

Supreme Court No. 85661-3

**IN THE 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 MEMORANDUM OF
THE ASSOCIATION OF WASHINGTON BUSINESS
SUPPORTING DIRECT REVIEW**

Kristopher I. Tefft, WSBA No. 29366
ASSOCIATION OF
WASHINGTON BUSINESS
1414 Cherry Street SE
Olympia, WA 98507
Telephone: (360) 943-1600

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I. INTRODUCTION

This amicus curiae memorandum is filed by the Association of Washington Business (“AWB”), the state’s chamber of commerce and principal institutional representative of the statewide business community. AWB supports Appellant Automotive United Trades Organization’s (“AUTO”) statement of grounds for direct review, and urges this Court to retain the case and determine whether the trial court erred in dismissing the matter under CR 12(b)(7) and CR 19. Ultimately, AWB urges the Court to reverse the trial court and remand, fashioning a remedy allowing AUTO’s claims to proceed on their merits.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

AWB is the state’s oldest and largest general business membership federation, representing the interests of approximately 7,500 Washington companies who in turn employ over 650,000 employees, approximately one-quarter of the state’s workforce. AWB members are located in all areas of Washington, represent a broad array of industries, and range from sole proprietors and very small employers to the large, recognizable, Washington-based corporations who do business across the country and around the world. AWB represents these interests in the legislative,

regulatory, and judicial fora of the state, and frequently appears as amicus curiae before this Court in issues of broad import to its membership.

AWB members' interest in this case is two-fold. First, AUTO has alleged, credibly, that state officers have taken unconstitutional actions with respect to taxpayer money, which threatens the public interest. Further, the state has defended on the basis that because the putatively unconstitutional actions involve compacts with Native American tribes, whose sovereign immunity may shield the tribes from suit, these constitutional claims cannot be heard in any judicial forum. As representatives of one of the most taxed and regulated communities in Washington, AWB finds offensive the notion that state officers might act contrary to the constitution or contrary to statute with respect to taxpayer money, but be insulated from any judicial check on that action simply because the illegality is with a sovereign entity within the state.

Secondly, AWB is strongly interested in the subject matter of the action itself. Our state's highways and transportation infrastructure, the funding of which is the subject of the fuel tax and const. art. II, § 40 ("18th Amendment"), is a critical component of our state's business climate, economic vitality, and quality of life. Yet infrastructure funding is in perpetual fiscal and public policy crisis. If taxpayer money – tens of

millions of dollars in the aggregate annually -- that is constitutionally dedicated to highway purposes is being diverted by the executive branch away from that purpose, that diversion needs to stop and it is the prerogative of the judicial branch to stop it.

III. ISSUES OF CONCERN TO AMICUS CURIAE

Whether the Court should accept direct review of the trial court's order dismissing this case on CR 12 and CR 19 grounds, on the "catch-22" that the matter could not proceed without joinder of certain Native American tribes, yet that the tribes could not be joined because of sovereign immunity?

IV. REASONS TO GRANT DIRECT REVIEW

A. WHETHER TRIBAL SOVEREIGN IMMUNITY PRECLUDES JUDICIAL REVIEW OF EXECUTIVE BRANCH AUTHORITY TO DIVERT CONSTITUTIONALLY PROTECTED REVENUE TO TRIBES IS A MATTER OF FUNDAMENTAL AND URGENT PUBLIC IMPORTANCE.

Included among the matters this Court will directly review from the trial court are cases "involving a fundamental and urgent issue of

broad public import which requires prompt and ultimate determination.”

RAP 4.2(a)(4).¹

In this regard, AWB is in complete agreement with the court below:

I do find one thing repugnant in this whole situation, and that is in our system of government the terminology that there is no judicial remedy. I do believe that there needs to be, after reviewing the cases from other states and more specifically the two that we deal with from the Court of Appeals, that this is an issue that needs to be addressed by our Supreme Court. We all know that you can get decisions from the various Courts of Appeals of the three divisions of this state. And I have read decisions where they indicated we don't have to follow what Division X says, we are our own division.

This decision needs to be resolved by our Supreme Court. And I go back to the statement, no judicial remedy. Our whole country and our whole system is based upon judicial remedy.

Report of Proceedings I (“RPI”) at 25-26. *Cf.* Br. of App. AUTO at 12-13. Despite apparently finding the thrust of the state’s legal position repugnant – tribal sovereignty trumps the lack of a judicial forum -- the trial court nevertheless felt constrained to grant the state’s motion to dismiss, putting the matter potentially before this Court.

Even if it erred in dismissing the matter rather than fashioning a remedy short of dismissal, the trial court was undoubtedly correct: if the

¹ AWB notes in passing this case also involves a request for injunction against a state officer, meeting the requirement of RAP 4.2(a)(5).

interplay of tribal sovereign immunity and executive (or legislative) branch prerogative results in legal arrangements that are completely walled off from judicial scrutiny, that lack of accountability impacts broad and fundamental public interests of the sort “our whole system is based upon.” Whether or not that ought to be the case merits the urgent attention of this Court.

The two cases the trial court referenced in its ruling, or the “furrow of well-plowed precedent,” Resp’t’s Br. at 1, the state thinks derails AUTO’s case are *Mudarri v. State*, 147 Wn. App. 590, 196 P.3d 153 (2008), *rev. denied*, 166 Wn.2d 1003 (2009) and *Matheson v. Gregoire*, 139 Wn. App. 624, 161 P.3d 486 (2007), *rev. denied*, 163 Wn.2d 1020 (2008). AWB would encourage the Court to plow a little deeper.

Indeed, the state places too much reliance on *Mudarri* and *Matheson*. The fact AUTO does not seek as its relief the direct and wholesale invalidation of the fuel compacts is a distinction with a difference. Here, AUTO’s request for relief is prospective and injunctive in nature with respect to the state officials it believes are acting in plain violation of fundamental state law. As has been pointed out several times in the briefing, AUTO does not seek invalidation of the compacts as such, and, unlike the challenger in *Matheson*, does not seek damages from the

state and tribes. It's hardly a stretch to observe that AUTO may have pled its case in this manner precisely to seek a remedy for unconstitutional state action in a manner that would propose to avoid, or cure, the flaws that led to dismissal in *Mudarri* and *Matheson*. Had AUTO sued "on the compacts," as opposed to "on the constitution," this may be a different case. But given the specific relief requested and specific causes of action alleged here, the Court should recall the heavily fact and case-specific nature of CR 19 analysis. *Burt. v. Dept. of Corrections*, 168 Wn.2d 828, 841-42, 231 P.3d 191 (2010) (citing *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 495, 145 P.3d 1196 (2006)).

Accordingly, the CR 19 analyses from those *Mudarri* and *Matheson*, which turned in each instance on the tribes' legally protected interest as a party to the contract, are not in any way determinative. To further state the obvious, *Mudarri* and *Matheson* are Court of Appeals decisions, not binding on this Court. This Court has never provided a CR 19 analysis in the case of tribal sovereign immunity. As one other amici put it: "If, as the State has urged, the courts are closed to AUTO, amici, and similarly situated litigants, this Court should definitively say so...". Amicus Brief of Nat'l Fed. of Independent Bus. et al. at 7.

B. A PROPER BALANCING OF “EQUITY AND GOOD CONSCIENCE” UNDER CR 19 MILITATES AGAINST DISMISSING AUTO’S CLAIMS DUE TO LACK OF AN ALTERNATIVE FORUM.

The parties have voluminously briefed the necessary party analysis of CR 19(a) and the four-part balancing test of CR 19(b). Indeed, AUTO has provided substantial arguments as to why the tribes are neither necessary nor indispensable parties, that they have waived their sovereign immunity by the terms of the compacts, and that tribal officers may be joined to the suit as signatories of the compacts. While generally agreeing and adopting AUTO’s position, AWB writes separately to emphasize its view that, where CR 12(b)(7) dismissal is universally acknowledged as a “drastic remedy,” *Mudarri*, 147 Wn. App. at 601, and assuming *arguendo* the tribes are an indispensable party, the Court ought to give special solicitude to the lack of adequate remedy prong of CR 19(b)(4).

While it is true that, in *Matheson*, the Court of Appeals weighed this factor in that case, as pled, and found it not enough to trump sovereign immunity (despite “weigh[ing] heavily in Matheson’s favor”), 139 Wn. App. at 636, that determination is not binding on this Court and further relies on a characterization of Ninth Circuit holdings that are not binding on this Court. *Id.* (citing *Wilbur v. Locke*, 423 F.3d 1101, 1115 (9th Cir. 2005)).

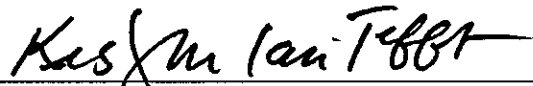
Yet it is this factor – the lack of any judicial review of state action merely because Native American tribes are on the other side of that action – that is the essence of the untenable “catch-22” such a resolution presents for taxpayers. It is precisely the “repugnant” situation the trial court criticized in its own ruling, decrying the prospect of a lack of judicial remedy for claims of unconstitutional state action. This Court ought to fashion an equitable remedy – AUTO offers several tenable options – that resolves the “catch-22” and allows the taxpayers their day in court.

V. CONCLUSION

Based on the foregoing, AWB urges the Court to accept direct review of the case and ultimately remand to the trial court to proceed to the merits.

Dated this 4th day of August, 2011.

ASSOCIATION OF WASHINGTON
BUSINESS



Kristopher L. Tefft, WSBA No. 29366
1414 Cherry Street SE
Olympia, WA 98507
(360) 943-1600