NO. 102223-9

SUPREME COURT OF THE STATE OF WASHINGTON

ANTIO, LLC; AZUREA I, LLC; BACK BOWL I, LLC; CANDICA, LLC; CERASTES-WTB, LLC; GCG EXCALIBUR, LLC; LINDIA, LLC; OAK HARBOR CAPITAL, LLC; OAK HARBOR CAPITAL II, LLC; OAK HARBOR CAPITAL III, LLC; OAK HARBOR CAPITAL IV, LLC; OAK HARBOR CAPITAL VI, LLC; OAK HARBOR CAPITAL VII, LLC; OAK HARBOR CAPITAL X, LLC; OAK HARBOR CAPITAL XI, LLC; and VANDA, LLC,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Respondent.

DEPARTMENT OF REVENUE'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Sixteen related LLCs seek to avoid the state's B&O tax by claiming that 100% of their gross income is deductible under RCW 82.04.4281(1)(a) as "amounts derived from investments." The Department of Revenue, the superior court, and the Court of Appeals all rejected the LLC's claim. Further review is not warranted, as the Court of Appeals applied established law to undisputed material facts when it affirmed the superior court's grant of summary judgment to the Department. *Antio, LLC v. Dep't of Revenue*, __ Wn. App. 2d __, 527 P.3d 164 (2023).

Importantly, the decision below does not conflict with any decision of this Court or the Court of Appeals, raises no constitutional question, and involves no issue of substantial public interest. Instead, the LLCs simply offer arguments that cannot be squared with this Court's decision in *O'Leary v. Department of Revenue*, 105 Wn.2d 679, 717 P.2d 273 (1986). In that case, this Court recognized that the legislative purpose for the investment income deduction is to permit taxpayers to

shield from the B&O tax only amounts derived from activity that is "incidental to the main purpose of a business." *Id*. at 682. The Legislature has not stepped in to modify the holding in *O'Leary* by redefining the term "investments," and no evidence supports the notion that the Legislature silently repudiated *O'Leary* when it amended the statute in 2002 to address a different issue.

Under this Court's precedent, the deduction is limited; it does not act as a full *exemption* from tax. The LLCs are permitted to claim the deduction with respect to their incidental investment activity. But like every other Washington taxpayer, they may not use the deduction as a means of escaping B&O tax on gross income derived from their main business activity. That has been the law for over forty years, and the LLCs offer no viable reason to change the law for their benefit.

The Court should deny the LLC's petition for review.

II. STATEMENT OF THE ISSUE

O'Leary holds that the investment income deduction in RCW 82.04.4281 applies narrowly and is limited to activity that is "incidental to the main purpose of a business." 105 Wn.2d at 682. Did the Legislature silently nullify *O'Leary* in 2002, thereby expanding the deduction to permit the LLCs to deduct 100% of their gross income from their main business activity?

III. STATEMENT OF THE CASE

A. The LLCs Filed and Paid B&O Tax then Sought a Full Refund, Which the Department Denied

The sixteen related LLCs are all located in Washington and all engage in the same business activity. They are investment funds that derive income from owning and securitizing distressed debt instruments such as defaulted credit card loans. CP 3. While the LLCs themselves are investment funds—meaning others may invest in them—their principal business activity involves acquiring and securitizing consumer debt and then selling interests in the securitized assets through a "private placement." *Id*.

The LLCs filed excise tax returns with the state and paid applicable B&O tax on their gross income for each of the 2015 through 2018 tax periods. CP 116.[1]

In December 2019, each of the LLCs filed refund claims with the Department. CP 12, ¶ 6. Each refund claim sought a refund of 100% of the B&O tax the entity claimed to have paid between January 2015 and December 2018, asserting that all its gross income was deductible as "investment income." For example, the Department received a refund claim from Oak Harbor Capital X, LLC seeking a refund of $158,357 for the 2015 through 2018 periods on the theory that "[a]ll revenue received by [the entity] is investment income, and therefore not subject to excise tax." CP 42.

The Department reviewed the refund claims, determined that they were not supported by the law, and issued audit

[1] Several of the LLCs—including the lead plaintiff Antio, LLC—actually paid no B&O tax to the state as a result of claiming a small business credit. A list of the B&O tax paid by the LLCs is provided at CP 116.

reports denying the claims. CP 12, ¶ 7. In addition to rejecting the LLCs' claim that they could deduct 100% of their gross income under the investment income deduction, the Department also explained that most of the LLCs had overstated the amount of their refund claim. *See, e.g.*, CP 51 (audit report issued to Antio, LLC, explaining that it had actually paid no B&O tax to the state and, for that alternative reason, was not entitled to a refund).

After receiving the refund denial notifications, the LLCs filed a combined refund action under RCW 82.32.180, which permits a person to bring a de novo tax refund lawsuit in Thurston County Superior Court. CP 1.

B. The Trial Court Followed *O'Leary*, Granted Summary Judgment to the Department, and the Court of Appeals Affirmed

After discovery was competed, the Department filed a motion for summary judgment asserting that, under the holding in *O'Leary*, the LLCs were not entitled to exclude 100% of their gross income from tax. CP 133, 138-39. The LLCs

opposed the motion, contending that *O'Leary* had been legislatively "nullified long ago" by amendments to the deduction statute. CP 143, 152. Plaintiffs also argued that information about the deduction statute provided on the Department's website should be considered as evidence informing the court's analysis. CP 160-61.

The trial court granted the Department's motion, explaining that *O'Leary* "has not been modified by the legislature" as the LLCs contend, but remains a proper interpretation of the plain meaning of the investment income deduction. VRP 20-21. The court also explained that it carefully reviewed the materials in the record, but did not "take [the LLCs'] invitation" to visit to the Department's website. VRP 19-20. An order consistent with the court's oral ruling was entered shortly thereafter. CP 391.

Plaintiffs sought reconsideration, asserting that information contained in the Department's website created a

genuine issue of material fact. CP 405. The trial court denied the motion, and the LLCs appealed. CP 435, 436.

The Court of Appeals affirmed the trial court's grant of summary judgment to the Department, holding that *O'Leary* had not been superseded by the Legislature. *Antio*, 527 P.3d at 169-70. The Court also explained that information contained on the Department's website, which the LLCs interpreted to mean they could deduct all of their business income, could not possibly override *O'Leary*. *Id*. at 170-71.

The LLCs moved for reconsideration, which the Court of Appeals denied.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

A. The Court of Appeals Correctly Applied Established Law to Undisputed Facts

The LLCs seek discretionary review to rehash the same arguments they offered below. Those arguments had no merit when presented to the trial court or the Court of Appeals, and they have no merit now.

1. *O'Leary* resolves this case

The LLCs seek the benefit of the investment income deduction in RCW 82.04.4281(1), which provides that "[i]n computing tax there may be deducted from the measure of tax: (a) Amounts derived from investments." The Legislature has not adopted a definition of "investments," but this Court did in *O'Leary*. Specifically, the Court explained that the term should be given its "plain and ordinary meaning," which is an activity "'incidental' to the main purpose of a business." *O'Leary*, 105 Wn.2d at 682. Additionally, the Court concluded that the deduction is properly limited to amounts derived from the use of surplus funds. *Id*.

O'Leary resolves this case, as the income the LLCs seek to deduct is derived entirely from the main purpose of their business. *See Antio*, 527 P.3d at 169.

In an effort to get around *O'Leary*, the LLCs suggest that the Legislature in 2002 intended to repudiate both the *O'Leary* definition of "investments" and the holding of an earlier case,

John H. Sellen Construction Co. v. Department of Revenue, 87 Wn.2d 878, 558 P.2d 1342 (1976). Pet. at 27-28. A brief synopsis of *Sellen* and *O'Leary* will help provide context.

Sellen involved the consolidated appeal of five taxpayers who claimed entitlement to the investment income deduction. 87 Wn.2d at 879-80. At the time they filed their appeal, the deduction statute (RCW 82.04.4281 (1980)) had two requirements. First, the income at issue must have been derived from "investments or the use of money as such." Former RCW 82.04.4281 (1980). Second, the taxpayer could not be engaged in "banking, loan, security, or other financial business." *Id.*; *see generally O'Leary*, 105 Wn.2d at 681-82 (listing the two requirements); *Simpson Inv. Co. v. Dep't of Revenue*, 92 Wn. App. 905, 917, 965 P.2d 654 (1998), *rev'd*, 141 Wn.2d 139 (2000) (describing the two requirements).

The five taxpayers in *Sellen* each sought the deduction only with respect to a small percentage of their gross income. 87 Wn.2d at 882. Nevertheless, the Department denied the

deduction on the theory that the five taxpayers were "other financial businesses" and, therefore, barred from claiming the deduction under the second statutory requirement. *Id*. at 882.

This Court disagreed, holding that the taxpayers were not financial businesses. *Id*. This was because each taxpayer was engaged in a business activity "apart from their investment activities," and the income each sought to deduct "'represented a very small percentage of their gross revenues.'" *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 151, 3 P.3d 741 (2000) (discussing facts and holding in *Sellen*, 87 Wn.2d at 882-83). In short, the fact that each taxpayer earned income from incidental investment activity did not render them "financial businesses." *Sellen*, 87 Wn.2d at 883.

Ten years after *Sellen*, this Court decided *O'Leary*, which involved only the first statutory requirement: the meaning of "investments." *O'Leary*, 105 Wn.2d at 682. The Court did not address the second requirement. *Id*. at 683.

As explained in *O'Leary*, income received by a taxpayer will meet the first requirement under former RCW 82.04.4281 if it was derived from activity incidental to the main purpose of the business and involved the use of surplus funds. *Id.* at 682. In *O'Leary*, a real estate partnership sought to deduct as an "investment" the interest payments it received from real estate contracts. The Court explained that "[t]o decide if the partners meet the first requirement, we must define investment and then determine if the real estate contracts meet that definition." *Id*. In defining investment, the Court "limited [the term] to the plain and ordinary meaning of the word," which is an activity "'incidental' to the main purpose of a business." *Id*.

Notwithstanding this Court's analysis, the LLCs inexplicably claim that the Court in *O'Leary* "did not purport to define the term 'investments.'" Pet. at 15. They also speculate that *Sellen* and *O'Leary*, in combination, merely formulated a "requirement for deductible investment income … that only non-financial businesses could meet, i.e., 'incidental investment

of surplus proceeds.'" *Id*. But nothing in *O'Leary* supports the LLCs' novel restatement of the Court's holding.

The Court also looked to *Sellen* to determine "an appropriate means" of distinguishing between income from investments and income from general business activity. *See id*. (explaining that *Sellen* provides "an appropriate means of distinguishing those investments whose income should be exempted from the B & O tax [under] RCW 82.04.4281"). The LLCs take issue with the fact that the Court in *O'Leary* considered prior precedent that addressed the second part of the two-part statutory analysis. But the Court's consideration of *Sellen* in no way weakens the holding in *O'Leary*, and should not lead to speculation that the Court meant something other than what it plainly said.

The LLCs' effort to reimagine the holding and analysis in *O'Leary* was ineffective when presented to the Court of Appeals and provides no reason for this Court to accept review.

The Court of Appeals did not misapprehend the controlling law; it properly applied the law to the material facts.

2. The legislative history pertaining to the 2002 amendment confirms that the Legislature was responding to *Simpson Investment Co*.

The Legislature did not substantively amend the investment income deduction for many years after *Sellen* was decided in 1976 or after *O'Leary* was decided in 1986.[2] Rather, the statute remained unchanged until 2002. *See* Laws of 2002, ch. 150, § 2. That lengthy period of inactivity strongly suggests that the Legislature acquiesced to this Court's analysis. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009).

More importantly, the impetus for the 2002 amendment was to resolve "disagreement and litigation" over the term "other financial businesses," which had been analyzed and

[2] The Legislature recodified the deduction in 1980, but without any change to its meaning or prior construction. *Simpson Inv. Co*., 141 Wn.2d at 150 n.8 (citing Laws of 1980, ch. 37, § 1).

applied in the *Simpson Investment Co.* appeal. *See* Laws of 2002, ch. 150, § 1. Prior to the 2002 amendment, as noted above, the statute provided that the deduction was not available to "those engaging in banking, loan, security, or other financial businesses." Former RCW 82.04.4281 (1980). The issue in *Simpson* was whether a holding company that provided cash management services to its various subsidiaries was an "other financial business" within the meaning of the statutory carve-out. 141 Wn.2d at 142-43.

On appeal, the Court of Appeals ruled that Simpson was not a financial business and was permitted to deduct its incidental investment income. 92 Wn. App. at 923. This Court reversed, reasoning that Simpson's "primary purpose and objective" was to earn income "through the utilization of significant cash outlays" comparable to a bank, loan or security business. *Simpson Inv. Co*., 141 Wn.2d at 153.

The taxpayer in *Simpson* had employed a common business structure whereby a parent "holding company"

provided cash management services to its subsidiaries. Within a few months after the decision was issued, the Legislature responded by directing the Department of Revenue to propose an amendment to RCW 82.04.4281 that would "clarify the application of [the statute] to *other financial businesses*." Laws of 2001, ch. 320, § 20 (emphasis added). Governor Locke followed up by directing the Department "to work closely with all affected parties to develop a suitable, constitutional proposal that can be considered by the legislature in 2002." Laws of 2001, ch. 320, partial veto message. Consistent with these directives, the Department formed a workgroup to study the issue and to propose legislation. *See* Final Legislative Report, 57th Wash. Leg., at 98 (Wash. 2002) (describing the background to the 2002 amendment to RCW 82.04.4281) (copy in the record at CP 389).

The proposed legislation adopted by the workgroup became House Bill 2641, an "ACT Relating to implementing the recommendations of the investment income tax deduction

task force ….” Laws of 2002, ch. 150. That legislation removed the reference to “other financial businesses,” added definitions of the specific businesses that cannot claim the deduction (i.e., banking, lending, and security businesses), and extended the deduction to amounts derived from interest on loans between related entities so long as “the total investment and loan income is less than five percent of gross receipts of the business annually.” Laws of 2002, ch. 150, § 2.

The Legislature also enacted findings that unmistakably explained that its intent was to override the holding in *Simpson* by removing the reference to “other financial businesses.” Specifically, the Legislature found “that the application of the business and occupation tax deductions provided in RCW 82.04.4281 for investment income of persons deemed to be ‘other financial businesses’ has been the subject of uncertainty, and therefore, disagreement and litigation.” *Id.*, § 1. The Legislature intended the 2002 amendment to “provide certainty and stability for taxpayers and the state.” *Id.*

The legislative history pertaining to the 2002 amendment never mentions *Sellen*, never mentions *O'Leary*, and does not indicate any disagreement with the historical application of the deduction in general; only its past application to holding companies that fell within the excluded class of "other financial businesses." In short, the legislative history lends abundant support to the Court of Appeals' conclusion that the Legislature did not intended to nullify *O'Leary*.

Additionally, when the Legislature did amend the statute in 2002, it did not enact its own definition of "investments." Instead, that term remained in the statute completely unchanged, further reinforcing the presumption that the Legislature acquiesced to this Court's prior interpretation. *See McKinney v. State*, 134 Wn.2d 388, 403, 950 P.2d 461 (1998) (when the Legislature declines to provide its own definition of a term, there is a presumption that it is satisfied with the definition established by the courts); *Baker v. Leonard*, 120 Wn.2d 538, 545, 843 P.2d 1050 (1993) ("Legislative silence

regarding the construed portion of [a] statute in a subsequent amendment creates a presumption of acquiescence in that construction.") (citation omitted).

If the Legislature truly intended to supersede *O'Leary*, there would be evidence of that intent somewhere in the legislative record. The evidence does not exist.[3] And the Court of Appeals correctly rejected the LLCs effort to read that intent into the history of the 2002 amendment.

3. The Department's public guidance does not support the LLCs' effort to avoid B&O tax

The LLCs argue that their effort to avoid B&O tax on all of their gross income is supported by actions the Department took when it cancelled an out-of-date Excise Tax Advisory in 2002, and when it provided informal guidance about the deduction on its website in 2017. Pet. at 25-26. These related

[3] The LLCs go so far as citing legislation that *did not pass out of committee*. Pet. at 19-20, 22, 29 (discussing S.B. 6184, 57th Leg., 1st Spec. Sess. (Wash. 2001) and S.B. 6384, 57th Leg., Reg. Sess. (Wash. 2002)). But even that inapt history does not support their claim that the 2002 legislation that did pass and became law secretly superseded *O'Leary*.

arguments fail. The LLCs misinterpret the Department's past and present guidance, which addressed (and addresses) the statutory carve-out for those businesses that may not claim the deduction, not the meaning of "investments."

As noted, the 2002 amendment to RCW 82.04.4281 removed the carve-out for "other financial businesses" and added definitions of the three types of businesses that may not claim the deduction; banks, lending businesses, and security businesses. Laws of 2002, ch. 150, § 2. The result is that taxpayers like Simpson Investment Company can claim the deduction to the extent they have income from investments. In response to the legislative change, the Department naturally cancelled its prior public guidance used to evaluate whether a business was an "other financial business." *See* Department Excise Tax Advisory (ETA) 3002.2009 at 14 (explaining that Department cancelled ETA 571 relating to the taxability of

investment income effective June 30, 2002).[4] Cancelling that out-of-date guidance offers no support for the LLCs' extreme view that the 2002 legislation silently nullified *O'Leary*.

The same is true with respect to informal guidance currently provided on the Department's website. When read as a whole, the webpage provides taxpayers with general guidance about the deduction. For example, the first paragraph of the website—which the LLCs do not cite—explains that businesses must treat "investment related income" as gross income subject to B&O tax under the broad statutory definition of "gross income of the business." CP 398 (citing RCW 82.04.080). The website next explains that "[a] B&O tax deduction is provided for amounts derived from investments," and generally discusses the statutory exceptions for amounts received from loans, the extension of credit, revolving credit arrangements, etc. *Id*.

[4] Available online at https://taxpedia.dor.wa.gov/documents/historical%20eta/3002%2009-19.pdf.

(second paragraph). From there, the website provides details about businesses that may not claim the deduction. CP 398-400.

The portion of the webpage that the LLCs rely on is contained within the third subsection, entitled "Deduction not available for banking business, lending business, or security business." CP 398. That subsection describes the statutory exclusion of banking, lending, and security businesses. It then provides additional guidance with respect to security businesses, explaining that the term does not include a "trader" that buys and sells securities "for his or her own account," and listing factors that help distinguish traders from true security businesses. CP 398-99.

It is within the "security business" context that the webpage explains that private investment funds generally fall outside the definition of a security business. "A trader not meeting the characteristics of a broker, dealer, or broker-dealer is not a security business and would be eligible for the B&O tax deduction for amounts derived from investments. Additionally,

most … private investment funds … are not a securities business" and, therefore, "are allowed the B&O tax deduction for amounts derived from investments." CP 399.

The Department's webpage correctly explains the contours of the statutory exclusion of banking, lending, and security businesses. It does not address the definition of "investments" or this Court's construction of that term in *O'Leary*. Accordingly, the LLCs are wrong to argue the Department's litigating position in this case represents "a 180-degree departure from" the webpage. Pet. at 34. There is no inconsistency. The LLCs might fairly complain that the website should provide *additional* guidance. But their claim that the website supports the notion that certain businesses can avoid tax on all of their gross income is entirely incorrect.

As multiple cases have confirmed, informal guidance offered by the Department is not a substitute for the statutes enacted by the Legislature and construed by the courts. *See, e.g., Dynamic Resources, Inc. v. Dep't of Revenue*, 21 Wn.

App. 2d 814, 823, 508 P.3d 680 (2022) (applicable statutes and rules control over any inconsistencies in informal tax guidance). The Department also has been clear on this point. *See* https://dor.wa.gov/education/industry-guides (information in the Department tax guides "is general in nature and does not replace or substitute Washington rules or laws"). Simply because the particular webpage the LLCs cite does not address all aspects of the investment income deduction does not mean that taxpayers are free to ignore the plain language of the statute or court decisions interpreting and applying that statute. The Court of Appeals committed no error in concluding that the Department's webpage was "immaterial" to the resolution of the case. *Antio*, 527 P.3d at 171.

O'Leary is controlling with respect to the issue decided in this case—the meaning of income from investments. The Department's past and present guidance, when considered in context, does not support the "radical change" advocated by the LLCs. *See* Pet. at 29 (contending that the 2002 amendment

"effected a radical change in the taxation of investment income"). Rather, the Department's guidance is consistent with the Legislature's decision to remove "other financial businesses" from the statutory exclusion. Those "other financial businesses" can claim the deduction if they have incidental investment income, as discussed below in Part IV.A.5.

4. The LLCs offer no viable reason for this Court to replace the *O'Leary* definition of investments with some other definition

The LLCs contend that the deduction statute is not ambiguous and "compel[s] the result sought by Petitioners." Pet. at 29-30. To get to their proffered result (a 100% exemption from B&O tax), they contend that the meaning of investments as set out in *O'Leary* should be replaced with some other (presumably broader) definition. *Id*. at 31-32. But this Court has already defined the term, and lower courts have consistently followed this Court's definition, not just in this litigation but in other cases as well. *See*, *e.g.*, *Browning v. Dep't of Revenue*, 47 Wn. App. 55, 58-59, 733 P.2d 594 (1987)

(discussing *O'Leary* and applying its holding). More importantly, the Legislature has not acted to change the definition. The Court should decline the LLCs invitation to formulate a different definition of investments through litigation and, instead, rely on the Legislature to change the law if its sees fit.

5. The LLCs can claim the deduction if they have income from investments, such as interest from a money market account

The result of this appeal is not unfair or unjust in any way. The LLCs implicitly suggest that they would be unable to claim the investment income deduction because their main business activity involves selling securitized interests in distressed debt instruments, which they characterize as "investing" activity.[5] But that supposition is not true. Like any

[5] The Department has not reviewed the specifics of the LLCs' business activity. Instead, the Department has accepted the LLCs' characterization of that activity set out in their refund petitions. That activity does not fairly fall within the meaning of "investments" set out in *O'Leary*, and likely would not fairly meet some other definition of the term.

other business (other than banking, lending, and security businesses), these LLCs may claim the investment income deduction on amounts derived from the incidental investment of surplus funds. As one obvious example, the LLCs could deduct interest earned on a money market account. Depositing surplus income into a money market account would be incidental to their main business activity, and the income derived from that incidental investment activity would qualify for the deduction.

While the LLCs are entitled to the exact same tax treatment as other Washington businesses, the trial court and Court of Appeals correctly rejected their effort to completely avoid B&O tax on amounts derived from their main business activity. There is no legal or logical justification for granting these LLCs special tax treatment that other businesses cannot obtain.

B. The Court of Appeals' Decision Does Not Conflict with Any Decisions of This Court or the Court of Appeals, and Raises no Constitutional Issues

The decision below does not conflict with any decisions of this Court or the Court of Appeals. To the contrary, the Court of Appeals applied established precedent when it affirmed the trial court.

Further, the appeal does not raise any constitutional issue. The LLCs simply seek to rehash statutory claims that were properly rejected below. For this additional reason, review is not warranted.

C. The Decision Below Maintains the Status Quo and Involves No Issue of Substantial Public Interest

O'Leary has been the law for nearly 40 years. That case reasonably interpreted and applied the investment income deduction. The deduction is limited in nature. It is not (and never has been) a means to completely exempt in-state business activity from the B&O tax.

The LLCs, citing information that was not presented to the trial court during the summary judgment proceedings, claim

that following this Court's holding in *O'Leary* might adversely impact Washington's ability to attract investment capital. Pet. at 8-10. The argument fails on three levels.

First, the decision below preserves the status quo by applying established precedent. Income from "investments" has a defined meaning, and applying that established meaning to the material facts of this case advances the rule of law and "the evenhanded, predictable, and consistent development of legal principles." *City of Federal Way*, 167 Wn.2d at 347 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)). The LLCs' theory that *O'Leary* is no longer good law, on the other hand, would undermine the rule of law by presuming that the Legislature intended to override a longstanding, prior judicial decision *sub silentio*. Where, as here, there is no evidence that the Legislature intended to supersede a prior Supreme Court decision, that prior authority should be respected.

Second, the LLCs offer only their unsupported assumption that "private equity" and "venture capital" might be more difficult to obtain if this Court does not act. Pet. at 8-9. However, courts will not consider policy arguments that "rest on unsupported assumptions." *Cashmere Valley Bank v. Dep't of Revenue*, 181 Wn.2d 622, 640, 334 P.3d 1100 (2014). Thus, unsubstantiated claims about the "magnitude of [the] issue," Pet. at 8, is not a valid reason for this Court to accept review.

Finally, and most importantly, the LLCs' policy argument should be directed to the Legislature, not the courts. As this Court explained nearly 90 years ago, arguments about state tax policy "might with propriety be directed to the Legislature, but are not pertinent to judicial inquiry." *City of Tacoma v. Tax Comm'n*, 177 Wash. 604, 617, 33 P.2d 899 (1934). If the LLCs believe they have a meritorious policy argument for "nullifying" *O'Leary* and expanding the investment income deduction, they can make their case to the Legislature. The argument has no place here.

V. CONCLUSION

The LLCs meet none of the criteria for discretionary review in RAP 13.4(b). Accordingly, the Department respectfully requests that this Court deny review.

This document contains 4,716 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 24th day of August, 2023.

ROBERT W. FERGUSON
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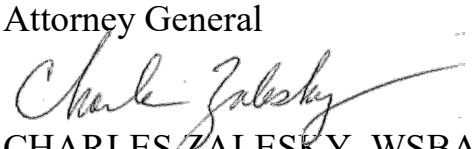

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of August, 2023, at Olympia, WA.

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