

NO. 93079-1

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON TRUCKING ASSOCIATIONS, et al.,

Respondents,

v.

EMPLOYMENT SECURITY DEPARTMENT OF THE STATE OF
WASHINGTON, et al.,

Appellants.

**SUPPLEMENTAL BRIEF
OF EMPLOYMENT SECURITY DEPARTMENT, ET AL.**

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I. INTRODUCTION

Plaintiff trucking carriers want to avoid paying unemployment taxes assessed after an audit of their industry led to the reclassification of certain employment relationships. The Employment Security Act, RCW 50.32, and the Administrative Procedure Act, RCW 34.05, provide a full and fair process for Plaintiffs to appeal those assessments—and to raise the constitutional claims they allege. By the express terms of those statutes, that appeal process is the exclusive means for challenging an assessment of unemployment taxes.

But Plaintiffs want more relief than the statutes provide, so they seek to circumvent them by alleging civil rights claims under 42 U.S.C. § 1983 and a common law tort claim. The tort claim is barred by the statutes that establish the exclusive means for challenging the assessments. The civil right claims are barred by the comity doctrine, which bars all such claims against state tax officials when state law affords adequate remedies. Applying the tests articulated by the United States Supreme Court, Washington statutes provide adequate state remedies in this case.

The Court of Appeals correctly upheld the dismissal of most of Plaintiffs' claims, but it erred in allowing portions of Plaintiffs' claims to proceed. All of Plaintiffs' claims are barred by the state statutes or the

comity doctrine. This Court should affirm the superior court's dismissal of Plaintiffs' complaint in its entirety.

II. STATEMENT OF THE CASE

In 2010, the Department concluded that, under the terms of the Employment Security Act, trucking carriers that enter into lease agreements with truck drivers who own and operate their own trucks (owner-operators) employ the drivers and, therefore, are responsible for paying unemployment taxes for the drivers; on that basis, the Department issued tax assessments to the plaintiff trucking carriers. CP 214-31. The carriers appealed the tax assessments. CP 221, 223, 285-97. The appeals were brought under the Employment Security Act and the APA, which permit appellants to raise constitutional objections and other legal challenges. RCW 50.32.030, .050, .090, .120; RCW 34.05.570(3).

While the administrative proceedings were pending, the carriers and the Washington Trucking Associations (WTA) filed this lawsuit against the Department and six of its former and current employees. The complaint alleged that the tax assessments were based on biased, pre-determined, and politically-motivated audits; it challenged the Department's position underlying the assessments that the owner-operators are in the carriers' employment under the Employment Security Act; and it alleged the assessments were preempted by federal law. CP

214-31. These allegations may be raised in administrative appeals and, if proved, are reasons a court may set aside an agency order under RCW 34.05.570(3) and .574(1). Indeed, the carriers raised these same allegations in their administrative appeals. *See* CP 285-97.

The Department moved to dismiss the complaint under CR 12. CP 252-78. The superior court granted the motion. CP 690-93. The Plaintiffs appealed the dismissal of (1) their § 1983 claims against individual defendants for allegedly violating the carriers' 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.

The Court of Appeals reversed in part the superior court's dismissal of the § 1983 claims. The court held that the comity doctrine barred the § 1983 claims only "to the extent that WTA and the Carriers seek damages based on the amounts of the assessments, but not to the extent that they seek damages independent of the assessment amounts." *Wash. Trucking Ass'ns, et al. v. Emp't Sec. Dep't, et al.*, 192 Wn. App. 621, 648-49, 369 P.3d 170 (2016).

The Court of Appeals also held that the exclusive remedy provision in the Employment Security Act barred the tortious interference claim only "to the extent that the claim is based on an allegation that the

reclassification of owner/operators as employees was improper.” *Id.* at 653. But “to the extent that the claim is based on allegations that [the Department] had an improper purpose or used improper means in making that reclassification,” the court concluded there was no remedy available and found the claim was not barred. *Id.* at 654.

Finally, the Court of Appeals held that the WTA lacks individual standing for the § 1983 and tortious interference claims and associational standing to assert a tortious interference claim, but the court could not determine upon the allegations in the complaint whether the WTA had associational standing for § 1983 claims. *Id.* at 639-41.

III. ARGUMENT

A. **The Comity Doctrine Bars All of the Plaintiffs’ § 1983 Claims Because the APA Provides an Adequate State Law Remedy**

Because of the importance of taxes in carrying out the essential functions of government, the United States Supreme Court sharply limits taxpayers’ use of 42 U.S.C. § 1983 to assert constitutional claims against state tax officials. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 421-22, 130 S. Ct. 2323, 176 L. Ed. 2d 1131 (2010). This longstanding principle of non-interference with state taxes—the “comity doctrine”—bars claims under § 1983 for injunctive, declaratory, or damages relief against state tax officials in federal *or state courts* when taxpayers have an adequate

state law remedy. *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 584-86, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995) (affirming dismissal of § 1983 suit in state court for declaratory and injunctive relief brought by trucking carriers against state tax officials); *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 when state law provides an adequate remedy). Exceptions to the comity bar are construed narrowly. *Nat'l Private Truck*, 515 U.S. at 589-90.

1. State law remedies here are procedurally adequate because the carriers' constitutional objections may be raised, and the assessments set aside, if they prevail

State law remedies are adequate if they afford a procedure for judicial determination of federal constitutional objections. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512-14, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981). The *Rosewell* Court emphasized that measuring the adequacy of a state law remedy is about procedural, not substantive, criteria; it italicized the word "procedural" four times. *Id.* Other courts throughout the nation have recognized that comity measures the adequacy of the state remedy by procedural, not substantive, criteria, and they have uniformly dismissed claims like those brought here. Pet. for Review at 9-11 (noting 19 other states' rulings).

It is the opportunity to obtain a judicial determination of constitutional objections—not the type or measure of relief available—that determines whether a state remedy is adequate. *Rosewell*, 450 U.S. at 514. The administrative and judicial remedies provided under RCW 34.05.570(3) cannot be distinguished from the state remedies found to be adequate in *Rosewell, Id.* at 508-09, 514-15, 528 (administrative remedy where taxpayer could recover only refund without interest was adequate), and *California v. Grace Brethren Church*, 457 U.S. 393, 413-17, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982) (tax refund with interest under state law was adequate, in constitutional challenge of state unemployment taxes). State law remedies that do not provide for fees or damages are not inadequate under the comity doctrine, and § 1983 claims seeking separate relief based on arguments that may be raised in a state law appeal must be dismissed. *Nat'l Private Truck*, 515 U.S. at 584, 592 (attorney fee claim dismissed, though state law afforded tax refunds only).

The Court of Appeals correctly recognized that § 1983 suits may not be brought against state tax officials when there is an adequate state law remedy, “regardless of the type of relief sought.” *Wash. Trucking Ass'ns*, 192 Wn. App. at 643-45 (citing *Nat'l Private Truck* and *Fair Assessment*). But it then contradicted itself—and the Supreme Court cases it cited—by comparing the types of relief available to the Plaintiffs under

§ 1983 to those available under the APA. *Id.* at 649-50. It erred when it found the state law remedy adequate only for “damages for the amount of the assessment,” because the APA permits a tax refund but not lost income or damages for disruption of relationships, reasonable attorney fees, or punitive damages. *Id.* The Court of Appeals’ ruling conflicts with United States Supreme Court precedent and every other relevant state court ruling.¹ Washington now stands alone in finding a state law remedy inadequate because it does not afford the same type of relief as § 1983.

The Court of Appeals also erred when it held that the carriers could potentially establish damages “independent of the assessment[s],” rendering the state law remedies adequate only for the amount of the assessments. *Wash. Trucking Ass’ns*, 192 Wn. App. at 645, 649-50. On the one hand, if the assessments are constitutional, then the carriers fail to state § 1983 claims. Plaintiffs have not alleged any unconstitutional basis for the audits, such as having been selected for audit based on their race,

¹ See Pet. for Review at 9-10, n.4-5 (citing state cases). The Department also discussed in its Petition two analogous cases where state courts upheld the dismissal of § 1983 claims against tax officials; the taxpayers sought compensatory and punitive damages and attorney’s fees, but the claims were barred because administrative review procedures where constitutional objections to the tax could be asserted were available. *Id.* at 9-10 (discussing *Gen. Motors Corp. v. City of Linden*, 671 A.2d 560, 561 (N.J. 1996), *cert. denied*, 519 U.S. 816 (1996); *Francis v. City of Columbus*, 676 N.W.2d 346, 349 (Neb. 2004)).

The carriers’ claim that *Gen. Motors Corp. v. Cty. of San Francisco*, 81 Cal. Rptr. 2d 544 (Cal. App. 1999), somehow supports them is wrong. Answer to Amicus at 10 n.9. There, the court found a constitutional violation with respect to a tax and ordered a refund under state law, but held the § 1983 claim for damages and attorney’s fees was barred based on *National Private Truck* and its progeny. *Id.* at 549-52.

sex, or creed. *See* CP 214-31.² Their argument that the audits were politically-motivated is based on the Department having targeted the trucking industry for audit. *See* CP 214-31. But there is nothing unconstitutional or improper about focusing audit resources on an industry that is suspected of misclassifying covered workers as independent contractors.³ And a desire to carry on a preferred business model without being audited or paying taxes is not a constitutional issue. There can be no claim independent of the validity of the assessments.

On the other hand, if the carriers can establish a constitutional violation, then their tax assessments can be “set aside” under the available state law remedy; their constitutional claims can be adjudicated in the APA appeals. RCW 50.32.050, .090, .120; RCW 34.05.574(1); RCW 34.05.570(3). The statutory remedies establish the exclusive *process* where the carriers may assert their arguments. The carriers can obtain any relief afforded by that process if they meet the required showing. The

² *See Dep’t of Revenue v. March*, 25 Wn. App. 314, 318-19, 610 P.2d 916 (1979) (court could “conceive of no reason why” choosing some accounts to be audited was barred, as long as the choice is not made on a constitutionally protected basis (i.e., race, sex, creed)). If the carriers believe their allegations establish unconstitutional bases to have initiated audits, they can assert them in APA appeals as a basis to set aside the assessments. That is their adequate remedy, which bars this claim.

³ *See* Br. of Resp’ts at 29 n.17. Where, as here, the Department determines that certain members of the industry have misreported employment status, audit of the whole industry is a fair response to ensure that competitors do not gain unfair advantage by their noncompliance with the law. Auditing the industry levels the playing field for everyone involved. *Id.*

Court of Appeals erred when it found this was not an adequate remedy. *Wash. Trucking Ass'ns*, 192 Wn. App. at 646-47.⁴

The point of the comity doctrine is this: if constitutional objections to the imposition of a state tax can be adjudicated in state courts, then the taxpayer cannot get relief in addition to what the state law remedies afford. The comity doctrine's bar on § 1983 claims against tax officials serves an important purpose: "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) (internal quotes and citation omitted). The Court of Appeals misunderstood and misapplied the comity doctrine, and its ruling undermines the doctrine's purpose.

2. Plaintiffs have not shown their available state law remedies are inadequate

Plaintiffs have the burden of proving there is no plain and adequate state law remedy to overcome comity's bar to their § 1983 claims. *Winicki v. Mallard*, 783 F.2d 1567, 1570 (11th Cir. 1986).⁵ They have not done so.

⁴ That Plaintiffs can assert their constitutional arguments in their APA appeals does not mean that they can show a constitutional violation. "The inability of plaintiffs to obtain the remedy they desire does not mean that they have been denied an adequate remedy." *Hogan v. Musolf*, 471 N.W.2d 216, 223 (Wis. 1991). "Plaintiff's argument confuses its entitlement to a full and fair hearing with its entitlement to a favorable resolution on the merits." *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).

First, Plaintiffs rely on cases asserting § 1983 claims against persons who are not state tax officials. Answer to Pet. at 6-7 (citing *Jones v. State*, 170 Wn.2d 338, 242 P.3d 825 (2010) (pharmacy licensing) and *Tarabochia v. Adkins*, 766 F.3d 1115 (9th Cir. 2014) (suspicionless automobile stop), and 10 (citing *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992) (housing preservation ordinance) and *Johnson v. City of Seattle*, 184 Wn. App. 8, 335 P.3d 1027 (2014) (nonconforming use of property)). These cases did not discuss the comity doctrine and do not apply here.⁶

Second, Plaintiffs rely on *Patel v. City of San Bernardino*, 310 F.3d 1138, 1141-42 (9th Cir. 2002), where tax officials continued to impose taxes that a court had declared unconstitutional. Answer to Pet. at 10. Even in *Patel*, the court permitted the plaintiffs to pursue only § 1983

⁵ *Winicki* and other cases are discussed in the Brief of Amicus Curiae Washington State Association of Municipal Attorneys at 15-16 (filed June 28, 2016).

⁶ Plaintiffs' reliance on *Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991) (see Answer to Pet. at 12-13), regarding § 1983 claims against state tax officials is misguided because the case predates *National Private Truck*, 515 U.S. 582. Although *Dennis* still stands for the proposition that Commerce Clause violations are actionable under § 1983, 498 U.S. 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. Even after *Dennis* but before *National Private Truck*, at least four states held that § 1983 suits cannot be brought in state courts against state tax officials when there are adequate state law remedies. 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 Cnty. Bd. of Assessment Review*, 642 A.2d 1251 (Del. Super. Ct. 1993).

claims that accrued “after the state courts overturned the tax.” 310 F.3d at 1142.⁷ Here, no court has declared the tax unconstitutional. The administrative law judge merely concluded in an interlocutory ruling that there might be a basis to reconsider some aspects of the assessments. CP 299-302. As in *Lowe v. Washoe Cty.*, 627 F.3d 1151, 1157 (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.’”

Third, Plaintiffs contend they have no remedy for their constitutional claims in their administrative appeals, because the reviewing court has authority only to modify the amount of an assessment, and the state law process therefore is inadequate. Answer to Pet. at 9-12; Answer to Amicus at 9. Their characterization of the remedy is inaccurate; RCW 50.32.050 and .090 and RCW 34.05.574(1) also allow an assessment to be set aside. Their argument also depends on the Court of

⁷ The *Sintra, Inc. v. City of Seattle* case also involved the continued enforcement of an ordinance that a court ruled was invalid. 119 Wn.2d at 23-24. In characterizing *Patel* and *Sintra* as announcing the viability of a claim for “knowing imposition of unlawful taxes,” Answer to Pet. at 10, the carriers in essence seek an artful pleading exception to comity. Where a court has declared an agency action unconstitutional, these cases support that continued enforcement may state a § 1983 claim as an exception to comity; but where there is no such court order, they do not—a state court must first pass upon a claim before federal legislation, including § 1983, may be used to interfere with state taxation. See *Nat’l Private Truck*, 515 U.S. at 590-91; *Fair Assessment*, 454 U.S. at 114-15.

Appeals' erroneous conclusion that certain alleged damage claims are independent of the validity of the assessments. *Wash. Trucking Ass'ns*, 192 Wn. App. at 649. This is not so. Plaintiffs' claim for relief is not independent of the validity of the assessments but instead turns upon it. But if the carriers disagree and believe the conduct alleged here have violated their rights *regardless of whether the assessments were valid*, they have the opportunity to make that argument under the APA.⁸

To support their argument that they have "no remedy," Plaintiffs also mischaracterize a recent federal court ruling that is plainly limited to its facts. *See* Answer to Pet. at 11-12 (citing *Wal-Mart Puerto Rico, Inc. v. Juan C. Zaragoza-Gomez*, 174 F. Supp. 3d 585 (D.P.R.), *aff'd*, 834 F.3d 110 (1st Cir. 2016)). The available refund procedures were inadequate because Puerto Rico had passed a new statutory cap on the payment of judgments to below ten percent of what Wal-Mart claimed it was owed, and because Puerto Rico is insolvent. 834 F.3d at 112, 120-21. So even at the end of the process where a meritorious constitutional claim was raised, and a court ordered a refund, the taxpayer would not be repaid. *Id.* at 121. The court acknowledged that the statutory cap and other limitations on

⁸ It is puzzling that the carriers cite *Hillsborough v. Cromwell*, 326 U.S. 620, 66 S. Ct. 445, 90 L. Ed. 358 (1946), as supporting their position, even though state law in that case would not allow a taxpayer to raise equal protection claims to dispute taxes. Answer to Pet. at 8-9. Washington law expressly permits constitutional claims. RCW 34.05.570(3); RCW 50.32.050, .090, .120.

satisfaction of judgments rendered the local remedy available “fundamentally different” from what it had previously found to be an adequate process. *Id.* at 119-21. The Puerto Rico case is distinguishable; Plaintiffs here can obtain a full refund if they prevail on the merits.

Section 1983 may not be used to circumvent state law governing tax appeals. 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). Their state law remedy is adequate. None of Plaintiffs’ arguments negates the adequacy of the state law remedy.⁹

B. The Trucking Associations’ § 1983 Claim is Barred

Because the trucking carriers’ § 1983 claims do not survive the comity doctrine’s bar, the WTA has no § 1983 claims. The WTA’s claim

⁹ Other bases the carriers could try to assert to defeat the comity doctrine are unpersuasive. For example, speed: in *Rosewell*, 450 U.S. at 520-21, the Supreme Court held a two-year delay was sufficiently speedy, as measured against the normal time for litigation. In *Kerr v. Waddell*, 916 P.2d 1173, 1180-82 (Ariz. Ct. App. 1996), the court rejected the argument that a delay in excess of 31 months was not speedy: “Much of the delay in the administrative process results from the taxpayers’ position during litigation.” 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 was vacated. *Eagle Sys., Inc. v. Emp’t Sec. Dep’t*, 181 Wn. App. 455, 461, 326 P.3d 764 (2014); *Wash. Trucking Ass’ns, et al. v. Trause, et al.*, No. C11-1223 RSM, 2012 WL 585077 (W.D. Wash. Feb. 21, 2012) (not reported).

The administrative appeal remedy is sufficiently efficient despite assertions that multiple carriers would need to file separate appeals raising similar arguments. Because the appeals would involve different parties, the process is not inefficient. *Nat’l Private Truck*, 515 U.S. at 591 n.6; *Kerr*, 916 P.2d at 1182-83. See *Jenkins v. Wash. Convention Ctr.*, 59 F. Supp. 2d 78, 85-86 (D.D.C. 1999) (multiplicity of suits exception does not apply in damage actions, which require “protracted analysis of the facts alleged as applied to each and every plaintiff”), *aff’d on other grounds*, 236 F.3d 6 (D.C. Cir. 2001).

is representative only; it has no greater standing than its members. *See Wash. Trucking Ass'ns*, 192 Wn. App. at 648.¹⁰

C. RCW 50.32.180 Bars the Tortious Interference Claims Because Challenges to the Department's Motives Go to the "Justness" of the Assessments, and Challenges to the Amount of the Assessments Go to the "Correctness" of the Assessments

The Court of Appeals erred in ruling that "RCW 50.32.180 does not bar the Carriers' tortious interference claim to the extent that the claim is based on allegations that ESD had an improper purpose or used improper means in making the reclassification of owner/operators." *Wash. Trucking Ass'ns*, 192 Wn. App. at 652-53. The ruling improperly allows taxpayers to circumvent exclusive administrative and judicial processes for challenging agency action and opens the floodgates to tortious interference claims that allege an adverse agency action is the product of ill intent, in turn chilling agency enforcement.

Plaintiffs' common law tortious interference claim is barred by the Employment Security Act's exclusive remedy provision, RCW 50.32.180. RCW 50.32.180 states: "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

¹⁰ The WTA's standing claims also fail because the association's members' participation as parties is indispensable. Pet. for Review at 14-15. The WTA did not challenge the Court of Appeals' ruling rejecting its individual claim for attorney's fees as damages, so that ruling is not before this Court. *See Wash. Trucking Ass'ns*, 192 Wn. App. at 638-39.

action to enjoin an assessment or require a refund or adjustment except in accordance with the provisions of this title.” (Emphasis added). Based on that statute’s plain language, the justness *or* correctness of assessments may be challenged only pursuant to the Employment Security Act.

A challenge to an assessment amount—including the carriers’ allegation that the Department unlawfully taxed some payments, Answer to Pet. at 4—is a challenge to its “correctness.” RCW 50.32.180. For this type of challenge, the appeal remedy “shall be exclusive.” *Id.*

In addition, the carriers’ allegation of improper motive or means in assessing unemployment taxes is a challenge to the “justness” of an assessment. The carriers can raise their arguments about improper motives and means in the APA appeals as claims of arbitrary and capricious or unconstitutional action. That is because the remedies “provided in this title” as referenced in RCW 50.32.180 include those in RCW 50.32.050, .090, and .120, which incorporate the APA standards that authorize a court to grant relief from an agency order for constitutional violations or arbitrary and capricious actions, RCW 34.05.570(3). Courts have considered such claims in APA appeals. *See, e.g., Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 78-82, 110 P.3d 812 (2005). Thus the Employment Security Act’s exclusive remedy statute bars the carriers

from asserting their arguments about the justness of the assessments as a separate tort claim.

The carriers can *raise arguments* about motives or means in the APA proceedings, but in order to *establish* a constitutional violation or arbitrary and capricious action, they must make the necessary legal showing. The Department has consistently argued that the carriers have not met the legal requirements to establish they are entitled to any relief. *See, e.g.,* Pet. for Review at 17 n.9, 19; Br. of Resp'ts at 28-29. Nothing precludes the Department from arguing in the APA appeals that the carriers failed to establish a constitutional violation or arbitrary and capricious action, yet the carriers fault the Department for doing just that. *See* Answer to Pet. at 16-18. The carriers essentially complain that the Department has not simply conceded this issue in the APA appeals.¹¹

¹¹ If the Department had argued in this case that the carriers must pursue their claims in the APA appeals, and then argued in the APA proceedings that the carriers must pursue their claims in tort, that would be inconsistent. But the Department has never so argued. The Court of Appeals did not rule there is any inconsistency in the Department's position. Its opinion does not address the matter. In fact, when the Plaintiffs raised this argument upon a motion to expand the record, the Court of Appeals Commissioner found no inconsistency, and the panel denied a motion to modify that ruling. Ruling Denying Motion for Additional Evidence on Review (July 22, 2015); Order Denying Motion to Modify (Sept. 16, 2015).

To the extent that the Court considers Plaintiffs' argument alleging inconsistency, they have failed to show estoppel should operate. They base their argument on cherry-picked and incomplete statements in multiple cases: on a *portion* of the Department's administrative briefing in one case involving one carrier, System-TWT Transport; on a *portion* of an oral argument in the administrative tribunal involving *another* carrier, Haney Truck Line (which transcript itself referenced earlier portions of the argument and briefing—which the carriers have not supplied); and on a *portion* of the briefing from superior court proceedings involving yet *another* carrier, Hatfield

The Court of Appeals erred in holding that RCW 50.32.180 “does not apply to determining whether ESD had an improper purpose or used improper means in imposing those assessments.” *Wash. Trucking Ass’ns*, 192 Wn. App. at 652.¹² Under RCW 50.32.180, the carriers’ arguments about improper purposes or means can be raised *only* in administrative and judicial review proceedings. RCW 50.32.180 functions like the comity doctrine and precludes interference with state taxation through remedies other than the prescribed appeal process. Parties cannot sue in tort to avoid paying taxes. To allow otherwise circumvents the statutorily mandated exclusive review process and undermines tax collection, threatening the existence of the unemployment benefits system. “The power to tax is basic to the power of the state to exist.” *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 826, 117 S. Ct. 1776, 138 L. Ed. 2d 34 (1997).

Enterprizes, that is not a named plaintiff in this action. Answer to Pet. at 16-18. But even those cherry-picked statements are consistent with the arguments here, that the claims in this suit cannot be separated from the correctness of the assessments. And, in any event, the carriers may challenge in the APA appeals any evidentiary or other rulings that they believe are in error, and the court may hear the matter upon review.

¹² This error is based on the mistaken conclusion that “no administrative remedy is available to the extent the claim is based on allegations that ESD had an improper purpose or used improper means in making that reclassification [of owner-operators as in the carriers’ employment].” *Id.* at 653-54. That is plainly wrong. The administrative law judge, Department’s Commissioner, or court can set aside the assessments under RCW 50.32.050, .090, and .120, and RCW 34.05.570(3) if the carriers show that the audit conduct violated the carriers’ constitutional rights or was arbitrary and capricious.

D. Even if RCW 50.32.180 Does Not Bar the Tortious Interference Claim, It Fails as a Matter of Law

As just explained, the Court of Appeals erred by not applying RCW 50.32.180 to bar the carriers' tortious interference claim. The Court of Appeals erred again by concluding that "the Carriers potentially can recover for tortious interference *even if ESD's reclassification decision was correct.*" *Wash. Trucking Ass'ns*, 192 Wn. App. at 654 (emphasis added). This ruling does not make sense. First, the carriers cannot have valid business expectancies in avoiding taxes that the law requires. *See Pleas v. City of Seattle*, 112 Wn.2d 794, 800, 774 P.2d 1158 (1989). Second, if the statement instead means that the carriers can recover for alleged improper investigation even if the correct result was reached, then this is contrary to established case law. There is no cause of action for dissatisfaction with the way an audit is conducted. *Janaszak v. State*, 173 Wn. App. 703, 735, 297 P.3d 723 (2013).

Correctly enforcing the law—and requiring employers' compliance with the law—is not "interference," nor is it "improper." *Pleas*, 112 Wn.2d at 804 ("Implicit in our previous cases dealing with tortious interference has been some showing that the interference complained of be 'wrongful' in some way or that plaintiff had a 'duty of non-interference.'" (Citations omitted)). The Department has no duty of

non-enforcement with respect to employers' tax liabilities, particularly when done correctly.

To hold otherwise is to open the floodgates to claims and to chill agencies from discharging their statutory duties for fear of defending costly claims by taxpayers who have no legal defense to taxation but question the motivation of government employees in administering the laws. Such a holding could impede the Legislature's ability to delegate authority to agencies to carry out important purposes, including mitigating the effects of unemployment.

The carriers' claim for tortious interference with contractual relationships fails to state a claim because it presupposes that the Department's tax assessments preclude the carriers from contracting with owner-operators. *See* CP 214-31; *Wash. Trucking Ass'ns*, 192 Wn. App. at 654, 656. As a matter of law, the assessments do no such thing. The only relationship the Department purports to define is "the employment intended to be covered by the act for the purpose of the act and none other." *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 458, 41 P.3d 510 (2002) (quoting *Compensation & Placement v. Hunt*, 22 Wn.2d 897, 899, 158 P.2d 98 (1945)). All that the Department requires is payment of taxes, not "restructuring" of contractual relationships or the trucking industry. CP 225-26. The complaint's allegations about

restructuring of relationships state erroneous legal conclusions; the Court need not accept them. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717-18, 189 P.3d 168 (2008). The allegations do not, as a matter of law, cause breach or termination of past business relationships or future expectancies between owner-operators and carriers. *See Pleas*, 112 Wn.2d at 800. This Court should hold that the Plaintiffs failed to state a claim.

IV. CONCLUSION

Taxpayers cannot circumvent adequate and exclusive review remedies by bringing independent civil rights and tort suits. This Court should reverse in part the Court of Appeals' decision and affirm in full the superior court's dismissal of the complaint.

RESPECTFULLY SUBMITTED this 2nd day of December, 2016.

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PROOF OF SERVICE

I, Bibi Shairulla, hereby state and 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 2nd day of December 2016, I caused to be served by emailing and mailing a true and correct copy of **Supplemental Brief of Employment Security Department, et al.**, with proper postage affixed thereto to:

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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.



Bibi Shairulla, Legal Assistant