No. 1034202

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 39625-8

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

TINA MACKAY,

Petitioner,

v.

PEMCO MUTUAL INSURANCE COMPANY,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In its unpublished opinion, Division Three properly held that the "actual cash value" ("ACV") definition in the homeowners insurance policy (the "Policy") that Petitioner Tina MacKay ("Petitioner") purchased from Respondent PEMCO Mutual Insurance Company ("PEMCO") was unambiguous in light of this Court's decision in *Holden v. Farmers Ins. Co. of Wash.*, 169 Wn.2d 750, 239 P.3d 344 (2010).

In *Holden*, this Court held that, absent a definition otherwise, the term "fair market value" in an insurance policy must be construed in favor of the insured to "include consideration of Washington State sales tax." 169 Wn.2d at 761. While the ACV definition in the Policy here does not define "market value," both the Court of Appeals and PEMCO properly construed the ACV to include consideration of Washington State sales tax in light of *Holden*.

The Petition attempts to manufacture a conflict with *Holden* by erroneously claiming that the ACV definition nevertheless *must* be ambiguous merely because it does not define the precise method for calculating sales tax. Petitioner

unpersuasively argues that the ACV definition's silence regarding sales tax *automatically* renders the provision ambiguous such that it must be (unreasonably) construed to include either the full sales tax she originally paid on each damaged or lost item or the full sales tax that she would need to pay in purchasing a brand new replacement item.

Petitioner's argument disregards fundamental principles of contract interpretation and advances an illogical reading of this Court's straightforward holding in *Holden*. This Court has expressly recognized that "one way to estimate the property's current value" is to include sales tax in calculating the replacement cost of the damaged property before subtracting for depreciation." 169 Wn.2d at 759. Thus, ACV can be calculated by either depreciating the replacement cost of an item and then applying the applicable sales tax rate for the insured's locale (as PEMCO generally did) or by adding the applicable sales tax to the replacement cost of an item and then subtracting for appropriate depreciation (as this Court contemplated in *Holden*). Both methodologies yield the exact same ACV.

The Court of Appeals properly held that the ACV definition is unambiguous under (a) the plain language of the

Policy and the purpose of the ACV payment, (b) this Court's recognition in *Holden* that sales tax is appropriately calculated in relation to the depreciated replacement cost of an item, and (c) the reasonable expectations of the average insurance consumer. In so holding, Division Three adhered to this Court's precedent in *Holden* and reaffirmed decades of Washington law concluding that a contract provision is unambiguous where it is only susceptible to one *reasonable* interpretation.

Petitioner fails to identify any Washington case actually in conflict with the Court of Appeals' unpublished opinion. RAP 13.4(b)(1). Nor does Petitioner's fundamental misunderstanding of the two-step replacement cost coverage in her insurance policy, and her equally flawed subjective interpretation of the purpose of the ACV definition, raise an actual issue of significant public interest. RAP 13.4(b)(4). Division Three wisely rejected Petitioner's strained interpretations of the ACV definition as unreasonable. This Court should do the same by denying review.

II. RESTATEMENT OF ISSUE

The issue presented by the Court of Appeals' decision is properly framed as:

Whether the Court of Appeals correctly concluded that PEMCO's calculation of "actual cash value," which includes the sales tax based on the depreciated market value of the lost or damaged personal property at the time of loss, is the only reasonable interpretation of the provision in Petitioner's homeowners insurance policy defining "actual cash value" as the "market value of new, identical or nearly identical property, less reasonable deduction for wear and tear, deterioration and obsolescence" in light of this Court's recognition in *Holden* that sales tax is appropriately calculated in relation to the depreciated replacement cost of an item?

III. RESTATEMENT OF THE FACTS

PEMCO incorporates the facts as set forth in its Opening Brief and Division Three's July 30, 2024 unpublished opinion.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Division Three's unpublished opinion is consistent with this Court's decision in *Holden*. (RAP 13.4(b)(1))

The only decision of this Court that Petitioner claims conflicts with the Court of Appeals' unpublished opinion is *Holden v. Farmers Ins. Co. of Wash.*, 169 Wn.2d 750, 239 P.3d 344 (2010). *See* Petition at 11–24. But Petitioner fails to identify

any actual conflict between Division Three's decision and *Holden*.

Even a cursory glance at the appellate court's unpublished opinion reveals that Division Three carefully analyzed *Holden* and *relied* upon this Court's reasoning in that case to properly hold here that the ACV definition in the Policy was unambiguous and PEMCO's calculation of the ACV payment was consistent with the methodology this Court approved of in *Holden.*

1. The Court of Appeals applied the same basic principles of contract interpretation as this Court did in *Holden*.

The Court of Appeals' unpublished opinion does not "contradict[] this Court's approach to ambiguity in *Holden*," so as to warrant review under RAP 13.4(b)(1). *See* Petition at 18. Petitioner, not Division Three, disregards the basic tenets of contract interpretation in arguing that the ACV definition is automatically ambiguous simply because the provision does not explicitly detail the formula used for calculating sales tax in an ACV payment.

The Court of Appeals' opinion accurately recites and relies upon the same well-settled principles of contract

interpretation underlying this Court's "approach to ambiguity in *Holden*." Division Three correctly recognized that "[u]ndefined terms do not automatically create ambiguity." Opinion at *4 (*Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 284, 313 P.3d 395 (2013)). Rather, undefined terms are simply given their "plain, ordinary, and popular" meaning. *Holden*, 169 Wn.2d at 764.

Moreover, Petitioner fails to understand that courts "consider the policy *as a whole*," giving it a "*fair, reasonable, and sensible* construction as would be given to the contract by the average person purchasing insurance." Opinion at *4 (internal quotation marks omitted) (quoting *Weyerhaeuser Co. v. Com. Union Ins. Co.*, 142 Wn.2d 654, 665–66, 15 P.3d 115 (2000)). A clause in an insurance policy is thus "only considered ambiguous if it is fairly susceptible to two or more *reasonable* interpretations." *Id*. (emphasis added) (citing *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005)). As Division Three astutely noted, "the expectations of the insured cannot override the plain language of the contract." *Id.* (quoting *Int'l Marine*, 179 Wn.2d at 284).

As discussed below, the Court of Appeals' opinion properly applied these foundational tenets of contract interpretation to correctly conclude that the Policy's ACV definition is unambiguous because it is only susceptible to one *reasonable* interpretation: sales tax in an ACV payment is properly calculated based on the depreciated market value of the damaged or lost item at the time of loss.

2. The Court of Appeals correctly held that PEMCO's interpretation of the actual cash value definition is the only reasonable interpretation.

Division Three correctly held that PEMCO's interpretation is the only reasonable interpretation of the ACV definition in light of *Holden* and the plain language of the Policy.

a. PEMCO's interpretation is on all fours with this Court's interpretation of the sales tax calculation in Holden.

In *Holden*, this Court held that "the absence of a definition for FMV[] creates an ambiguity *as to whether sales tax is included* under the ACV provision of the Policy" that must be construed against the insurer "to include consideration of Washington State sales tax." 169 Wn.2d at 760 (emphasis added). Notably, the Court did not hold that the absence of a

FMV definition inherently creates ambiguity as to *how* sales tax is calculated.

This is because, as Division Three recognized here, "the average insurance consumer would understand actual cash value to be the replacement cost, or what it would cost to replace an item in the market, *less depreciation to reflect the age or wear and tear of the damaged property*." Opinion at *4 (emphasis added) (discussing *Holden*, 169 Wn.2d at 757). Thus, the only *reasonable* interpretation of the ACV definition in both *Holden* and the Policy here is that the insured will be indemnified for the (appropriately) depreciated market value of the damaged item at the time of loss, including sales tax *on that depreciated market value*.

This Court's recognition in *Holden* that sales tax is properly calculated in relation to the depreciated market value of the damaged or lost item at the time of loss reinforces the propriety of Division Three's conclusion that the Policy is unambiguous here. This Court has expressly approved of "one way to estimate the property's current value": "the sales tax is simply included in calculating the replacement cost of the

damaged property *before subtracting for depreciation*." *Id*. at 759 (emphasis added).

Like in *Holden*, the purpose of the ACV provision here is to indemnify the insured for the value of the lost item *at the time of the loss*.[1] *See Holden*, 169 Wn.2d at 761. Therefore, also like in *Holden*, PEMCO calculated the sales tax based on the depreciated value of the damaged item (i.e., the market value at the time of loss). To determine the market value, PEMCO would generally find a comparable replacement item in the market and use the purchase price of that item as the damaged item's estimated replacement cost. PEMCO then would depreciate the pre-tax replacement cost as appropriate to account for the item's age and condition to arrive at the pre-tax ACV. If the item is taxable (i.e., the insured would be required to pay sales tax when purchasing the item), PEMCO would then apply the sales tax rate in effect in Petitioner's zip code and added that sales tax amount to the pre-tax ACV to arrive at the ACV. *See* Resp. Br. at 27.

[1] The "replacement cost," meanwhile, indemnifies Petitioner for the actual cost she incurred in replacing the item—including sales tax. *See* Resp. Br. 6–8.

The Court of Appeals astutely recognized that this methodology is entirely consistent with the formula this Court approved of in *Holden*, because *both methods yield the exact same result*. *See* Opinion at *6. The order of operation is immaterial—PEMCO would arrive at the exact same ACV under either methodology.

For example, assume that an item's replacement cost is $10.00, the applicable sales tax rate is 10%, and 30% depreciation is appropriate to account for the damaged item's age and condition.

Methodology No. 1: Under the general methodology PEMCO utilizes, PEMCO depreciates the replacement cost ($10.00) by the appropriate depreciation factor (30%) to arrive at the damaged item's pre-tax ACV ($7.00). PEMCO then applies the applicable sales tax rate (10%) to the pre-tax ACV ($7.00) to calculate the sales tax amount ($0.70). Finally, PEMCO adds the sales tax ($0.70) to the pre-tax ACV ($7.00) to determine the item's ACV ($7.70).

Methodology No. 2: Alternatively, PEMCO could use the exact formula this Court articulated in *Holden*. First, the sales tax would be "included in calculating the replacement cost of the

damaged property": $10.00 (replacement cost) + $1.00 (10% sales tax) = $11.00 (total replacement value). Then PEMCO would calculate the appropriate depreciation amount based on that total replacement value ($11.00 x 30% = $3.30), "before subtracting for depreciation" ($11.00 – $3.30) to reach the item's ACV ($7.70).

Both methods calculate the exact same ACV (in this example, $7.70). This is because both methodologies calculate the sales tax based on the market value of the damaged or lost personal property at the time of the loss—just as *Holden*, the Policy, and the average, reasonable insurance consumer each contemplates.

b. Division Three correctly rejected Petitioner's mischaracterization that the sales tax was improperly "depreciated."

The Court of Appeals correctly held that PEMCO's calculation of actual cash value does not improperly "depreciate" sales tax.

First, "[a]s an initial matter, the record fails to show that PEMCO depreciated sales tax." Opinion at *5. As illustrated above, PEMCO simply "depreciated the value of the *damaged*

property and then applied the sales tax rate for Ms. MacKay's zip code." *Id.* (emphasis added). PEMCO's methodology is consistent with the plain language of the Policy, which expressly provides that the ACV of a damaged item will be calculated by looking at the "market value of new, identical or nearly identical property *less reasonable deduction for wear and tear, deteriorating and obsolescence*." Resp. Br. at 6–8; Opinion at *2.

Second, as Division Three astutely recognized, Petitioner's characterization of "the sales tax as having been 'depreciated' in the context of calculating actual cash value is a mischaracterization." Opinion at *6. Sales tax decreasing as the value of an item decreases is not "depreciation"; "[t]he sales tax rate is simply pegged to the cost of an item purchased in the retail marketplace." *Id*. *See* RCW 82.08.020(2)) ("Sales tax is calculated as a percentage of the retail selling price of an item."). It is both common sense *and the law* that the "'selling price' determines the amount of sales tax due 'on each retail sale.'" *State, Dep't of Revenue v. Bi-More, Inc.*, 171 Wn. App. 197, 203–04, 286 P.3d 417 (2012) (quoting RCW 82.08.020(1)). Indeed, "[c]onsumers in Washington regularly purchase used items in the marketplace at varying discounts compared to new

items, *understanding they will pay sales tax on the used price of the item rather than the new price*." Opinion at *5 (emphasis added).

Finally, Petitioner cites no Washington law prohibiting the depreciation of sales tax. On the contrary, this Court in *Holden* approved of such "depreciation" in its "replacement-cost-minus-depreciation" valuation formula. *See* 169 Wn.2d at 759–60. While "this Court in *Holden* was not asked whether the sales tax portion can be depreciated" (Petition at 23), the Court *did* contemplate that the sales tax portion of the market value would decrease in correlation to any decrease in the value of the damaged property (such as deductions for depreciation). *See* 169 Wn.2d at 759; Opinion at *6. As Division Three recognized, "when calculating the actual cash value of an item, the same value may be reached by either adding the replacement cost and associated sales tax *before* applying depreciation" (*Holden* methodology) "or by applying depreciation to the replacement cost and then adding sales tax" (PEMCO's general practice). Opinion at *6. In either scenario, the sales tax is correspondingly reduced as the value of the *item* is depreciated. That is simply how sales tax works.

The Court of Appeals properly held that PEMCO's calculation of sales tax is (a) entirely consistent with the methodology this Court approved of in *Holden* and (b) the only reasonable interpretation of the ACV definition.

3. The Court of Appeals properly rejected Petitioner's strained interpretations of the Policy's actual cash value definition.

Division Three wisely rejected Petitioner's strained interpretations of the ACV definition as unreasonable.

The ACV definition unambiguously states that PEMCO will pay Petitioner "the market value of new, identical or nearly identical property less reasonable deduction for wear and tear, deterioration and obsolescence." Opinion at *2 (quoting CP 123). Again, the purpose of the ACV payment here (and in *Holden*) was to indemnify Petitioner for the market value of the lost or damaged property *at the time of the loss*. *See Holden*, 169 Wn.2d at 761 ("the ACV provision indicates that the measure of recovery is related to 'the amount necessary to repair or replace the damaged property'") (quoted source omitted).

The Policy does not require PEMCO to indemnify Petitioner for the value of the damaged item *at the time of the*

original purchase; nor does the Policy require PEMCO, in the initial ACV payment, to indemnify Petitioner for the value of a *brand new replacement item*. The Court of Appeals therefore prudently rejected Petitioner's illogical interpretations of the ACV definition that would require PEMCO to (a) somehow calculate and include in the ACV payment the amount of sales tax the insured *originally* paid on the item at some indeterminate time in the past; or (b) rewrite the plain language of the Policy so that the sales tax component of the replacement cost payment is advanced prior to the actual replacement of the item, as part of the ACV payment.

Division Three also correctly rejected the Petition's contention that either of Petitioner's interpretations is rendered reasonable based on nonbinding and inapposite authority suggesting that labor costs are not subject to depreciation.

a. Petitioner's interpretation that actual cash value should include the full sales tax previously paid on the damaged item at the time of original purchase is illogical and unreasonable.

Petitioner's interpretation of the ACV definition as requiring PEMCO to indemnify her against some speculative

amount of sales tax that she paid at some point in the past when originally purchasing the damaged item is inherently unreasonable because, again, the purpose of the ACV payment is to indemnify the insured for the market value of the damaged item *at the time of the loss*, "including the associated sales tax." Opinion at *6. The ACV payment does not "indemnify[] the insured against some amount of sales tax the insured paid at some time in the past." *Id.*

Moreover, Petitioner's interpretation would be impractical, if not entirely unworkable. Such an interpretation "is premised on the assumption that she paid sales tax when the item was purchased." Opinion at *5. Even assuming Petitioner *had* "paid sales tax at the time of purchase, sales tax rates vary over time and location." *Id.* For example, a Washington resident could have traveled to Oregon, which has no sales tax, to make a larger purchase decades ago. Because PEMCO would have no way of knowing that when calculating the ACV, the insured would receive an improper windfall if the ACV included the presumed original sales tax paid.[2] Simply put, "[a]ny attempt to estimate

[2] By comparison, to receive the replacement cost payment, the Policy requires Petitioner to submit documentation of the

the amount of sales tax Ms. MacKay may have paid when purchasing the now-damaged property would be grounded in assumptions and speculation." *Id.* This interpretation is inherently unreasonable.

Holden never held—or even insinuated—that an actual cash value payment should "include the sales tax she paid when she bought the furniture." Petition at 21 (quoting *Holden*, 169 Wn.2d at 759). This Court in *Holden* merely acknowledged that the insured's loss there "included the sales tax she paid when she bought the furniture and kitchen items"; therefore, "taking sales tax into account" in calculating the ACV to indemnify the insured for the *current* value of the damaged property at the time of loss "does not result in her reaping a windfall." 169 Wn.2d at 759. And "one way to estimate the property's *current* value" is to include the *current* sales tax rate when "calculating the replacement cost of the damaged property before subtracting for depreciation." *Id.* (emphasis added).

Regardless, by including sales tax in the market value of a damaged item, PEMCO *did* assume that Petitioner originally

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actual cost she incurred (including sales tax) in purchasing a replacement item. *See* Resp. Br. at 6–8, 20–21.

paid sales tax on the item and indemnified Petitioner for the *current* market value of the damaged item, including the sales tax component. PEMCO's interpretation of the Policy is the only reasonable one under *Holden*.

b. Petitioner's interpretation that the actual cash value should include sales tax calculated on the replacement cost is unreasonable.

Division Three also properly rejected Petitioner's proposed bifurcation of the ACV payment—which would include sales tax calculated based on the replacement cost of a new item, added to the depreciated market value of the replacement item—as unreasonable and contrary to the expectations of any reasonable consumer. *See* Opinion at *5.

As the Court of Appeals recognized, "[c]onsumers in Washington regularly purchase used items in the marketplace at varying discounts compared to new items, *understanding they will pay sales tax on the used price of the item rather than the new price*." *Id.* (emphasis added). "If a consumer entered the marketplace to replace the damaged item with an item in the same or similar condition, the consumer would expect to pay the actual cash value for the item plus the associated sales tax." *Id.*

"This is because the amount of sales tax charged for each retail sale is a percentage of, and solely reliant on, the '[retail] selling price' of the item at the time of purchase." *Id.* (alteration in original) (quoting RCW 82.08.20(1)).

In light of this, the Court of Appeals wisely "fail[ed] to see that an insured would expect to receive payment for the sales tax associated with the replacement cost of an item *when being indemnified for the actual cash value of that item.*" *Id.* (emphasis added). Yet again, Petitioner's unreasonable interpretation of the ACV definition is grounded in her fundamentally flawed understanding of the purpose of the ACV payment (to indemnify her for the market value of the damaged property at the time of loss, including sales tax) versus the purpose of the RC payment (to indemnify her for the actual cost of replacing the damaged item, including sales tax). *See* Resp. Br. at 18–21.

The Court of Appeals properly concluded that "the Policy cannot be sensibly construed as bifurcating the actual cash value into the replacement cost of the property, and associated sales tax on the replacement cost, and then depreciating the replacement cost to its current value while maintaining the sales tax calculated on the replacement cost." Opinion at *5.

The Court of Appeals' conclusion is entirely consistent with *Holden*, where this Court contemplated that the sales tax on an ACV payment would decrease accordingly when the pre-tax value of the item was reduced for depreciation. *See* 169 Wn.2d at 759.

c. Inapposite and nonbinding authority regarding labor costs does not render Petitioner's illogical interpretations reasonable.

Petitioner's reliance on two out-of-state cases and a ruling from the Washington Office of Insurance Commissioner (the "Commissioner") prohibiting the depreciation of labor costs does not render her interpretations of the Policy's ACV definition reasonable or give rise to any grounds for review under RAP 13.4(b).

First, the Court of Appeals wisely rejected Petitioner's request to analogize labor costs to sales tax and draw an "inference" to the Commissioner's ruling that "the expense of labor in standard fire insurance policies is not subject to depreciation" and treat the depreciation of sales tax in kind. Opinion at *6. "Sales tax is calculated as a percentage of the retail

selling price of an item," while labor "is not necessarily fixed in any manner to the retail price of an item." Opinion at *6. Accordingly, Division Three aptly concluded that "there is no relationship to be inferred between sales tax and labor with respect to depreciation."

Second, the Commissioner envisioned that the prohibition on the depreciation of labor would be limited to the repair of a damaged *structure* by a contractor. *See* WSR 21-23-066 ("The practice of depreciating labor costs on insurance payments for *property damage claims* floats a significant part of the *labor repair costs* to the consumer *and their repair contractor* . . .") (emphasis added) (explaining the purpose of the amendments prohibiting depreciation of labor costs in WAC 284-20-010). The Commissioner's rule has nothing to do with the sales tax associated with the replacement of non-salvageable *personal property*.

Third, Petitioner cites no authority for her proposition that review under RAP 13.4(b)(1)—or any other provision of RAP 13.4(b)—is somehow warranted because the Court of Appeals did not expressly cite to two out-of-state, inapposite cases in its unpublished decision. *See* Petition at 22.

Petitioner cites *Johnson v. Hartford Cas. Ins. Co*., No. 15-CV-04138-WHO, 2017 WL 2224828, at *7 (N.D. Cal. May 22, 2017) for the proposition that sales tax is not subject to depreciation when calculating ACV. But *Johnson* is inapposite for three key reasons: (1) that case involved a structure/dwelling loss, rather than a personal property loss; (2) the policy there was analyzed in the context of California Insurance Code Section 2051, which limits "deduction[s] for *physical* depreciation" when calculating ACV; and (3) the policy's definition of "actual cash value" similarly limited depreciation to *physical* depreciation. *See* Resp. Br. 35–36. Petitioner's policy here contains no similar restriction to "physical" depreciation.

The Petition next cites to *Dieudonne v. United Prop. & Cas. Ins. Co.*, No. CV 19-12476, 2021 WL 4476782, at *5 (E.D. La. Sept. 30, 2021) for the proposition that an insurance policy is ambiguous where it fails to explain whether depreciation applies to labor and sales tax. *See* Petition 22. But *Dieudonne* is similarly inapposite. The court there addressed a different subject entirely—whether labor costs were depreciable—based on an imprecise reading of Fifth Circuit precedent. *See* Resp. Br. 34. Petitioner cites no Washington precedent supporting her

contention that labor costs and sales tax are analogous under Washington law. As discussed above, the Court of Appeals correctly concluded that PEMCO's calculation of the ACV did not constitute a "depreciation" of sales tax. *See* Opinion at *5–6.

By rejecting Petitioner's analogy to the Commissioner's rule on labor costs (*see* Opinion at *6–7), Division Three effectively "address[ed] the reasoning" of these cases and clearly found them unpersuasive and insignificant "in the assessment of whether McKay's interpretation is at least reasonable." Petition at 22. Petitioner has not demonstrated that any conflict exists between the Court of Appeals' unpublished decision and a decision of this Court. The Court should deny review under RAP 13.4(b)(1).

B. Petitioner's subjective and unreasonable interpretation of her insurance policy does not constitute an issue of significant public interest warranting this Court's review. (RAP 13.4(b)(4))

The interpretation of an insurance policy is not, as Petitioner argues, automatically an issue of significant public interest warranting this Court's review under RAP 13.4(b)(4). Just as an insured's expectations "cannot override the plain language of the contract" to create an ambiguity where none

exists (Opinion at *4), an insured's subjective expectations and fundamental misunderstanding of her own unambiguous insurance coverage do not constitute an issue of significant public interest.

Nor did the Court of Appeals' unpublished decision "upset the traditional balance that protects the public interest." Petition at 27. Division Three merely applied fundamental principles of contract interpretation to correctly conclude that the Policy was unambiguous because it was only susceptible to one *reasonable* interpretation (PEMCO's) in light of the plain language, *Holden*, and the expectations of the average, *reasonable* insurance consumer.

Division Three's decision does not improperly require insureds to "float the difference between the partial sales tax paid in the initial ACV payment and the full amount of sales tax paid on a replacement item." Petition at 28. Again, nothing in *Holden* requires insurers to advance the sales tax on the replacement cost of an item when indemnifying the insured for the actual cash value of the *damaged* item *at the time of the loss*. Nor does the Policy provide otherwise.

Petitioner chose to purchase a replacement cost insurance contract that clearly set forth a two-step payment process involving (1) an initial ACV payment for the market value of the damaged item *at the time of loss* and (2) a second payment indemnifying her for the actual cost of replacing the item (over and above the initial ACV payment) if and when she purchased a replacement. Petitioner did not purchase a Policy that provides indemnification for the entire replacement cost of a damaged or lost item *prior* to Petitioner replacing that item. There is nothing "unfair" about the "operation" of Petitioner's policy here. *See* Petition at 26.

Finally, the Commissioner's ruling on an entirely distinct issue does not give rise to an issue of significant public interest here. *See* Petition at 29. Division Three correctly recognized that the Commissioner has never analogized the calculation of sales tax based on the market value of a damaged item at the time of loss to labor costs, and the Court of Appeals wisely declined to do so here. *See* Opinion at *6–7. Division Three astutely recognized that "there is no relationship to be inferred between sales tax and labor with respect to depreciation": "[s]ales tax is calculated as a percentage of the retail selling price of an item,"

while labor "is not necessarily fixed in any manner to the retail price of an item." Opinion at *6.

Finally, Petitioner ignores that even if an ambiguity existed in the Policy, PEMCO has already construed that ambiguity in her favor by including the sales tax in a manner entirely consistent with the formula this Court approved of in *Holden*. This Court has concluded that "one way" of calculating the current market value of damaged property is to add sales tax to the replacement value "before subtracting for depreciation." Like the Court of Appeals, this Court understands—as does the average consumer—that sales tax is inextricably linked to, and dependent upon, the underlying retail price of the item. This is common sense *and* the law—not an issue of significant public interest to the average, reasonable insurance consumer.

Simply put, Petitioner's subjective and fundamental misunderstanding of the purpose of the ACV provision in the Policy she purchased is not a matter of significant public interest. Review is not warranted under RAP 13.4(b)(4).

V. CONCLUSION

PEMCO respectfully requests that the Petition for Review be denied under RAP 13.4(b).

DATED this 30th day of September, 2024.

I certify that this memorandum contains 4,869 words, in compliance with RAP 18.17.

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