NO. 100348-0

SUPREME COURT OF THE STATE OF WASHINGTON

PHILIP EDWARD SIFFERMAN; et al.,

Petitioners,

v.

CHELAN COUNTY and its TREASURER DAVID GRIFFITHS; STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners (Sellers) sold private residences constructed on subleased land owned by the Wapatos, a Native family, and held in trust by the United States. Sellers paid state and local real estate excise tax (REET) on their sales, and afterwards filed this excise tax refund action. Neither the Wapatos nor the United States are parties to this litigation, nor was the REET applied to either of them.

Notwithstanding their status as non-Indians, Sellers claimed express federal preemption relying on laws intended to benefit Tribes and individual tribal members. Sellers also asserted several state-law claims. The trial court granted summary judgment to Respondents and the Court of Appeals affirmed. This Court should deny discretionary review.

First, the Court of Appeals correctly relied on 25 U.S.C. § 5108's plain language to conclude that federal law does not expressly preempt the REET because § 5108 applies only to trust lands *acquired* in 1934 or later, and the trust land here was

acquired long before 1934. In addition, the rights covered by § 5108 are interests in land and do not include leasing authority, which is addressed in another statute.

Like other courts, the Court of Appeals also concluded that 25 C.F.R. § 162.017 does not, on its own, preempt any state tax. Thus, the federal regulation does not support Sellers' express preemption argument.

Second, even if § 5108 applied, it would preempt only direct taxes like a property tax, and not a transactional tax like the REET. Sellers claim that a conflict with federal case law interpreting the federal law exists, but the cases they cite are readily distinguishable.

Third, the Court of Appeals correctly declined to consider Sellers' claim for declaratory relief under the Uniform Declaratory Judgment Act (UDJA). Sellers brought refund claims under RCW 82.32.180, which provides that "no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as

herein provided." Because Sellers sought refunds under RCW 82.32.180, they were precluded from also seeking relief under the UDJA.

Fourth, some of the Sellers complain about having paid REET based on their entire transaction prices. But they have no one to blame but themselves. Sellers would have been entitled to partial refunds had they proved the correct amount of tax. All of them, however, declined to provide evidence establishing the value of the private residences they sold in response to Respondents' discovery requests, and they chose not to present that evidence in summary judgment proceedings. Thus, Sellers cannot now fault the Court of Appeals for upholding the trial court's conclusion that they failed to meet their burden of proving the correct amount of tax.

Nor can Sellers fault the Court of Appeals for disregarding a 1994 Department of Revenue letter to claim a 50 percent refund, when the letter involved time-share condominiums, and not private residences such as those sold by

Sellers. Moreover, Sellers never mentioned or relied on the Department's letter in their summary judgment briefs. The Court of Appeals thus understandably concluded that the trial court did not err in denying refunds to Sellers based on an inapplicable letter which they did not mention. That unremarkable conclusion is not a matter of substantial public interest.

Fifth, Sellers' due process claim does not present a significant constitutional issue. Unlike the Court of Appeals, Sellers simply ignore this Court's case law holding that in a dispute under RCW 82.32 the opportunity for a hearing may be postponed until after the taxpayer pays the disputed taxes.

Finally, the Court of Appeals did not err in declining to reverse the trial court's dismissal of Sellers' class action claims. Among other reasons, the court correctly explained why RCW 82.32.180, as this Court has held, precludes class action claims.

This Court should deny discretionary review.

II. COUNTERSTATEMENT OF THE ISSUES

1. 25 U.S.C. § 5108 preempts state and local taxes imposed on land and certain rights in property that were acquired and placed into trust no earlier than 1934. Is § 5108 inapplicable when the land at issue here was placed into trust around 1884 and leasing authority is not covered by the statute?

2. Is 25 C.F.R. § 162.017 an interpretative regulation without independent force to preempt any state tax?

3. 25 U.S.C. § 5108 preempts only direct taxes on land. If § 1508 applies, is the REET permissible as a transactional tax on the sale of real property improvements?

4. The Legislature has provided an exclusive statutory remedy for taxpayers seeking refunds through RCW 82.32.180, which does not authorize declaratory relief under the UDJA. Is Sellers' claim under the UDJA contrary to RCW 82.32.180?

5. Although they bore the burden of proof, Sellers chose to present no evidence of the values of their private

residences in support of their refund claims. Did Sellers fail to prove their claims?

6. This Court has held the procedures in RCW 82.32 satisfy due process. Did Sellers' refund action under RCW 82.32.180 provide them due process?

7. This Court has held that class action claims are not permitted in excise tax refund actions under RCW 82.32.180. In this action under RCW 82.32.180, are Sellers precluded from pursuing class action refunds?

III. COUNTERSTATEMENT OF THE CASE

The improvements at issue are private residences at Wapato Point, a resort in Chelan County with private residence homes, full-share condominiums, and timeshare condominiums. *See* CP 125-26. The private residences are constructed upon trust land allotted to the Wapatos, a Native family. CP 3 (¶ 4.1). The allotted land is a "portion of the original Indian trust allotment, Moses Agreement No. 10 (Que-til-qua-soon, or Peter Wapato) . . . in Chelan County[.]" CP 253. Each Seller held

portions of the land pursuant to subleases and assignments of sublease rights. CP 4 (¶ 4.2). No Seller is a member of the Wapato family or a member of a Tribe. *See* CP 94, 134, 139-40. And no Tribe was involved in the transactions at issue or participated in this litigation.

Petitioners Philip Edward Sifferman, Bruce and Raelyn Penoske, and Steven and Jacqueline Ramels, entered into transactions in which they assigned their sublease of the real property and sold the private residence constructed thereon. CP 4-5 (¶¶ 4.4, 4.6, 4.8). Each filed a REET Affidavit reporting the "Gross Selling Price" as the "Taxable Selling Price." CP 102-04. The Chelan County Treasurer collected REET based on Taxable Selling Prices they reported. *See id.*

Petitioners Michael and Diane Lass, Thomas and Sharon Jansen, and Patrick French (the Lass owners) likewise entered into a transaction in which they assigned their sublease of the real property and sold the private residence constructed thereon. CP 5 (¶¶ 4.10, 4.12). On their REET affidavit, the Lass owners

reported a "Gross Selling Price" of $624,500.00 and a "Taxable Selling Price" of $312,250.00, claiming a 50 percent exemption of $312,250.00. CP 105-06. The Treasurer collected REET based on the Taxable Selling Price they reported. *See id.*

Petitioner Paradise Lake House LLC, a Washington limited liability company, entered into a transaction in which it assigned its sublease of the real property and sold the private residence constructed thereon. CP 5 (¶ 4.12). On its REET Affidavit, Paradise Lake House reported a "Gross Selling Price" and "Taxable Selling Price" of $514,500.00. CP 107. The Treasurer collected REET based on the Taxable Selling Price it reported. *See id.*

Sellers or their agents provided the information on the REET Affidavits. Chelan County does not fill in the information on REET affidavit forms, or dictate how they should be filled out. CP 84-85 (¶¶ 3-4).

Sellers filed an action seeking refunds of the REET they paid, declaratory relief under the UDJA, and refunds on behalf

of an alleged class of unnamed, similarly-situated taxpayers. CP 1-11. Respondents successfully moved to dismiss the class action refund claims. CP 66-68.

The trial court later granted summary judgment to Respondents, denied summary judgment to Sellers, and dismissed Sellers' action with prejudice. CP 371-73. Sellers appealed and the Court of Appeals affirmed. *Sifferman v. Chelan Cnty.*, ___ Wn. App. 2d ___, 496 P.3d 329 (2021).

IV. REASONS THE COURT SHOULD DENY REVIEW

A. Sellers' Express Federal Preemption Claim Is Without Merit

States may impose taxes on non-Indians engaging in taxable activity on trust land unless federal law expressly or impliedly preempts the tax. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173, 109 S. Ct. 1698, 104 L. Ed. 2d 209

(1989). Sellers claim express preemption, primarily relying on 25 U.S.C. § 5108. Pet. Rev. at 5-9.[1]

The Court of Appeals committed no error in rejecting Sellers' claim of express preemption under 25 U.S.C. § 5108. Section 5108 applies only to lands or rights *acquired* under the Indian Reorganization Act (IRA) of 1934 and a later act:

> Title to any lands or rights *acquired* pursuant to this Act [*i.e.*, the IRA] or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, *and such lands or rights* shall be exempt from State and local taxation.

(Emphasis added). Here, as Sellers concede, the Wapato Point land was acquired well before the IRA of 1934. *See* Pet. Rev. at

[1] Sellers also rely on 25 U.S.C. § 5102, which extended existing periods of trust placed upon Native lands, to support their express preemption claim. Pet. Rev. at 6. Prior to their review petition, however, Sellers never mentioned, raised, or made any argument based on § 5102. Therefore, the Court of Appeals did not address it. Moreover, § 5102 is completely silent regarding state taxation. Therefore, it lends no support for express preemption.

9 ("It is undisputed that Moses Allotment 10, the Wapato Point property was allotted in 1884, prior to the IRA of 1934.").[2]

Sellers seek to avoid the express limitation on § 5108's reach by arguing that 25 U.S.C. § 415, which addresses the leasing of restricted Native lands, somehow granted the Wapato family a "right" that was acquired pursuant to the IRA of 1934. Pet. Rev. at 7. Sellers do not explain why the leasing authority granted by § 415 is a "right" based on § 5108's actual language. Rather, they simply claim it would be "ludicrous" to conclude that § 5108 does not apply because both § 415 and § 5108 "are part of the IRA." Pet. Rev. at 7. The Court of Appeals, however, correctly concluded that the leasing authority authorized by § 415 is not a "right" for purposes of § 5108.

[2] Other courts have found § 5108 inapplicable when lessees or non-Indian owners of improvements seeking its benefit failed to prove the land at issue was acquired under the IRA of 1934 or the 1955 Act. *See Herpel v. Cnty. of Riverside*, 45 Cal. App. 5th 96, 118-22, 258 Cal. Rptr. 3d 444 (2020); *Pickerel Lake Outlet Ass'n v. Day Cnty*., 953 N.W.2d 82, 89-91 (2020).

First, § 5108 is silent regarding the leasing of allotted lands. *See Sifferman*, 496 P.3d at 342 ("It is significant here that . . . § 5108 makes no mention of a right to lease allotted lands, although such leases are also administered by the Secretary. § 415.").

Second, § 5108 authorizes the Interior Secretary to "acquire . . . any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing land for Indians[,]" and further provides that the "rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired[.]" Based on the statute's language, the Court of Appeals concluded:

> [I]n listing water rights, surface rights, and interests in land in § 5108, and subsequently stating that "title to lands or rights acquired under the Act" are exempt from federal and state taxation, Congress indicated that the exemption applied to the rights and interests listed in § 5108 and not to additional, undefined rights.

Sifferman, 496 P.3d at 342. Then, after discussing the text of § 415, the Court of Appeals concluded that "§ 5108 does not apply to the allotted lands in this case." *Id.*

This interpretation properly reads § 5108 as a whole and in context. *See Stand Up for California! v. U.S. Dep't of Interior*, 959 F.3d 1154, 1159 (9th Cir. 2020) ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); *PeaceHealth St. Joseph Med. Ctr. v. Dep't of Revenue*, 196 Wn.2d 1, 8, 468 P.3d 1056 (2020) (legislative intent is derived from "the plain language of the statute, considering the text of the provision, the context of the statute, related provisions, amendments, and the statutory scheme as a whole"). The statute's plain language addresses the acquisition of interests in lands, water rights, and surface rights, and not the granting of leasing authority. Indeed, it would be nonsensical to conclude that the leasing authority granted by § 415 is a "right" coming within § 5108 because leasing authority is not a "right" that can be taken in the name of the

United States and held in trust. The Court of Appeals, therefore, correctly concluded that § 5108 does not expressly preempt the REET as applied to Sellers' sales of improvements constructed upon the Wapato Point land.

To bolster their express preemption claim under § 5108, Sellers rely on 25 C.F.R. § 162.017. Pet. Rev. at 9-11. But as the Court of Appeals noted, *Sifferman*, 496 P.3d at 343 n.8, Sellers misunderstand the nature of that regulation, which "merely clarifies and confirms what § [5108] already conveys." *Confederated Tribes of Chehalis Rsrv. v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153, 1157 n.6 (9th Cir. 2013) (internal quotation marks omitted).[3] The Ninth Circuit thus has concluded that § 162.017 "does not of its own force operate to preempt any specific state tax." *Desert Water Agency v. U.S.*

[3] Section 5108 was previously codified at 25 U.S.C. § 465. *Chehalis Reservation* and several of the other cases discussed in this answer analyze § 5108 prior to its recodification. This answer uses the current codification of § 5108 throughout.

Dep't of the Interior, 849 F.3d 1250, 1256 (9th Cir. 2017) (footnote omitted).

Because § 162.107 lacks "independent legal effect," *id.* at 1254, it provides no independent basis to conclude that federal law expressly preempts the REET. Thus, whether based on § 5108 or the federal regulation, Sellers' express preemption claim fails as a matter of law.

The well-reasoned analysis of the Court of Appeals does not require further review.

B. The Court of Appeals' Decision Does Not Conflict With Federal Case Law Construing 25 U.S.C. § 1508

Sellers next assert federal case law interpreting § 5108 (if it applies) supports preemption of the REET. But the cases they rely on are readily distinguishable.

For instance, Sellers imprudently rely on *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992). But it addressed whether Yakima County could impose the REET on *tribal sellers*. The Supreme Court held that "a tax

upon the *Indian's* activity of selling the land . . . is void[.]" *County of Yakima*, 502 U.S. at 269 (emphasis added). Here, Sellers are not tribal sellers so *County of Yakima* is inapplicable.

Sellers also attempt to concoct a conflict based on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973), and *Chehalis Reservation*. This argument also fails. They claim these cases establish that no state tax of any kind can be applied with respect to permanent improvements constructed on trust land. Pet. Rev. at 12-13. Not so. *Mescalero* and *Chehalis Reservation* found preemption solely with respect to taxes imposed directly on improvements. *See Mescalero*, 411 U.S. at 158 (holding § 5108 preempted a compensating use tax on improvements, because the use was "so intimately connected with use of the land itself"); *Chehalis*

Reservation, 724 F.3d at 1159 (holding § 5108 preempted property taxes on improvements).[4]

In contrast, *Mescalero* found § 5108 inapplicable with respect to New Mexico's gross receipts tax applying to a ski resort operated by a tribal business. The Supreme Court noted "[o]n its face, the statute exempts land and rights in land, not income derived from its use." 411 U.S. at 155. It further explained that tax exemptions ordinarily are not implied and off-reservation income is not exempt from tax simply because the land from which it is derived is itself exempt from tax. *Id.* at 156. Consistent with these principles, the Supreme Court has held that "[l]essees of otherwise exempt Indian lands are also subject to state taxation." *Id.* at 157 (citing *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 69 S. Ct. 561, 93 L. Ed. 721 (1949)).

[4] In *Chehalis Reservation*, the Ninth Circuit declined to follow several circuit cases rejecting express preemption claims based on § 5108 because "[n]one of them involved property taxes[.]" *Id.* at 1159.

Here, the REET is a transactional tax like New Mexico's gross receipts tax. This Court long ago rejected the claim that the REET is a direct property tax. *Mahler v. Tremper*, 40 Wn.2d 405, 409, 243 P.2d 627 (1952). Rather, it "is a tax upon the act or incidence of transfer." *Id.* at 410. As a transactional tax imposed on sales, the REET, like New Mexico's gross receipts tax, is not preempted by § 5108.

Finally, unlike this case involving the taxation of non-Indians, both *Mescalero* and *Chehalis Reservation* involved attempts to tax a Tribe or tribal business. *See Mescalero*, 411 U.S. at 146 (taxation of ski resort operated by the Mescalero Apache Tribe); *Chehalis Reservation*, 724 F.3d at 1154 (taxation of business in which Chehalis Tribe owned an undivided 51 percent interest).

Based on *Chehalis Reservation*, Sellers argue that the distinction between Tribes and non-Indians is "irrelevant." Pet. Rev. at 12. But Sellers disregard that *Chehalis Reservation* involved the taxation of a tribal majority-owned business. For

that reason, the Ninth Circuit repeatedly emphasized that the exemption in § 5108 does not turn on the particular form *in which the Tribe chooses to conduct its business*. *See Chehalis Reservation*, 724 F.3d at 1156, 1157 (twice). Thus, the taxation of a non-Indian was not at issue in *Chehalis Reservation*. *Mescalero*'s holding that lessees of exempt Indian lands are subject to state taxation, 411 U.S. at 157, also rebuts Sellers' argument.

The Court of Appeals' decision does not conflict with *County of Yakima*, *Mescalero*, or *Chehalis Reservation*. Therefore, further review based on an alleged conflict with federal case law is not warranted.[5]

[5] In the courts below, Sellers unsuccessfully raised an implied preemption claim under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980). Although they argue the Court of Appeals erred in applying the *Bracker* balancing test, Pet. Rev. at 13 n.2, Sellers do not rely on that part of the opinion to support review by this Court.

C. The Court of Appeals Correctly Declined to Consider Sellers' UDJA Claim

Next, Sellers allege the Court of Appeals erred in not applying the UDJA to their claims. Pet. Rev. at 13-15. Sellers ignore that they brought excise tax refund claims under RCW 82.32.180, which specifies "the procedural requirements to which a taxpayer must adhere in an excise tax refund action filed in state court." Sifferman, 496 P.3d at 338 (citing *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 52, 905 P.2d 338 (1995)). RCW 82.32.180 is a "conditional, partial waiver of the sovereign immunity afforded by Article II, § 26 of the Washington constitution." *Lacey*, 128 Wn.2d at 52. Therefore, a taxpayer seeking an excise tax refund must sue the State "'in the manner provided by the statute.'" *Lacey*, 128 Wn.2d at 42 (quoting *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 575, 403 P.2d 880 (1965)).

RCW 82.32.180 authorizes refund actions; it does not authorize declaratory relief actions. The statute requires taxpayers to "(1) identify themselves, (2) state the correct

amount of tax each concedes to be the true amount, [and] state reasons why the tax should be reduced or abated[.]" *Lacey*, 128 Wn.2d at 50. In addition, RCW 82.32.180 expressly provides that "no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided." This limitation on the Legislature's waiver of sovereign immunity applies to proceedings under the UDJA for declaratory relief.[6]

In declining to consider Sellers' request for relief under the UDJA, the Court of Appeals distinguished a refund claim under RCW 82.32.180 from a facial challenge to the validity of the REET. *See Sifferman*, 496 P.3d at 338. This Court's recent

[6] In the courts below, Sellers also sought refund relief under RCW 82.32.150, but they do not pursue that claim in their review petition. RCW 82.32.150 provides a limited exception to the usual prepayment requirement before a taxpayer may file a court action to challenge an excise tax. Under RCW 82.32.150, a court may grant a restraining order or injunction, but only to "restrain or enjoin the collection of any tax . . . upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state."

decision in *Washington Bankers Association v. State*, ___ Wn.2d ___, 495 P.3d 808 (2021), supports that distinction.

In *Washington Bankers*, this Court allowed two banking associations to challenge a tax statute under the UDJA because "RCW 82.32.180 is silent as to the procedure for parties such as the financial institutions here who have paid a tax, *seek no refund*, and instead challenge the tax's constitutionality." 495 P.3d at 827-28 (emphasis added). Here, in contrast, Sellers sought refunds under RCW 82.32.180.

Moreover, declaratory relief generally is not available when a plaintiff has an adequate statutory remedy. *See*, *e.g.*, *Seattle-King Cnty. Council of Camp Fire v. Dep't of Revenue*, 105 Wn.2d 55, 58, 711 P.2d 300 (1985) (a plaintiff who has "a completely adequate remedy available to him" is not entitled to a declaratory judgment); *Hawkins v. Empres Healthcare Mgmt., LLC*, 193 Wn. App. 84, 102, 371 P.3d 84 (2016) ("Declaratory relief is a rare, exceptional remedy. A court does not provide

this remedy when it can provide an adequate alternative remedy.").

Finally, Sellers' request for declaratory relief under the UDJA is meaningless at this stage. The published opinion of the Court of Appeals makes clear that REET does not apply to "[t]he transfer of the interest in the subleased land[.]" *Sifferman*, 496 P.3d at 340 (citing RCW 82.45.010(3)(c)). Rather, it applies only "to the value of the transfers of improvements on the taxpayers' subleased properties." *Id.* A declaration under the UDJA stating the same thing is unnecessary.

The Court of Appeals correctly declined to grant declaratory relief under the UDJA in Sellers' refund action under RCW 82.32.180. This issue does not warrant further review.

D. Sellers' Failure to Prove Their Refund Claims Is Not a Matter of Substantial Public Interest

Sellers next argue review is necessary because state law and policy are ambiguous in applying the REET to sales of

improvements constructed on trust land. *See* Pet. Rev. at 15-18. Once again, they are incorrect. Under state law, REET clearly applies to transfers of improvements located on trust land. RCW 82.45.010(1) (defining "sale" to include the "transfer of improvements constructed upon state land"). Contrary to Sellers' assertion, this argument does not present an issue of substantial public importance. *See* Pet. Rev. at 5.

The underlying thrust of Sellers' argument is that they should be excused from having to pay REET on their private residence sales because "no assessed values for Wapato Point properties are entered on the assessment rolls of the Chelan County Assessor because they are situated on Indian land." Pet. Rev. at 16. In a refund action under RCW 82.32.180, however, the taxpayer bears the burden of proving the correct amount of the tax it owed. *Bravern Residential, II, LLC v. Dep't of Revenue*, 183 Wn. App. 769, 776, 334 P.3d 1182 (2014) (citing RCW 82.32.180). To receive a refund, therefore, Sellers were required to prove the correct amount of tax.

Sellers, however, *chose to present no evidence* proving the values of their improvements in the trial court proceedings, because throughout they sought only full refunds. *See* CP 150-55 (Interrogatory Nos. 10, 13, 16, 20, 23), 296, 363. Thus, none proved the correct amount of tax, and the trial court properly denied them refunds.

Sellers also contend that the Court of Appeals, based on an alleged "policy" established by a 1994 Department of Revenue letter, should have concluded the trial court erred in not granting to Sellers refunds of 50 percent of the REET they paid. The Court of Appeals properly gave the Department's letter no weight. By its express terms, the letter applies only to time-share condominium units. CP 86-87. And, as the court explained, the "letter specified that because the improvements were time-share properties rather than exclusive-use properties, determining their value was particularly complicated." *Sifferman*, 496 P.3d at 340. But here, Sellers' private residences were exclusive-use properties. And Sellers presented no

evidence showing that the value of private residences located on trust land has any relationship with the value of time-share condominium units located on trust land.

Furthermore, Sellers *never* relied on or even mentioned the 1994 letter in their trial court briefs. *See* CP 161-73, 288-98, 353-66. Therefore, they cannot now complain that the Court of Appeals should have concluded the trial court erred in not granting refunds based on it.

Consequently, Sellers failed to meet their burden of proof under RCW 82.32.180. That failure does not necessitate further review by this Court.

E. Sellers Do Not Present a Significant Constitutional Issue As This Court's Authority Resolves Their Due Process Claim

Sellers also contend that requiring them to pay a REET in violation of state law and federal law as a condition to record their real estate transactions violated their due process rights. Pet. Rev. at 18-19. This Court, however, has expressly held that "[i]n the area of tax collection, it is constitutionally sound to

postpone the opportunity for a hearing until after the payment of the delinquent taxes." *Peters v. Sjoholm*, 95 Wn.2d 871, 877, 631 P.2d 937 (1981) (citing *Fuentes v. Shevin*, 407 U.S. 67, 91-92, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972)). Thus, Sellers received ample due process through their refund action under RCW 82.32.180.

Furthermore, the sole legal authority Sellers offer in support of their due process claim is a 3-2 decision from the 1890s that long pre-dates *Peters*. *See* Pet. Rev. at 18-19 (discussing *Baldwin v. Moore*, 7 Wash. 173, 34 P. 461 (1893)). In *Baldwin*, the Court struck down on due process grounds a statute prohibiting the county auditor from recording a deed conveying real property unless all taxes on the property were fully paid. *Id.* at 178. But in *Baldwin*, "[n]o provision [was] made in the act whereby an interested party can test the validity of the tax, or the truthfulness of the record." *Id.* at 174. Here, in contrast, the Legislature grants taxpayers the opportunity to challenge the validity of the REET through an administrative

refund claim under RCW 82.32.170 or a superior court refund action under RCW 82.32.180. *See Sifferman*, 496 P.3d at 346.

The Court of Appeals also found support in *Thurston County v. Tenino Stone Quarries*, 44 Wash. 351, 87 P. 634 (1906), a case involving the collection of a road poll tax. In that case, this Court distinguished *Baldwin* for the same reason—that "there was no provision made for any judicial proceeding or other means of ascertainment by the auditor as to the correctness or legality of the tax shown by the record." 44 Wash. at 358. at 358. *See Sifferman*, 496 P.3d at 346.

F. Sellers' Class Action Claims Also Are Contrary to This Court's Authority

Lastly, Sellers argue that "Washington courts have consistently allowed class action status in declaratory judgment proceedings challenging the validity of a tax." Pet. Rev. at 18 (citing cases). But none of the cases they cite involved a refund claim under RCW 82.32.180 or the State's waiver of sovereign immunity.

Sellers further fault the Court of Appeals for relying on *Lacey*, which they say "does not present a blanket prohibition on class action, even under RCW 82.32.180." Pet. Rev. at 20. Sellers ignore *Lacey*'s reasoning:

> RCW 82.32.180 contains no express language authorizing class actions in suits for tax refunds. Since the state waives sovereign immunity only to the extent provided in the statute, the statute must expressly authorize class actions. If the Legislature intended to permit class action suits for taxpayers seeking excise tax refunds under RCW 82.32.180, it logically would have included such a provision permitting them.

128 Wn.2d at 53-54. Accordingly, because RCW 82.32.180 does not authorize class actions, the Court of Appeals correctly declined to reverse the trial court's order dismissing Sellers' class action refund claims.

V. CONCLUSION

For the reasons stated herein, this Court should deny review.

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RESPECTFULLY SUBMITTED this 29th day of November, 2021.

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PROOF OF SERVICE

I certify that on November 29, 2021, through my legal assistant, I electronically filed this document with the Clerk of the Court using the Washington State Appellate Courts' e-file portal and served a copy of this document via electronic mail under an electronic service agreement on:

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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 29th day of November, 2021, at University Place, WA.

s/Cameron G. Comfort
Cameron G. Comfort, Sr. Asst Atty General

ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

November 29, 2021 - 12:07 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,348-0
Appellate Court Case Title:	Phillip Edward Sifferman, et al. v. Chelan County, et al.
Superior Court Case Number:	17-2-05220-2

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