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NO. 90584-3

**SUPREME COURT**
**OF THE STATE OF WASHINGTON**

WASHINGTON TRUCKING ASSOCIATIONS, a Washington non-profit corporation; EAGLE SYSTEMS, INC., a Washington corporation; GORDON TRUCKING, INC., a Washington corporation; HANEY TRUCK LINE, INC., a Washington corporation; JASPER TRUCKING, INC., a Washington corporation; PSFL LEASING, INC., a Washington corporation; and SYSTEM-TWT TRANSPORTATION d/b/a SYSTEM-TWT, a Washington limited liability company,

Appellants,

v.

THE STATE OF WASHINGTON, EMPLOYMENT SECURITY DEPARTMENT; PAUL TRAUSE, individually and in his official capacity as the former Commissioner of the Employment Security Department, and JANE DOE TRAUSE, husband and wife and the marital community composed thereof; BILL WARD, individually and in his official capacity, and JANE DOE WARD, husband and wife and the marital community composed thereof; LAEL BYINGTON, individually and in his official capacity, and JANE DOE BYINGTON, husband and wife and the marital community composed thereof; JOY STEWART, a single individual, individually and in her official capacity; and MELISSA HARTUNG, a single individual, individually and in her official capacity; ALICIA SWANGWAN, a single individual, individually and in her official capacity,

Respondents.

# BRIEF OF RESPONDENTS

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## I. INTRODUCTION

This tort suit is an impermissible collateral attack on unemployment insurance tax audits and assessments, which may be challenged only pursuant to the Employment Security Act and Administrative Procedure Act (APA). Plaintiffs, six trucking carriers (Carriers) and the Washington Trucking Association (WTA), sue the Employment Security Department (Department) and six of its current and former employees, challenging tax assessments while pursuing, but not having exhausted, the exclusive administrative review remedies.

Because the comity doctrine bars Plaintiffs' 42 U.S.C. § 1983 claim, and the exclusive remedy provision of the Employment Security Act, RCW 50.32.180, bars their tortious interference claim, the superior court properly dismissed the lawsuit for failure to state a claim for which relief can be granted. The Carriers may not dress their tax assessment appeal in tort clothing. Nor can they circumvent state law barring recovery of attorney fees in an administrative appeal process.

Plaintiffs' tortious interference claim is further precluded by the doctrines of exhaustion of administrative remedies and primary jurisdiction, as the administrative process is not concluded. Additionally, Plaintiffs fail as a matter of law to prove the elements of tortious interference.

Lastly, claims by the WTA fail because the WTA cannot state a claim for attorney fees and costs alone and lacks associational standing to bring other damage claims on behalf of members, whose participation as parties is indispensable. In any event, claims by the WTA on behalf of members challenging the audits and assessments fail for the same reasons as the claims by the Carriers.

## II. COUNTERSTATEMENT OF THE ISSUES

1. Does the comity doctrine bar Plaintiffs' 42 U.S.C. § 1983 claim because the Employment Security Act and APA provide adequate state law remedies for challenging the tax audits and assessments?

2. Is Plaintiffs' tortious interference claim barred by the exclusive remedy provision of the Employment Security Act, RCW 50.32.180, the doctrine of exhaustion of administrative remedies, and/or the doctrine of primary jurisdiction?

3. Even if the tortious interference claim is not barred, does the claim fail because the Department's tax assessments are consistent with binding case law and do not breach or terminate the Carriers' contractual relationships with owner-operators?

4. Does the WTA fail to state a claim for which relief can be granted because its only personal claim is one for attorney fees, which is not an independent cause of action, and because the WTA lacks associational standing since any claims it would assert on behalf of members would require their participation as parties, as damages sought on members' behalf are unknown?

## III. STATEMENT OF THE CASE

At various times in 2010, the Department issued tax assessments to the Carriers because they had not been paying unemployment insurance taxes for their owner-operators, whom they call independent contractors

rather than employees covered by the Employment Security Act, Title 50 RCW. *See* CP 214-31. "Employment" under the Act broadly includes independent contractors in common law so long as they perform "personal services" under a contract, unless a narrow statutory exemption applies. *See* RCW 50.04.100, .140.[1] Employers may appeal tax assessments as provided in the Employment Security Act and the APA, and the Carriers did so. Complaint ¶¶ 33, 43, CP 221, 223[2]; *see* RCW 50.32.030; RCW 34.05.570. Consistent with RCW 50.32.030, the collection on the assessments was stayed pending the final decision on the appeals and the Carriers were not required to pay the disputed tax amounts. The WTA was not audited nor issued a tax assessment. CP 214-31.

The Carriers' appeals were assigned to be heard by Administrative Law Judge Todd Gay of the Office of Administrative Hearings (OAH). Complaint ¶¶ 33, 43, CP 221, 223. In January 2011, four Carriers moved for summary judgment in their administrative cases, arguing that the owner-operators were independent contractors or were otherwise excepted from coverage, that federal law preempts the Employment Security Act with respect to their owner-operators, and that the audits were predetermined and

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[1] Moreover, "[t]he mandate of liberal construction requires that courts view with caution any construction that would narrow the coverage" of the Act. *Shoreline Cmty. Coll. Dist. No. 7 v. Emp't Sec. Dep't*, 120 Wn.2d 394, 406, 842 P.2d 938 (1992).

[2] References to the "complaint" herein are to the Second Amended Complaint for Damages Under 42 U.S.C. § 1983 and Under State Law. CP 214-31.

conducted by auditors who did not follow audit standards; they asked that the assessments be dismissed. CP 285-97.

ALJ Gay denied the Carriers' motion and concluded the owner-operators were in employment of the Carriers at least for their personal driving services, but the value of leased equipment should not be taxed as wages. CP 291-92.[3] ALJ Gay rejected the Carriers' preemption argument as a matter of law based on *Western Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 450-58, 41 P.3d 510 (2002) (owner-operator was in employment of motor carrier for unemployment insurance purposes, and federal transportation law does not preempt Employment Security Act), and found that "genuine disputes of material fact [existed] regarding the relationships between carriers and contractors." CP 294. Addressing the Carriers' claims of faulty audits, the ALJ declined to dismiss the assessments and recognized that the Carriers' challenges to the audits

[3] In an order of remand entered soon after the order denying summary judgment, ALJ Gay further explained: "The department should consider fair apportionment of payment under the contract attributable to driving or other personal services. *Examples* of possible methodology for accomplishing such fair apportionment follow: . . . . The taxing authority should not be expected to determine the contractual pay rates and industry average pay rates, but the burden should be on the taxpayer to provide this information with some evidentiary support." CP 301 (emphasis in original).

The remand order further directed the Department to determine whether any of the owner-operators it included in the assessment performed no services in Washington, but stated "[t]he taxing authority should not be expected to determine situs of service of each entity paid by the petitioner in the audit years, but the burden should be on the taxpayer to provide this information, with some evidentiary support[.]" CP 301. Further, the remand order directed the Department to identify entities included in the audit which are incorporated, and with respect to each such entity, to determine whether all personal services are performed only by corporate officers, again placing the burden on the Carriers to provide information with evidentiary support on this issue. CP 300.

would be addressed at a hearing on the merits. ALJ Gay stated: "I am not prepared at this juncture to rule on the relevance of the quality of the audit. . . . The subject matter should be tested on the merits . . . with further findings of fact." CP 295.

The Department and the Carriers then discussed settlement of the administrative appeals. *See* CP 336-406. The Carriers subsequently asserted a settlement agreement had been reached, and they filed a motion in Pierce County Superior Court for an order to show cause why the alleged settlement should not be enforced. *See* CP 336-406. After a show cause hearing, the superior court issued an order enforcing the purported settlement agreement. CP 336-406.

The Department appealed the Pierce County Superior Court order, asserting that there was no settlement agreement and that the superior court lacked jurisdiction because the show cause proceedings were improper. *Eagle Sys., Inc. v. Emp't Sec. Dep't*, 181 Wn. App. 455, 457, 326 P.3d 764 (2014). The Court of Appeals vacated the alleged settlement agreement on personal jurisdiction grounds because the Carriers failed to properly initiate the lawsuit. *Id.* As a result, the Carriers' administrative appeals remain pending for hearing before an ALJ. Plaintiffs are wrong when they state the Court of Appeals "did not disturb the trial court's substantive determination that ESD had breached a binding settlement

agreement." Br. Appellants at 18. Rather, the Court of Appeals did "not address whether or not a valid contract (i.e., a settlement agreement) existed." *Id.* at 461.

While the administrative proceedings were still pending, WTA and the Carriers sued the Department and six of its former and current employees, alleging the Department's tax assessments were based on biased, pre-determined, and politically-motivated audits. CP 214-31.[4] The complaint was filed in Spokane County Superior Court but transferred to Thurston County. CP 5-213. Plaintiffs challenge the Department's conclusions underlying the assessments that the Carriers' owner-operators, who own their trucking equipment yet provided services to the Carriers under lease agreements, are in the Carriers' "employment" under the Employment Security Act. CP 214-31. The complaint further alleged the assessments were preempted by the Federal Aviation Administration

[4] Previously, in July 2011, while the administrative proceedings were pending, WTA and the Carriers (except Jasper Trucking, Inc.) filed a lawsuit almost identical to this one in the federal district court, challenging the same tax assessments at issue here. *Wash. Trucking Ass'n v. Trause*, U.S. District Court, No. C11-1223-RSM, 2012 WL 585077 (W.D. Wash. Feb. 21, 2012) (not reported), CP 307-24. The federal court dismissed the suit under the Tax Injunction Act, stating that the pending administrative proceedings, with the availability of judicial review, provided an adequate state law remedy for the Carriers to challenge the tax assessments. *Trause*, 2012 WL 585077, at *4, CP 326-34. Contrary to Plaintiffs' assertion, they were not "told by the federal court to pursue in state court their § 1983 remedies." Br. Appellants at 31. The court stated that if the Carriers "receive an adverse ruling after exhausting their administrative remedies, they may seek judicial review [of the final administrative decision] pursuant to" the Employment Security Act and the APA. CP 332-33. The court noted: "Plaintiffs are specifically authorized to raise any constitutional objections to the ESD's actions." *Id.* (citing RCW 34.05.570(3)(a)), CP 333. The WTA and Carriers did not appeal the order of dismissal by the federal court.

Authorization Act (FAAAA), 49 U.S.C. § 14501(c). CP 225-26.

Defendants moved for dismissal of the Plaintiffs' complaint under CR 12(b)(6) and/or CR 12(c). CP 252-78. The superior court granted Defendants' motion, dismissing the complaint with prejudice. CP 690-93. Plaintiffs seek direct review by this Court. CP 694-700.

While the complaint asserted five causes of action, here Plaintiffs only challenge the superior court's dismissal of: (1) their federal civil rights claim under 42 U.S.C. § 1983 against individual defendants for allegedly violating the Carriers' constitutional due process, equal protection, Contract Clause, and Commerce Clause rights; and (2) their state common law claim for tortious interference with the Carriers' contractual and business relationships with their owner-operators. Br. Appellants at 1.

## IV. SUMMARY OF ARGUMENT

The superior court properly dismissed the Carriers' federal and state law claims relating to their tax audits and assessments because relief can be obtained only by appealing the assessments.

The Carriers failed to state a claim under 42 U.S.C. § 1983 upon which relief can be granted because, under the comity doctrine, § 1983 claims for injunctive, declaratory, or damages relief may not be brought against state tax officials in federal *or state courts* when there is an

adequate state law remedy wherein parties may raise federal constitutional objections. The remedies available in the Employment Security Act and APA appeals process are adequate as they are similar to the schemes held by the United States Supreme Court to be adequate state law remedies. § 1983 is not a vehicle to circumvent state law governing tax appeals. The comity doctrine bars the § 1983 claim. Because Plaintiffs' § 1983 claim was properly dismissed, Plaintiffs have no basis for award of attorney fees, since 42 U.S.C. § 1988 does not apply to state law claims.

Plaintiffs' common law tortious interference claim is barred by the Employment Security Act's exclusive remedy provision, RCW 50.32.180. Based on that statute's plain language, unemployment tax audits and assessments may be challenged only pursuant to the Employment Security Act and the APA. Additionally, the doctrines of exhaustion of administrative remedies and primary jurisdiction bar the tortious interference claim. Further, the Carriers cannot prove the elements of tortious interference, as the Department's assessments are in line with binding case law, and the alleged errors in the assessment amounts do not breach or terminate the Carriers' relationships with owner-operators.

The WTA was not issued any tax assessments. As to WTA's claimed direct injury of paying attorney fees, this is not a cause of action in and of itself. Plaintiffs essentially seek to circumvent the law that

provides they cannot obtain attorney fees and costs for litigating their administrative appeals. This, the Court should not permit. Further, the WTA lacks associational standing to assert claims of its members because the members' damages are not known and their establishment requires the members' participation. And for the same reasons that the Carriers have no claim relating to alleged injuries from the audits and assessments, the WTA has no claim on the Carriers' behalf.

## V. ARGUMENT

### A. Standard of Review

CR 12 "weeds out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy." *McCurry v. Chevy Chase Bank*, 169 Wn.2d 96, 102, 233 P.3d 861 (2010).[5] Dismissal is appropriate under CR 12 if the Court concludes beyond a reasonable doubt that the Plaintiffs cannot prove "any set of facts which would justify recovery." *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (citation omitted). The superior court properly granted Defendants' motion to dismiss under this standard.

In their complaint, Plaintiffs refer to their administrative appeals from the tax assessments and the contents of some rulings made by the

[5] While the court granted dismissal under CR 12(b)(6) and/or CR 12(c), dismissal under the latter provision is more appropriate as the Defendants had filed an answer. *Blenheim v. Dawson & Hall Ltd.*, 35 Wn. App. 435, 437, 667 P.2d 125 (1983).

ALJ. Complaint ¶¶ 33, 43, 44, CP 221, 223, 224. Accordingly, judicial notice of records submitted by the Department in support of its motion, and for the purposes offered, is appropriate.[6] Judicial notice of the declarations and evidence offered by Plaintiffs and facts concerning other carriers and state agencies is not appropriate for the reasons argued below by the Defendants, CP 644-45, but in any event is immaterial. In granting Defendants' motion, the Court considered all records submitted by the parties. CP 692. Even when the information to which Defendants objected is considered, dismissal of the complaint is still appropriate.

While the facts alleged in a complaint are presumed true for purposes of a motion to dismiss, "the court is not required to accept the complaint's legal conclusions as true." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717-18, 189 P.3d 168 (2008). Many allegations in Plaintiffs' complaint and in their assertions of hypothetical facts are conclusions, and, as such, the Court need not accept them. The legal issue here is whether the law

[6] In determining a CR 12(b)(6) or (c) motion to dismiss or for judgment on the pleadings, the Court "may take judicial notice of public documents if their authenticity cannot be reasonably disputed in ruling on a motion to dismiss." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008) (citation omitted); ER 201(b); *Vandercook v. Reece*, 120 Wn. App. 647, 651, 86 P.3d 206 (2004) ("ER 201 sometimes permits a court to take judicial notice of court records," because "the existence of such records (as opposed to the truth of the contents of the allegations contained therein) is 'not subject to reasonable dispute.'"). Judicial notice of court records in a different case is appropriate to show the adjudication occurred. *See In re Coday*, 156 Wn.2d 485, 500 n.3, 130 P.3d 809 (2006) (judicial notice of oral decision in different case was appropriate to prove res judicata). Further, "[d]ocuments whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss." *Rodriguez*, 144 Wn. App. at 726.

provides an independent remedy in tort for Plaintiffs' claims. Because it does not, the complaint was properly dismissed.

Although the superior court's written order is silent as to the bases on which the court ruled, this is immaterial because review of an order dismissing a complaint is de novo. *Kinney*, 159 Wn.2d at 842.

### B. The Comity Doctrine Bars Plaintiffs' Claim Under 42 U.S.C. § 1983 Because There Is An Adequate State Law Remedy To Challenge The Tax Audits And Assessments

Plaintiffs raise federal constitutional claims under the Civil Rights Act, 42 U.S.C. § 1983, which essentially challenge the validity of the audits and assessments of unemployment taxes. Complaint ¶¶ 46-52, CP 224-28. But, as the United States Supreme Court has explained, § 1983 may not be used to circumvent state law governing tax appeals.

Claims under § 1983 for injunctive, declaratory, or damages relief may not be brought against state tax officials in their individual capacities[7] in federal *or state courts* when there is an adequate state law remedy, which includes frameworks like the APA wherein parties may raise federal constitutional objections to taxes. *Nat'l Private Truck Council, Inc.*

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[7] Claims under § 1983 may not be brought against the Department or its employees in their official capacity. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (neither a State nor its officials acting in their official capacities are "persons" under § 1983); *Edgar v. State*, 92 Wn.2d 217, 211, 595 P.2d 534 (1979) (state is not a "person" who may be liable under § 1983). To the extent Plaintiffs assert a § 1983 claim against the Department or its employees acting in their official capacities, their claim is not covered by § 1983. The § 1983 claim against the state tax officials in their individual capacities is barred for the reasons argued herein.

*v. Oklahoma Tax Comm'n*, 515 U.S. 582, 584-86, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995) (Court affirmed dismissal of § 1983 suit in state court for declaratory and injunctive relief brought by trucking carriers against state tax officials, noting "[w]e have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration"); *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116, 102 S. Ct. 177, 70 L. Ed. 2d 271 (1981) (barring § 1983 damage award against state tax officials in federal courts when state law provides an adequate remedy); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 514, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981) (explaining in § 1983 action that state law remedy is adequate if it provides a "full hearing and judicial determination" at which the taxpayer may raise federal constitutional objections to the tax).

This bar to § 1983 claims has been applied in the unemployment tax arena. *Hawaiian Telephone Co. v. State Dep't of Labor & Indus. Rel.*, 691 F.2d 905, 909-11 (9th Cir. 1982) (comity principles bar § 1983 suit challenging state unemployment tax scheme when there is adequate remedy to challenge tax assessments in state court); *California v. Grace Brethren Church*, 457 U.S. 393, 413, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982) (first amendment challenge to state unemployment taxes).

The superior court properly dismissed the § 1983 claim because there is an adequate remedy under the Employment Security Act and the APA to raise Plaintiffs' federal constitutional challenge to the tax audits and assessments.

**1. The comity doctrine underlying the Tax Injunction Act precludes using § 1983 as a vehicle to challenge state taxes, so long as there is an adequate state law remedy.**

Under the Tax Injunction Act, a federal court may not entertain any action based on the state's enforcement of a state tax scheme where there is an adequate remedy in state law. The act provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. The act is rooted in federal reluctance to interfere with state taxation. *See Rosewell*, 450 U.S. at 522; *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 826, 117 S. Ct. 1776, 138 L. Ed. 2d 34 (1997) ("The power to tax is basic to the power of the state to exist."). The act serves important purposes: "To borrow from Circuit Judge Taft . . . if § 1983 could be invoked in this situation, 'the obstruction to the collection of taxes would be so frequent as to be intolerable.'" *Stufflebaum v. Panethiere*, 691 S.W.2d 271, 272 (Mo. 1985) (citation omitted).

Courts have broadly construed the reach of the Tax Injunction Act, consistent with the act's purpose not to disturb states' taxing efforts. Thus, the act "cannot be avoided by an attack on the administration of a tax as opposed to the validity of the tax itself." *Brooks v. Nance*, 801 F.2d 1237, 1239-41 (10th Cir. 1986); *Hickmann v. Wujick*, 488 F.2d 875, 876 (2d Cir. 1973) ("Plaintiffs' argument that they are not seeking to claim illegality or that the assessment was illegal is no more than a play on words.").

Although the Tax Injunction Act is intended to limit only federal court jurisdiction, the comity doctrine on which the act is based is antecedent and broader. *See Fair Assessment*, 454 U.S. at 110 ("the principle of comity which predated the [Tax Injunction] Act was not restricted by its passage."); *Nat'l Private Truck*, 515 U.S. at 590 (Tax Injunction Act "may be best understood as but a partial codification of the federal reluctance to interfere with state taxation"). Deference to states' authority to tax is termed comity. Cases applying comity principles date back to at least 1870. *See Dows v. Chicago*, 78 U.S. 108, 110, 20 L. Ed. 65 (1870); *Nat'l Private Truck*, 515 U.S. at 586-89.

The Supreme Court has held the principles of federal reluctance to interfere with state taxation embodied in the act apply equally to federal legislation, including § 1983, and neither a federal *nor state court* may entertain a § 1983 action that challenges a state tax assessment so long as

there is an adequate state law remedy available. *Nat'l Private Truck*, 515 U.S. at 590. The Court explained that while the language of the Tax Injunction Act is silent on state courts, "this silence is irrelevant" because the Court does "not understand § 1983 to call for courts (whether federal or state) to enjoin the collection of state taxes when an adequate remedy is available under state law." *Id.* This is because a judgment entered by a state court under § 1983 is "just as disruptive as one entered by a federal court." *Id.* at 591. The Court affirmed dismissal of the § 1983 suit for declaratory and injunctive relief brought by the trucking carriers in state court against state tax officials. *Id.* at 592.

*National Private Truck* bars the use of § 1983 for declaratory or injunctive relief in state court against state tax officials when there is an adequate state law remedy. The Supreme Court's earlier pronouncement in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary* applied the same principle in rejecting a claim for damages. 454 U.S. at 116. In *Fair Assessment*, state taxpayers and an association representing real property owners brought a suit for damages under § 1983 against county and state tax officials. *Id.* at 105-06. The plaintiffs argued their § 1983 claim should not be barred because damages actions "are inherently less disruptive of state tax systems than injunctions or declaratory judgments." *Id.* at 113. The Court rejected this argument and pointed out the plaintiffs could not

recover damages unless a court first determined the tax system violates their constitutional rights, which would, in effect, be the same thing as a declaratory judgment. *Id.* The "very maintenance of the suit itself would intrude on the enforcement of the state scheme." *Id.* at 114. The Court held taxpayers "must seek protection of their federal rights by state remedies," provided those remedies are adequate. *Id.* at 116. The Court's holding was based on comity, as the language of the Tax Injunction Act does not address damages. *See Id.* at 105.

Other state courts have recognized that *National Private Truck* holds that the "principle of federal constraint in the area of state taxation applies not only to federal courts, but also to federal legislation," such as § 1983, in state courts. *E.g., Gen. Motors Corp. v. City & County of San Francisco*, 69 Cal. App. 4th 448, 458 (1999). Additionally, although *National Private Truck* involved only injunctive and declaratory relief under § 1983, state courts consistently have applied the Supreme Court's holding to extend to damages actions in state court under § 1983, based on the Court's reaffirmation of its *Fair Assessment* opinion. *See Id.* ("General Motors is wrong to say that the reasoning of *National Private Truck* did not reach damages."); *Kowenhoven v. County of Allegheny*, 901 A.2d 1003, 1014 (Pa. 2006) ("although Section 1983 injunctive and declaratory relief were at issue in *National Private Truck Council*, its reasoning

applies equally to a Section 1983 request for money damages, particularly in view of the Court's earlier pronouncement, in *Fair Assessment*"); *Kerr v. Waddell*, 916 P.2d 1173, 1179 (Ariz. Ct. App. 1996) ("We interpret [*National Private Truck*] to forbid an award of damages [under § 1983] for the same reasons that injunctive and declaratory relief are forbidden.").

Plaintiffs attempt to cast doubt on this proposition with a misplaced reliance on a case that predates *National Private Truck*. Br. Appellants at 36-37 (discussing *Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991)). Though *Dennis* still stands for the proposition that Commerce Clause violations are actionable under § 1983, *id.* at 440, its discussion of claims that may be asserted against state tax officials is displaced by *National Private Truck*, as the *Dennis* majority did not consider the Tax Injunction Act or comity doctrine. After *National Private Truck*, at least 17 states' courts have held, based on the comity doctrine, that § 1983 suits for injunctive, declaratory, or damages relief cannot be brought in state courts against state tax officials when there is an adequate state law remedy, which includes frameworks like the APA.[8]

[8] *Gen. Motors Corp. v. City of Linden*, 671 A.2d 560, 564-65 (N.J. 1996) (both federal and state courts 'must refrain from granting federal relief under § 1983 when there is an adequate legal remedy'" (quoting *National Private Truck*)); *Buckley Powder Co. v. Colo.*, 924 P.2d 1133 (Colo. App. 1996) (§ 1983 state tax suit by trucking company dismissed), *rev'd on other grounds*, 945 P.2d 841 (Colo. 1997); *Kerr*, 916 P.2d at 1179 [Ariz. Ct. App. 1996] ("Where an adequate remedy exists under state law, no relief of any kind is available in a state court action brought under § 1983 challenging the assessment or collection of state taxes."); *PPG Indus., Inc. v. Tracy*, 659 N.E.2d 1250,

Even after *Dennis* and before *National Private Truck*, at least four states' courts held the same.[9] No court since *National Private Truck* has held otherwise.

Plaintiffs' citation to *Hibbs v. Winn*, 542 U.S. 88, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004), is equally unavailing. Br. Appellants at 38.

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1252 (Ohio 1996) (no basis for attorney fees under 42 U.S.C. § 1988 because state appeals procedure to challenge tax assessment is adequate remedy at law); *Murtagh v. County of Berks*, 715 A.2d 548 (Pa. Cmmw. Ct. 1998) (overruling earlier opinion and determining *National Private Truck* compelled dismissal of state court suit under § 1983 for damages against county tax board, where adequate state law remedies exist); *Kerns v. Dukes*, 707 A.2d 363, 368 n.6 (Del. 1998) (discussing injunctive or declaratory relief under § 1983 in state court), *overruled on other grounds by Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665 (Del. 2013); *Camps Newfound/Owatonna Corp. v. Town of Harrison*, 705 A.2d 1109, 1111 (Me. 1998) ("[I]f our law provides an adequate remedy, the Camp cannot maintain a 1983 claim."); *Gen. Motors Corp.*, 69 Cal. App. 4th at 458 [1999]; *Glynn County Bd. of Tax Assessors v. Haller*, 543 S.E.2d 699, 701 (Ga. 2001) (discussing injunctive or declaratory relief under § 1983 in state court); *State v. Sproles*, 672 N.E.2d 1353, 1361 (Ind. 1996) ("It is within the State's discretion to channel tax appeals to the administrative process and the Tax Court, so long as those remedies are adequate."); *Francis v. City of Columbus*, 676 N.W.2d 346, 351-52 (Neb. 2004) ("We conclude that when a litigant seeks damages in a § 1983 claim challenging a state or local tax, Nebraska courts must refrain from granting such relief, so long as a state law offers an adequate legal remedy."); *By Lo Oil Co. v. Dep't of Treas.*, 703 N.W.2d 822, 832 (Mich. App. 2005) (discussing injunctive or declaratory relief under § 1983 in state court); *Kowenhoven*, 901 A.2d at 1014 [Pa. 2006]; *Panhandle Producers & Royalty Owners Ass'n v. Okla. Tax Comm'n*, 162 P.3d 960, 964 n.6 (Okla. Civ. App. 2007) ("Suits for violation of the Commerce Clause may be brought under § 1983 to obtain injunctive and declaratory relief from state action that violates the Commerce Clause. However, the Supreme Court has since held that state courts may not grant relief under §1983 where there is an adequate state remedy available." (citing *Dennis* and *National Private Truck*)); *J.P. Alexandre, LLC v. Egbuna*, 49 A.3d 222, 227-29 (Conn. App. Ct. 2012) (§ 1983 damages action in state court dismissed); *Higdon v. State*, 404 S.W.3d 478, 481 (Tenn. Ct. App. 2013) (relief under § 1983 "is not available in state tax cases in which an adequate remedy is provided under state law"); *Commonwealth Brands, Inc. v. Morgan*, 110 So.3d 752, 763 (Miss. 2013) (overruling opinion predating *National Private Truck* and instead holding the "constitutionality of a state tax may not be challenged under Section 1983 in state court if an adequate remedy is available under state law").

[9] *See Hogan v. Musolf*, 471 N.W.2d 216 (Wis. 1991); *L.L. Bean, Inc. v. Bracey*, 817 S.W.2d 292 (Tenn. 1991), *abrogated on other grounds*, *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008); *Hanson v. Quill Corp.*, 500 N.W.2d 196 (N.D. 1993); *Tatten Partners, L.P. v. New Castle County Bd. of Assessment Review*, 642 A.2d 1251 (Del. Super. Ct. 1993).

*Hibbs* held that the Tax Injunction Act did not preclude a federal challenge by a third party who objected to a tax credit received by others while not challenging the third party's own taxes due. *Id.* at 106-08. Invalidation of the tax credit would have increased tax revenue to the state.[10] *Hibbs* is unique and based on its unusual facts. *Hibbs* did not "recast the comity doctrine." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 430, 130 S. Ct. 2323, 176 L. Ed. 2d 1131 (2010). Rather, six years after *Hibbs*, the Court reaffirmed the principle of non-interference with state taxation embodied in comity. *Id.* at 421-22, 424 (comity doctrine is "more embracive" than Tax Injunction Act, and *Hibbs* in contrast has "a more modest reach").

Thus, the established federal and state precedents uniformly hold that under the Tax Injunction Act and related comity doctrine, "neither state nor federal courts may award damages or grant either injunctive or declaratory relief when a state provides an adequate remedy" in tax cases. *Gen. Motors*, 671 A.2d at 565; *Patel v. City of San Bernardino*, 310 F.3d 1138, 1141 (9th Cir. 2002) ("Read together, *Fair Assessment* and *National Private Truck* bar use of § 1983 to litigate state tax disputes in either state or federal court."). Because Plaintiffs' claim is for damages against state tax officials in state court based on federal legislation, comity applies.

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[10] *See Hill v. Kemp*, 478 F.3d 1236, 1250 (10th Cir. 2007) ("Our case, of course, does not involve the somewhat unusual circumstance confronted by *Hibbs* of citizens seeking to eliminate tax credits and 'flog' the State to collect more tax revenues[.]").

Explaining that the Carriers pay unemployment compensation taxes for employee drivers and other staff, Plaintiffs assert that the Carriers "are not seeking to avoid paying unemployment taxes." Br. Appellants at 38. This argument ignores the obvious: Plaintiffs challenge whether the services of owner-operators are subject to taxation, thus implicating the Department's revenue raising function. That the Carriers pay taxes for *other* workers is immaterial. Plaintiffs' argument that "[r]equiring ESD to charge only the amount of taxes it is legally able to levy is *not tax avoidance*," Br. Appellants at 39, fails for the same reason. Challenge of the amount of the tax implicates the Department's revenue raising function and thus triggers the comity doctrine. Because the state law remedy is adequate as shown below in Section V.B.3, the correctness of the assessment amounts must be addressed in the state law administrative appeal process.

Plaintiffs argue that exhaustion is not required for § 1983 claims and that the superior court orally ruled otherwise. Br. Appellants at 31-32. But the comity doctrine underlying the Tax Injunction Act precludes the ability to bring § 1983 claims in federal and state courts in tax cases where there is an adequate state law remedy. This is not exhaustion, but a bar to the claim. It is unique to tax challenges. The general rule that § 1983 actions may be brought in state court without exhausting administrative

remedies does not apply to cases in which the allegedly actionable behavior of the defendant tax officials implicates the state's assessment and collection of taxes. Whether exhaustion applies in general in § 1983 claims not involving taxes is not on point. Besides, because this Court reviews de novo an order of dismissal, *Kinney*, 159 Wn.2d at 842, it does not matter whether the superior court suggested in its oral rulings that Plaintiffs' § 1983 claims were subject to exhaustion requirements.

**2. State law remedies against taxes are generally adequate, and any exceptions are narrowly construed.**

Suits under § 1983 against state tax officials challenging tax assessments may proceed only when there is no adequate state law remedy. Under the Tax Injunction Act, a state law remedy is adequate if it is plain, speedy, and efficient. 28 U.S.C. § 1341. Courts must narrowly construe this exception to the Tax Injunction Act. *Grace Brethren Church*, 457 U.S. at 413. Under the comity doctrine, courts consider whether the remedy is "plain, adequate and complete," which has the same meaning as "plain, speedy and efficient" for purposes of the Tax Injunction Act. *Fair Assessment*, 454 U.S. at 116, n.8. The state remedy "need not . . . be 'the best remedy available or even equal to or better than the remedy which

might be available in the federal courts.'" *Mandel v. Hutchinson*, 494 F.2d 364, 367 (9th Cir. 1974) (citation omitted).[11]

The availability and adequacy of a state law remedy for purposes of the Tax Injunction Act require only "a state-court remedy that meets certain minimal *procedural* criteria." *Rosewell*, 450 U.S. at 512 (emphasis in original). Under the comity doctrine as well, courts analyze the adequacy of the remedy in terms of the process afforded by the state. *See Grace Brethren Church*, 457 U.S. at 412-17 (constitutional objection to unemployment taxes can be adequately addressed in state law challenge). It is sufficient if the state law remedy provides a "full hearing and judicial determination" at which the taxpayer may raise federal constitutional objections to the tax. *Rosewell*, 450 U.S. at 514. For example, the Court has held that a state's procedure to challenge a tax by seeking a refund—with or without interest—from the state agency and then, if denied, appealing to the courts and raising all arguments against validity of the tax, including constitutional ones, was adequate. *Rosewell*, 450 U.S. at 507-08, 514-15; *Grace Brethren Church*, 457 U.S. at 413-15.

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[11] The Supreme Court has cautioned against disruption of state taxation in favor of comity, particularly when regulation of commercial activity is at issue: "Comity's constraint has particular force when lower federal courts are asked to pass on the constitutionality of state taxation of commercial activity. For '[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.'" *Levin*, 560 U.S. at 421-22 (quoting *Dows*, 78 U.S. at 110).

Only in rare circumstances have courts declared state law remedies inadequate. For example, in *Patel v. City of San Bernardino*, on which the Plaintiffs mistakenly rely, the Ninth Circuit concluded that a § 1983 action in federal court may be permitted in the narrow and exceptional circumstance where a state court declares a tax unconstitutional but the city continues to collect it. 310 F.3d at 1141-42; Br. Appellants at 38. The state remedy there was unclear and hence inadequate only "[t]o the extent that the city refused to follow" the state court's decision after it became final; the court permitted the plaintiffs to pursue remedies for damages that accrued "after the state courts overturned the tax." *Id.* at 1142.

**3. The state law remedies under the Employment Security Act and the APA are adequate and preclude Plaintiffs' § 1983 claim.**

Washington's Employment Security Act and the APA provide an adequate remedy to challenge the tax audits and assessments the Carriers complain of in this lawsuit. Thus, the § 1983 claim fails as a matter of law and was properly dismissed.

Upon finding an employer has failed to pay statutory unemployment taxes, the Department will issue an order and notice of assessment, and the aggrieved employer may request a hearing to contest the assessment. RCW 50.24.070, 50.32.030, .050; WAC 192-04-050(5), -060(1). The filing of a request for hearing stays collections and the accrual

of interest and penalties on the disputed taxes until a final decision is made. RCW 50.32.030. At a hearing conducted by OAH, an independent state agency, parties have the right to engage in discovery, submit evidence, present testimony, and examine witnesses. RCW 34.05.446(3); WAC 192-04-130; RCW 34.05.449; WAC 192-04-110. After the hearing, an ALJ will issue an initial order affirming, modifying, or setting aside the assessment. RCW 50.32.050; RCW 34.05.461. An initial order is subject to review by the Department Commissioner's Review Office[12] for a final order, which is then subject to judicial review. RCW 50.32.070, .080, .120; WAC 192-04-170.[13] Judicial review is governed by the APA. RCW 34.05.510; RCW 50.32.120. In judicial review, the aggrieved party may challenge the order on various grounds, including alleged constitutional violations. RCW 34.05.570(3).

The Washington appeals scheme is remarkably similar to the schemes upheld by the United States Supreme Court as adequate in *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. at 508-09, and in *California v. Grace Brethren Church*, 457 U.S. at 415. There and here, taxpayers may

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[12] Pursuant to RCW 50.12.020, the Commissioner delegated to the Commissioner's Review Office the responsibility to conduct reviews of ALJ initial orders and issue final agency orders. *See* WAC 192-04-020(5) (defining "Commissioner" as "the commissioner's review office of the employment security department.").

[13] Payment of the assessed sums to the Commissioner or registry is not required in order to appeal to the courts, as Plaintiffs state at Br. Appellants at 8-9, but rather only to stay the Commissioner's order and thereby avoid collection efforts and imposition of further interest and penalties during pendency of judicial review. *See* RCW 50.32.130.

seek review by the agency, and then the courts, where the taxpayers may raise constitutional objections. RCW 34.05.570(3).

The Carriers appear to assert that the administrative appeal remedy here is not speedy. Br. Appellants at 41 (complaining of alleged 17 month delay in reconsidering assessments). But the Supreme Court held a two-year delay was sufficiently speedy, as measured against the normal time for litigation. *Rosewell*, 450 U.S. at 520-21. And, when confronted with an argument that a delay in excess of 31 months in the administrative process was not speedy and that the administrative tribunal had an excessive backlog of cases that would contribute to further delay, an Arizona court held that the administrative process was sufficiently speedy. *Kerr*, 916 P.2d at 1181-82. The court poignantly observed: "Much of the delay in the administrative process results from the taxpayers' position during litigation. . . ." *Kerr*, 916 P.2d at 1182. Here, much delay was caused by the Carriers filing motions that were denied, bringing a federal lawsuit that was dismissed, and improperly obtaining an order enforcing an alleged settlement which has now been vacated by the Court of Appeals. *Eagle Sys.*, 181 Wn. App. at 461.

The Carriers also appear to assert the administrative appeal remedy is inefficient because each carrier needed to file separate appeals where similar arguments would be asserted. *See* Br. Appellants at 12 ("appellate

process is expensive and uncertain" for multiplicity of carriers issued assessments), 46-47 (arguing WTA should be able to assert recurring arguments challenging assessments because it is "far more economical"). However, courts have rejected this claim, noting that because a multiplicity of administrative appeals would not involve the *same* parties, the process is not inefficient. *Kerr*, 916 P.2d at 1182-83 (rejecting taxpayers' claim that administrative process was inadequate because of refusal to allow class action); *Nat'l Private Truck*, 515 U.S. at 591 n.6. *See also Jenkins v. Wash. Convention Ctr.*, 59 F. Supp. 2d 78, 85-86 (D.D.C. 1999) (multiplicity of suits exception can be applied only when taxpayer seeks injunction or declaratory relief, but not in damage actions, which require "protracted analysis of the facts alleged as applied to each and every plaintiff."). Unique facts concerning each carrier and their contracts with owner-operators can be significant. *See* RCW 50.04.140.

Plaintiffs' argument about alleged inadequacy of the state law remedy is based on the false premise that the assessments were declared unlawful. They were not. In arguing throughout their Brief of Appellants that the ALJ declared the taxes unlawful, Plaintiffs misstate the ALJ's interlocutory ruling. The ALJ concluded there might be a basis to reconsider some aspects of the assessments, but placed the burden on the Carriers to produce evidence justifying reconsideration. CP 299-302. This

is proper because taxpayers must prove exemption from taxation. *W. Ports*, 110 Wn. App. at 451. Further, when an employer fails to provide evidence during an audit (e.g., concerning how much of an owner-operator's pay is for personal services), the Department is authorized to issue assessments relying on the information available to it. *See* RCW 50.12.080; WAC 192-340-020.[14] Like the defendants in *Lowe v. Washoe County*, 627 F.3d 1151 (9th Cir. 2010), "Defendants here did not continue to collect a tax that a state court previously had declared invalid. Consequently, Plaintiffs have not demonstrated that the state court remedy in this case is uncertain and therefore not 'plain.'" *Id.* at 1157.[15] To the extent the Carriers allege that Defendants acted inconsistent with ALJ Gay's remand order, they must bring this argument before the

[14] Statutes and regulations require employers to keep records for all persons in their employment showing, among other things, their wages paid. *See* RCW 50.12.070; WAC 192-310-050. As a precedential Commissioner decision explains, where a petitioner contests the amount of wages on which an assessment is based, it is "apparent that [the] petitioner bears the burden of proof of establishing and identifying those amounts which are incorrectly included." *In re Economy Construction*, No. 68-26-P, 69-1-P, Wash. Dep't of Emp't Sec. Dec. No. 806 (Oct. 20, 1969); *see also In re Charles Sten*, No. 69-8-P, Wash. Dep't of Emp't Sec. Dec. No. 792 (June 30, 1969) (employer's failure to keep required records prevents Commissioner from reducing amount of wages). Courts treat precedential Commissioner's decisions as persuasive authority. *Martini v. Emp't Sec. Dep't*, 98 Wn. App. 791, 795, 990 P.2d 981 (2000).

[15] The *Lowe* court further suggested that the "dictum in *National Private Truck Council* and the holding in *Patel* concern situations in which a state court declared a tax invalid under the *Federal* Constitution," and that when no federal constitutional right is directly at issue then the Tax Injunction Act's "underlying policies of federalism and comity would seem to recommend against federal interference." 627 F.3d at 1157 n.1 (emphasis in original). The court declined to base its holding distinguishing *National Private Truck* and *Patel* on this basis, however. *Id.* But here, the ALJ's alleged declaration that the taxes were unlawful was not based on any federal constitutional provision, and the ALJ did not declare the taxes unlawful but imposed on the Carriers a burden to produce additional evidence for the Department's consideration. CP 299-302.

administrative tribunal. No authority permits that the claims be raised in this independent suit.[16]

In essence, Plaintiffs' arguments about the alleged inadequacy of the state law remedy appear to be that they cannot recover their attorney fees for the administrative hearings, and that some evidence they have offered has been excluded by ALJs. Br. Appellants at 42-43. The *National Private Truck* Court dismissed the claim for fees because there was no § 1983 claim, 515 U.S. at 592; thus, absence of a basis for fees alone does not allow preservation of a cause of action. Plaintiffs' argument about the unavailability of attorney fees for administrative proceedings must be directed to the Legislature.

Further, this Court should not address issues of admissibility of evidence in the underlying administrative proceedings. Those arguments must be raised on administrative and judicial review. The same is true of the Carriers' argument—rejected by the ALJ—that the Department's audits were rigged or improper and should result in dismissal of the

[16] Plaintiffs may refer to a later stipulated reduction in the assessment amount for one Carrier and similar discussions concerning other Carriers based on portions of the ALJ's interlocutory remand order. Those discussions are not in the record, as they have taken place in the administrative proceedings after the Court of Appeals vacated the alleged settlement agreement. Plaintiffs should not be permitted to assert that any negotiated stipulation in the administrative proceedings should be treated as an admission by the Department that the ALJ declared the assessments unlawful. He did not.

assessments.[17] Besides, there is no cause of action for an assertion that one must be satisfied with the way in which an audit is conducted. *Janaszak v. State*, 173 Wn. App. 703, 735, 297 P.3d 723 (2013). There is not always a legal remedy for every perceived wrong.

None of Plaintiffs' arguments negates the adequacy of the state law remedy. Under the Employment Security Act and the APA, the Carriers get a "full hearing and judicial determination" at which they may raise federal constitutional objections to the tax. *Rosewell*, 450 U.S. at 514; RCW 34.05.570(3) (specifically permitting constitutional objections).

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[17] The argument that the alleged rigged audits should result in exclusion of the assessments is essentially an assertion that the assessments are void as a result of improper conduct. *See* Br. Appellants at 41. But while the Carriers may argue at the administrative hearings that the tax assessments are *incorrect*, this does not render them void nor require their dismissal or exclusion based on alleged impropriety in the Department's audits. *See Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 78-79, 110 P.3d 812 (2005) (improper investigation not a basis to overturn agency action because litigant had opportunity at administrative hearing to present evidence to contest decision, and was therefore not prejudiced even if investigation was improper).

That an ALJ has disagreed with the Carriers' argument for exclusion of the audits and assessments is not the same as a statement by the head of the agency that supposedly has authority to adjudicate a matter that the agency is powerless to do so. *Cf. McCarthy Fin., Inc. v. Premera*, 182 Wn. App. 1, 19-20, 328 P.3d 940 (2014). The Department and Commissioner's Review Office have never stated they lack authority to determine whether owner-operators are in covered employment under Title 50 RCW.

Furthermore, Plaintiffs' argument about politically-motivated audits appears to be based on the Department's enforcement position, which is consistent with *Western Ports*, 110 Wn. App. at 450-58, and the Department having targeted trucking carriers for audit. There is nothing unlawful about targeting for audit an industry that is suspected of misclassifying covered workers as independent contractors. Indeed, having identified certain trucking carriers who misreported owner-operators as determined by the Department, audit of the whole industry is arguably fairest so that competitors do not gain unfair advantage by their noncompliance with the law. Auditing the industry levels the playing field.

Plaintiffs may be frustrated by the administrative process and may believe they will not obtain a favorable result there, but their frustration does not render the state law appeal remedy inadequate. *See May Trucking Co. v. Oregon Dep't of Transp.*, 388 F.3d 1261, 1272 (9th Cir. 2004) (dismissing trucking carrier's claim under Tax Injunction Act, stating "Plaintiff's argument confuses its entitlement to a full and fair hearing with its entitlement to a favorable resolution on the merits"). The statement of a Wisconsin court is also salient:

> We do not agree with the plaintiffs' contention that the remedy is inadequate because they cannot obtain the same relief under the state remedies that are available under a sec. 1983 action. The inability of plaintiffs to obtain the remedy they desire does not mean that they have been denied an adequate remedy.

*Hogan*, 471 N.W.2d at 223.

*Jones v. State*, 170 Wn.2d 338, 242 P.3d 825 (2010) (involving a § 1983 suit against state pharmacy board officials), cited at Br. Appellants at 29-30, fails to avail Plaintiffs for several reasons. First, it is not a tax case. The comity doctrine applies here. Second, no summary suspension is at issue here. Collection of taxes, penalties, and interest is stayed on administrative appeal. RCW 50.32.030. Third, while fabrication of evidence was at issue in *Jones* and other cases cited at Br. Appellants at 29, the complaint does not allege evidence was fabricated here. *See* CP

214-31. Fourth, while Jones exhausted administrative remedies because a "final agency determination" was made there, 170 Wn.2d at 356-57, here there is no final agency action and administrative remedies are thus not exhausted.[18]

In summary, the bar on § 1983 claims for damages against state tax officials in federal and state courts has been consistently applied when there is an adequate state law remedy, as here. Because the Carriers have a procedurally adequate state law remedy under the Employment Security Act and the APA to challenge the Department's tax audits and assessments, their § 1983 claims were properly dismissed with prejudice.

### C. The Exclusive Remedy Provision, RCW 50.32.180, And/Or The Judicial Doctrines Of Exhaustion Of Administrative Remedies And Primary Jurisdiction Bar The Tortious Interference Claim

#### 1. RCW 50.32.180 bars Plaintiffs' state law claim because it provides the appeal remedies "shall be exclusive."

The Employment Security Act and the APA set forth the specific, exclusive process for the challenge of unemployment tax assessments. RCW 50.32.180 plainly limits the Carriers to administrative appeal

[18] *Tarabochia v. Adkins*, 766 F.3d 1115 (9th Cir. 2014), cited at Br. Appellants at 30-31, and *Johnson v. City of Seattle*, _ Wn. App. _, 335 P.3d 1027 (2014), cited at Br. Appellants at 25, 41-42, are also inapposite because they are not tax cases. The comity doctrine did not apply there, but does apply to preclude the suit here. *Johnson* is also distinguishable because while the plaintiff there had a vested right in his nonconforming land use and thus was never in violation of the ordinance under which he was cited, 355 P.3d at 1032, the Carriers have no vested right to avoid unemployment tax liability for services performed in their employment under Title 50 RCW.

remedies: "The remedies *provided in this title* for determining the justness or correctness of assessments, refunds, adjustments, or claims *shall be exclusive* and no court shall entertain any action to enjoin an assessment or require a refund or adjustment except in accordance with the provisions of this title." (Emphasis added).

RCW 50.32.180 functions as the state law equivalent of the Tax Injunction Act and comity doctrine and furthers the purposes of non-interference with state taxation through remedies other than the prescribed appeal process. An action in tort is not an available method to contest tax assessments. Instead, an employer must timely (1) appeal a tax assessment (RCW 50.32.030), (2) seek the Commissioner's review of an adverse ALJ initial order (RCW 50.32.050), and (3) petition the court for judicial review of an adverse final decision of the Commissioner (RCW 50.32.090). Judicial review "may be had only in accordance with the procedural requirements of" the APA. RCW 50.32.120. Thus, the plain language of the Employment Security Act and the APA sets forth the specific, exclusive remedy to challenge unemployment tax assessments.

Plaintiffs fail to address RCW 50.32.180. They cite it only to state they cannot bring a declaratory judgment action concerning their preemption argument. Br. Appellants at 9, 14. But by its plain language, the statute does more. While Plaintiffs assert that the administrative appeal

process is futile, this does not avoid the mandate that the administrative appeal remedies of the Employment Security Act "shall be exclusive." RCW 50.32.180. There are no exceptions for alleged futility in the statutes "provided in this title." *See* RCW 50.32.180; RCWs 50.32.030, .050, .090, .120. Each of Plaintiffs' claims—assertions that the audits were biased and predetermined, that the Carriers' owner-operators are independent contractors, and that the assessments were preempted by the FAAAA, CP 214-31—challenge the "justness or correctness of assessments." RCW 50.32.180. The claims must be addressed through the established appeals process, not through the filing of a separate civil lawsuit. *Id.*[19]

Under the exclusive remedy statute, parties cannot sue in tort to avoid paying unemployment taxes. To allow otherwise circumvents state law and threatens the existence of the unemployment insurance system.[20]

**2. The doctrines of exhaustion of administrative remedies and primary jurisdiction also bar the state law claim.**

In addition, under the judicial doctrine of exhaustion of administrative remedies, a court will not intervene when the "relief sought can be obtained by resort to an exclusive or adequate administrative

[19] The superior court's dismissal order did not specify on which bases the court ruled, and the court's oral rulings did not mention RCW 50.32.180, but this is immaterial because this Court reviews the dismissal de novo. *Kinney*, 159 Wn.2d at 842.

[20] *See* RCW 50.01.010 ("Social security requires protection against this greatest hazard of our economic life [i.e., from economic insecurity due to unemployment]. This can be provided only by application of the insurance principle of sharing the risks, and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment. . .").

remedy." *S. Hollywood Hills Citizens Ass'n for Pres. of Neighborhood Safety & Env't v. King County*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984). The appeal remedy afforded under the Employment Security Act and the APA is exclusive and adequate for purposes of the exhaustion doctrine.

"The doctrine of exhaustion of administrative remedies is well established in Washington." *S. Hollywood Hills*, 101 Wn.2d at 73. In general, a party cannot challenge an agency action "unless all rights of administrative appeal have been exhausted." *Id.* Whether exhaustion is required is a question of law. *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 170 Wn. App. 260, 271, 284 P.3d 785 (2012). Failure to exhaust administrative remedies precludes a tort action for the same claim. *Rains v. Dep't of Fisheries*, 89 Wn.2d 740, 741-44, 575 P.2d 1057 (1978); *Rosen v. Tacoma*, 24 Wn. App. 735, 741, 603 P.2d 846 (1979) ("Even arbitrary and capricious municipal action cannot be the basis for liability in tort for economic loss when the party suffering the loss fails to pursue available administrative remedies.").[21] *See also Systems Amusement, Inc. v. State*, 7 Wn. App. 516, 518, 500 P.2d 1253 (1972) (affirming dismissal of complaint for alleged due process violations where plaintiff did not pursue

[21] Plaintiffs argue the trial court merely held the Carriers' claim of deprivation of due process was premature, without denying it was a legitimate claim. Br. Appellants at 31. To the contrary, the superior court's order dismissed the complaint with prejudice, CP 690-93; by granting the CR 12 motion, the superior court ruled there is no claim on which relief can be granted, regardless of when the claim is raised.

available administrative appeal remedies, noting nonexistence of a cause of action for money damages against the state for non-tortious discretionary acts allegedly performed arbitrarily and capriciously).

The exhaustion doctrine serves important purposes. It insures against premature interruption of the administrative process, allows the agency to develop the necessary factual background on which to base a decision, allows exercise of agency expertise in its area, provides a more efficient process, and protects the agency's autonomy by allowing it to correct its own errors and insuring individuals are not encouraged to ignore an agency's procedures by resorting to the courts. *S. Hollywood Hills*, 101 Wn.2d at 73-74.

Futility serves only as a potential defense to exhaustion, and applies only to Plaintiffs' tortious interference claim. But futility is not based on the likelihood of an adverse outcome. *Stafne v. Snohomish County*, 174 Wn.2d 24, 36, 271 P.3d 868 (2012). Nor is futility shown by speculation that the question at issue has already been decided. *See Beard v. King County*, 76 Wn. App. 863, 871, 889 P.2d 501 (1995) (court will not remedy a denial of a promotion for which plaintiff did not apply based on his speculation that seeking promotion was futile). Rather, the futility exception to exhaustion applies only when "the available administrative remedies are inadequate, or if they are vain and useless." *Orion Corp. v.*

*State*, 103 Wn.2d 441, 458, 693 P.2d 1369 (1985) (citation omitted)). The exception is narrowly applied, and "a strong bias exists" toward requiring parties to use the statutorily prescribed administrative process before asking courts for relief. *Stafne*, 174 Wn.2d at 34-35.

Plaintiffs conclude, from some unfavorable evidentiary rulings by ALJs, that the appeal process is futile and/or inadequate.[22] Br. Appellants at 40-41. For example, Plaintiffs complain about exclusion of their evidence regarding the basis for their claim of federal preemption. Br. Appellants at 18-19, 40-41. The ALJ's decision is reasonable, given the considerable case law that indirect effects of generally applicable legislation on motor carriers' prices, routes, and services are too tenuous, remote, or peripheral to trigger FAAAA preemption.[23] But Plaintiffs'

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[22] Several of the ALJ rulings about which Plaintiffs complain are in cases concerning other companies that are not parties here. *See* Br. Appellants at 18-20 and 40-41 (referring to rulings by ALJ Schuh and to assessments involving carriers MacMillan Piper and Hatfield Enterprizes).

[23] *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992); *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (indirect effect "in a certain sense" of state prevailing wage law on prices, routes, or services insufficient for preemption); *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 721, n.9, 153 P.3d 846 (2007) (following reasoning of *Mendonca*); *W. Ports*, 110 Wn. App. at 445 ("federal statutory and regulatory scheme does not preempt state employment security law by which a person who might be an independent contractor under federal transportation or common-law principles may nevertheless be entitled to [unemployment] compensation"); *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014) (state meal and rest break laws not preempted even if they raise overall cost of doing business or require a motor carrier to redirect or reroute equipment because they are "generally applicable background regulations that are several steps removed from prices, routes, or services").

Even the Court's opinion in *Rowe v. New Hampshire Motor Transport Association*, cited at Br. Appellants at 26, reaffirmed that the required connection for FAAAA preemption must be more than "tenuous, remote, or peripheral." 552 U.S. 364,

erroneous assertion of federal preemption is irrelevant to whether they state a claim for relief in this independent suit.

The Department does not seek to prevent the use of owner-operators, challenge owner-operators' status as independent contractors under other areas of law, or seek to dictate any prices, routes, or services of any motor carrier. The Carriers' arguments that their employment security obligations present an unfair cost are policy arguments that should be directed to the Legislature. Indeed, motor carriers have obtained an exemption in the Industrial Insurance Act. RCW 51.08.180 ("[A] person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier"). Such an exemption is absent in the Employment Security Act.

None of the administrative cases involving the Carriers has yet resulted in an initial ALJ order, let alone a final agency order, so the Carriers' suspicions about outcomes are speculation, and they must pursue remedies "thought to be unavailing." *Dils v. Dep't of Labor & Indus.*, 51 Wn. App. 216, 219-20, 752 P.2d 1357 (1988) (construing Industrial

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371, 128 S. Ct. 989, 169 L. Ed. 2d 933 (2008). The laws at issue there had a "connection with trucking [that] is not tenuous, remote, or peripheral," and they "aim[ed] directly at the carriage of goods." *Id.* at 376. But the Employment Security Act is generally applicable; by imposing unemployment insurance taxes, the Department in no way attempts to "freeze in place" or "bind" carriers to specific prices, routes, or services. *Id.* at 372. *Rowe* does not support Plaintiffs' preemption argument.

Insurance Act). After the ALJ issues an initial order, the Carriers may challenge it, and any unfavorable evidentiary rulings, by a petition to the Commissioner and then on judicial review. RCW 50.12.020; WAC 192-04-020(5), RCW 50.32.070, .080, .120; RCW 34.05.570(3).

Plaintiffs' argue that ALJs have ruled they have no authority to address the alleged "rigged audits," and that these rulings somehow creates a cause of action, suggests inadequacy of administrative remedies, or gives rise to a futility exception from exhaustion. Br. Appellants at 27, 42-43. Their argument is without merit. Only if the "rigged audits" affected correctness of the ultimate decision would facts relating to the investigation even be relevant. *McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2001).[24]

That an ALJ has issued some interlocutory rulings with which Plaintiffs disagree does not mean exhausting the administrative process is futile. The ALJ's interlocutory evidentiary rulings may not be collaterally attacked here.[25] Because the Carriers have not exhausted administrative

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[24] While the Plaintiffs assert certain auditors had performance quotas, Br. Appellants at 12-13, and this must for purposes of review of the court's dismissal order be accepted as true, Plaintiffs cite no authority that this is unlawful. Nor does this prove the assessments were incorrect. Underground economy auditors are expected to identify appropriate targets for audit, and there is nothing unlawful about targeting for audit an industry that is suspected of misclassifying covered workers as independent contractors.

[25] Plaintiffs' judicial estoppel argument about challenge to the audit process in the administrative proceedings, Br. Appellants at 19 n.14, is made in a footnote only, and without analysis of the doctrine or its elements. The Court should decline to consider the argument. Besides, saying that the argument must be raised in the administrative

remedies and cannot establish doing so would be futile within the meaning of law, the superior court properly granted dismissal.

The doctrine of primary jurisdiction is based on similar principles. It applies when a claim, originally cognizable in the courts, requires an administrative body with special competence to resolve certain issues before the court exercises its jurisdiction over the matter. In such a case the judicial process is suspended pending the administrative body's action. *Dioxin/Organochlorine Center v. Dep't of Ecology*, 119 Wn.2d 761, 775, 837 P.2d 1007 (1992) (affirming dismissal of declaratory judgment action for failure to exhaust administrative remedies). "The court will usually defer to agency jurisdiction if enforcement of a private claim involves a factual question requiring expertise that the courts do not have or involves an area where a uniform determination is desirable." *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 554, 817 P.2d 1364 (1991).

Here, the Department has special competence to determine whether an owner-operator is in employment of a motor carrier under the Employment Security Act. The Commissioner's Review Office has not been given the opportunity to apply its expertise.

In addition, collateral estoppel principles announced by this Court in *Reninger v. Dep't of Corrections* support bar of the tortious interference

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proceedings is not to say that the argument has merit. It is up to the Carriers to challenge in the APA appeals the rulings they believe are in error.

claim. 134 Wn.2d 437, 951 P.2d 782 (1998). This is because final resolution of the Carriers' administrative appeals ultimately will bar this lawsuit since the Carriers get only "one bite of the apple" with respect to their claims. *Id.* at 454 (where litigants pursued administrative appeals relating to personnel disputes and then sued in tort attempting to raise the same arguments and issues as wrongful constructive discharge and tortious interference, plaintiffs "were entitled to one bit of the apple, and they took that bite. That should have been the end of it."). Collateral estoppel bars a party from repeating in a lawsuit the same allegations raised in administrative proceedings.[26] *Id.* ("The normal rules of collateral estoppel apply here to prevent successive and vexatious litigation."). Collateral estoppel applies despite some differences in available relief. *Id.* at 453 ("courts look to disparity of relief to determine whether sufficient incentive existed for the concerned party to litigate vigorously in the administrative hearing").

Plaintiffs' civil claims are premised upon the assertion that the Department was wrong to treat owner-operators as in employment of the

[26] Collateral estoppel, or issue preclusion, prevents relitigation of an issue after the party estopped has already had a full and fair opportunity to present its case. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993). The requirements for application of collateral estoppel are: (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice. *Id.*

Carriers for unemployment tax purposes, that federal law preempts enforcement of the assessments, and/or that the Department's audits were improperly conducted. These claims were each raised by the Carriers in the administrative review proceedings; indeed, they are explicit reasons a party may seek reversal under RCW 34.05.570(3). There is no showing of disparity in relief available in the two settings (except to the extent Plaintiffs claim entitlement to attorney fees under 42 U.S.C. § 1988, discussed below), and, in any event, the Carriers have vigorously litigated their administrative appeals. Collateral estoppel will apply despite any alleged disparity in relief. Therefore, this Court's *Reninger* opinion further supports bar of the tortious interference claim.

**D. Plaintiffs Cannot Prove Tortious Interference With Business Expectancies Or Contractual Relationships Because The Tax Assessments Are Consistent With Binding Law And Do Not Cause Breach Or Termination Of Carriers' Relationships With Owner-Operators**

Even if Plaintiffs' tortious interference claim is not barred by RCW 50.32.180 or by exhaustion or primary jurisdiction or collateral estoppel, it fails as a matter of law and was properly dismissed because assessing unemployment taxes against the Carriers does not constitute tortious interference with their contractual relationships with their owner-operators. While Plaintiffs assert that the owner-operators should be treated as independent contractors and not in their employment for tax

purposes and that enforcement of the Employment Security Act is preempted, these arguments were already rejected by the Court of Appeals in *Western Ports*. 110 Wn. App. at 450-58 (owner-operator was in employment of the motor carrier under the Act, and federal transportation law, including the FAAAA, does not preempt the Employment Security Act). While Plaintiffs may disagree with this case, it is controlling law, and for the Department and its employees to take a position consistent with this law in the course of their official duties does not amount to tortious interference with business expectancies or contracts. Plaintiffs' challenge to *Western Ports*, including their preemption arguments, can be raised on judicial review pursuant to the APA.[27]

"A claim of intentional interference requires (1) the existence of a valid contractual relationship of which the defendant has knowledge, (2) intentional interference with an improper motive or by improper means that causes breach or termination of the contractual relationship, and (3) resultant damage." *Elcon Const., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 168, 273 P.3d 965 (2012) (citations omitted).[28] "Exercising one's legal

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[27] Plaintiffs allege that under *Penick v. Emp't Sec. Dep't*, 82 Wn. App. 30, 39, 917 P.2d 136 (1996), owner-operators are not subject to unemployment compensation taxes, and Defendants "[s]uddenly" decided to "change the rules." Br. Appellants at 10, 11. This is not so. The language in *Penick* about owner-operators is dicta, and the court's holding six years later in *Western Ports*, 110 Wn. App. at 450-58, that an owner-operator was in employment of the carrier for unemployment purposes, controls.

[28] Plaintiffs incorrectly assert that Defendants challenge the tortious interference claim only on the basis of improper motive or means. Br. Appellants at 33. Defendants

interest in good faith is not improper interference." *Id.* Further, "[a]ction is not improper when the interference in contractual relations fosters a 'social interest of greater public import than is the social interest invaded.'" *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159 (3d Cir. 1988) (citations omitted); Restatement (Second) of Torts § 766 comment c. at 10. Importantly, another court held "the imposition of unemployment tax liability on a putative employer concerning services performed by individuals working under a contract purporting to create an independent contractor relationship between the parties" does not infringe upon a trucking carrier's contractual relationship with a driver. *SZL, Inc. v. Indus. Claim Appeals Office*, 254 P.3d 1180, 1188 (Colo. Ct. App. 2011).

Plaintiffs complain that the Defendants taxed equipment and drivers who performed no services in Washington, allegedly forcing Plaintiffs to incur unnecessary expenses in the appeal process. Br. Appellants at 16, 17, 21, 23, 35, 39, 41, 42, 43. Even if this were true, taxing equipment or drivers not working in Washington does not tortiously interfere with the relationship between owner-operators and carriers. The

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challenged all claims—including the tortious interference claim—on the basis of RCW 50.32.180, exhaustion, primary jurisdiction, and collateral estoppel based on arguments pursued in administrative proceedings. CP 252-78; CP 643-68. Defendants also argued Plaintiffs cannot establish damage to Carriers' relationships with owner-operators through challenges to the assessment *amounts*, as opposed to alleged unlawfulness of any tax assessments at all (e.g., by preemption, or by a determination the owner-operators are independent contractors). CP 654-55.

alleged interference must cause breach or termination of the contractual relationship in order to make a claim for tortious interference. *Elcon Const.*, 174 Wn.2d at 168. As such, Plaintiffs' tortious interference claim is based on their assertion that services performed by owner-operators are not taxable, and that taxing such services will preclude the Carriers from contracting with them. *See* CP 214-31. But taxes on equipment (as opposed to on personal services for operation of the equipment) or on services performed by owner-operators working outside Washington relates only to the *amount* of tax, and even then may have no effect on the taxes assessed for each owner-operator because the amount of yearly earnings taxed is capped per worker. *See* RCW 50.24.010.

Plaintiffs also err in suggesting the Department's reclassification of persons as in employment for unemployment insurance purposes harms the Carriers' relationships with owner-operators for other legal purposes or will necessarily result in "restructuring the trucking industry." Br. Appellants at 1. The Employment Security Act explicitly covers services performed in interstate commerce by persons who under other laws may be considered independent contractors. RCW 50.04.100. A determination that the owner-operators are in the Carriers' employment for unemployment tax purposes does not affect their classification for other purposes nor preclude use of owner-operators.

Plaintiffs' discussion of *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989), and *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992), Br. Appellants at 34-35, is off-point because here, there is no final determination by any tribunal that the Department's tax assessments are improper. The finding of intentional interference in *Pleas* was based in part on the city's failure to process building permit applications "'promptly and diligently and in good faith' as required by the judgment of the court" entered more than eight years before the city approved the permit. 112 Wn.2d at 799. The *Sintra* case also involved violation of a court order. There, without seeking a stay or supersedeas order, the city continued to enforce an ordinance after it had been ruled invalid by the superior court. 119 Wn.2d at 23-24.

But here, ALJ Gay's interlocutory order of remand placed on the Carriers the burden of providing evidence for the Department to consider in reissuing assessments, CP 300 ("the burden should be on the taxpayer to provide this information, with some evidentiary support"), and is thus not a determination that the Department's assessments were improper or illegal or inflated, as repeatedly argued by Plaintiffs.[29] While the Plaintiffs

[29] *See also W. Ports*, 110 Wn. App. at 451 (burden on taxpayer to prove exemption from taxation); RCW 50.12.080 and WAC 192-340-020 (authorizing use of best information available when employer fails to provide wage information during an audit). ALJ Gay's instruction, CP 299-302, that the Carriers must produce evidence to the Department relating to the value of equipment, situs of work, and corporate form of

argue that the Department's assessments are inconsistent with ALJ Gay's order, this is not so, and in any event this is subject to review only in the administrative review proceedings. *Pleas* and *Sintra* are distinguishable because there is no final determination of impropriety on Defendants' part.

The cases cited by Plaintiffs about good faith use of enforcement powers—*U.S. v. La Salle Nat'l Bank*, 437 U.S. 298, 98 S. Ct. 2357, 57 L. Ed. 2d 221 (1978), and *U.S. v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964), Br. Appellants at 28-29—were not tort suits against state tax officials and are thus inapposite. Those cases do not suggest a cause of action exists here.

### E. The Washington Trucking Association Fails To State A Claim For Which Relief Can Be Granted And Lacks Standing

The WTA was not audited or issued any tax assessments, so it did not suffer the alleged injuries asserted by the Carriers. Rather, the WTA seeks to recoup attorney fees it has voluntarily expended on behalf of the Carriers in their tax assessment appeals. *See* Br. Appellants at 40, 48. But attorney fee recovery is not an independent cause of action. Plaintiffs cite no authority for the proposition that such cause of action exists, and Defendants are aware of none. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (court may generally assume that

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owner-operators means that the Carriers had *not* carried their burden on the evidence then submitted, and the assessments were thus *lawful*, or at least potentially so.

where no authority is cited, counsel found none after a diligent search). Absent a contract or law that provides otherwise, the general rule for attorney fees in Washington, commonly referred to as the "American rule," is that each party in a civil action will pay its own attorney fees and costs. *Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 296, 149 P.3d 666 (2006). Since litigants cannot obtain fees for recognized causes of action unless the law or a contract so provides, simply incurring litigation costs cannot itself give rise to a cause of action.

In any event, the WTA lacks standing to bring the attorney fee claim. Standing requires a party to show "a personal injury fairly traceable to the challenged conduct and likely to be redressed by the requested relief," and that the claim "falls within the zone of interests protected by the statute or constitutional provision at issue." *State v. Johnson*, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014) (citation omitted). The WTA's incurrence of attorney fees and costs was traceable to the Plaintiffs' decision, not to the Defendants' conduct.

Also, the claim for fees and costs is not a recognizable injury for which courts may provide redress. Plaintiffs admit that no authority exists allowing them to recover their legal expenses in the administrative process. Br. Appellants at 43. The attorney fee claim seeks to circumvent the statute barring recovery of attorney fees in the administrative appeal

process. *See* RCW 34.05.574(3) ("The court may award damages, compensation, or ancillary relief only to the extent expressly allowed by another provision of law.").

To the extent the WTA claims any other damages on behalf of members (e.g., relating to alleged incorrectness of assessments issued to other motor carriers not named as plaintiffs), the association lacks standing. For associations there is a special standing test. *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 215, 45 P.3d 186 (2002), *amended on denial of recons.*, 50 P.3d 618 (2002). The association must prove: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members. *Id.* In determining whether the third prong has been met, courts consider "whether the circumstances of the case and the relief requested make individual participation of the association's members indispensable." *Id.* This requirement is needed for courts to maintain control over proceedings. *See Id.* Further, "an organization lacks standing where it 'seeks damages and yet alleges neither monetary injury to itself nor assignment of its members' damage claims.'" *Nat'l Elec. Contractors Ass'n v. Emp't Sec. Dep't*, 109 Wn. App. 213, 221, 34 P.3d 860 (2001) (citation omitted).

The WTA fails the third element of the test because the claim asserted requires participation of individual members since the amount of damages claimed by any member is not certain, ascertainable, or known. *See Id.* at 215-16. Plaintiffs contend that owner-operators who provide services to motor carriers should not be covered by the Employment Security Act. But resolution of this claim depends on facts that may be unique to each carrier and the owner-operators, such as contractual terms and levels of control, and whether each owner-operator maintains an independent business. *See* RCW 50.04.140. Under these circumstances, association members would not be mere witnesses; their participation as parties would be necessary to establish their damages, if any. The members have no such damages that may be pursued in this independent claim, however, because they have administrative appeal remedies. Besides, there is no showing that members' damage claims were assigned to the WTA. And for the reasons discussed above, WTA's attorney fee expenses are not a cognizable claim or injury for standing.

Because no cause of action by the Carriers states a claim on which relief may be granted them, a meritless claim by the WTA for attorney fees and costs cannot state a cause or create standing. Moreover, the WTA lacks associational standing to bring claims on behalf of members because

their own participation is indispensable. The superior court properly ruled the WTA lacks standing and failed to state a claim.

### F. There Is No Basis For Plaintiffs' Claim For Attorney Fees

Plaintiffs seek attorney fees under only 42 U.S.C. § 1988, which applies to § 1983 actions. They are not entitled to attorney fees because they state no cognizable claim under § 1983, as argued above. "It follows that when no relief can be awarded pursuant to § 1983, no attorney's fees can be awarded under § 1988." *National Private Truck*, 515 U.S. at 592. Plaintiffs do not allege a basis for attorney fees for their state law claim. None exists. Plaintiffs' attorney fee request must be denied.

## VI. CONCLUSION

Plaintiffs have failed to state a claim for relief. The comity doctrine precludes a federal or state court from entertaining a § 1983 claim that interferes with state tax administration, so long as there is an adequate state law remedy. The Employment Security Act and APA appeal remedies, which the Carriers have pursued, are adequate. Under RCW 50.32.180 and judicial exhaustion and primary jurisdiction principles, they are exclusive. Further, the WTA cannot bring a meritless claim for attorney fees and lacks associational standing to pursue other claims on behalf of carrier members. The Defendants respectfully ask the Court to affirm the superior court's dismissal order.

## PROOF OF SERVICE

I, Roxanne Immel, declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 17th day of February 2015, I caused to be served a copy of **Brief of Respondents** on the Appellants' counsel of record on the below stated date as follows:

Via email, per agreement and U.S. mail, postage prepaid

| | |
|---|---|
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Original e-filed by e-mail

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

Dated this 17th day of February 2015 in Seattle, Washington

ROXANNE IMMEL, Legal Assistant

## OFFICE RECEPTIONIST, CLERK

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**Subject:** RE: Washington Trucking Associations, et al. v. Employment Security Dept. et al.; No. 90584-3 -- Brief of Respondents

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**Subject:** Washington Trucking Associations, et al. v. Employment Security Dept. et al.; No. 90584-3 -- Brief of Respondents

Dear Clerk,

Attached for filing is Brief of Respondents by the Employment Security Department in *Washington Trucking Associations, et al. v. Employment Security Dept. et al.; No. 90584-3.*

The attorneys for the Appellants are receiving this email per the parties' e-service agreement. A hard copy will also be mailed.

Sincerely,
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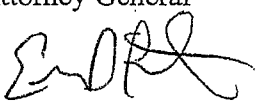
RESPECTFULLY SUBMITTED this 17th day of February, 2015.

ROBERT W. FERGUSON
Attorney General



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