th Amendment, that have evaluated taxes similar to Washington’s HST, have both found that the taxes ran afoul of their constitutions. The constitutional prohibition on diversion of gas taxes to non-highway purposes cannot be circumvented by disguises or clever wording. If the incidence of the tax is as a gas tax, the monies collected must be preserved for maintain and improving state highways.

AUTO/Tower, like all Washington citizens, have a vested interest in the proper maintenance of Washington’s highway transportation system. Their very

livelihood depends on the State's ability to keep highways open, efficient, and safe. As Washington taxpayers for whom the MTCA "hazardous substances" tax is merely another tax on motor vehicle fuel, they have a right to insist that the Constitution be respected.

Washington's law, like Idaho's and Oregon's similar statutes, violates both the letter and the spirit of the prohibition on diversion: taxes on motor vehicle fuel must be used for highway purposes. When applied to motor vehicle fuel, the HST is a gasoline tax. Its revenue is being diverted from the MVF to the STCA in the very way that the voters sought to prevent when enacting the 18th Amendment.

The trial court here incorrectly concluded that the State was not violating the 18th Amendment by diverting motor vehicle tax funds to the toxics control accounts. This Court should reverse the trial court and hold that the HST as applied to motor fuel violates the Washington Constitution.

(6) The State's Unconstitutional Action Cannot Become Constitutional by the Passage of Time

The State argued, and the trial court agreed, that regardless of the merit of the constitutional challenges raised, AUTO/Tower's claim was time-barred. CP 683. It concluded that it was not brought within a reasonable time under the UDJA, and that it was barred by the doctrine of laches. *Id.*

The State and that trial court are wrong on both counts. In essence, the trial court's ruling is that an unconstitutional state action can become constitutional simply by the passage of time. This is simply incorrect as a matter of law. The very notion that citizens must raise challenges to unconstitutional laws within a certain time frame, or risk some sort of waiver, is nonsensical and repugnant to the Constitution, which preserves inviolate this Court's role as arbiter of the Constitution.

Constitutional construction is a judicial function that should not be abdicated to the political branches of government. *Washington State Legislature v. Lowry*, 131 Wn.2d 309, 320, 931 P.2d 885, 891 (1997). As the United States Supreme Court has said with respect to its equivalent role:

No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text. As we emphasized in *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L.Ed.2d 1039 (1974): "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.... Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury* that '[i]t is emphatically the province and duty of the judicial department to say what the law is.' "

United States v. Morrison, 529 U.S. 598, 616 n.7, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000). This Court plays the same pivotal role with respect to Washington's Constitution. This Court has declared that its "mandate as the Supreme Court of

Washington [is] to decide” whether legislative action is “true to the spirit of the Constitution.” *Lowry*, 131 Wn.2d at 320.

To allow an unconstitutional executive or legislative action to stand because no citizen recognized it quickly enough is tantamount to an abdication of this fundamental judicial power to the other branches. Although each branch of government is charged with upholding our Constitution, this Court bears the ultimate responsibility for interpreting constitutional provisions. It is also the role of this Court to determine when the executive and legislative branches of government have overstepped their boundaries. *Lowry*, 131 Wn.2d at 320.

Questions about the enactment of unconstitutional legislation have never been subject to any limitations period. For example, in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 960 P.2d 919 (1998), this Court found the statute of repose for medical malpractice claims to be unconstitutional, violating equal protection. The lawsuit in that case was filed in 1996. The legislation, by contrast, was enacted in 1976. Clearly, the statute of limitations did not prevent the plaintiffs there from raising a constitutional challenge to the enactment of a statute.

A facially unconstitutional law could conceivably linger on the books for many years before finally affecting a plaintiff. For instance, many all-white communities used to have ordinances forbidding black persons from voting or owning property there. Such ordinances are facially unconstitutional, even

though they would not affect any of the residents. But years later, when a black person moves into that community and discovers that the law, he has suffered an injury, his cause of action accrues, and he may seek redress by challenging the facial constitutionality of the law. *Shelley v. Kraemer*, 334 U.S. 1, 8, 68 S. Ct. 836, 839, 92 L. Ed. 1161 (1948); *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 117, 118 P.3d 322, 325 (2005). This sort of situation happens frequently. In *State v. Palendrano*, 293 A.2d 747, 752 (N.J. Super. Ct. 1972), the New Jersey Superior Court found it facially unconstitutional (indeed, “obnoxious” and “senseless”) to prosecute a woman for being a “common scold,” even though this had been a common law crime since the days of William Blackstone.

Nowhere is the absurdity of the State’s position on a limitations period more evident than in the criminal context. If a citizen is accused of violating a statute that was passed 30 years prior, and that statute was unconstitutional when passed, is the citizen foreclosed from raising the argument by a statute of limitations? Citizens are charged with knowledge of the laws, even though they have actual knowledge. Should Court reject constitutional challenges to those laws based on laches? Such arguments have never been raised, and should not be accepted as a constraint on this Court’s fundamental power to interpret and enforce the Constitution.

A statute of limitations may only apply if its application does not subvert or contravene the Constitution. *O’Brien v. Wilson*, 51 Wash. 52, 58, 97 P. 1115,

1117 (1908). In *O'Brien*, a private party asserted adverse possession over lands originally granted to the State under the Constitution. Those lands could not be passed to private hands except by public auction. Noting that adverse possession is essentially a statute of limitations on reclaiming ownership of land, this Court concluded that allowing such a constitutional violation to stand because too much time had passed was impermissible and repugnant to the Constitution. *Id.* at 1116.

Unconstitutional statutes are *void* from their enactment. *Marbury v. Madison*, 5 U.S. 137, 176, 1 Cranch 137, 2 L.Ed.2d 60 (1803); *City of Seattle v. Grundy*, 86 Wn.2d 49, 541 P.2d 994 (1975). The failure to challenge an unconstitutional act does not allow the void statute to somehow ripen into a constitutional measure. Therefore, only analogous cases from which to ascertain a statute of limitations here provide that there is no statute of limitations.

(a) The UDJA Has No Statute of Limitations; the Trial Court Erred in Creating One

There is no statute of limitations on declaratory judgment actions. This is logical because declaratory judgment is important to this Court's role as constitutional guardian. *Seattle Sch. Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 490, 585 P.2d 71, 80 (1978). Where the question is one of great public interest and has been brought to the court's attention with adequate argument and briefing, and where it appears that an opinion of the court will be

beneficial to the public and to other branches of the government, this Court may exercise its discretion and render a declaratory judgment to resolve a question of constitutional interpretation despite procedural impediments. *Seattle Sch. Dist. No. 1*, 90 Wn.2d at 490, (this Court ruled on constitutionality of State school funding despite concerns about lack of “justiciable controversy”); *see also Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972); *Huntamer v. Coe*, 40 Wn.2d 767, 246 P.2d 489 (1952).

This Court has not spoken on the subject of time restrictions for declaratory judgment actions. The Court of Appeals has ruled that a declaratory judgment action must be brought “within a reasonable time.” *Cary v. Mason County*, 132 Wn. App. 495, 501, 132 P.3d 157, 160 (2006), *review denied*, 159 Wn.2d 1005 (2007); *City of Federal Way v. King County*, 62 Wn. App. 530, 536, 815 P.2d 790, 794 (1991) (superseded by statute on other grounds). The Court of Appeals defined “reasonable time” by analogizing to the time allowed for appeal of a similar decision as prescribed by statute, rule of court, or other provision. *Cary*, 62 Wn. App. at 501.

Applying the *Federal Way* rule and analogizing this action, the State argued below that AUTO/Tower’s challenge is similar to a case involving misappropriation of funds by a state officer. CP 69. The State claimed that AUTO/Tower are not challenging the validity of the tax only that the Department

of Revenue has “misappropriated” the gas tax portion of HST revenue from the MVF to the state toxics control accounts. *Id.*

The State misconstrues AUTO/Tower’s argument and draws a false analogy. AUTO/Tower *are* challenging the validity of the portion of the MTCA statute that applies the HST to motor fuel. In that sense, the statute is invalid.¹⁰ However, the Department has followed the strictures of the statute and collected the HST in accordance with the law as written. Therefore, the Department is not guilty of misappropriating state funds, and the State’s analogy is inapt. This case also cannot be analogized to tax refund cases, as AUTO/Tower are not seeking tax refunds.

This action is a challenge to an unconstitutional statute, not a claim of misappropriation of funds by a rogue state officer. No court or statute has assigned a statute of limitations on an action seeking only declaratory judgment and prospective relief for an unconstitutional statute. For example, in DeYoung v. Providence Medical Center, 136 Wn.2d 136, 960 P.2d 919 (1998), this Court found the statute of repose for medical malpractice claims to be unconstitutional, violating equal protection. The lawsuit in that case was filed in 1996. The legislation, by contrast, was enacted in 1976. Clearly, the statute of limitations did not prevent the plaintiffs there from raising a constitutional challenge to the enactment of RCW 4.16.350.

¹⁰ However, AUTO/Tower are not arguing that MTCA in its entirety is unconstitutional.

Also, it is unclear whether it is even permissible for the Court of Appeals to insert a statute of limitations in the UDJA where the Legislature did not. It is not within the power of any court to add words to a statute even if it believes the legislature intended something else but failed to express it adequately. *Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). Only when a failure to insert language renders the statute absurd and useless may a court step in to supply language. *State v. Taylor*, 97 Wn.2d 724,729-30, 649 P.2d 633 (1982); *see also, State v. Edwards*, 104 Wn.2d 63, 68, 701 P.2d 508 (1985); *State v. S.M.H.*, 76 Wn. App. 550, 557, 887 P.2d 903 (1995); *State v. Brasel*, 28 Wn. App. 303, 623 P.2d 696 (1981).

The *Cary* and *Federal Way* courts cannot write a statute of limitations into the UDJA. Such an action is for the Legislature, not the courts. The UDJA's lack of a statute of limitations does not render it absurd, thus it does not meet the *Taylor* test for inserting language into a statute. The UDJA is not rendered absurd, nor is its purpose undermined, by lack of a statute of limitations. In fact, the lack of a time restriction furthers the statute's purpose of providing equitable and prospective review of potentially unlawful actions, regardless of when the occurred.

Even assuming that courts' could interpose a "reasonable time" statute of limitations into the UDJA, AUTO/Tower's claims are not time-barred. AUTO/Tower were unaware until recently of the constitutional flaw in the HST.

CP 656-57. Although there were some 18th Amendment discussions in 1988, organizations such as the Washington Environmental Council insisted that the HST passed constitutional muster. *Id.* AUTO/Tower relied on those assertions.¹¹

AUTO/Tower filed this action quickly after reviewing legal analysis questioning the constitutionality of the HST. Therefore, this action was brought within a "reasonable time."

(b) The Doctrine of Laches Does Not Bar AUTO/Tower's Action

The State argues that this Court should ignore the constitutional questions at issue by applying the doctrine of laches to dismiss AUTO/Tower's complaint. The State claims that AUTO/Tower were obliged to sue over the HST when it was first passed, and that the State will be "immensely prejudiced" if this suit is allowed. Because AUTO/Tower are not seeking damages or retroactive relief, this alleged prejudice arises from the future loss of gas tax funds that are currently diverted to MTCA. Moreover, Tower is aggrieved only recently by the improper application of the HST to its motor fuel.

The State's laches argument is *groundless*. Laches does not foreclose this Court's inquiry into the constitutionality of the HST. In *Swartout v. City of Spokane*, 21 Wn. App. 665, 586 P.2d 135 (1978), *review denied*, 91 Wn.2d 1023

¹¹ To assert that AUTO and all its component members are charged with whatever knowledge AUTO's lobbyist could glean from the rumor mills in the Legislature in 1988 is overreaching. Moreover, Tower, also a named party here, was not a member of AUTO until well after 1988. It could not be charged with any such knowledge regardless of the State's attempt to time-bar AUTO.

(1979) the Court of Appeals stated: “Generally a void statute is of no effect and may be successfully attacked at any time.” *Id.* at 674. The Attorney General in 2002 confirmed this principle’s applicability in AGO 2002 No. 7. In *Citizens for Responsible Gov’t v. Kitsap County*, 52 Wn. App. 236, 758 P.2d 1009 (1988) the plaintiffs challenged the constitutionality of a county zoning ordinance three years after its enactment because the county did not follow the public notice requirements of RCW 36.70.630. *Id.* at 237. No challenge was raised in that case to the substantive constitutionality of the ordinance. *Id.* at 239. If it had, this Court made it clear that laches would *not* apply:

Thus, in zoning matters, an ordinance that is clearly a usurpation of power, inconsistent with constitutional or statutory provisions, or an invasion of property with no relation to the public health, safety, morals, or welfare, is void and incapable of being validated. It can be attacked at any time, regardless of previous acquiescence or the amount of time since its passage.

Id.

“Laches 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). The doctrine of laches bars a cause of action if the defendant establishes that (1) the plaintiff knew, or had a reasonable opportunity to discover, the facts constituting a cause of action; (2) the plaintiff unreasonably delayed commencing an action; and (3) the defendant was materially prejudiced by the delay in bringing the action. *Somsak v. Criton Technologies/Heath Tecna*,

Inc., 113 Wn. App. 84, 93, 52 P.3d 43, 48 (2002) *modified sub nom. Somsak v. Criton Technologies/Heath Tecna, Inc.*, 63 P.3d 800 (2003); *Davidson v. State*, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991).

Generally, the propriety of invoking laches to scuttle a claim depends upon the particular facts and circumstances of each case. *Schrock v. Gillingham*, 36 Wn.2d 419, 219 P.2d 92 (1950); *McKnight v. Basilides*, 19 Wn.2d 391, 143 P.2d 307 (1943). Important factors in the analysis include the circumstances, if any, justifying the delay, the relief demanded, and the question of whether the rights of defendant or other persons, such as the public, will be prejudiced by the maintenance of the suit. *Lopp v. Peninsula Sch. Dist. No. 401*, 90 Wn.2d 754, 758-59, 585 P.2d 801, 804 (1978).

However, “[t]he main component of laches is prejudice to the other party.” *Clark County Public Utility District v. Wilkinson*, 139 Wn.2d 840, 848-49, 991 P.2d 1161 (2000). As the State correctly notes, it carries the burden of proving prejudice and damage. *Id.*; State’s summary judgment motion at 8.

If a case is brought in the public interest, it weighs against the application of laches. *Lopp*, 90 Wn.2d at 758-59. Before 1978, this Court *never* permitted the doctrine of laches to be invoked in cases brought in the public interest. *State ex rel. Mason v. Board of County Commissioners of King County*, 146 Wash. 449, 455, 263 P. 735 (1928). In *Mason*, this Court held that that plaintiff’s challenge to improper legislative redistricting was not barred by laches or acquiescence

because the case was one of “public concern and public right.” *Id.* The *Mason* bright-line rule prohibiting application of laches in public interest cases was ultimately abandoned in *Lopp*. However, the fact that a case is brought in the public interest is still a factor in determining whether laches should apply: “The nature of the lawsuit, here a public interest lawsuit, is simply another factor to be considered by the court in determining whether the doctrine of laches should be applied.” *Lopp*, 90 Wn.2d at 759.

Even assuming this Court should ignore *Swartout* and *Kitsap County* and engage in a laches inquiry, this case does not meet the test. AUTO/Tower have not acceded or acquiesced to the State’s unconstitutional actions, as laches requires. They made an affirmative political decision to forego a constitutional challenge to the HST and respect the will of the voters. CP 69. However, that decision changed when the Legislature corrupted the will of the voters by proposing significant HST rate increases and diverting HST revenues to the general fund. This change in circumstances disrupted the uneasy peace between those who pay the HST on gasoline, and the Legislature. In a society often accused of being overly litigious, particularly when it comes to business interests, AUTO demonstrated restraint in refusing to rush into court despite the questionable constitutionality of the HST, particularly given the expenses of such an action. Regardless of whether the State thinks that this decision was incorrect, it does not reflect the wavier or acquiescence that is the hallmark of laches.

Also, the State has not demonstrated any prejudice from the decision not to challenge the HST in 1988. In fact, as the State's motion amply demonstrates, the State has benefited for 22 years from the unconstitutional diversion of motor fuel taxes to the State toxics control accounts. CP 71-73. Because AUTO/Tower are seeking only declaratory judgment and prospective relief, the State's only claim of prejudice is that it will no longer be able to fund MTCA by unconstitutional means. The State will actually benefit, because the Legislature will be required to fund MTCA in a constitutional manner, and the gas taxes that are currently diverted away from highway funds will be reinstated for that purpose. The State cannot deny that it benefits from good roads as much as it benefits from a clean environment.

Finally, AUTO/Tower's constitutional challenge is in the public interest and should not be barred by the application of laches. Although AUTO/Tower could seek damages and retroactive relief for the State's unconstitutional actions, they have chosen to forego such relief. They understand that such relief, while benefiting themselves, could potentially harm the public at large and create chaos. They have brought this case in the public interest, not for their own ends. This fact weighs strongly in favor of denying the State the defense of laches.

(7) AUTO/Tower Should Be Awarded Attorney Fees Under the Common Fund Theory

AUTO/Tower are entitled to attorney fees under the "common fund" theory.

It has long been the rule that equity may allow reimbursement of attorneys' fees from a fund created or preserved by a litigant for the benefit of others as well as himself. *Weiss v. Bruno*, 83 Wn.2d 911, 912, 523 P.2d 915, 916 (1974). This Court has adopted the federal principal that attorney fees to a private party are appropriate when that party in effect acts as a "private attorney general" when effectuating public policy that benefits a large class of people. *Id.*

This Court has awarded fees under the common fund theory in precisely the same circumstances at issue here: (1) a successful suit brought by petitioners (2) challenging the expenditure of public funds (3) made pursuant to unconstitutional legislative and administrative actions (4) following a refusal by the appropriate official and agency to maintain such a challenge. *Id.* at 914.

AUTO/Tower asked the Washington Attorney General to take action regarding this 18th Amendment violation, and brought and this challenge privately after the Washington State Attorney General declined to do so. CP 116-19. The suit challenged the improper diversion of public funds pursuant to unconstitutional legislative and administrative action. Attorney fees are warranted under the common fund theory.

F. CONCLUSION

As applied to motor vehicle fuel, the deposit of HST revenue into the STCA for non-highway purposes violates the 18th Amendment. AUTO/Tower do not seek the invalidation of the HST, nor do they seek recovery of past revenues

derived from the HST, an excise tax on motor vehicle fuel improperly placed in the STCA. This Court should issue a declaratory judgment stating that RCW 82.21.030 is unconstitutional, and directing that any future revenues from application of the HST to motor vehicle fuels be placed in the MVF. Costs on appeal, including reasonable attorney fees, should be awarded to AUTO/Tower.

DATED this 25th day of August, 2011.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the Brief of Appellants in Supreme Court Cause No. 85971-0 to the following parties:

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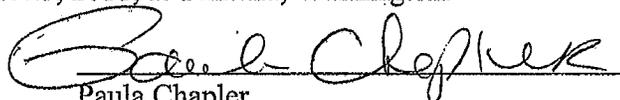
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 25, 2011, at Tukwila, Washington.



Paula Chapler
Talmadge/Fitzpatrick

DECLARATION

OFFICE RECEPTIONIST, CLERK

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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Subject: Automotive United Trades Organization, et al. v. State of Washington, et al. Cause No. 85971-0

Per Ms. Tribe's request, please see the attached Brief of Appellants for filing in the following case:

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