

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 77985-6

HERBERT NELSON,
on his behalf and on behalf of all others similarly situated,

Respondent,

v.

APPLEWAY CHEVROLET, INC., a Washington corporation, d/b/a
APPLEWAY SUBARU/VOLKSWAGEN/AUDI, APPLEWAY
ADVERTISING, APPLEWAY AUDI, APPLEWAY AUTOMOTIVE
GROUP, APPLEWAY CHEVROLET LEASING, APPLEWAY
GROUP, APPLEWAY MAZDA, APPLEWAY MITSUBISHI,
APPLEWAY SUBARU, APPLEWAY TOWING, APPLEWAY
TOYOTA, APPLEWAY VOLKSWAGEN, EAST TRENT AUTO
SALES, LEXUS OF SPOKANE, OPPORTUNITY CENTER, and TSP
DISTRIBUTORS; and AUTONATION, INC., a Delaware corporation,

Petitioners.

SUPPLEMENTAL BRIEF OF PETITIONERS

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I. INTRODUCTION

The court of appeals agreed that businesses have the right to pass through to consumers the Business & Occupation (“B&O”) taxes they pay to the State. Despite this, the court below also held that consumers may sue, on a class basis, any business that *itemizes* on its invoices how much B&O tax the business has passed through – even if it does so in a non-deceptive way. The Court should reverse for three independent reasons:

First, in construing RCW 82.04.500 to allow businesses to pass through the B&O tax *only* if they hide the pass-through, the court below ignored the plain words of the statute, which do not regulate itemization or disclosure of the B&O tax. In addition, the decision below contradicts the Department of Revenue’s reading of the statute and punishes businesses for engaging in constitutionally-protected speech. This Court should make clear that an action might lie against a business (although *not* under RCW 82.04.500) only if it discloses the amount of B&O tax in deceptive way.

Second, the court of appeals allowed Herbert Nelson to sue for damages under RCW 82.04.500 simply because he invoked the Uniform Declaratory Judgments Act (“UDJA”), even though he could not show that he had a right to sue under RCW 82.04.500. The decision below also dilutes the standing analysis under the UDJA, allowing a litigant to demand declaratory relief with respect to a statute without regard to the zone of interests protected by the statute or cognizable injury. This Court should make clear that litigants may not use the UDJA as a means of avoiding the test for private rights of action and standing requirements.

Third, the court of appeals’ decision allows putative class plaintiffs seeking monetary recoveries to avoid the requirements of CR 23(b)(3), which governs class claims for damages, and instead to rely on the less stringent requirements of CR 23(b)(2), which controls class claims for equitable relief. The court below permitted a CR 23(b)(2) class even though the proposed class representative could not articulate any benefit from declaratory or injunctive relief *other than* to serve as a springboard for his multi-million dollar damages demand. Consistent with settled law across the country and the plain language of CR 23, this Court should reiterate that CR 23(b)(3), *not* CR 23(b)(2), controls the decision whether to certify a damages class.

II. FACTUAL BACKGROUND

The dealers¹ have discussed the factual background in prior briefing. A few key facts bear emphasis to provide context for this brief.

No Deception Alleged. Mr. Nelson does *not* claim that the dealers itemized B&O tax in an inaccurate, misleading, or deceptive way. Instead, Mr. Nelson claims that businesses cannot itemize B&O tax, no matter how or when they do so, and that itemization is *per se* illegal.

Statute Allows Pass-Through. Mr. Nelson admits that RCW 82.04.500 permits businesses to shift the economic burden of the B&O tax to consumers. CP 191. As explained below, the court of appeals agreed.

DOR Opinion. The Department of Revenue (“DOR”), the agency that administers the B&O tax statute, issued a Special Notice in 2000 (re-

¹ This brief will refer to the various petitioners simply as “the dealers.”

issued in 2002), advising taxpayers that RCW 82.04.500 “does not prevent a seller from itemizing and showing the effect of the tax.” CP 23-24.

The Dealers’ Disclosure. The dealers openly advertised the B&O tax pass-through in their stores, and consumers’ contract documents disclosed and explained the pass-through. CP 19-22, 28-29, 50-51, 53, 56.

Awareness of the Pass-Through. Mr. Nelson was aware of the pass-through before he bought his vehicle. CP 28-29, 36. Although Mr. Nelson knew he could decline to complete his transaction, CP 30, he purchased his car despite the \$79.23 B&O tax pass-through, because he liked the vehicle, *id.*

III. ARGUMENT

A. **The Court Should Hold That the B&O Tax Statute Does Not Forbid Disclosure of a Legal Pass-Through.**

The court of appeals acknowledged that, under RCW 82.04.500, businesses may (indeed, they *will*) shift the economic burden of the B&O tax to consumers. *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 942-43, 121 P.3d 95 (2005); *see Canteen Serv., Inc. v. State*, 83 Wn.2d 761, 762, 522 P.2d 847, 847-48 (1974) (“The legal incidence of a tax does not always fall upon the same person or entity as the economic burden.”) Nevertheless, the court of appeals concluded that RCW 82.04.500 was “design[ed] . . . to set forth the manner in which the pass-through must take place,” 129 Wn. App. at 943, and that the statutory provision renders “itemization . . . of the B&O tax [pass-through] . . . unlawful,” *id.* at 949.

This reading of RCW 82.04.500 has no support in the statutory text, the legislative purpose, or the case law. It violates the First Amendment and the public policy in favor of disclosure. It conflicts with Washington jurisprudence, including case law from this Court, rejecting similar interpretations of other tax statutes. It ignores persuasive out-of-state decisions, including case law analyzing a materially identical taxing statute. Finally, it contradicts DOR’s analysis of the same issue.

1. Neither the Statutory Text Nor Its Purpose Suggests a Prohibition on Itemization.

This appeal can be resolved entirely through a proper interpretation of RCW 82.04.500, which reads as follows:

Tax part of operating overhead. It is *not the intention* of this chapter *that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers* but that such taxes shall be levied upon and collectible from the person engaging in the business activities herein designated and that *such taxes shall constitute a part of the operating overhead* of such persons.

Id. (emphasis added). The statute does not say anything about whether, how, or when a business may itemize the B&O tax. In fact, the statute’s manifest purpose has everything to do with protecting the state’s purse – and nothing to do with how a business portrays B&O tax to its customers.

In creating one of the State’s primary revenue sources, the B&O Tax Chapter broadly imposes B&O tax on the “gross proceeds of sales,” RCW 82.04.070, with only narrow deductions, *Lacey Nursing Center, Inc. v. Department of Revenue*, 128 Wn.2d 40, 49, 905 P.2d 338 (1995). Under RCW 82.04.070, “gross proceeds of sales” includes all operating

overhead costs of a business, meaning that all businesses must pay B&O tax on operating overhead. But “gross proceeds of sales” does *not* include taxes “collected by a taxpayer, as agent for . . . the state of Washington.” WAC 458-20-195(4). Businesses therefore *need not* pay B&O taxes on taxes that the Legislature imposes on purchasers or customers but that businesses itemize and collect as the State’s agent, such as sales tax.

In this context, RCW 82.04.500 makes clear that, without regard to who bears the economic burden of the tax, the Legislature has “levied” B&O tax on businesses, not on their purchasers. The statute thus requires businesses to treat B&O tax as part of their “operating overhead” included in the taxable base under RCW 82.04.070 and forbids the tax from being “construed” as a tax upon purchasers merely collected by businesses and excludable from the tax base. As the Connecticut Supreme Court stated in interpreting a materially identical statute,² this language reflects the Legislature’s intent that the tax “be treated as an item of operating overhead measured by gross earnings derived from the sale of . . . products.” *Texaco Refining & Marketing Co. v. Comm’r of Revenue Servs.*, 522 A.2d 771, 779 (Conn. 1987). This is “not altered by the fact that, for its own accounting purposes, the [seller] billed its customers separately for the sales price of its . . . products and for the taxes it collected from them.” *Id.* at 779. Itemization on a consumer invoice thus

² The Connecticut statute states: “It is not the intention of the general assembly that the [petroleum sales] tax . . . be construed as a tax upon purchasers of petroleum products, but that such tax be levied upon and be collectible from petroleum companies . . . and that such tax shall constitute a part of the operating overhead of such companies.” Conn. Gen. Stat. § 12-599(a).

does *not* permit a business to “construe” B&O tax as a tax on purchasers or to claim that it acts as the State’s “collecting agent” when it passes through the B&O tax. *See* WAC 458-20-195(4) (itemization “does not in itself make such taxpayer a collecting agent” and allow deduction). Even if itemized, the tax remains “collectible” by the State from the business.

Neither the court of appeals nor Mr. Nelson has cited any statutory language, legislative history, or case law suggesting an additional “legislative purpose” to restrict consumer disclosures or “to set forth the manner in which the [B&O] pass-through must take place.” *Nelson*, 129 Wn. App. at 943. In fact, other tax statutes show that (1) the Legislature knows how to regulate tax disclosures to consumers, and (2) it did not do so in RCW 82.04.500. For example, RCW 82.16.090 states as follows:

Any customer billing issued by [certain] gas distribution business[es] . . . **shall include** the following information:

(2) The rate, origin and approximate amount of each tax levied upon the revenue of the . . . business and added as a component of the amount charged to the customer. Taxes based upon revenue of the . . . business to be listed on the customer billing **need not include** taxes . . . levied under chapter[] . . . 82.04 RCW.

Id. (emphasis added). In contrast to RCW 82.04.500, the Legislature in RCW 82.16.090 specified the required tax disclosures on consumer invoices, plainly identifying the information that “[a]ny customer billing . . . shall include.” Moreover, rather than *forbid* itemization of B&O tax, RCW 82.16.090 states that B&O taxes imposed under RCW 82.04 “**need not**” (emphasis added) “be listed on the customer billing.”

The recognition in RCW 82.16.090 that B&O tax “need not” be itemized should dispose of plaintiffs’ claim that B&O tax “never” may be itemized. “When statutes relate to the same thing or class, they are in pari materia and must be harmonized if possible.” *Monroe v. Soliz*, 132 Wn.2d 414, 425, 939 P.2d 205 (1997) (internal quotations omitted). “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Cobra Roofing Servs., Inc. v. Dept. of Labor & Indus.*, 157 Wn.2d 90, 99, 135 P.3d 913 (2006). The court of appeals’ interpretation of RCW 82.04.500 as prohibiting itemization would render superfluous RCW 82.16.090’s statement that certain businesses “need not” itemize the charge, and therefore should be rejected.

2. The Court of Appeals’ Statutory Construction Violates the First Amendment and Public Policy.

Even after the decision below, businesses remain free to set prices so as to pass through any “overhead” costs, including the B&O tax. As a result, the only certain effect of the court of appeals’ decision, if allowed to stand, would be to restrict *disclosure* of the B&O tax component of the price charged. The court of appeals’ construction of RCW 82.04.500 thus transforms a revenue-generating statute into a restriction of commercial speech in conflict with the First Amendment. “If a statute is susceptible of two or more interpretations, some of which may render it unconstitutional, the court will, if possible, give it an interpretation which upholds its constitutionality.” *State v. Dixon*, 78 Wn. 2d 796, 804, 479 P.2d 931

(1971). Because RCW 82.04.500 as construed by the court below would violate the First Amendment, the Court should reject that construction.

The First Amendment precludes restrictions on truthful disclosures concerning lawful activity unless the restrictions “directly and materially serve[]” a “substantial” government interest and are “no more extensive than necessary.” *Kitsap County v. Mattress Outlet/Gould*, 153 Wn.2d 506, 512, 104 P.3d 1280 (2005). Mr. Nelson has not claimed that the itemized B&O tax pass-through was misleading, *see Nelson*, 129 Wn. App. at 933, and has agreed that passing through the B&O tax as overhead was “perfectly legal,” CP 191. Further, Mr. Nelson never identified *any* governmental interest (much less a substantial interest) that a restriction on the disclosure of the B&O tax pass-through would directly serve.³

Mr. Nelson does not even argue that the court of appeals’ opinion can be squared with the First Amendment, instead resorting to the claim that the dealers did not preserve this issue. Ans. to Pet. for Rev. at 9-10. In fact, the dealers fully discussed the issue in their briefs below, *see* App. Br. at § D.3.e; Reply Br. at § A.5, and the court of appeals attempted to grapple with it. Division III suggested that the speech restriction was justified because RCW 82.04.500 has “language indicating that the tax could not be passed on to customers.” *Nelson*, 129 Wn. App. at 946. But

³ Although the speech at issue may qualify as political speech, the dealers assume *arguendo* that the less stringent test for regulating commercial speech applies. Mr. Nelson chides the dealers for not addressing *Kitsap County*’s test for determining when government may restrict commercial speech. Ans. to Pet. for Rev. at 10. In fact, *Kitsap County* makes clear that the burden falls on Mr. Nelson to justify government regulation, 153 Wn.2d at 512, and he has not come forward with *any* justification for a *per se* ban on itemization.

this statement not only contradicts the court’s acknowledgement (and Mr. Nelson’s concession) that the statute permits “the B&O tax . . . [to] be passed on to the customer,” *id.* at 942, it also begs the question, i.e., whether construing the statute to prohibit itemization *per se* (as the court of appeals apparently did) can be squared with the First Amendment.

Unlike the court of appeals, *Bloom v. O’Brien*, 841 F. Supp. 277 (D. Minn. 1993), conducted the proper First Amendment analysis, using the same factors this Court applied in *Kitsap County*. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980) (creating four-part test for commercial speech regulation). In *Bloom*, the court addressed a challenge to a statute **permitting** health care providers to pass-through to consumers a gross-revenues tax, but **prohibiting** them from “separately stat[ing] the tax obligation . . . on bills provided to individual patients.” *Id.* at 278-79. The court preliminarily enjoined enforcement of the statute on First Amendment grounds, stating:

It is vital to the public interest, particularly when some individuals will pay increased medical bills because of the [tax] statute, that there be full and accurate disclosure of the economic implications of the statute.

Id. at 284. This Court has embraced the same principle of disclosure. See *Kitsap County*, 153 Wn.2d at 512 (discussing consumer’s “keen” interest in “free flow of commercial information”). As interpreted by the court below, RCW 82.04.500 would violate the First Amendment and the public policy favoring the “free flow of commercial information.” This Court should reject the court of appeals’ reading of the statute on that basis.

3. The Court of Appeals' Decision Conflicts with the Jurisprudence of Washington and Other Jurisdictions.

Given that businesses may shift the economic burden of the B&O tax to consumers irrespective of itemization, *see Nelson*, 129 Wn. App. at 943, itemizing the B&O tax does not change its underlying character as a tax on business, which remains the business's legal liability. The court of appeals, however, rejected this argument, holding instead that merely itemizing the B&O tax violated the legislative "intention" that B&O taxes not be "construed as taxes upon the purchasers or customers." RCW 82.04.500; *see Nelson*, 129 Wn. App. at 943, 944-45.

Neither the court of appeals nor Mr. Nelson cited a single case in support of the court's resolution of this point, instead devoting their efforts to distinguishing the many cases cited by the dealers, including binding precedent from this Court. These cases share the same fact pattern: the seller itemizes a business tax; as a result of itemization, the seller construes the tax as a consumer tax; and, finally, the seller argues that, as a tax on consumers, the itemized amount is excludable from its tax base. The courts reject such arguments because itemization is a matter of form that does not affect the nature of the tax. *See, e.g., PUD No. 3 of Mason County v. State*, 71 Wn.2d 211, 212, 427 P.2d 713, 714-15 (1967) (rejecting argument that "by billing . . . taxes as a separate item to the consumer [a business may] convert them to taxes on the ultimate user of the services"); *Branson v. Port of Seattle*, 152 Wn.2d 862, 873, 101 P.2d 67, 72 (2004) (fee on car rental companies, which they itemized and chose

“to pass . . . through to their customers,” is *not* effectively imposed on consumers); *Sprint Spectrum, L.P./Sprint PCS v. City of Seattle*, 131 Wn. App. 339, 346-47, 127 P.3d 755, 759 (2006) (rejecting notion that business tax becomes consumer tax when “the cost of the . . . tax is added to the price . . . [of the] service” and “the economic burden of . . . [the business] tax is borne by its customers,” or the “tax is specifically segregated and identified as a charge to [the business’s] customers”).⁴

In holding that itemization transformed the B&O tax into a tax on consumers in violation of RCW 82.04.500, the decision below contradicts these cases. Neither Mr. Nelson nor the court of appeals has articulated a reason to depart from these settled interpretations of similar statutes.

4. The Court of Appeals’ Decision Contradicts the Governing Agency’s Interpretation.

Because RCW 82.04.500 on its face does not prohibit itemization, the statutory language alone should end this appeal. But if there were any ambiguity, the court of appeals should have deferred to the DOR Special Notice addressing the precise issue before the Court, on which Washington taxpayers, including the dealers, have relied.

⁴ See also *Pure Oil Co. v. State*, 12 So. 2d 861, 863 (Ala. 1943) (seller could not exclude from taxable base separately-itemized gross sales tax for which it was legally liable; “[i]nvoices or bookkeeping cannot change the fact that the purchaser is paying the sale price fixed by the seller, nothing more nor less”); *United Nuclear Corp. v. Revenue Div.*, 648 P.2d 335, 340 (N.M. Ct. App. 1982) (“fact that the [seller] separately stated an amount for taxes” was “irrelevant” and did not change the legal incidence of the tax, which remained on the seller) (citing *Canteen Serv., Inc. v. State*, 83 Wn.2d 761, 522 P.2d 847 (1974)).

The DOR has expertise in administering and applying the B&O Tax Chapter. Indeed, the Legislature has stated that taxpayers have “[t]he right to rely on specific, official written advice and written tax reporting instructions from the department of revenue to that taxpayer.” RCW 82.32A.020(2). For that reason, Washington courts routinely defer to DOR interpretations. *See Overton v. Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981) (deferring to DOR interpretation of tax deferrals for manufacturers); *New West Fisheries, Inc. v. Dep’t of Revenue*, 106 Wn. App. 370, 377, 22 P.3d 1274 (2001) (“Where . . . the statute is susceptible of more than one reasonable interpretation, we defer to the [DOR’s] interpretation of the statute if that interpretation does not conflict with the statutory language and is within the agency’s expertise.”).

Here, the DOR concluded that “[i]t is *not illegal for a seller to itemize* the B&O tax.” CP 23-24 (emphasis added). The DOR Special Notice construed the statute in a manner consistent with the statutory language, Washington authority, the Constitution, cases from other jurisdictions, and applicable regulations. *See* WAC 458-20-195(4) (“The mere fact that the amount of tax is added by the taxpayer as a separate item to the price of goods sold . . . does not in itself[] make such taxpayer a collecting agent.”). This Court should defer to the DOR.

B. The Decision Below Undermines Universally-Applied Private-Right-of-Action and Standing Requirements.

Division III’s decision erodes the universally-applied private-right-of-action and standing requirements. Most notably, the decision subverts

the legislative process by allowing plaintiffs to sue under a statute, label their claims as seeking “declaratory relief” (even if they seek damages), and thus avoid having to meet the standards for an implied right of action.

1. The Court Below Ignored the Private-Right-of-Action Requirement for UDJA Claims.

Consumers have neither rights nor remedies under the B&O Tax Chapter. Instead, the Legislature “charged [the DOR] with enforcing the tax code,” *Assn. of Washington Business v. Dep’t of Revenue*, 155 Wn.2d 430, 440, 120 P.3d 46 (2005) (citing RCW 82.32.300), and granted taxpayers judicial avenues to redress alleged violations (e.g., by seeking refunds). But no evidence suggests – and this Court has never held – that the Legislature also intended to provide non-taxpayer parties with a right to enforce any provision of the B&O tax code. Given that the Legislature enacted the B&O Tax Chapter for the purpose of imposing broad-based taxation on *businesses*, implying consumer rights or remedies under RCW 82.04.500 would neither “further the purposes of the statute . . . [nor] assure its effectiveness.” *M.W. v. Dep’t of Social & Health Servs.*, 149 Wn.2d 589, 596, 70 P.3d 954 (2003); *Braam v. State*, 150 Wn.2d 689, 712, 81 P.3d 851 (2003) (refusing to imply private right of action where there was “no evidence of legislative intent to create a private cause of action[] and . . . implying one [would be] inconsistent with the broad power vested in [the agency] to administer these statutes”).

For these same reasons, courts outside of Washington have rejected similar claims by consumers asserting rights under business tax

statutes. In *Van Eck v. Gavin*, 690 A.2d 460, 461 (Conn. Super. Ct. 1996), a consumer challenged an itemized tax under a materially identical statute. *See supra* n.2. Even though the court agreed that “the ultimate [tax] burden . . . is passed on to the purchaser,” the court found that because “he was not a taxpayer,” the consumer did not have a private right of action. *Id.* Similarly, in *Blockbuster, Inc. v. White*, 819 So.2d 43, 44 (Ala. 2001), a consumer claimed that Blockbuster violated the law by “adding [a] rental tax to the amount he had agreed to pay for [video] rentals.” Like the B&O tax, the rental tax was not “a direct tax on the [consumer],” but it could be “absorb[ed] . . . into the total rental price.” *Id.* at 45. The Alabama Supreme Court held that the consumer had no private right of action against Blockbuster under the taxing statute. *Id.* at 44-45.

Although the court below recited the three-prong test for determining whether a statute allows a private right of action, it did not apply that test to Mr. Nelson’s claim under RCW 82.04.500. *Nelson*, 129 Wn. App. at 935-36. Instead, as Mr. Nelson has put it, the court below ruled that “Mr. Nelson’s rights are ‘affected’ by the B&O Tax statute, and he thus has the right to proceed under the UDJA to protect his rights.” Ans. to Pet. for Rev. at 12. This carves out a breathtakingly broad exception to the private-right-of-action requirement, allowing litigants to invoke the UDJA for interpretation of a statute and monetary relief – even if they do *not* have the right to sue under the statute itself.⁵

⁵ As the amicus briefs show, other plaintiffs already have taken advantage of the decision below, seeking “declarations” under the UDJA that various other businesses have violated RCW 82.04.500 and demanding monetary recoveries.

Settled Washington jurisprudence contradicts Division III's approach. This Court, for example, has conducted a private-right-of-action analysis to determine whether a plaintiff may pursue declaratory relief. *See, e.g., Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 762 P.2d 356 (1988) (dismissing claim for damages and declaratory relief where statute did not provide private cause of action); *Coalition for the Homeless v. DSHS*, 133 Wn.2d 894, 949 P.2d 1291 (1997) (conducting private-right-of-action analysis before concluding that plaintiffs could seek declaratory and injunctive relief under the UDJA). Dispensing with that inquiry, as Mr. Nelson urges, would lead to profound changes in the administration of justice. For example, this Court in *Braam* unanimously found no private right of action under Washington foster care statutes or the federal Child Welfare Act, even though those statutes were "for the especial benefit of children." 150 Wn.2d at 712. Under the decision below, however, the *Braam* plaintiffs could revive their claims by invoking the UDJA despite the absence of a private right of action, thus transforming the test for a private right of action into a pleading formality.

Federal and state courts nationwide repeatedly have rejected the notion that declaratory judgment statutes operate to "establish a new cause of action or grant jurisdiction to the court when it would not otherwise exist." *Builders Ass'n v. City of Reno*, 776 P.2d 1234, 1234 (Nev. 1989); accord *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77 (D. Maine 2004); *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 916 (Minn. Ct. App. 2003). *See* Pet. for Rev. at 14-15

(citing cases). Neither the court of appeals nor Mr. Nelson has explained why this Court should read the UDJA to create new statutory claims.

2. The Court Below Ignored the Standing Requirement under the UDJA.

Although the court of appeals acknowledged that standing is a prerequisite under the UDJA, it stripped the applicable two-prong “zone of interests” and “injury” test of meaning, employing an analysis that cannot withstand even minimal scrutiny under this Court’s precedent.

The court of appeals held that Mr. Nelson fell within RCW 82.04.500’s “zone of interests” because the Legislature did not impose the B&O tax on customers. *Nelson*, 129 Wn. App. at 939. But this Court held just the opposite in *Branson v. Port of Seattle*, 152 Wn.2d 862, 101 P.2d 67 (2004). In *Branson*, a consumer challenged an itemized airport concession fee imposed by the Port of Seattle on car rental companies but passed on to consumers. This Court determined that the plaintiff was not within the statutory “zone of interests” because, just as RCW 82.04.500 does not purport to regulate the relationship between businesses and their buyers, the statute at issue in *Branson* regulated only the “fees charged by the Port” to car rental companies. 152 Wn.2d at 876, 101 P.2d at 74.⁶ The fact that the words “purchasers” and “customers” appear in the B&O tax statute changes nothing, for they appear as part of an explanation of

⁶ Although the court of appeals purported to distinguish *Branson* based on differences in statutory language, the court did not explain why any difference would be material to this issue. *Nelson*, 129 Wn. App. at 941. Nor does it matter for purposes of the “zone of interests” inquiry that the car rental companies were not defendants in *Branson*, as Mr. Nelson suggests.

how the tax must be “construed,” without regard to disclosure of the tax.

Nor can Mr. Nelson show the “injury” necessary for standing. The court below found injury because Mr. Nelson alleged that “he purchased a vehicle . . . and was charged with a [B&O tax pass-through] *after negotiating the purchase price.*” *Nelson*, 129 Wn. App. at 941 (emphasis added). To the extent this implied that the alleged *timing* of the disclosure violated rights under the statute, the court’s analysis cannot withstand scrutiny. RCW 82.04.500 does not discuss disclosure, let alone the *timing* of disclosure – and elsewhere the court of appeals itself wrote that timing did not matter, stating that “damages” could be determined without “any inquiry into [the parties’] negotiations.” *Id.* at 949. And if the court meant to suggest, as Mr. Nelson argues, that the injury stemmed from the mere fact of the charge, *Ans. to Pet. for Rev.* at 14, this argument cannot be reconciled with the sellers’ right to shift the tax burden onto consumers as “part of the operating overhead.” RCW 82.04.500; *see Gurley v. Rhoden*, 421 U.S. 200, 204 (1975) (purchasers “traditionally” bear “[t]he economic burden of taxes incident to the sale of merchandise”). Because sellers may pass through the B&O tax even if they do not itemize it, Mr. Nelson suffered no legally cognizable injury from itemization.

C. The Court Below Misapplied CR 23(b)(2) to Class Claims Seeking Predominantly Monetary Relief.

This Court should reaffirm that, as it announced fifteen years ago, the less rigorous class certification standards of CR 23(b)(2) do *not* apply to actions that principally seek money damages, such as this one.

By its terms, CR 23(b)(2) applies only to those class actions that can be resolved by “final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” Despite this narrow focus, plaintiffs sometimes seek Rule 23(b)(2) class certification even where they claim damages because doing so (a) avoids the need for plaintiffs to pay to notify the class, (b) eliminates the ability of class members to opt out, and (c) evades the certification tests set forth for damages classes in CR 23(b)(3), thus giving plaintiffs “the benefits of a class action without the bother.”⁷ *Sarafin v. Sears Roebuck & Co.*, 446 F. Supp. 611, 614-16 (N.D. Ill. 1978). But certification under CR 23(b)(2) “does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.” Adv. Comm. Notes to Fed. R Civ. P. 23(b)(2). Courts consistently follow this guidance.

This Court has agreed with the traditional reading of Rule 23(b)(2). In *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992), in which plaintiffs sought disgorgement of fees as a remedy for a lawyer’s wrongdoing, the Court first noted that “CR 23(b)(2) is limited to injunctive or declaratory relief.” *Id.* at 456 (citations omitted). It then observed that the trial court’s disgorgement order, like the request for

⁷ Unlike CR 23(b)(2), CR 23(b)(3) requires class plaintiffs in damages cases to establish that issues common to the class predominate over individual issues and that a class action is superior to other methods of adjudication; CR 23(b)(3) also mandates class notice and provides opt-out rights. *Sitton v. State Farm Mut. Ins. Co.*, 116 Wn. App. 245, 252, 63 P.3d 198 (2003). Because certification of damages claims under CR 23(b)(2) sacrifices these protections, it “violates due process unless the monetary damages sought are merely incidental to the primary claim for injunctive or declaratory relief.” *Id.* (internal quotations omitted).

disgorgement of B&O tax here, “is monetary relief. When the declaration merely forms the basis for monetary relief, a CR 23(b)(2) action is not appropriate.” *Id.*⁸ Here, plaintiffs’ request for damages likewise predominates over any request for declaratory or injunctive relief.

First, the class includes only purchasers who in the past have paid itemized B&O taxes. Because class members do not have a continuing interest in the dealers’ *future* conduct, the damages claims necessarily predominate as to them. Indeed, parties who have suffered past injury from a practice but cannot show likelihood of future injury (and Mr. Nelson has made no such showing) generally lack standing to pursue injunctive relief. *See* Pet. for Rev. at 19. Because these parties “seek no more than compensation for loss resulting from the defendant’s [alleged] breach of legal duty,” the damages claims predominate. *Richards v. Delta Air Lines, Inc.*, __ F.3d __, 2006 WL 1970177, *4 (D.C. Cir. July 14, 2006) (citations omitted); *see also Molski v. Gleich*, 318 F.3d 937, 950 n.15 (9th Cir. 2003) (for injunctive and declaratory relief to predominate, court must find, *inter alia*, that “even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought”) (citation omitted).

⁸ The fact that *Eriks* involved denial of a request for class recertification, as Mr. Nelson observes, makes no difference: the law is the same when a court decides whether to certify a CR 23(b)(2) class in the first instance. *See, e.g., Richards v. Delta Air Lines, Inc.*, __ F.3d __, 2006 WL 1970177, *4 (D.C. Cir. July 14, 2006) (“[W]hen the relief sought would simply serve as a foundation for a damages award, . . . or when the requested injunctive or declaratory relief merely attempts to reframe a damages claim, . . . the class may not be certified pursuant to Rule 23(b)(2).”) (citing cases).

Second, the court below justified CR 23(b)(2) certification on the theory that damages could be determined “with reference to the individual sales agreements.” *Nelson*, 129 Wn. App. at 943. But neither federal nor Washington law suggests that a court may use CR 23(b)(2) just because it thinks damages can be calculated easily. Further, one cannot in fact ascertain the impact of itemization by “reference to the individual sales agreements.” Instead, given the “haggling that ensues in the American market when one buys a vehicle,” calculating damages would require individual inquiry into the impact of negotiations on the actual loss to each class member.⁹ See *Robinson v. Texas Automobile Dealers Ass’n*, 387 F.3d 416, 423-24 (5th Cir. 2004) (reversing certification in challenge to tax itemization based on need to consider individual negotiations).

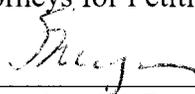
IV. CONCLUSION

The dealers request that this Court reverse the decision below and direct entry of judgment in favor of the dealers on all of Mr. Nelson’s claims, including his claim for declaratory and injunctive relief.

RESPECTFULLY SUBMITTED this 21st day of August, 2006.

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⁹ Many purchasers, having seen the B&O tax disclosures in the dealers’ stores, would have negotiated with the B&O tax in mind; others might have negotiated away all or part of the impact of the B&O tax once the exact amount was computed; and still others might simply have negotiated to a bottom line.