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SUPREME COURT  
OF THE STATE OF WASHINGTON

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AUTOMOTIVE UNITED TRADES ORGANIZATION, a Washington  
nonprofit corporation, TOWER ENERGY GROUP, a California  
corporation,

Appellants,

v.

STATE OF WASHINGTON; and JIM MCINTYRE, WASHINGTON  
STATE TREASURER,

Respondents.

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REPLY BRIEF OF APPELLANTS

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ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
A. INTRODUCTION .....	1
B. REPLY ON STATEMENT OF THE CASE .....	2
C. SUMMARY OF ARGUMENT .....	4
D. ARGUMENT .....	6
(1) <u>Standard of Review</u> .....	6
(2) <u>The HST as Applied to Motor Fuel Is Unconstitutional Because It Functions as an Excise Tax on the Sale, Use, and Distribution of Motor Fuel</u> .....	7
(a) <u>The Legislature Cannot Evade the 18<sup>th</sup> Amendment With Semantics</u> .....	7
(b) <u>The Notion that the Tax Is Based on Mere “Possession” is Belied by the Fact that the Tax Is Imposed Based on the Sale Price of the Fuel</u> .....	9
(c) <u>Circumstances Surrounding the 18<sup>th</sup> Amendment’s Enactment Strengthen Tower/AUTO’s Position that the Legislature Should Not Be Able to Impose New Gas Taxes for Non-Highway Projects</u> .....	11
(d) <u>Other States Have Rejected Legislative Attempts to Circumvent Anti-Diversionsary Constitutional Provisions Through Semantics</u> .....	15

(3) This Court Should Not Create a New Rule in Washington that Unconstitutional Statutes Become Constitutional Over Time.....16

(a) There Is No Statute of Limitations on a Challenge to an Unconstitutional Statute When Only Prospective Relief Is Sought.....17

(b) The Doctrine of Laches Does Not Bar This Action for a Declaration Regarding the Constitutionality of the HST .....23

(4) Tower/AUTO Are Entitled to Attorney Fees Under the Common Fund Theory .....28

E. CONCLUSION.....30

## TABLE OF AUTHORITIES

Page

### Table of Cases

#### Washington Cases

<i>Baker v. Seattle-Tacoma Power Co.</i> , 61 Wash. 578, 112 Pac. 647 (1911).....	19, 28
<i>Boyle v. Oleson</i> , 58 Wash. 670, 109 P 203 (1910).....	27
<i>Carrillo v. City of Ocean Shores</i> , 122 Wn. App. 592, 94 P.3d 961 (2004).....	21, 25
<i>Citizens for Responsible Gov't v. Kitsap County</i> , 52 Wn. App. 236, 758 P.2d 1009 (1988).....	25, 26
<i>City of Sequim v. Malkasian</i> , 157 Wn.2d 251, 138 P.3d 943 (2006).....	29
<i>DiNino v. State ex rel. Gorton</i> , 102 Wn.2d 327, 684 P.2d 1297 (1984).....	18, 19
<i>Douchette v. Bethel Sch. Dist. No. 403</i> , 117 Wn.2d 805, 818 P.2d 1362 (1991).....	18
<i>Ellis v. City of Seattle</i> , 142 Wn.2d 450, 13 P.3d 1065 (2000).....	6
<i>Grein v. Cavano</i> , 61 Wn.2d 498, 379 P.2d 209 (1963).....	28-29
<i>Hsu Ying Li v. Tang</i> , 87 Wn.2d 796, 557 P.2d 342 (1976).....	29, 30
<i>Interlake Porsche &amp; Audi, Inc. v. Bucholz</i> , 45 Wn. App. 502, 728 P.2d 597 (1986), <i>review denied</i> , 107 Wn.2d 1022 (1987).....	29
<i>Interlake Sporting Ass'n, Inc. v. Wash. State Boundary Review Board for King County</i> , 158 Wn.2d 545, 146 P.3d 904 (2006).....	29
<i>Island County v. State</i> , 135 Wn.2d 141, 955 P.2d 377 (1998).....	6
<i>Jensen v. Henneford</i> , 185 Wash. 209, 53 P.2d 607 (1936).....	8
<i>LaVergne v. Boysen</i> , 82 Wn.2d 718, 513 P.2d 547 (1973).....	18, 26
<i>Leischner v. Alldridge</i> , 114 Wn.2d 753, 790 P.2d 1234 (1990).....	30
<i>Pierce County v. State</i> , 159 Wn.2d 16, 148 P.3d 1002 (2006).....	13, 14
<i>Reeder v. King County</i> , 57 Wn.2d 563, 358 P.2d 810 (1961).....	20
<i>School Dist. No. 2 of Teton Cy. v. Jackson-Wilson High School Dist. in Teton Cy.</i> , 52 P.2d 673 (1935).....	12
<i>Seattle Trust &amp; Sav. Bank v. McCarthy</i> , 94 Wn.2d 605, 617 P.2d 1023 (1980).....	30

<i>State ex rel. Munro v. Todd</i> , 69 Wn.2d 209, 417 P.2d 955 (1966).....	9
<i>Tesoro Refining &amp; Marketing Co. v. Dep't of Revenue</i> , 164 Wn.2d 310, 190 P.3d 28 (2008).....	7
<i>To-Ro Trade Shows v. Collins</i> , 144 Wn.2d 403, 27 P.3d 1149 (2001), <i>cert. denied</i> , 535 U.S. 931 (2002).....	18, 19
<i>Walker v. Munro</i> , 124 Wn.2d 402, 879 P.2d 920 (1994).....	18
<i>Weiss v. Bruno</i> , 83 Wn.2d 911, 523 P.2d 915 (1974).....	30

Federal Cases

<i>Baker v. Carr</i> , 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).....	19
<i>Chase Securities Corp. v. Donaldson</i> , 325 U.S. 304, 65 S. Ct. 1137, 89 L.Ed. 1628 (1945), <i>rehearing denied</i> , 325 U.S. 896, 65 S. Ct. 1561, 89 L.Ed. 2006 (1945).....	18
<i>Gelpcke v. City of Dubuque</i> , 68 U.S. (1 Wall) 175, 17 L.Ed. 520 (1863).....	13
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).....	7, 14
<i>W. River Bridge Co. v. Dix</i> , 47 U.S. (6 How.) 507, 12 L.Ed. 535 (1848).....	13

Other Cases

<i>Automobile Club of Oregon v. State</i> , 314 Or. 479, 840 P.2d 674 (1992).....	16
<i>Carr v. Frohmiller</i> , 56 P.2d 644 (Ariz. 1936) .....	12
<i>In re Opinion of the Judges</i> , 240 N.W. 600 (S.D. 1932) .....	12
<i>Panhandle Eastern Pipe Line Co. v. Fadely</i> , 332 P.2d 568 (Kan. 1958).....	12
<i>V-1 Oil Company v. Idaho Petroleum Clean Water Trust Fund</i> , 128 Idaho 890, 920 P.2d 909, <i>cert. denied</i> , 519 U.S. 1009 (1996).....	16

Constitutions

Washington Const. art. VII, § 5 .....	11
---------------------------------------	----

Statutes

RCW 82.21.030 .....7, 10, 31  
RCW 82.21.030(5).....10  
RCW 82.36.020 .....8

Codes, Rules, Regulations

23 U.S.C. § 126(a) (1964).....12  
28 U.S.C.A. § 2415 (1984) .....19  
WAC 458-20-252.....7

A. INTRODUCTION

The State of Washington protects the rights of those who pay motor vehicle-related taxes, including fuel taxes. In fact, Washington's constitution in article II, § 40 ("the 18<sup>th</sup> Amendment") expressly creates the motor vehicle fund ("MVF") dedicated to providing a safe and efficient highway system, and requires that taxes on motor fuel *must* be deposited therein and expended only for highway purposes. However, the Model Toxics Control Act, RCW Ch. 70.105D ("MTCA") levies an excise tax ("HST") on petroleum products – including motor fuel – that is deposited into a toxics control account and used for MTCA purposes. This tax violates the 18<sup>th</sup> Amendment, which requires taxes on motor fuel to be expended only for highway purposes.

In this appeal, Tower Energy Group ("Tower") and Automotive United Trades Organization ("AUTO") have argued that diversion of motor fuel taxes for non-highway purposes is unconstitutional. They have not challenged the constitutionality of MTCA as a whole, nor have they sought damages or retrospective relief.

The State has responded, arguing that the tax in question does not violate the 18<sup>th</sup> Amendment, and that the trial court correctly ruled that this constitutional challenge to a statute is time-barred.

The application of MTCA to motor fuel violates the 18<sup>th</sup> Amendment. The Legislature cannot avoid constitutional restrictions on its use of revenues by simply trying to camouflage the nature of the tax it imposes on motor fuel. Case law on this subject instructs courts to look at the tax as it actually functions, rather than as the Legislature described it. The HST as applied to motor fuel is a gas tax diverted to non-highway purposes.

There is no statute of limitations, either in statutes or in case law on bringing a claim in the public interest to challenge an unconstitutional law. An unconstitutional statute should not be allowed to ripen into a constitutional one by the mere passage of time. Also, Tower/AUTO have sought only declaratory judgment, and have not asked for damages or retroactive relief. Therefore, there is no injury to the State from the alleged "delay" in filing this action. In fact, if AUTO is correct, the State has benefited from collecting 22 years worth of unlawful gas taxes that it will not be required to disgorge.

B. REPLY ON STATEMENT OF THE CASE

Tower/AUTO have recited the facts in their own summary judgment motion, and the facts here are largely undisputed.

There is one issue of contention. The State characterizes Tower/AUTO's prior decision not to challenge MTCA as one of

indifference or even purposeful delay, because of political participation by AUTO's executive director during the enactment of the HST. Br. of Resp'ts at 4.

The State assumes too much about the legal acumen of AUTO's executive director<sup>1</sup> by assuming that in 1988, he knew for a fact that application of the HST to motor fuel was unconstitutional. While lobbyists for other organizations raised the potential back in 1988 that the HST might be problematic, MTCA supporters such as the Washington Environmental Council insisted it was not. CP 656. The 18th Amendment was not heavily discussed during the debates, and AUTO never saw any legal analysis of the subject during the deliberations on the legislation or the campaign on the referendum. *Id.* The point when AUTO was educated on the issue and came to believe that the HST was, in fact, unconstitutional was when attorney Phil Talmadge wrote an opinion letter for the Washington State Petroleum Association that circulated through the 2009 legislative session. AUTO filed suit quickly after reading that letter. CP 657.

Also, far from waiving or ignoring its rights to file suit, AUTO exercised restraint regarding any potential 18<sup>th</sup> Amendment challenge.

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<sup>1</sup> Tim Hamilton, AUTO's executive director, is a former gas station operator and not a lawyer.

Although AUTO did not endorse the HST as applied to motor fuel and had some concerns about its legality, it has acknowledged that it is good to clean up toxins in the environment. *Id.* This fact allowed AUTO to overlook the potential unconstitutionality of the tax, and an uneasy peace ensued. *Id.*

However, recently the HST's purpose has been corrupted as the Legislature considered HST rate increases and large scale diversions of HST revenues from the state toxics control accounts to the general fund. CP 669. This recent abuse of the HST has prompted AUTO to take action and ask this Court to review the tax for its constitutionality. CP 657.

Finally, the State does not, and *cannot* sustain any claim that Tower had knowledge of the 18<sup>th</sup> Amendment violation and failed to act. Tower had nothing to do with the enactment of the HST, and was not a member of AUTO until long after the 1988 HST fight was over.

Tower/AUTO understand that any retroactive relief or request for damages, though warranted, would be unfair to the State. That is precisely why they seek only declaratory judgment and prospective action to correct this illegal provision of MTCA.

#### C. SUMMARY OF ARGUMENT

The Washington Constitution absolutely prohibits the diversion of excise taxes on motor vehicle fuel away from the vital purpose of

maintaining and improving our state's highways. Tower/AUTO have challenged the HST because it diverts such excise taxes on gasoline to a non-highway purpose.

The State has responded, arguing that the Legislature's deft crafting of the HST avoids any 18<sup>th</sup> Amendment problem by using the term "possession" and by stating that the Legislature does not intend to use the tax proceeds to fund highways. The State also argues that this Court should avoid the constitutional question altogether, by overruling long-standing precedent and applying laches or an artificial statute of limitations to bar Tower/AUTO's suit.

The Legislature cannot evade constitutional strictures through drafting techniques. This Court has always examined tax laws based on their actual incidence and impact, not on the language the Legislature has chosen to use. Looking at the HST's incidence as applied to motor vehicle fuel, it is an excise tax on gasoline, the proceeds of which must be deposited into the MVF.

This Court, like its sister courts, has long held that a statute which by its nature is unconstitutional is void and can be challenged at any time. Also, declaratory judgment actions have no statute of limitations, and even if one were imposed here, it has not commenced because Tower/AUTO are not seeking any retrospective relief.

The HST is unconstitutional applied to motor vehicle fuel, and this Court should so rule.

D. ARGUMENT

(1) Standard of Review

The State agrees with Tower/AUTO that this Court's reviews *de novo* the trial court's summary judgment order. Br. of Resp'ts at 6; *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). The State also observes that AUTO must demonstrate the unconstitutionality of the HST "beyond a reasonable doubt," citing *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377, 380 (1998). Br. of Resp'ts at 6.

It is important to note the limitations of the "beyond a reasonable doubt" standard as articulated in *Island County*. The "reasonable doubt" standard, when used in the context of a criminal proceeding is an evidentiary standard referring to a subjective state of certitude of the facts in issue. *Island County*, 135 Wn.2d at 147. In contrast, the "beyond a reasonable doubt" standard used to evaluate statutes refers not to an evidentiary standard, but to the fact that the party must, "by argument and research convince the court that there is no reasonable doubt that the statute violates the constitution." *Id.* The standard is based on appropriate judicial deference to a co-equal branch of government. Courts afford some deference to the Legislature's ability to consider the constitutionality

of its enactments. *Id.* But this is not the same as a “burden of proof on appeal.”

Ultimately, it is up to courts, not the Legislature, to determine whether a given statute is within the legislature's power to enact or whether it violates a constitutional mandate. *Id.*, citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–80, 2 L.Ed. 60 (1803).

(2) The HST as Applied to Motor Fuel Is Unconstitutional Because It Functions as an Excise Tax on the Sale, Use, and Distribution of Motor Fuel

Tower/AUTO’s opening brief explains why a tax on the “possession” and “control” of motor fuel as opposed to explicitly taxing its “sale, distribution, or use,” is a distinction without a difference for purposes of the 18<sup>th</sup> Amendment. Br. of Appellants at 18. “Possession” is merely the “power to sell or use” a hazardous substance. WAC 458-20-252. Our Supreme Court has emphasized that the sale or use of a hazardous substance – not physical possession – is the lynchpin of the HST. *Tesoro Refining & Marketing Co. v. Dep’t of Revenue*, 164 Wn.2d 310, 190 P.3d 28 (2008); Br. of Appellants at 19.

(a) The Legislature Cannot Evade the 18<sup>th</sup> Amendment With Semantics

The State claims that there is no 18<sup>th</sup> Amendment problem with the HST because the “plain language” of the RCW 82.21.030 imposes the

HST on “possession” of motor fuel, rather than on its “sale, distribution or use.” Br. of Resp’ts at 8.

The State’s argument fails in two respects. First, the “plain language” of the statute is immaterial if practical effect of the tax is an excise tax on motor fuel. The Legislature 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. *Jensen v. Henneford*, 185 Wash. 209, 217, 53 P.2d 607 (1936). “The character of a tax is determined by its incidents, not by its name.” *Id.* A legislative body cannot change the real nature and purpose of an act by semantic manipulation. *Id.* Second, the State’s argument would blow a gaping hole in the 18<sup>th</sup> Amendment, rendering it meaningless. Under the State’s interpretation, the Legislature could levy *any* excise tax on motor fuel and, as long as the stated purpose of the tax was not to fund highways, the tax would be constitutional. This is impermissible under *Jensen*.

Both the gas tax – RCW 82.36.020 – and the HST impose an excise tax on motor fuels, the former by its explicit language, and the latter as a function of the MTCA. Yet the latter violates the former by depositing funds in the state toxics control accounts, and not in the MVF as required by the 18<sup>th</sup> Amendment. The HST violates the plain language of 18<sup>th</sup> Amendment as it applies to Tower/AUTO members. They pay the

HST on motor 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 fuel, yet its revenues are not deposited into the MVF. The revenue generated from this excise tax on motor fuels constitutes the bulk of the HST's revenue, yet it is diverted to the state toxics control accounts. Consequently, the HST is unconstitutional.

The Legislature cannot skirt the requirements of the 18<sup>th</sup> Amendment by imposing a tax on motor 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). Under the 18<sup>th</sup> Amendment, the HST revenues from motor fuel must go to the MVF.

(b) The Notion that the Tax Is Based on Mere "Possession" is Belied by the Fact that the Tax Is Imposed Based on the Sale Price of the Fuel

In its opening brief, Tower/AUTO explained how case law and regulations reveal that the term "possession" as used in RCW 82.21.020 places the actual incidence of the HST on the sale or use of motor fuel. Br. of Appellants at 18-20.

The State answers that the HST falls upon only the "ability" to sell or use the hazardous substance, and that this distinction avoids the 18<sup>th</sup>

Amendment problem. Br. of Resp'ts at 9. The State reads *Tesoro* differently from Tower/AUTO, arguing that the Legislature sufficiently avoided tethering "possession" to "sale or use." The State concedes that the HST falls primarily upon motor fuel, but claims that this is proper because petroleum products are the largest source of hazardous substance pollution. *Id.* at 13. The State also claims that because the Legislature's intent was to clean up this pollution, the HST poses no 18<sup>th</sup> Amendment problem. *Id.*

The holding of *Tesoro* is plain: "the [HST] statute focuses on whether the taxpayer has the power to sell or use the hazardous substance. RCW 82.21.030. The fact *Tesoro* uses refinery gas contradicts the argument that *Tesoro* lacks sufficient control over refinery gas to fall within RCW 82.21.030." *Tesoro*, 164 Wn.2d at 321. Again, as explained in *Jensen*, the incidents of a tax, and not the name, control.

The State's claims are also belied by the fact that the HST is imposed not on the volume of motor fuel possessed, but on its *wholesale value*. RCW 82.21.030(5). If, as the State argues, the Legislature's concern about hazardous substances was potential pollution (Br. of Resp'ts at 13) then 100 gallons of fuel would be more dangerous than 75 gallons. However, if the current wholesale price of 100 gallons of fuel is

\$1000, and then two weeks later the price spikes and the wholesale price of 75 gallons is \$1200, the 75 gallons is taxed more than the 100 gallons.

The HST is tethered to the market value of fuel, rather than its quantity and thus its potential environmental impact. It is also tethered to the sale or use of the fuel, rather than its mere “possession.” The State’s claim that the HST is not an excise tax on motor fuel diverted to other purposes cannot stand.

(c) Circumstances Surrounding the 18<sup>th</sup> Amendment’s Enactment Strengthen Tower/AUTO’s Position that the Legislature Should Not Be Able to Impose New Gas Taxes for Non-Highway Projects

Tower/AUTO argues in its opening brief that the 18<sup>th</sup> Amendment and its proviso should be interpreted in the context of taxes in place at the time of its enactment. Br. of Appellants at 13-14. Tower/AUTO notes that concerns over preserving the Motor Vehicle Excise Tax (“MVET”) and the B&O tax as applied to motor fuel motivated the inclusion of the proviso, but that neither the enacting language nor the proviso should be read in a way that renders the 18<sup>th</sup> Amendment’s anti-diversionary policy meaningless. *Id.* at 16.<sup>2</sup>

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<sup>2</sup> In fact, the 18<sup>th</sup> Amendment is entirely consistent with Washington constitutional principles on taxation that have banned diversion of tax revenues since this state’s founding in 1889. Washington Const. art. VII, § 5. The framers, rooted in Progressive Era distrust of legislators and the Legislature, restricted the ability of the Legislature to divert revenues. Provisions similar to article VII, § 5 in other state constitutions have been held to restrict diversion of revenues. For example, constitutional

The State responds that circumstances surrounding enactment of the 18<sup>th</sup> Amendment suggest that the Amendment was only intended to prevent diversion of the gas tax that existed in 1944. Br. of Resp'ts at 14. The State describes state and federal laws in the 1930's that were concerned with preserving the existing gas tax, and then concludes that the framers of the 18<sup>th</sup> Amendment were only concerned with that tax. *Id.* at 14-16. Particularly, the State suggests that the existence of the 1934 Hayden-Cartwright Act, 23 U.S.C. § 126(a) (1964), proves that the voters who approved the 18<sup>th</sup> Amendment were only concerned with preserving the existing gas tax, and not with preventing diversion of future gas tax revenues that the Legislature might invent. Br. of Resp'ts at 16. The State also claims that the proviso reinforces its interpretation. Br. of Resp'ts at 18-22.

The State's contention that the voters only intended to preserve the existing gas tax is belied by the 18<sup>th</sup> Amendment's language: it is imposed on "all excise taxes collected by the State of Washington on the sale,

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provisions in Arizona (article 9, § 3), Kansas (article 11, § 5), South Dakota (article II, § 8), and Wyoming (article 15, § 13), just to name a few, mirror the language of our own article VII, § 5. Each of these states has case authority barring the diversion of revenues. *See, e.g., Carr v. Frohmiller*, 56 P.2d 644 (Ariz. 1936) (revenues collected for pension and burial expenses of old age pensioners could not be diverted to general fund); *Panhandle Eastern Pipe Line Co. v. Fadely*, 332 P.2d 568 (Kan. 1958) (diversion of funds from State Corporation Commission's natural gas conversation fund to general fund was void); *In re Opinion of the Judges*, 240 N.W. 600 (S.D. 1932) (money in sinking fund could not be diverted to making feed loans); *School Dist. No. 2 of Teton Cy. v. Jackson-Wilson High School Dist. in Teton Cy.*, 52 P.2d 673 (1935) (constitution forbids transfer of funds to other school district).

distribution or use of motor vehicle fuel....” The Amendment does not refer to the existing gas tax, but encompasses “all excise *taxes*” in the plural sense. Had the framers intended only protect the 1944 gas tax that the State describes, they could have done so.

The State describes a state and federal fervor surrounding the dedication of gas taxes exclusively for highway use, and then concludes that the most “natural” reading of the 18<sup>th</sup> Amendment is one that is narrowly drawn. In other words, such was the overriding concern of Washingtonians about preserving gas taxes for highway use that they empowered the Legislature to enact any other tax on gasoline they wished, as long as the Legislature “intended” the funds to go to other purposes. But that is inconsistent with the language of the 18<sup>th</sup> Amendment, its history, or Washington tax policy dating back to 1889.

The law should not be construed to do indirectly what it cannot do directly. *Pierce County v. State*, 159 Wn.2d 16, 48-49, 148 P.3d 1002, 1020 (2006), citing *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall) 175, 192, 17 L.Ed. 520 (1863) (“It is almost unnecessary to say, that what the legislature cannot do directly, it cannot do indirectly. The stream can mount no higher than its source.”); *see also, W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 516, 12 L.Ed. 535 (1848) (“All the powers of the states, as sovereign states, must always be subject to the limitations

expressed in the United States Constitution.... What is forbidden to them, and which they cannot do directly, they should not be permitted to do by color, pretence, or oblique indirection.”). Courts will not give effect to a provision that would result in a violation of the Constitution. “To do so would, in Chief Justice Marshall's words, ‘subvert the very foundation of all written constitutions.’” *Pierce County*, 159 Wn.2d at 49, citing *Marbury*, 5 U.S. (1 Cranch) at 178.

The problem with the State's narrow reading is that it assumes gasoline taxes are elastic and limitless. If the State can tax gasoline for any purpose under the sun, provided that the intent is not related to highways, then the State can simply pile tax upon tax on this crucial commodity—with no benefit to highway users who pay such “user taxes.” The State's reading dismantles the 18<sup>th</sup> Amendment, allowing the Legislature to do indirectly what it cannot do directly: use gas taxes to fund non-highway purposes. Given the critical underfunding of our highway programs, the State cannot maintain the argument that diverting gas taxes to the HST is not impacting the State's ability to maintain its highways.

A more sensible interpretation of the 18<sup>th</sup> Amendment is to restrict the Legislature from taxing gasoline to pay for purposes that serve the general public, rather than the users of highways. If the Legislature wants

to fund schools, it should not be permitted to impose a gas tax to do so. If the Legislature wants to fund solar energy research, it should not be permitted to impose a gas tax to do so. The 18<sup>th</sup> Amendment ensures that gas taxes, past, present, and future, will be used to fund highways, and not diverted to other purposes.

(d) Other States Have Rejected Legislative Attempts to Circumvent Anti-Diversionsary Constitutional Provisions Through Semantics

In its opening brief, AUTO cites to Oregon and Idaho decisions enforcing similar anti-diversionary amendments in their respective constitutions. Br. of Appellants at 21-24. Tower/AUTO argues that case law interpreting those provisions enacted at similar points in history and for similar purposes, can guide this Court in reviewing Washington's 18<sup>th</sup> Amendment. *Id.*

The State responds that the cited cases "have no precedential value" and are inapplicable because of differing language in the respective amendments they interpret. Br. of Resp'ts at 25. Specifically, the State cites to Washington's proviso, and to its previous argument that the Legislature can exempt a new gas tax from the 18<sup>th</sup> Amendment by stating that its intent is not to fund highways. Br. of Resp'ts at 26-27.

The Oregon and Idaho opinions are instructive because they reveal the underlying purpose behind similar anti-diversionary constitutional

provisions: to prevent abuse of a state's ability to divert gas tax revenue through semantic manipulation. Both courts considered and rejected statutes that, on their face, appeared to be written to evade their states' anti-diversionary amendments, but in reality were nothing more than gas taxes in disguise. *V-1 Oil Company v. Idaho Petroleum Clean Water Trust Fund*, 128 Idaho 890, 920 P.2d 909, 913, *cert. denied*, 519 U.S. 1009 (1996); *Automobile Club of Oregon v. State*, 314 Or. 479, 491, 840 P.2d 674 (1992).

As the state agencies argued in Oregon and Idaho, the State here argues that the Washington Legislature in drafting the HST evaded the 18<sup>th</sup> Amendment by claiming to levy the tax on possession, and by stating that its "intent" was not to fund highway purposes. The State claims that the Legislature may levy any tax on gasoline that it wishes, provided that it proclaims the tax to be applied to non-highway purposes.

This Court should follow the Oregon and Idaho courts and resist the State's attempt to undermine and ultimately dismantle the 18<sup>th</sup> Amendment. The State's position renders the Amendment meaningless and would permit gas taxes to be levied for any number of unrelated purposes, to the continued detriment of the state highways.

- (3) This Court Should Not Create a New Rule in Washington that Unconstitutional Statutes Become Constitutional Over Time

Tower/AUTO argue in their opening brief that the trial court erred in ruling that laches or a fictional UDJA statute of limitations somehow barred their constitutional claims. Br. of Appellants at 25-37. This Court has never before ruled that an individual or organization was time-barred from bringing a constitutional challenge, and Tower/AUTO seek to preserve that right for all Washington citizens. The State's argument is a particularly pernicious one that would *severely* restrict the ability of Washington citizens to raise challenges to unconstitutional statutes. This Court should emphatically reject the State's argument.

(a) There Is No Statute of Limitations on a Challenge to an Unconstitutional Statute When Only Prospective Relief Is Sought

The State makes a number of arguments attempting to analogize Tower/AUTO's suit to other kinds of actions or situations, in the hope of persuading this Court that a fictional statute of limitations on this UDJA action began to run from the date when the HST was first enacted. Br. of Resp'ts at 29-34.

The State first argues, without support in law, that "allowing a timeliness defense...should be no different than applying the doctrines of judicial restraint to constitutional challenges." Br. of Resp'ts at 29. The State maintains that a statute of limitations serves the same function as this

Court's justiciability requirements. The State then cites two cases in which this Court declined constitutional challenges due to the lack of a live dispute (*DiNino v. State ex rel. Gorton*, 102 Wn.2d 327, 332, 684 P.2d 1297, 1301 (1984)) and the lack of a live dispute *and* standing (*To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 415, 27 P.3d 1149, 1155 (2001), *cert. denied*, 535 U.S. 931 (2002)). Br. of Resp'ts at 29-30.

The first flaw in the State's argument is that justiciability requirements are not the same as statutes of limitations. Statutes of limitation are creatures of legislation, rather than the judicial process. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S. Ct. 1137, 89 L.Ed. 1628 (1945); *rehearing denied*, 325 U.S. 896, 65 S. Ct. 1561, 89 L.Ed. 2006 (1945); *LaVergne v. Boysen*, 82 Wn.2d 718, 720, 513 P.2d 547, 548 (1973).

Justiciability is a question of court self-restraint that may not be evaded. *Walker v. Munro*, 124 Wn.2d 402, 411-12, 879 P.2d 920, 926 (1994). Absent the elements of justiciability, a court "steps into the prohibited area of advisory opinions." *Id.* Statutes of limitations are legislatively created and do not even exist in certain types of cases. The purpose of statutes of limitations is to shield defendants and the judicial system from stale claims. *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991). When plaintiffs sleep on their

rights, evidence may be lost and witnesses' memories may fade. *Id.* at 813.

Questions of justiciability, unlike statutes of limitations, are rooted in constitutional concerns over limitations of judicial authority and separation of powers. *Id.* For example, no statute of limitations restricts the federal government from filing suit to recover real or personal property. 28 U.S.C.A. § 2415 (1984). However, if the federal government lacked standing or failed to demonstrate a live dispute in its quest to recover the property, its case would likely be dismissed. *See, e.g., Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663 (1962).

Justiciability and statutes of limitation are not the same. Justiciability is not even at issue in this case. The State's attempt to graft the holdings of *Di Nino* and *To-Ro Trade Shows* onto a statute of limitations argument is unavailing.

The State next argues that the "reasonable time" requirement of the UDJA should preclude Tower/AUTO's suit. The State claims that this Court should borrow statutes of limitations from other types of actions, such as an action for misappropriation of public funds or an action for

refund of an excise tax. Br. of Resp'ts at 32-34.<sup>3</sup> Also, the State considers that the "reasonable time" should be calculated from the date of passage of the statute in question. The State's argument disregards the constitutional rights of Washington citizens. As constitutional challenges to statutes may be facial or as-applied, the State's formulation of timeliness would effectively eliminate a wide swath of as-applied challenges to statutes, whose problematic application was not immediately apparent upon enactment.

The DJA "should be liberally interpreted in order to facilitate its socially desirable objective of providing remedies not previously countenanced by our law." *Reeder v. King County*, 57 Wn.2d 563, 564, 358 P.2d 810 (1961). This perhaps is why the UDJA has no statute of limitations, because it encompasses the types of controversies that are not easily categorized. Borrowing statutes of limitations from inapposite statutes in order to bar constitutional challenges is not a liberal interpretation of the UDJA.

This is not an action for misappropriation of funds or refund of an excise tax. Both of those are actions seeking retrospective relief and

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<sup>3</sup> The State also criticizes Tower/AUTO for not proposing a different statute of limitations. Br. of Resp'ts at 33. Tower/AUTO propose no statute of limitations because none exists, nor should exist, to bar an action seeking a declaration about the constitutionality of statute where no retrospective relief is sought.

damages for actions that occurred at a specific time in the past. In fact, this action seeks no retrospective relief at all. This suit merely seeks a declaration by this Court that the HST as applied to motor fuel is unconstitutional. The State's attempt to analogize this suit to totally inapplicable actions in order to engraft a statute of limitations onto the UDJA is inappropriate, and frustrates the purposes of the UDJA.<sup>4</sup>

Even assuming that this Court would want to implant a statute of limitations onto the UDJA, Tower/AUTO have complied with it by seeking only prospective relief. *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 609, 94 P.3d 961, 970 (2004). In *Carrillo*, property owners brought an action to challenge the constitutionality of certain sewer and water fees imposed by the city of Ocean Shores. *Id.* at 597. The property owners knew of and acquiesced in the water fee for six years, and the sewer fee for 19 years. *Id.* at 608-09. The statute of limitations on a refund action was three years, and the property owners therefore only requested refunds for the three previous years. Nevertheless, the City argued that the statute of limitations barred the action, citing the owners' knowledge of the fees at the time they were enacted. *Id.*

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<sup>4</sup> As Tower/AUTO explained in their opening brief, the Court of Appeals has erred in barring certain types of UDJA actions under a phantom statute of limitations borrowed from another statute. Br. of Appellants at 32.

The Court of Appeals reasoned that the statute of limitations was not calculated from the date when the ordinance was passed, but from the earliest date at which the owners sought damages. *Id.* Because the statute of limitations was three years, and the owners limited their request for retrospective relief to three years, the statute of limitations did not bar the action. *Id.*

Here, Tower/AUTO have not sought retrospective relief. They seek only declaratory judgment and prospective constitutional compliance. Therefore, any statute of limitations the State might wish to borrow has not been violated. Likewise, Tower/AUTO's plea for prospective relief ameliorates any suggestion that Tower/AUTO's complaint was not brought "within a reasonable time" under the UDJA.

Finally, the State's statute of limitations argument would not apply to a citizen who reads an article in the paper tomorrow about the HST could recommence this suit without a statute of limitations problem. Such a person would presumably have brought suit within the State's definition of a "reasonable time" and thus be in compliance with any statute of limitations the State might impose. This is a nonsensical and artificial barrier to justice, and is not compelled by the UDJA. The parties are before this Court, this case is briefed, and this Court should consider and decide it.

The harm caused by the unconstitutional diversion of MVF funds is ongoing and substantial. It harms not only AUTO but all users of gasoline and of our state's highways. This Court should not decline the issue based on an artificial timeliness argument that would not apply to any other citizen of Washington.

(b) The Doctrine of Laches Does Not Bar This Action for a Declaration Regarding the Constitutionality of the HST

The State next argues that the suspicion of AUTO's executive director that the HST might be unconstitutional bars the organization from bringing the challenge under the doctrine of laches. Br. of Resp'ts at 34-44. Because AUTO's director had 18<sup>th</sup> Amendment concerns when the HST was enacted, the State claims, the passage of time has extinguished any ability to now seek judicial review. *Id.* at 29. Apparently, the State believes that Tower is somehow charged with AUTO's alleged actions during the years when Tower was not an AUTO member.

The State claims that invalidation of the HST as applied to motor fuel will harm its future ability to fund the projects for which MTCA was enacted. Br. of Resp'ts at 36-38. The State claims that it would be prejudiced if, in the future, it were required to fund MTCA in a constitutional manner. *Id.* Therefore, the State claims, it has met its burden under the laches doctrine to show prejudice. *Id.* at 39.

If the State's argument sounds illogical, that is not an accident. The State is desperate to evade the simple truth that Tower/AUTO seek only declaratory judgment and prospective relief, and therefore the State can claim no prejudice from the mere passage of time since the HST was enacted. In fact, if Tower/AUTO are correct and the HST as applied to motor fuel is unconstitutional, the State will have *benefited* from 23 years of collecting and spending funds it was legally prohibited from collecting.

The State can claim no prejudice from having received funds that constitutionally it should not have received. It also can claim no prejudice from the future loss of an unconstitutional revenue stream. Had Tower/AUTO sought to recoup decades of HST revenue, the State's argument would resonate. Here, it is hollow.

Also, laches cannot bar a constitutional challenge to the validity of a statute or ordinance if the statute of limitations does not. In *Carrillo*, the fee ordinance case, the city made an almost identical argument to the State's here. The city claimed that the owners' knowledge of the fees for 19 years, combined with the fact that the City was using the fees to fund vital utilities, compelling a finding that laches barred the action. The Court of Appeals properly rejected that argument, concluding that because the relief requested did not extend beyond the statute of limitations, laches also did not bar the constitutional challenge to the fee ordinances.

*Carrillo*, 122 Wn. App. at 609. Laches could not bar the action because, “[a]bsent highly unusual circumstances, we will not apply the doctrine of laches to bar an action short of the applicable statute of limitations.” *Id.* at 610.

The State’s own brief provides ample authority in support of Tower/AUTO’s claim that laches is inapplicable here. “In dicta, the *Swartout* court articulated the general principle that an invalid ordinance can be challenged at any time....” Br. of Resp’ts at 40. “The *Citizens for Responsible Government* court stated in dicta the narrow principle that zoning regulations that are void can be challenged at any time.” *Id.* “Generally, a void *legislative* act is of no effect and may be successfully attacked at any time.” *Id.* at 40 n.11 (emphasis in original).<sup>5</sup> “[T]he Attorney General opinion cited by AUTO...simply restates the general proposition that a void ordinance has no force and effect and can be challenged at any time.” *Id.* at 41 n.12.

The State claims that these clear legal principles are irrelevant because the Court has sometimes found that constitutional challenges to specific government actions were brought too late. Br. of Resp’ts at 39-

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<sup>5</sup> The State drops this last quotation into a footnote, pointing out that Tower/AUTO used the word “statute” instead of “legislative act.” While the two terms differ, the State makes no argument that a statute is not in fact a “legislative act.” Br. of Resp’ts at 40 n.11.

41. For example, in *Citizens for Responsible Gov't v. Kitsap County*, 52 Wn. App. 236, 758 P.2d 1009, 1011 (1988), the Court of Appeals distinguished between a constitutional challenge to the *very nature of the enactment itself*, as compared to a procedural challenge to *how* the law was enacted. *Citizens*, 52 Wn. App. at 239.<sup>6</sup> The former challenge may be brought at any time, regardless of the citizen's knowledge of, or acquiescence in, the measure at the time of enactment. *Id.*

Tower/AUTO are not challenging the procedural means by which the HST was enacted. They are not seeking retrospective damages for diversion of funds. They are simply asking this Court to decide whether the HST as applied to motor fuel, by its nature, is unconstitutional. There is no time limit on such a challenge.

Finally, even assuming the State's timeliness arguments are valid, they only apply to AUTO. The State makes no assertion about Tower's prior knowledge regarding the unconstitutionality of the HST. *Id.* Tower is an individually named plaintiff in this case. Any purported knowledge of the HST's unconstitutionality held by Tim Hamilton or AUTO can be imputed to Tower. Tower was not an AUTO member until long after 1988.

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<sup>6</sup> *LaVergne*, upon which the State parenthetically relies, stands for the same proposition. In that case, the challenge was not to the nature of the legislation, which was a typical school levy, but to the *procedure* by which it was enacted. *LaVergne*, 82 Wn.2d at 548. Therefore, *LaVergne* does not support the State's position.

The State argues that Tower is “in privity” with AUTO, and therefore the AUTO’s historical knowledge regarding the HST is imputed to Tower. Br. of Resp’ts at 43. The State cites *Boyle v. Oleson*, 58 Wash. 670, 109 P 203 (1910), a case in which children of a divorced mother were barred from challenging a 30-year old divorce decree by the mother’s acquiescence in that decree. *Boyle*, 58 Wash. at 205. The State cites other cases discussing privity, but neglects to note that those cases discuss principles of res judicata and collateral estoppel, not laches. Br. of Resp’ts at 43-44.

The State misunderstands the concept of privity as it applies to the doctrine of laches. The *Boyle* court (upon which the State relies) noted that the children could “only claim through” their mother, and that therefore her knowledge and acquiescence was imputed to them. *Id.*

Here, Tower is not in a position where it only has a claim to challenge the HST through its membership in AUTO. Tower pays the HST, and has independent standing that would still exist even if AUTO were dismissed. Therefore, the *Boyle* rationale that imputed knowledge to parties’ whose claims were merely derivative is inapplicable here.

Tower/AUTO’s suit is timely and reasonable under the UDJA, because they seek only declaratory judgment and prospective relief. The State’s arguments regarding timeliness fail. This Court should consider

the important constitutional issue raised by AUTO, and uphold the 18<sup>th</sup> Amendment.

(4) Tower/AUTO Are Entitled to Attorney Fees Under the Common Fund Theory

Tower/AUTO in their opening brief that they are entitled to attorney fees under the common fund theory. Br. of Appellants at 38.

The State replies that (1) the HST is not patently unconstitutional as applied to motor vehicle fuel, (2) this Court is without power to redirect HST taxes on gasoline to the MVF, and (3) even if this Court awarded the fees, such an order would be prohibited because attorney fees are not a “highway purpose.” Br. of Resp’ts at 44-47.

The common fund theory is an equitable one, designed to encourage suits to create or protect funds that benefit other citizens, rather than simply benefit the litigant. Washington courts have recognized that where a party brings an action to preserve or create a monetary fund, the party may seek reimbursement of the attorney fees expended from the common fund itself. In *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, 112 Pac. 647 (1911), the Supreme Court allowed attorney fees to a stockholder who brought an action to vacate a sale of property where officers of the corporation and certain stockholders transferred the property to themselves at a profit. Similarly, in *Grein v. Cavano*, 61

Wn.2d 498, 379 P.2d 209 (1963), the Supreme Court allowed attorney fees to a party who had brought an action for an accounting of the finances of a Teamsters Union local. The principle was aptly described by the Supreme Court in the following fashion:

[A] court may, in its discretion, allow counsel fees to a complainant who has maintained a successful suit for the preservation, protection, or increase of a common fund. The rationale of the rule is that the complainant has brought “benefit” to the fund.

*Grein, id.* at 505. See also, *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 728 P.2d 597 (1986), *review denied*, 107 Wn.2d 1022 (1987) (action creating fund of judgment proceeds).

An actual monetary fund need not always be created or preserved before attorney fees may be awarded. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 557 P.2d 342 (1976). However, the courts have ordinarily found that a fund must actually exist, or the lawsuit must result in ascertainable benefit to others in addition to the litigant, before fees may be allowed by the trial court. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 271, 138 P.3d 943 (2006); *Interlake Sporting Ass'n, Inc. v. Wash. State Boundary Review Board for King County*, 158 Wn.2d 545, 146 P.3d 904 (2006).

The State's arguments cannot overcome the equitable impetus for awarding common fund fees in this case. The notion that the statute or

action *must* be patently unconstitutional is not supported by the case law. That was the circumstance in *Weiss v. Bruno*, 83 Wn.2d 911, 914, 523 P.2d 915, 917 (1974), when the remedy sought was to prevent the unlawful expenditure of public funds. But other common fund cases preserving or creating a particular fund do not hold that patent unconstitutionality is a requirement for common fund recovery. *Seattle Trust & Sav. Bank v. McCarthy*, 94 Wn.2d 605, 612, 617 P.2d 1023 (1980); *Leischner v. Alldridge*, 114 Wn.2d 753, 757, 790 P.2d 1234, 1237 (1990); *Hsu Ying Li*, 87 Wn.2d at 799. Here, Tower/AUTO are in fact preserving a fund, not merely preventing unlawful expenditure.

Equity demands that the MVF, which will be substantially increased due to AUTO's action, should reimburse Tower/AUTO's attorney fees, which were expended solely for that fund's benefit, and for the benefit of the citizens of Washington.

#### E. CONCLUSION

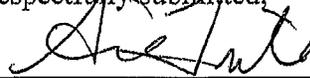
Neither laches nor a statute of limitations bars Tower/AUTO's constitutional challenge to the nature of the HST as applied to motor vehicle fuel. The deposit of HST revenue into the STCA for non-highway purposes violates the 18<sup>th</sup> Amendment. Tower/AUTO do not seek the invalidation of the HST, 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 Tower/AUTO.

DATED this 8<sup>th</sup> day of November, 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 Reply Brief of Appellants in Supreme Court Cause No. 85971-0 to the following parties:

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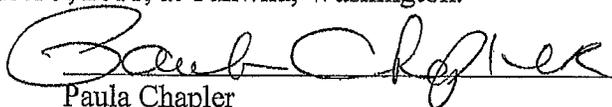
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 9, 2011, at Tukwila, Washington.



Paula Chapler  
Talmadge/Fitzpatrick

DECLARATION

## OFFICE RECEPTIONIST, CLERK

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**To:** Paula Chapler  
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**From:** Paula Chapler [<mailto:paula@tal-fitzlaw.com>]

**Sent:** Wednesday, November 09, 2011 10:18 AM

**To:** OFFICE RECEPTIONIST, CLERK

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

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

Case Name: Automotive United Trades Organization, et al. v. State of Washington, et al.

Cause No. 85971-0

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