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No. 86602-3

SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON OFF HIGHWAY VEHICLE ALLIANCE, NMA TRAIL
DIVISION, DAVID S. BOWERS, KATHLEEN J. HARRISON, JON
O'BRIEN, and KURT KOOTNEKOFF,

Petitioners,

v.

STATE OF WASHINGTON, JAMES L. McINTIRE, in his capacity as
Treasurer thereof, STATE OF WASHINGTON PARKS AND
RECREATION COMMISSION, and REX DERR, in his capacity as
Director thereof,

Respondents.

BRIEF OF AMICI
AUTOMOTIVE UNITED TRADES ORGANIZATION

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A. INTRODUCTION

Washington's citizens were so concerned about preventing the Legislature from diverting motor vehicle fund ("MVF") monies to non-highway uses that they enacted a constitutional amendment on the subject in 1944. For the last 70 years, this Court has repeatedly curbed legislative attempts to narrowly circumscribe that constitutional provision in order to gain access to the MVF for non-highway projects.

Today, budget pressures have led to several well-meaning legislative enactments that are slowly eroding the constitutionally protected MVF. This case – in which the Court of Appeals majority opinion held that MVF monies may be spent on operation and maintenance of parks – is just one example of this erosion presently before this Court.

If this erosion affected another constitutional right – such as privacy, speech, or search and seizure – it would likely be front page news and this Court would be reading amicus briefs from the ACLU or the Center for Constitutional Rights. However, since the right at stake is the right to safe and useful highways, roads, and bridges, there are no headlines or demonstrations.

Constitutional rights are not subject to popular opinion or the vagaries of legislative necessity. If Washington's citizens decide to

amend the Constitution to permit the diversion of MVF resources funds to other purposes, so be it. Until then, this Court must once again act to curb understandable legislative temptation to evade a lesser known – but nonetheless legitimate – constitutional amendment.

B. INTEREST OF INTERVENORS/AMICI

AUTO is a nonprofit corporation duly licensed to do business in the State of Washington that has members across the state. AUTO is a trade association protecting the interests of automotive-related businesses and trades.

AUTO's members also rely directly on the Washington State highway system for their business. They sell fuel to persons and businesses using the highway system. They daily rely on the highways to send and receive business-related shipments, for commuting, and other transportation. As participants in the automotive industry, AUTO's members are uniquely reliant upon a strong highway system for use by their customers: the owners of motor vehicles. Without a safe, efficient, and extensive highway structure, not only could their customers not reach AUTO members' retail locations that generate revenue, those customers would have no need of their products whatsoever.

Without good roads, AUTO's members would not be in business. One of AUTO's goals is to make it easier for every Washington business

and consumer to have inexpensive and efficient use of roads and highways, where its members' products are used.

C. STATEMENT OF THE CASE

AUTO acknowledges and incorporates by reference the statement of the case as recited in the supplemental brief of petitioner Washington Off Highway Vehicle Alliance ("WOHVA").

D. SUMMARY OF ARGUMENT

This case represents another in a series of private actions attempting to halt the rapid erosion of the rights of Washington's citizens guaranteed by Article II, Section 40 to the Washington Constitution ("the 18th Amendment"). Diverting funds from the Motor Vehicle Fund ("MVF")¹ to the General Fund or to the operation of state parks is impermissible under the 18th Amendment. This constitutional violation cannot be remedied by labeling the diverted funds a "refund," unless that refund benefits only those who paid the gas tax and who used the gasoline for non-highway purposes.

AUTO agrees with petitioner WOHVA that the decision of the Court of Appeals majority should be reversed.

¹ The MVF is mandated by the 18th Amendment and implemented by RCW 46.68.070.

E. ARGUMENT

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 the 18th Amendment. 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.” Wash. Const. art. II, § 40. In enacting the 18th Amendment, the citizens of Washington defined “highway purposes” in considerable detail.

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 Wn.2d 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 (1907). The 18th Amendment falls squarely within that tradition.

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

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”); *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).

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.

However, despite this clear constitutional mandate, in recent years the legislative and executive branches have been eroding the 18th Amendment by increasing excise taxes on motor vehicle fuel, and applying the revenues to non-highway purposes. This trend began in 1988, when the Legislature enacted (and voters subsequently amended) the Model Toxics Control Act, RCW ch. 70.105D (“MTCA”) which imposed an excise tax on “hazardous substances,” called the “Hazardous Substances Tax” (“HST”). Although the HST is ostensibly levied on a variety of substances, the State has admitted that it was imposed primarily to address – and derives the majority of its revenue from – motor vehicle fuel. The revenues from the HST do not go to highways or to any

highway purpose, but to address environmental concerns. The question of whether this scheme is permissible under the 18th Amendment is currently pending before this Court.²

More recently, the 18th Amendment has been undermined because the State has agreed to issue millions of dollars in “refunds” from the MVF to Indian tribes. However, by law those tribes do not pay the taxes in the first place, and thus are not entitled to “refunds” from the MVF. Also, the tribes are not spending those dollars on highway purposes, despite compacts with the State in which they promise to do so. That 18th Amendment case is also currently pending before this Court.³

The 18th Amendment is also at issue in an ongoing case involving the leasing of the two center lanes of Interstate 90 for non-highway purposes. Although this Court has ruled in the case on whether the State can expend MVF funds to appraise the center lanes,⁴ the issue of whether it is constitutional to actually convert the lanes to non-highway use is yet to be decided.

² Washington State Supreme Court No. 85971-0.

³ Washington State Supreme Court No. 85661-3. Technically, the 18th Amendment issue is not squarely before this Court in the case about the tribal compacts. Instead, they dismissed the plaintiffs’ case for inability to join the tribes as necessary parties. The plaintiffs have petitioned this Court simply for the right to be heard on their 18th Amendment and other constitutional arguments.

⁴ *Freeman v. Gregoire*, 171 Wn.2d 316, 256 P.3d 264 (2011).

The present case once again brings the question of preserving the 18th Amendment before this Court. Like the case involving tribal compacts, the issue is whether it is constitutional for the State to issue “refunds” from the MVF to use for non-highway purposes such as parks, regardless of whether the “refunds” benefit those who actually paid the tax and are entitled to refunds.

The Court of Appeals’ majority analysis in this case exemplifies the slippage away from earlier 18th Amendment jurisprudence. In 1969, this Court plainly announced:

Lest that term [“highway purposes”] be too narrowly construed, the people have defined its scope in the succeeding subparagraphs (a) through (e). *If there were any doubt that the funds were intended to be used exclusively for ways open to the public for motor vehicular traffic, these clarifying provisions should remove them.*

State ex rel. O’Connell v. Slavin, 75 Wn.2d 554, 558, 452 P.2d 943, 946 (1969) (emphasis added). This clear statement left no room for doubt: MVF expenditures must “exclusively” benefit roads open to motor vehicle traffic. By contrast in the present case, the Court of Appeals’ majority opined that MVF funds can be applied to the maintenance and operation of state parks. *Washington Off-Highway Vehicle Alliance v. State*, 163 Wn. App. 722, 739, 260 P.3d 956, 966 (2011). In fact, the Court of Appeals’ majority concluded that the Legislature has plenary power to expend MVF

funds on *any* purpose, as long as those funds are designated as “refunds.”

Id.

The Court of Appeals’ majority performed logical gymnastics to reach its remarkable conclusion that the Legislature may now expend MVF funds on any purpose. First, it held that any “refund” from the MVF is, by definition, a “highway purpose.” *Id.* at 735. It concedes that a real “refund” must go to the taxpayers who buy gasoline for non-highway uses. But under this “refund” program, those taxpayers who paid the taxes will not actually receive dollars in hand from the taxes they paid, the normal concept of a “refund.” However, the Court of Appeals’ majority justifies spending on parks because it will, in part, benefit “boaters” who they say are entitled to refunds under the program.

It is improper to classify MVF expenditures on state parks as a “refund” to boaters. The problem with including boaters as a category of taxpayers who are entitled to the “refund” dispensed under the NOVA program is that by statute, boaters already receive an individual refund of gasoline taxes. RCW 46.09.310(8)(a). Thus, any “refund” they receive by expenditure of MVF money on state parks is a double refund.

In fact, the actual impact of the Court of Appeals’ majority analysis is that a non-highway purpose receives what is tantamount to an

appropriation from the MVF. The plain and simple result is a constitutional violation.

This Court is the guardian of the Washington Constitution. As one judge of the 9th Circuit Court of Appeals recently acknowledged, concern over constitutional rights should be equally pressing regardless of the provision at issue:

Judges know very well how to read the Constitution broadly when they are sympathetic to the right being asserted. ...When a particular right comports especially well with our notions of good social policy, we build magnificent legal edifices on elliptical constitutional phrases-or even the white spaces between lines of constitutional text. ...It is wrong to use some constitutional provisions as springboards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us.

Silveira v. Lockyer, 328 F.3d 567 (9th Cir. 2003) (Kozinski, J., dissenting from a denial of *en banc* review).

F. CONCLUSION

As the dissent below so aptly stated, the majority's holding in this case is an "end run around the constitution's explicit prohibition on the use of highway funds for nonhighway purposes." *Id.* at 742 (Worswick, J., dissenting). This is not the State's first attempt as such an end run, nor is it likely to be the last. It is this Court's duty to defend the Constitution, and it should do so here.

DATED this ~~2011~~ 20th day of April, 2012.

Respectfully submitted,

A handwritten signature in cursive script that reads "Philip A. Talmadge". The signature is written in black ink and is positioned above the typed name and address.

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DECLARATION OF SERVICE

On said day below I emailed and deposited with the U.S. Postal Service a true and accurate copy of: Motion for Leave to File an Amicus Brief and Brief of Amici Automotive United Trades Organization in Supreme Court Cause No. 85661-3 to the following parties:

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Original efiled with:

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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 this 23 day of April, 2012, at Tukwila, Washington.



Paula Chapler
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Paula Chapler
Subject: RE: Washington Off Highway, et al. v. State of Washington, Cause No. 86602-3

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Per Mr. Talmadge's request, please see the attached Motion for Leave to File an Amicus Brief and Brief of Amici Automotive United Trades Organization for filing in the following case:

Case Name: Washington Off Highway, et al. v. State of Washington, et al.
Cause No. 86602-3
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Please replace the documents filed with your court this morning with these documents. The only change is the declaration of service. Thank you for your prompt attention to this matter\

Sincerely,

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