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NO. 91534-2

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SNOQUALMIE,

Respondent,

v.

THE STATE OF WASHINGTON DEPARTMENT OF REVENUE,

Appellant,

and,

KING COUNTY EXECUTIVE DOW CONSTANTINE; KING COUNTY ASSESSOR LLOYD HARA; KING COUNTY;

Defendants.

DEPARTMENT OF REVENUE'S ANSWER TO BRIEFS OF AMICI CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS AND MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTIES

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ORIGINAL

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I. INTRODUCTION

The Legislature enacted a constitutionally permissible tax preference in favor of tribally owned properties. Amici Curiae, Washington State Association of Municipal Attorneys (WSAMA) and Master Builders Association of King and Snohomish Counties (Builders) seek to transform what they see as economic unfairness resulting from this legislative policy into a constitutional violation. The Washington Constitution allows the Legislature to create tax exemptions. To promote the economies of the state's Indian tribes and to treat them like other governments in the state, the Legislature created a tax preference (the Act). This economic development tax preference exempts certain tribal property and requires the tribe to pay a fee or "payment in lieu of leasehold excise tax" (PILT) to local governments for services.

Contrary to the Amici's arguments, this does not violate our Constitution. In fact, the Amici's arguments confirm that this Court should reverse the trial court's decision declaring the Act unconstitutional. First, the City lacks standing to even bring this challenge because it is not injured by the Act, and fails to meet the requirements for representational standing. Second, if this Court reaches the merits of the case, the Legislature acted within its broad discretion to pass an exemption with the PILT as a condition of that exemption. In doing so, the Legislature also

provided sufficient standards and procedural safeguards to the counties to determine the PILT amount under the Act. Finally, the Act also complies with the federal equal protection clause by achieving two objectives: improving the economic health of tribes and treating tribes like other governments in the State.

II. ARGUMENT

A. The City Lacks Standing To Challenge The Act's Constitutionality.

Both WSAMA and Builders assert that the City has standing in this case based on the same injuries that the City alleged in its own brief. WSAMA Br. at 3-5; Builders Br. at 14-15. WSAMA further asserts that new caselaw demonstrates that the City has representational standing on behalf of its resident taxpayers.[1] WSAMA Br. at 6-7. These additional arguments, however, do not change the result that this Court should reach. The Act does not harm the City. Nor does the City meet the test for representational standing in this case. Thus, the City lacks standing in any capacity to challenge the Act.

[1] Notably, WSAMA's assertion that the City has representational standing on behalf of its resident taxpayers is narrower than the City's argument that it has representational standing on behalf of all its residents. *Compare* WSAMA Br. at 6-7 *with* City's Br. at 11 n.2. Thus, WSAMA implicitly recognizes that the City does not have standing to represent all of its residents because the Act affects only property owners within the City, not all residents.

1. The City cannot claim an injury based on alleged future revenue losses from currently taxable tribal property.

WSAMA echoes the City's claim that the City has standing because the Act will cause the City to lose revenue in the future if the Muckleshoot Indian Tribe seeks the economic development exemption for additional property other than the Salish Lodge and is granted the exemption. WSAMA Br. at 3-5. To demonstrate that the City's harm is not speculative, WSAMA identifies the details of the development agreement between the City and the Tribe for this additional property. According to WSAMA, the Tribe has agreed to pay the City "substantial amounts of money" in relation to the development of the property, and therefore, the City's future harm is certain. WSAMA Br. at 4. WSAMA's arguments miss the point of the standing requirements.

The speculation here is not whether the Tribe has begun developing the additional property, but whether the Act will cause the City to lose tax revenue from this property. It is the City's alleged loss in revenue that is pure speculation. *See, e.g., Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 379-80, 858 P.2d 245 (1993) (fire district lacked standing when it could only show it might be affected by a potential event in the future). The development agreement shows that the Tribe is still developing this additional property. CP 222-80. The

Tribe did not seek the economic development exemption for the property, and nothing in the record demonstrates that it will seek such an exemption or that it will even qualify for the exemption.[2] In fact, the Tribe and the City could reach their own compromise in an amended development agreement regarding whether the Tribe will apply for the economic development exemption on this property. Alternatively, the Tribe and the City could agree that the Tribe will make certain payments to the City if it does seek the economic development exemption. These different possibilities show that WSAMA's assertion of a "direct injury" to the City is mere conjecture and insufficient to give the City standing.

2. WSAMA misapplies caselaw to suggest the City has representational standing.

For representational standing, WSAMA relies upon a recent decision of this Court to argue that the City may assert the constitutional claims in this case on behalf of its residents. WSAMA Br. at 6 (citing *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution,* No. 91551-2, 2016 WL 455957 (Wash. Feb. 4, 2016)). But WSAMA misstates the Court's conclusions in that case.

[2] Whether this additional property would qualify for the economic development exemption is unclear because, according to the agreement, the Tribe will use part of the land to construct a residential housing development. CP 226-27, 268-69. Once the housing development is constructed, the Tribe may sell this land to individual homeowners. *See id.* Thus, in the future, it is possible that the Tribe will no longer even own part of the additional property at issue.

WSAMA asserts that this Court "found that all of the organizational plaintiffs had representational standing because of the effect a proposed local initiative would have on their individual members." *Id.* This assertion is wrong. This Court did not even mention representational standing in the *Spokane Entrepreneurial Center* case. Instead, it simply applied the two-part standing test for declaratory judgment actions to the various petitioners in the case and concluded that they met the test. 2016 WL 455957 at *4. For example, the Court concluded that Spokane County, the only petitioner that was a government entity in the case, had standing to challenge the proposed initiative that would have assigned water rights to the Spokane River. *Id.* The Court explained that the County itself had standing because it uses the Spokane River for its sewage treatment plant, and assigning conflicting water rights would harm the County's use. *Id.*

Thus, *Spokane Entrepreneurial Center* has no bearing on the representational standing issue presented here: whether a municipal corporation can bring a constitutional uniformity claim and nondelegation claim against a property tax exemption on behalf of its residents. As the Department argued in its opening and reply briefs, the City cannot do so. App. Opening Br. at 18-22; App. Reply Br. at 7-9.

3. The PILT itself does not harm the City or its residents.

Both WSAMA and Builders complain that the Act harms City property owners by shifting the Tribe's tax burden to them. WSAMA Br. at 6; Builders Br. at 15. This Court has expressly recognized that property tax exemptions shift the tax burden to other property owners. *See, e.g., Belas v. Kiga*, 135 Wn.2d 913, 933, 959 P.2d 1037 (1998). This is the impact for any property tax exemption, not just the Act's economic development exemption, and the Legislature's authority to make exemptions and cause such shifts is noncontroversial under the law.

What WSAMA and the Builders ignore in their argument about shifting tax burdens is the required causal relationship between the injury alleged and the action brought. *See State v. Rowe*, 60 Wn.2d 797, 799, 376 P.2d 446 (1992) (to have standing, challenger must be injured by the part of the statute alleged to be unconstitutional). The PILT itself does not create the tax shift. The PILT instead mitigates the burden that local jurisdictions face as a result of tribal property qualifying for an exemption under the Act. Accordingly, the PILT is neither the source of a shift in the burden of property taxes nor a source of harm to cities or other taxpayers.

Builders further criticize the Department for overlooking the "very clear harm" that the Act causes to the City by reducing its revenue from property taxes. Builders Br. at 15. Builders' criticism, however, stems

from a misstatement of the facts. The Act did not cause the City to lose any revenue. *See* CP 696. To the contrary, the City received the full amount of its requested levy plus the PILT. *Id.* Nor can Builders rely upon the mere fact that the City is closer to its levy limit to demonstrate that the City is injured. Builders Br. at 15. Potential budget difficulties are inadequate to establish a concrete harm for standing. *Walker v. Munro*, 124 Wn.2d 402, 412-14, 879 P.2d 920 (1994). Finally, even if this Court assumes that the Act will cause the City to lose revenue at some point in the future, this harm is not a legal injury sufficient to give the City standing. *See State ex rel. Hansen v. Salter*, 190 Wash. 703, 706, 70 P.2d 1056 (1937) (calling the possible reduction in revenue to a county from a property tax exemption for private vehicles a harm without an injury)

B. The Act Establishes An Exemption From Property Taxes, Not A New Tax Scheme Subject To Uniformity Requirements.

On the merits, WSAMA and Builders rely upon the same false premise as the City to argue that the Act is unconstitutional, asserting that the Act establishes an alternative property tax scheme that violates the uniformity requirements in Washington law. WSAMA Br. at 7-10; Builders Br. at 5-11. But neither WSAMA nor Builders offers any support for this alleged premise, other than the fact that the PILT is a condition for an exemption from property taxes. *Id.* This fact, however, does not

demonstrate that the PILT is a substitute property tax. To the contrary, there are numerous examples of the Legislature exempting property from property taxes and then applying an excise tax or fee in lieu of taxes on the use of such property. *See, e.g.*, RCW 84.36.090 (vessels exempt from property taxes but their use is subject to watercraft excise tax under RCW 82.49.010); RCW 82.29A.030 (imposing leasehold excise tax on publicly owned property that is exempt from property taxes); RCW 35.82.210 (property owned by housing authorities is exempt from property taxes, but authorities may make payments in lieu of taxes).[3]

This Court also has expressly approved this practice as constitutional in other contexts. *Japan Line, Ltd. v. McCaffree*, 88 Wn.2d 93, 98-99, 558 P.2d 211 (1977) (cancellation of ad valorem tax on leasehold interests in public property and concurrent enactment of leasehold excise tax did not constitute unconstitutional gift of state funds); *Washington Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 651-52, 62 P.3d 462 (2003) (leasehold excise tax is an excise tax not subject to

[3] There are also numerous examples of properties that are exempt from property taxes only if they meet certain criteria that the Legislature has set forth. *See, e.g.*, RCW 84.36.575 (aircraft is exempt from taxation only if owned by a nonprofit, used for emergency medical transportation, and the exemption benefit inures to the nonprofit).

uniformity). Thus, the Act is unremarkable. The Legislature can create an exemption and, in lieu of it, require a fee or an excise tax.[4]

This is precisely what the Legislature did here: It created a tax preference for certain tribal property in the form of an exemption, conditioned upon a PILT. While WSAMA and Builders complain that the exemption favors Indian tribes over other property owners, such a preference does not violate the Constitution's uniformity requirements. WSAMA Br. at 9-10; Builders Br. at 7-11. The Constitution expressly permits the Legislature to exempt property from taxation: "Such property as the legislature may by general laws provide shall be exempt from taxation." Const. art. VII, § 1.[5] Uniformity does not apply to exempt properties. *Belas*, 135 Wn.2d at 923 ("[U]nless specifically exempted from taxation, all real estate constitutes one class which must be taxed uniformly.").

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[4] WSAMA restates the City's arguments regarding why the PILT is not a fee or an excise tax. WSAMA Br. at 10-11. For the reasons the Department already discussed in its opening and reply briefs, the PILT is not a property tax, but a fee or excise tax. *See* App. Opening Br. at 24-39; App. Reply Br. at 13-20.

[5] Prior to 1930, this Court interpreted former Article VII of the Constitution as limiting the Legislature's exemption power to property with the same characteristics as property expressly exempt under the Constitution. *See State ex. rel. Chamberlin v. Daniel*, 17 Wash. 111, 119-22, 49 P. 243 (1897). Then, the Legislature could only grant property tax exemptions by amending the Constitution. *See* Alfred Hirsch, *The Washington Tax System – How It Grew*, 39 Wash. L. Rev. 944, 948-49 & n.25 (1964). Accordingly, very few exempt properties existed, and the uniformity requirements applied to nearly every property. *Id.* In 1930, the people approved Amendment 14, giving the Legislature wide discretion under Article VII, section 1, to create property tax exemptions. *Id.* at 956-57. Today many different property tax exemptions exist. *See* RCW 84.36.

Instead, the Legislature has wide discretion to create property tax exemptions. *E.g., Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County*, 82 Wn.2d 138, 144, 508 P.2d 1361 (1973). Courts generally uphold such exemptions unless they are clearly arbitrary or unreasonable. *Id.* Here, the Legislature acted reasonably in granting a property tax exemption for certain tribal property. With the exemption, the Legislature intended to improve the economic health of tribal communities by granting tribal economic development properties outside of tribal reservations an exemption from property taxes. Laws of 2014, ch. 207, §§ 1, 5 (codified as RCW 84.36.010).

The Legislature also intended to treat Indian tribes like other governments, and the Act accomplishes that. Both tribal and government properties are subject to leasehold excise tax when a leasehold interest exists. Laws of 2014, ch. 207, § 3 (RCW 82.29A.020(1)(a)&(c)); RCW 82.29A.030(1)(a). And both tribal and certain government properties are subject to PILT or a PILT-type payment when a leasehold interest does not exist. Laws of 2014, ch. 207, §§ 8-9 (RCW 82.29A.055(1); RCW 84.36.012(2)(b)); *see, e.g.*, 31 U.S.C. § 6902(a)(1) (Department of Interior making payment related to exempt federal lands); RCW 77.12.203 (Department of Fish and Wildlife make payment in lieu of property taxes).

Thus, the Act subjects tribal property to similar conditions as other government property.

C. Excise Taxes Are Not Subject To The Constitution's Uniformity Requirements, And The Act Complies With Any Statutory Requirement For Uniformity.

Demonstrating a misunderstanding of both tax law and the Act, WSAMA and Builders cite to RCW 82.29A.010 to suggest that excise taxes, like the leasehold excise tax, must comply with the Constitution's uniformity provisions. WSAMA Br. at 9; Builders Br. at 7. This is wrong because excise taxes are not subject to constitutional uniformity requirements. *Black v. State*, 67 Wn.2d 97, 99-100, 406 P.2d 761 (1965).

Relying on RCW 82.29A.010, WSAMA and Builders also argue that the Legislature has imposed a statutory uniformity requirement for excise taxes that the Act violates. WSAMA Br. at 8-9; Builders Br. at 7. Again, this is wrong. First, RCW 82.29A.010 applies only to leasehold excise taxes, not all excise taxes. Second, RCW 82.29A.010 merely states the Legislature's findings relating to leasehold excise taxes. It explains that private lessees of exempt government property "receive substantial benefits from governmental services provided by units of government." RCW 82.29A.010(1)(a). For this reason, the Legislature recognized that "a uniform method of taxation should apply to such leasehold interests in

publicly owned property," and therefore, the Legislature imposed a leasehold excise tax. RCW 82.29A.010(1)(b).

The Act fully complies with these Legislative findings. In fact, the Act as codified expressly addresses the taxation of leasehold interests in the context of exempt tribal property. It states: "The legislature also finds that eliminating the property tax on property owned exclusively by federally recognized Indian tribes within the state requires that the leasehold excise tax also be applied to leasehold interests on tribally owned property." RCW 82.29A.010(1)(d). Thus, just as with lessees of state or local government property, lessees of tribal property exempt under the Act must pay the same leasehold excise tax. RCW 82.29A.020(1)(c) (defining publicly owned real or personal property to include exempt tribal property), RCW 82.29A.030 (imposing leasehold excise tax on leasehold interests in publicly owned real or personal property). Accordingly, the same method of taxation applies to leasehold interests in both exempt government property and exempt tribal property.

D. The Act Delegated The Authority To Counties To Determine PILT With Sufficient Standards.

Builders argue that the Act is an unconstitutional delegation of legislative authority, relying on the standards in this Court's recent decision in *Automotive United Trades Organization (AUTO) v. State*, 183

Wn.2d 842, 357 P.3d 615 (2015). Builders Br. at 11-14. In *AUTO*, this Court upheld a statutory scheme delegating authority to the executive branch to negotiate fuel tax agreements with Indian tribes. Builders attempt to distinguish the *AUTO* case, but *AUTO* is directly on point and shows that the Act is a constitutional delegation of legislative power.

Builders focus their argument on the first requirement of the delegation test: whether the Legislature has provided "standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it." *AUTO*, 183 Wn.2d at 859-60. Builders assert that the Act's maximum amount for the PILT is the only provision that might constitute a sufficient standard for a proper delegation. Builders Br. at 13. But this ignores key provisions of the Act that the Department has already outlined in its previous briefing as providing "fairly detailed standards and guidelines" for determining the PILT amount. *See* App. Reply Br. at 23-24.

Rather than asserting that the Act contains no standards, Builders' true complaint appears to be that the Act's standards lack the necessary detail to constitute a proper delegation. Builders Br. at 13. For example, Builders complain that while the Act sets a maximum amount for the PILT, it does not set a minimum amount. *Id.* But this makes sense given the PILT's purpose. The Legislature intended for the PILT to offset the

burden caused by exempt tribal properties to local jurisdictions. *See, e.g.*, H.B. Rep. on E.S.H.B. 1287, at 4-5, 63rd Leg., Reg. Sess. (Wash. 2014) (comparing PILT to payments federal government makes to counties for public services to exempt land). In some situations, an Indian tribe may be providing all services to the property at issue, and therefore, no burden would be imposed upon local jurisdictions by the exempt property. The Legislature recognized this and acted appropriately by setting a maximum PILT amount, but not a minimum PILT amount.

Builders further complain that the Legislature's requirement to determine the PILT amount through "good faith negotiations" is insufficient guidance for counties and tribes. Builders Br. at 13. Once again, however, Builders fail to give the Act a "fair reading." *See AUTO*, 183 Wn.2d at 861. The Legislature intended PILT to offset the burden caused to local jurisdictions from providing services to otherwise exempt tribal property. Given that the PILT is a "payment in lieu of leasehold excise tax," the Legislature also connected PILT to the statutory chapter on leasehold excise tax. The Legislature prohibited the PILT amount from exceeding "the leasehold excise tax amount that would otherwise be owed by a taxable leasehold interest in the property." Laws of 2014, ch. 207, § 8 (RCW 82.29A.055(2)). Both the Legislature and the Department have provided guidance regarding how to determine leasehold excise tax

without the benefit of rental contract terms. *See* RCW 82.29A.020(2)(g); WAC 458-29A-200(6)(a). Thus, the Act's purpose and relation to leasehold excise tax provide the necessary guidance for a county and tribe to negotiate the PILT amount in good faith.

E. This Court Should Not Consider WSAMA's New Equal Protection Claim, But If It Does, The Act Easily Satisfies The Applicable Rational Basis Requirements.

For its final argument, WSAMA asserts an entirely new claim that the City never raised before the trial court or in its briefing to this Court. For the first time, WSAMA argues that the Act "violates the Equal Protection clauses of the Washington and U.S. Constitutions."[6] WSAMA Br. at 12-16. Apparently, WSAMA's theory of disparate treatment is that the Act makes the property tax exemptions in RCW 84.36.010 conditional for tribal properties, but categorical for all other properties. *Id.* at 13.

This Court has stated that it will not consider issues raised first and only by an amicus. *See, e.g., Madison v. State*, 161 Wn.2d 85, 104 n.10, 163 P.3d 757 (2007) (refusing to consider argument raised only by an amicus that statutes at issue violated equal protection through racial

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[6] WSAMA asserts that the PILT condition violates the equal protection clauses of both the state and federal constitutions, but fails to cite any provision of the Washington Constitution or offer any independent argument in support of this assertion. WSAMA Br. at 12. Accordingly, this Court should not consider WSAMA's passing references to the State Constitution. *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 248-49, 350 P.3d 647 (2015) ("[I]ssues not supported by argument and citation to authority will not be considered on appeal.") (internal quotation marks omitted).

discrimination); *Citizens for Responsible Wildlife Management v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003) ("Amicus Curiae Washington State Farm Bureau raises several novel arguments that Citizens did not. However, those arguments will not be discussed as we will not address arguments raised only by amicus.").

Not only is WSAMA improperly raising a new argument as an amicus, but it is also raising a claim that the City could not have brought in the first place. As a political subdivision of the state, the City cannot bring a federal equal protection claim against the Department. *See, e.g., Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40, 53 S. Ct. 431, 77 L. Ed. 1015 (1933) (rejecting cities' challenge to tax exemption on equal protection grounds because municipal corporations are creatures of the state that do not possess equal protection rights); *City of Newark v. New Jersey*, 262 U.S. 192, 196, 43 S. Ct. 539, 67 L. Ed. 943 (1923) (concluding that a city cannot bring equal protection claim against the state); *City of Seattle v. State*, 103 Wn.2d 663, 668, 694 P.2d 641 (1985) (recognizing city itself does not have rights under equal protection clause, but allowing city to bring equal protection challenge against annexation statutes that directly applied to it).

The City also could not have brought this equal protection claim because WSAMA is asserting the equal protection rights of others that are

not parties to this litigation. WSAMA appears to raise an equal protection claim on behalf of Indian tribes and their members. WSAMA Br. at 13-16. Thus, ironically, WSAMA is asserting the equal protection rights of Indian tribes like the Muckleshoots, which have expressly supported the Act and its constitutionality. *See* Muckleshoot Br. at 5-9. Neither WSAMA, nor the City, have standing to assert such arguments on behalf of Indian tribes. *See Haberman v. Wash. Public Power Supply System*, 109 Wn.2d 107, 138-39, 744 P.2d 1032 (1987) (plaintiffs and intervenors lacked standing to assert the equal protection rights of other parties and nonparties in a lawsuit).

Even if WSAMA and the City could raise an equal protection claim on behalf of Indian tribes and their members, this claim would still fail. Equal protection requires that "all persons similarly situated should be treated alike." *American Legion Post #149 v. Dep't of Health*, 164 Wn.2d 570, 608, 192 P.3d 570 (2008) (internal quotations omitted). As WSAMA states, the first step in an equal protection analysis is to determine the appropriate level of scrutiny to apply to the law being challenged. WSAMA Br. at 12 (citing *Paulson v. Pierce County*, 99 Wn.2d 645, 652, 664 P.2d 1202 (1983)). In turn, "the appropriate level of scrutiny depends on the nature of the classification or rights involved." *American Legion Post #149*, 164 Wn.2d at 608. Suspect classifications,

such as race, are subject to strict scrutiny. *Id.* If the Act does not involve a suspect classification, however, this Court should apply the much more deferential standard of rational basis review. *See id.* at 609.

WSAMA claims the Act creates a race-based class "where tribal status is required." WSAMA Br. at 13. In an effort to avoid rational basis review, WSAMA goes so far as to misstate the holdings of the United States Supreme Court. *Id.* WSAMA relies upon the Court's seminal decision in *Morton v. Mancari* to proclaim that "[i]nherently suspect classifications based on race include membership in a federally recognized tribe." *Id.* (citing *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)). But the *Mancari* case says the opposite. In *Mancari*, the Supreme Court expressly concluded that an employment preference the Bureau of Indian Affairs gave to members of federally recognized Indian tribes was a political, not racial classification, and therefore, subject to rational basis review. 417 U.S. at 553-54 & n.24. The Court explained that the preference was constitutional because it was rationally tied to Congress' unique obligation to Indians, and designed to further Indian self-government. *Id.* at 555.

Since *Mancari*, courts have concluded that state laws granting preferences to Indian tribes or their members also can qualify as political classifications subject to rational basis review. *See, e.g., Washington v.*

Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 500-01, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979) (Washington statutes establishing jurisdiction on reservation lands were subject to rational basis review because the Legislature passed such laws to further the policy that Congress set forth in Public Law 280); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 732-34 (9th Cir. 2003) (gaming compacts entered into by California and federally recognized Indian Tribes were political in nature and subject to rational basis review). In these cases, the courts have concluded that rational basis review is appropriate when state laws "promote tribal self-governance, benefit tribal members, or implement or reflect federal laws." *Greene v. Commissioner of Minn. Dep't of Human Services*, 755 N.W.2d 713, 727 (Minn. 2008).

Here, the Act's express language demonstrates that it establishes a political classification subject to rational basis review. Contrary to WSAMA's assertions, the Act does not create a property tax exemption based on an individual's "tribal status." WSAMA Br. at 13. Instead, it grants a property tax exemption to "all property belonging exclusively to any federally recognized Indian Tribe" when certain conditions are met. Laws of 2014, ch. 207, § 5 (RCW 84.36.010). The Act's application to Indian tribes, rather than individual Indians, shows the political nature of the tax preference. *See Artichoke Joe's California Grand Casino*, 353

F.3d at 734 (noting the important distinction between an unqualified preference for individual Indians and a limited preference for Indian tribes that is inherently political).

Beyond the Act's language, its purpose overwhelmingly shows that it is a political classification. In passing the Act, the Legislature intended to create jobs and improve the economic health of tribal communities. Laws of 2014, ch. 207, § 1. This further confirms that the Act carries out federal policy by promoting tribal self-government and benefitting tribal members. With the Act, the Legislature also clearly intended to expand upon the State's policy of treating Indian tribes equal to other governments in the state. Laws of 2014, ch. 207 ("AN ACT Relating to subjecting Indian tribes to the same conditions as state and local governments for property owned exclusively by the tribe); RCW 43.376 (establishing government-to-government relationship with Indian tribes). Such a clear statement of legislative intent leads to only one conclusion: the Act is a political classification to which rational basis review applies.

Under a rational basis review, the Act must meet three requirements: (1) all members of the class must be treated alike, (2) a rational basis exists for treating those within and without the class differently, and (3) the classification is rationally related to the purpose of

the legislation. *American Legion Post #149*, 164 Wn.2d at 609. As the challenger, WSAMA "bears the burden of showing that there is no reasonable basis for the questioned classification in a revenue statute." *United Parcel Service, Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 369, 687 P.2d 186 (1984). In tax matters, the Legislature has broad discretion to make classifications. *Id.* Given such broad discretion, this Court "may assume the existence of any conceivable state of facts that could provide a rational basis for the classification." *American Legion Post #149*, 164 Wn.2d at 609 (internal quotations omitted).

Despite this "minimal standard," WSAMA asserts that the Act cannot pass the third requirement for rational basis review. WSAMA Br. at 16. It argues that requiring Indian tribes to pay PILT to receive a tax exemption for certain properties is not rationally related to the Act's purpose of creating jobs and improving the economic health of tribal communities. WSAMA Br. at 16. But just like WSAMA's other arguments, WSAMA focuses solely on the PILT condition in the Act, rather than the Act in its entirety. In the Act, the Legislature granted a property tax exemption to tribal property used for economic development. Laws of 2014, ch. 207, § 5 (RCW 84.36.010(1)). The exemption is rationally related to the Act's purpose because with the benefit of a

property tax exemption, an Indian tribe will have greater revenue to put towards the economic development of its property.

The Legislature also required certain tribal property to pay PILT to receive a property tax exemption. Laws of 2014, ch. 207, §§ 8-9 (RCW 82.29A.055(1); RCW 84.36.012(2)(b)). The PILT condition is also rationally related to the Act's purpose because it subjects tribes to the same conditions as other governments and alleviates the burden caused to local jurisdictions by otherwise exempt tribal property. Laws of 2014, ch. 207. Because these purposes justify the Act's tribal tax preference, the Act fully complies with the federal equal protection clause.

F. Builders' Policy Arguments Are For The Legislature, Not This Court.

Builders assert several more arguments regarding the Act that essentially boil down to one claim: the Act gives tribes an unfair advantage. Builders Br. at 16-17. But simply because Builders may not agree with the policy that the Legislature has set forth in the Act does not mean that the Act is unconstitutional. And Builders' claims of unfairness are based upon a number of inaccurate statements.

First, Builders complain that the Legislature did not take into account the impacts to local governments that the Act would cause. Builders Br. at 14. Not so. During the 2014 legislative session, Builders

and the City had ample opportunity to voice their concerns regarding the Act to the Legislature. *See* CP 201-04 (local government and business opposition to the Act); H.B. Rep. on E.S.H.B. 1287, at 4-5, 63rd Leg., Reg. Sess. (Wash. 2014) (describing public testimony opposing bill); S.B. Rep. on E.S.H.B. 1287, at 4, 63rd Leg., Reg. Sess. (Wash. 2014) (same). The Act itself demonstrates that even though the Legislature ultimately passed the bill, it gave these concerns serious consideration. *See* Laws of 2014, ch. 207, § 8 (RCW 82.29A.055) (imposing PILT on certain exempt tribal property to offset burden to local jurisdictions), § 11 (RCW 43.136.090) (requiring report to address various factors including "state and local government revenue reductions, increases, and shifts from all tax sources . . . impacts on business investment and business competition . . . and types of business activities affected"), § 14 (mandating the Act to expire on January 1, 2022).

Second, Builders complain that the Act gives Indian tribes a competitive advantage because it allows them to purchase property for economic development without having to pay property taxes. Builders Br. 16. Again, this is not true. The Act only allows an Indian tribe to seek the economic development exemption for property the tribe owned prior to March 1, 2014. Laws of 2014, ch. 207, § 5 (RCW 84.36.010(2)). Thus, contrary to Builders' claims, the Act does not permit Indian tribes to buy

up new properties, and then seek an economic development exemption for such properties. In fact, it is this exact scenario that the Legislature likely intended to avoid by imposing the March 1, 2014, ownership requirement. *See, e.g.*, H.B. Rep. on E.S.H.B. 1287, at 5. Accordingly, the Legislature carefully crafted the Act to consider all of the interests at stake.

III. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and grant summary judgment to the Department.

RESPECTFULLY SUBMITTED this 20th day of April, 2016.

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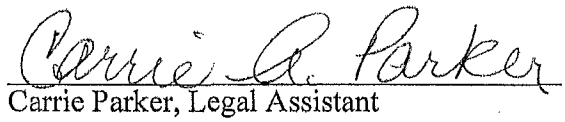
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of April, 2016, at Tumwater, WA.



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Attached for filing is a Motion for Filing Overlength, Consolidated Response to Amici Curiae and Department of Revenue's Answer to Briefs of Amici Curiae Washington State Association of Municipal Attorneys and Master Builders Association of King and Snohomish Counties.

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