

No. 85661-3

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellant,

v.

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

Respondents.

AMICUS CURIAE BRIEF OF THE ASSOCIATED GENERAL
CONTRACTORS OF WASHINGTON; INLAND NORTHWEST
AGC; OREGON – COLUMBIA CHAPTER, THE ASSOCIATED
GENERAL CONTRACTORS OF AMERICA; WASHINGTON
ASPHALT PAVEMENT ASSOCIATION; PUGET SOUND
CHAPTER, NATIONAL ELECTRICAL CONTRACTORS
ASSOCIATION; MECHANICAL CONTRACTORS ASSOCIATION
OF WASHINGTON; NATIONAL UTILITY CONTRACTORS
ASSOCIATION OF WASHINGTON; AMERICAN COUNCIL OF
ENGINEERING COMPANIES OF WASHINGTON; ASSOCIATED
BUILDERS AND CONTRACTORS OF WESTERN WASHINGTON;
AND WASHINGTON AGGREGATES AND CONCRETE
ASSOCIATION

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CONSTITUTIONAL PROVISIONS

Wash. Const. Art. II, § 40 8, 10

STATUTES

RCW 82.36.450 7, 8

I. Introduction.

The Associated General Contractors of Washington (AGCWA); Inland Northwest AGC (AGCINW); Oregon – Columbia Chapter, The Associated General Contractors of America (AGCOC); Washington Asphalt Pavement Association (WAPA); Puget Sound Chapter, National Electrical Contractors Association (NECA); Mechanical Contractors Association of Washington (MCA); National Utility Contractors Association of Washington (NUCAW); American Council of Engineering Companies (ACEC); Associated Builders and Contractors of Western Washington (ABC); and Washington Aggregates and Concrete Association (WACA) ("amici") support Appellant AUTO's petition for direct review by this Court of the dismissal of its action to prevent unlawful disbursement of funds from the Washington State Motor Vehicle Fund.

II. Statement of Interest of Amici Applicants

A. Applicants' Membership Composition and Operational Localities

The amici, ten Washington state construction contractor associations, submit this amicus brief in support of the pending Petition for Review.

There are three trade associations in Washington which are chapter level affiliates of the Associated General Contractors of America. As such, these three associations are sister organizations and contain similar memberships with regards to the type and nature of work performed by their respective memberships. These members perform both private and public sector construction and are involved in all types of construction in the state, including office, retail, industrial, highway, heavy civil healthcare, utility, educational and civic projects.

Collectively these three sister associations encompass more than 1,000 general contractors, subcontractors, and associates, including construction industry suppliers and other service providers.

Formed in 1922, the **The Associated General Contractors of Washington** (AGCWA) is the state's largest commercial, industrial, and highway construction industry trade organization. It is headquartered in Seattle with satellite offices in Bellingham, Fife, Olympia, and Yakima.

The **Inland Northwest AGC** (AGCINW) is headquartered in Spokane. AGCINW members are principally located within the

eastern portion of Washington and conduct business therein and elsewhere within Washington.

The **Oregon – Columbia Chapter, The Associated General Contractors of America** (AGCOC) is headquartered in Wilsonville, Oregon, but also contains within its geographical boundaries the five southwestern counties of Washington in and around the Portland-Vancouver metropolitan area. AGCOC membership includes 43 companies located within and conducting business within those five Washington counties and elsewhere within the state.

The **Washington Asphalt Pavement Association** (WAPA) was formed in 1955 and represents the asphalt pavement industry on a statewide basis. WAPA's producer members manufacture and place 90% of all the asphalt pavements in the state of Washington. This includes WSDOT, Cities, Counties, Ports, Military and the private sector.

WAPA members provide high paying family wage jobs to 3,000 employees throughout the State with annual sales from \$400 to \$500 million. These figures do not include the contributing sales, and jobs, provided by our associate members that support the

asphalt industry with equipment, materials, technology, and professional services.

Puget Sound Chapter, National Electrical Contractors Association (NECA) is the largest electrical contractors' association in Washington, and has over 50 members in the chapter and over 150 statewide with other chapters. NECA has been in business since 1949. NECA contractors perform specialized construction work related to the design, installation, and maintenance of electrical systems.

The **Mechanical Contractors Association of Western Washington** (MCA), in existence since 1986, represents over 50 contractor members who provide construction services to major commercial, industrial and public institutions throughout Western Washington. Contractor members employ over 5,000 plumbers and pipefitters who perform the majority of plumbing and pipefitting work in the non residential market.

The **National Utility Contractors Association of Washington** (NUCAW) is an independent chapter of the National Utility Contractors Association. NUCAW was founded in 1978 and is the largest utility contractors association in Washington. The association represents over 5 utility contractors, as well as other

large and small construction contractors, material suppliers, bonding companies, equipment companies, engineering, graphic design companies, and other construction industry related firms.

The **American Council of Engineering Companies of Washington** (ACEC) is the business association of Washington State's engineering industry, representing independent engineering companies throughout our state. ACEC member firms are engaged in the design of Washington's infrastructure in transportation, environment, business & industry, water resources, communications, and other areas. ACEC's 150 Member firms, headquarters or branch offices in Washington State employ over 6500 people.

The **Associated Builders and Contractors of Western Washington** (ABC) is a construction trade association representing over 300 general contractors, subcontractors, suppliers and industry professionals, both union and open shop. ABC members specialize in commercial, multi-family, mixed use, institutional and public works.

The **Washington Aggregates and Concrete Association** (WACA) was founded in 1959 and is Washington's largest and oldest industry trade association specifically representing the sand,

gravel, quarry rock, ready mix concrete, cement and asphalt industry suppliers and related businesses in Washington State. WACA represents over 175 primary suppliers of construction aggregates and related business located throughout Washington State. This comprises over 65% of the states production and supply of construction aggregates and over 80% of the state's production and supply in ready mix concrete, cement manufacturing, asphalt production and aggregate extraction facilities.

In Washington state, annual construction aggregate production averages approx 72 million tons. These construction aggregates are used in a wide variety of applications - most notably; transportation projects; 51.7%, residential construction; 23.2%, commercial Applications; 17.6% and other related general and specific types of construction; 11%. This makes transportation and public works construction the highest consumer of construction aggregates and related aggregate products in Washington state.

In 2009, estimated the construction aggregates material supply industry generated annual gross sales of over \$340Million in construction aggregates and related aggregate based products and on average had a monthly employment of 6,888 employees.

B. Relevance and Impact of Construction Industry on Washington State Economy and Government

According to the 2010 results of an annual study performed by the University of Washington, more than 216,000 workers were employed by contractors, construction services and materials suppliers in the State of Washington in 2009. This represents 9.4% of the State's private sector workforce. The total payroll for construction industry jobs exceeds \$11.4 billion, which represents 10.5% of the total state non-government payroll.

In 2009, in-state business activity in the construction industry was nearly \$27.1 billion, 15.3% of all in-state sales. Construction industry businesses paid a total of \$1.67 billion to the State in sales and B&O taxes. This figure represents 22.2% of all State sales tax payments, 10.1% of all B&O taxes and 18.7% of all payments combined. These figures do not include local construction taxes, which represent an additional amount exceeding \$500 million.

III. Issues Presented For Direct Review

1. Should this Court accept direct review and remand for a determination on the merits of AUTO's challenge to RCW 82.36.450 and its implementation by state officers in disbursing funds to Indian tribes from the

Motor Vehicle Fund that are not used "exclusively for highway purposes" under Wash. Const. Art. II, §40?

IV. Argument Why Direct Review Should Be Granted

A. This Court Should Accept Direct Review Because The Trial Court's Dismissal Under CR 19 Insulates Unconstitutional Actions of State Officials From Judicial Scrutiny and Harms State Interests.

The trial court's dismissal under CR 12 and CR 19 precludes a decision on the merits of AUTO's challenge under the Washington Constitution to a statute that authorizes payments to the tribes from the Motor Vehicle Fund. AUTO's underlying action argues that payments from the Motor Vehicle Fund to 22 tribes violates the Wash. Const. Art II, § 40. While the Governor ostensibly derives authority under RCW 82.36.450 authorizing payments from the Motor Vehicle Fund pursuant to compacts with Indian tribes, the AUTO actions seeks a declaratory judgment that such disbursements from the Motor Vehicle Fund are in fact unconstitutional and seeks relief preventing disbursement of fuel tax revenue from the Motor Vehicle Fund.

Resolution of this issue is of particular interest to amici, who have an immediate interest in the constitutionally mandated requirement that payments from the Motor Vehicle Fund be used

for highway purposes and that this be done in an open and transparent manner.

Appellant AUTO and other potential amici have thoroughly presented clear and cogent arguments and caselaw as to: (1) why the payments to the tribes are unconstitutional and (2) why the tribes are not indispensable parties pursuant under CR 19. The present amici will not reiterate those arguments, but do concur with the same. What has not been presented to this Court are any of the practical and harmful implications created by such unconstitutional actions and associated lack of transparency.

1. Harm to Continued Infrastructure Investment

The State's need for infrastructure investment is well documented. Beginning in 2003, the Legislature passed the "nickel package" and followed up in 2005 with the "transportation partnership act". Together these legislative actions raised the gas tax in Washington by 14.5 cents per gallon.

However, the Washington Transportation Commission estimates that there is still over \$35 billion dollars of high priority projects that need to be completed in the next 20 years¹. These

¹ Washington Transportation Plan 2030, p.6, adopted by Washington Transportation Commission in December 2010.

include projects related to safety, maintenance, and capacity improvements. Several of the highly visible projects remaining include completion of the SR-520 bridge replacement in Seattle and the North-South Freeway in Spokane. Another example of the State's highway infrastructure needs involves the aging and unsafe condition of our bridges. In 2009, the Federal Highway Administration inventoried 405 bridges in Washington that are structurally deficient.²

All of these projects are typically funded from the Motor Vehicle Fund which currently receives 37.5 cents per gallon of fuel sold in the State (outside of relevant tribal operations). This is the same tax which is subject to the highway usage limitations set forth in Const. Art. II, §40.

The substantial funding for highway projects that has been available recently under both the "nickel package" and "transportation partnership act" is quickly coming to an end. Currently, there are approximately 120 projects remaining to complete of the original 421 projects listed. Moreover, the resulting debt obligation that is arising because of the fully bonded nature of these revenue packages is growing. The debt service will grow to

² WSDOT Gray Notebook No. 38, p. 15

encompass 70% of WSDOT's portion of the current gas tax revenues as soon as 2014³.

As a result, additional revenue will be necessary in the near future to continue tackling the State's serious highway infrastructure needs. Under current law (as required by the passage of Initiative 1053), any increase in the motor vehicle fuel tax by the Legislature alone will require a two-thirds majority vote in both legislative houses. This is highly unlikely to occur. This leaves the other method available under the Initiative - passage of a tax increase by a simple majority vote and subsequent submission to the State's voters by referendum for concurrence.

It is in this legislative and political context that transparency, accountability, and adherence to the rule of law become paramount. The voters of this State must trust and believe their highway dollars are being wisely managed and spent on the purposes for which they were intended before they are likely to vote for additional revenues, even though the needs are patently obvious.

The WSDOT and the construction industry have worked collaboratively to successfully complete projects "on-time and on-

³ Transportation Resource Manual, Washington Joint Transportation Committee, p. 20

budget". One method by which the public and media are able to see and audit this happening is through the WSDOT's "Grey Notebook" which is published quarterly. This publication documents and explains WSDOT's stewardship of monies expended from the Motor Vehicle Fund on State highways and how the construction industry is working in partnership to perform in an accountable and transparent way. In the latest Grey Notebook⁴, nearly 50 pages are dedicated to "Stewardship" and provide that 85% of all projects under both the "nickel package" and "transportation partnership act" have been delivered both on time and under budget. More importantly, the total program cost is 1% under budget in the aggregate⁵.

Unfortunately, there is no analogous documentation related to the tribes' stewardship that would permit similar inquiry or analysis. Information related to the gas tax refund related tribal compacts are not available to the public and there is no independent third party verification and audit process. To the contrary, the latest report by the Department of Licensing raises significant doubts as to the tribes' stewardship⁶. The voting public

⁴ Grey Notebook No. 41, 10th Anniversary Edition, WSDOT

⁵ Grey Notebook No. 41, 10th Anniversary Edition, WSDOT, p. 58

⁶ 2010 Tribal Fuel Tax Agreement Report

is, accordingly, left to guess about this use of the Motor Vehicle Fund.

This question is especially relevant since the amount of funds paid to the tribes is currently significant and will become ever more so in the future. From November 1, 2009 through December 31, 2010, tribal fuel tax refunds were \$31.72 million⁷. This amount is expected to increase into the hundreds of millions of dollars annually as tribal fuel operations expand. At such levels, the tribal refunds will represent a significant percentage of the annual gas tax revenues.

2. Harm to Economy

Misuse of monies from the Motor Vehicle Fund also hurts the State's economy and other government revenues.

The construction industry represents a large portion of the state's economy and serves as one of its most pronounced "economic engines". A recent University of Washington annual study⁸ showed that more than 216,000 workers were employed by contractors, construction services and materials suppliers in the State of Washington in 2009. This represented 9.4% of the State's

⁷ 2010 Tribal Fuel Tax Agreement Report, p. 2

⁸ Annual study conducted through the University of Washington School of Construction Management

private sector workforce with a total payroll exceeding \$11.4 billion, which represents 10.5% of the total state non-government payroll.

Even more importantly, the study also demonstrated the multiplier effect of construction activity. It showed that for every \$1 dollar spent on construction, an additional \$1.97 dollar in economic activity is generated throughout the state and the household earnings of all Washington households were increased by 64 cents.

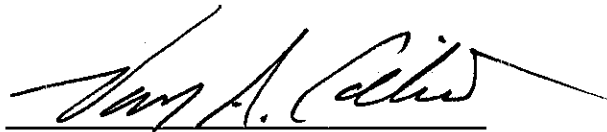
Public infrastructure investment also acts as a seed for private investment. From investment in highways, to energy, to sewer and water, public infrastructure spurs additional private economic development. Construction of public infrastructure creates tangible and beneficial facilities that are utilized by the public for years into the future.

Unfortunately, if monies from the Motor Vehicle Fund, which are constitutionally designated for highway usage, are used in other non-construction ways then this economic activity is vastly diminished. There is no creation of family wage construction jobs. There is no lasting infrastructure improvements that spur further economic growth. The economic "ripple effect" of payroll, supply, and service payments is significantly reduced.

V. CONCLUSION.

This Court should grant the applicants leave to appear as amicus curiae in this case and accept their amicus curiae brief in support of Appellant AUTO's petition for direct review.

RESPECTFULLY SUBMITTED this 5th day of August, 2011.

A handwritten signature in black ink, appearing to read "Van A. Collins", written over a horizontal line.

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