Honorable Marshall Ferguson, Dept. 31

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

WASHINGTON BANKERS ASSOCIATION, a Washington Public Benefit Corporation, and AMERICAN BANKERS ASSOCIATION, a District of Columbia Non-Profit Corporation, Plaintiffs, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON, and VIKKI SMITH, as Director of the Department of Revenue of the State of Washington, Defendants.	NO. 19-2-29262-8 SEA MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED – CR 12(b)(6) **Noted for January 9, 2020** **1:30 p.m.**

I. INTRODUCTION AND RELIEF REQUESTED

This case involves Substitute House Bill (SHB) 2167, a recent amendment to the state's business and occupation (B&O) tax (attached as Appendix A).[1] The stated purpose of SHB 2167 is to combat the growing "wealth disparity in the country between the wealthy few and the lowest income families" by imposing an additional tax on "specified financial institutions." App. A § 1. The additional tax applies to the taxable gross income of large financial institutions at the rate of 1.2%. *Id.* § 2(1). It is effective January 1, 2020, and amounts collected

[1] SHB 2167 may be formally cited as Laws of 2019, ch. 420, and is available online at: http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/House/2167-S.SL.pdf.

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are to be deposited into the general fund. App. A §2(1), § 2(5). Plaintiffs challenge the additional tax on two theories, both of which are legally deficient under established law.

Plaintiffs' first cause of action seeks a declaratory judgment with respect to the manner in which the Legislature debated and passed SHB 2167 during the 2019 legislative session. The "enrolled bill doctrine," however, precludes the requested relief. The enrolled bill doctrine reflects judicial respect for the separation of powers by forbidding a judicial inquiry into the legislative procedures used for enacting a statute that is "properly signed and fair upon its face." *Wash. State Grange v. Locke*, 153 Wn.2d 475, 499-500, 105 P.3d 9 (2005). Consequently, the Court is unable to provide the declaratory relief requested by Plaintiffs.

The second cause of action seeks a declaratory judgment with respect to the additional tax that SHB 2167 will impose on some large financial institutions. Declaratory relief, however, is not available under established law. Rather, a person challenging the tax imposed by SHB 2167 must pay the tax and sue for a refund as required under RCW 82.32.150 and .180. These statutes, granting a limited waiver of state sovereign immunity, provide a plain, speedy, and adequate statutory method for challenging the imposition of state excise taxes. Plaintiffs have not met the requirements imposed under RCW 82.32.150 and .180 and, as a result, fail to state a claim upon which relief may be granted.

For these reasons, plaintiffs' Complaint should be dismissed.

II. STATEMENT OF MATERIAL FACTS

The initial bill, House Bill 2167, was introduced in the House of Representatives and referred to the House Finance Committee on April 10, 2019. Complaint, ¶ 16. After the House of Representative and Senate passed SHB 2167 on April 26, 2019, and April 28, 2019, respectively, Governor Inslee signed the bill into law on May 21, 2019. Complaint, ¶ 31. The Act, codified at RCW 82.04.29004, imposes an additional B&O tax on financial institutions with net incomes in excess of one billion dollars. Complaint, ¶ 23. On its face, the additional tax applies to all "specified financial institutions" that conduct business in Washington

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regardless of where the financial institution happens to have its commercial domicile. Complaint, ¶ 2. Plaintiffs contend that the tax will apply to "approximately twenty large financial institutions that are domiciled outside of Washington." Complaint, ¶ 3.

III. STATEMENT OF ISSUES

1. The enrolled bill doctrine "forbids an inquiry into the legislative procedures preceding the enactment of a statute that is 'properly signed and fair upon its face.'" *Brown v. Owen*, 165 Wn.2d 706, 723, 206 P.3d 310 (2009) (quoting *Wash. State Grange*, 153 Wn.2d at 499-500). In light of this established law, should the Court dismiss Plaintiffs' first cause of action under CR 12(b)(6) where it is undisputed that SHB 2167 was properly signed into law?

2. Pursuant to article II, section 26 of the Washington Constitution, the Legislature has established the statutory requirements for bringing a court challenge to an excise tax enacted by the Legislature and has limited such actions to a suit for refund of taxes already paid, to be filed in Thurston County Superior Court. RCW 82.32.150 and .180. In light of the express language of these plain, speedy, and adequate remedial statutes, should the Court dismiss plaintiffs' second cause of action under CR 12(b)(6) where it is undisputed that neither plaintiff seeks a refund of taxes already paid?

3. Alternatively, if plaintiffs seek leave to add as a party a taxpayer that *has paid* the disputed tax and *is seeking* a refund, should the Court transfer this matter to the Thurston County Superior Court in accord with the conditional and limited waiver of sovereign immunity granted by RCW 82.32.150 and .180?

IV. EVIDENCE RELIED ON

This motion involves a CR 12(b)(6) motion to dismiss. As a result, defendants rely on the allegations contained in plaintiffs' Complaint.

V. ARGUMENTS AND AUTHORITY

Dismissal for failure to state a claim under CR 12(b)(6) is appropriate when a plaintiff can prove no set of facts, consistent with the complaint, that would entitle it to the relief it is

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seeking. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987). "[W]here it is clear from the complaint that the allegations set forth do not support a claim, dismissal is proper." *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977). Facts alleged in the complaint are accepted as true, and the court may even consider hypothetical facts. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). However, if a plaintiff's claim "'remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate.'" *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 843-44, 347 P.3d 487 (2015) (quoting *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005)).

Both causes of action outlined in the complaint are legally deficient and do not raise any issue upon which declaratory relief may be granted. Consequently, this Court should dismiss plaintiffs' Complaint.

A. Plaintiffs' Claim Based on Article II, Section 36 Fails to State a Claim For Which Relief May be Granted

Plaintiffs' first claim depends upon the notion that SHB 2167 was not introduced more than ten days before adjournment of the session and, therefore, must be judicially invalidated as a violation of article II, section 36 of the Washington Constitution. This argument is wrong on two scores. First, the enrolled bill doctrine precludes the judicial nullification of a bill "properly signed and fair on its face" based on the history of its enactment. Second, by plaintiffs' own admission, the bill was introduced 18 days before adjournment. Complaint, ¶ 16.

1. The enrolled bill doctrine precludes judicial inquiry into the Legislature's procedures for enacting a bill

Since statehood, our courts have consistently held that the enrolled bill doctrine precludes judicial inquiry into matters beyond the four corners of the enrolled bill. *See generally Eyman v. Wyman*, 191 Wn.2d 581, 596, 424 P.3d 1183 (2018) (lead opinion of Gordon McCloud, J.); *Id.* at 610-11 (Yu, J., concurring). The enrolled bill includes within its

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four corners the certifications of the presiding officers of each house that the bill was duly passed by constitutional majorities. Appendix A. Plaintiffs' request that this Court invalidate SHB 2167 completely ignores this important and longstanding principle of separation of powers. Properly analyzed in light of this controlling legal principle, plaintiffs seek relief that this Court should not grant.

The enrolled bill doctrine provides that an "enrolled bill on file, when fair upon its face, must be accepted without question by the courts, as having been regularly enacted by the Legislature." *State ex rel. Reed v. Jones*, 6 Wash. 452, 477, 34 P. 201 (1893). The doctrine "long predates our federal constitution and was firmly upheld by the United States Supreme Court in 1892." *Eyman*, 191 Wn.2d at 610 (Yu, J., concurring) (citing *Marshall Field & Co. v. Clark*, 143 U.S. 649, 665-66, 12 S. Ct. 495, 36 L. Ed. 294 (1892)). Washington courts continue to follow this established rule to this day. *Eyman*, 191 Wn.2d at 596 (lead opinion of Gordon McCloud, J.); *Brown*, 165 Wn.2d at 723-24.

Additionally, it is beyond dispute that article II, section 36 addresses internal legislative procedure outside the four corners of the enrolled bill. The provision states:

> No bill shall be considered in either house unless the time of its introduction shall have been at least ten days before the final adjournment of the legislature, unless the legislature shall otherwise direct by a vote of two-thirds of all the members elected to each house, said vote to be taken by yeas and nays and entered upon the journal, or unless the same be at a special session.

Const. art. II, § 36.

Internal processes and procedures of the type specified in article II, section 36, are precisely the type of legislative action the enrolled bill doctrine is designed to protect. "'The enrolled bill doctrine forbids an inquiry into the legislative procedures preceding the enactment of a statute that is 'properly signed and fair upon its face.'" *Brown*, 165 Wn.2d at 723 (quoting *Wash. State Grange*, 153 Wn.2d at 499-500). The doctrine prohibits what has been called a game of "judicial peek-a-boo into legislative processes." *Eyman*, 191 Wn.2d at 627 (Stevens, J., dissenting). Simply put, Washington courts will not go behind an enrolled bill to examine

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the method, means, manner, or procedure by which the Legislature passed it. *Id.* (quoting *Derby Club, Inc. v. Becket*, 41 Wn.2d 869, 882, 252 P.2d 259 (1953) (Hill, J., concurring)).

The enrolled bill doctrine reflects important separation of powers principles and is supported by sound public policy. First and foremost, an inquiry into the Legislature's internal procedures would quintessentially transgress the deference that courts afford the Legislature as a coequal branch of government.

> The constitutional principle upon which this doctrine is based is that the three branches of state government are co-equal in dignity and that none of them is entitled to look behind the properly certified record of another to determine whether that branch has followed the procedures prescribed by the constitution, but rather each is responsible and answerable only to the people for its proper performance of the function for which it is constituted.

Citizens Council Against Crime v. Bjork, 84 Wn.2d 891, 897 n.1, 529 P.2d 1072 (1975). Moreover, "[a]n additional reason of public policy which supports the doctrine is that it is necessary in order that the people may rely upon the statutes as setting forth the laws which have been enacted by the legislature." *Id.* "Just as the legislature may not go beyond the decree of the court when a decision is fair on its face, the judiciary will not look beyond the final record of the legislature when an enactment is facially valid, even when the proceedings are challenged as unconstitutional." *Brown*, 165 Wn.2d at 722 (citing *Reed*, 6 Wash. at 460). Thus, as recently explained, "'[w]hat constitutes the statutory law of a state must necessarily be an absolute proposition, and not simply a prima facie one.'" *Eyman*, 191 Wn.2d at 611 (Yu, J., concurring) (quoting *Reed*, 6 Wash. at 458). It follows that records of legislative proceedings cannot be used to impeach an enrolled bill, because to do so would deny both state officers and the public alike the ability to know what the law is. *Reed*, 6 Wash. at 466.

The four corners of the enrolled bill demonstrate the regularity of its enactment, including passage by constitutional majorities in both houses in the same session. Appendix A. The simple fact that constitutional majorities voted for SHB 2167, as attested by the signatures of the presiding officers on the enrolled bill, precludes judicial questioning of the procedure

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used to enact it. *See State ex rel. Dunbar v. State Bd. of Equalization*, 140 Wash. 433, 443, 249 P. 996 (1926) (courts do not examine the antecedent history connected with a bill passed into law except where necessary to construe a bill in accordance with legislative intent); *see also Power, Inc. v. Huntley*, 39 Wn.2d 191, 204, 235 P.2d 173 (1951) (procedural requirements "are binding only upon the legislative conscience"). Thus, for example, the enrolled bill doctrine precluded judicial consideration of whether an amendment to a bill changed its scope and object contrary to article II, section 38, of the Washington Constitution. *Roehl v. Pub. Util. Dist. 1 of Chelan County*, 43 Wn.2d 214, 219, 261 P.2d 92 (1953); *see also State ex rel. Bugge v. Martin*, 38 Wn.2d 834, 840-41, 232 P.2d 833 (1951) (same). Likewise, the doctrine barred judicial inquiry into whether the Legislature passed a bill after the expiration of the days allotted for its session. *Morrow v. Henneford*, 182 Wash. 625, 634, 47 P.2d 1016 (1935). The doctrine also barred inquiry into whether the title of a bill deceived legislators. *State ex rel. Wash. State Toll Bridge Auth. v. Yelle*, 61 Wn.2d 28, 33-34, 377 P.2d 466 (1962). These authorities, and others, preclude the very "peek-a-boo into legislative processes" advocated by plaintiffs in their complaint. *See Eyman*, 191 Wn.2d at 627 (Stevens, J., dissenting).

Accordingly, it is not appropriate to look behind the certification of SHB 2167 as a means to undo what the legislative branch has passed into law. *Eyman*, 191 Wn.2d at 596 (lead opinion of Gordon McCloud, J.). "The enrolled bill doctrine serves as a constitutional backstop that prevents the judiciary from overstepping its role." *Id.* Separation of powers recognizes the separate spheres of each branch. *Id.* And the enrolled bill doctrine "prohibits judicial meddling into legislative processes." *Id.* at 627 (Stevens, J., dissenting). "Thus, once a bill has been certified by the Legislature as having been passed, that certification is 'conclusive upon each of the other [branches of government]' including the judiciary." *Id.* at 596-97 (lead opinion of Gordon McCloud, J.) (quoting *Brown*, 165 Wn.2d at 723, in turn quoting *Reed*, 6 Wash. at 461-62). These important constitutional principles preclude plaintiffs from obtaining the declaratory judgment they seek.

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2. In any event, the Legislature complied with article II, section 36 when it enacted SHB 2167

The Constitution directs that bills are to be introduced at least ten days before the adjournment of the session at which they are enacted. Const. art. II, § 36. The requirements of this section are straightforward and have never been interpreted by a Washington court. By plaintiffs' own admission, HB 2167 was introduced 18 days before the Legislature adjourned its 2019 regular session. Complaint, ¶ 16 (bill introduced on April 10, 2019); House Journal at 3912 (Legislature adjourned sine die on April 28, 2019).[2] Plaintiffs thus challenge a bill that was introduced 18 days before adjournment on the basis that it was allegedly not introduced at least ten days before adjournment.

Plaintiffs argue that as originally introduced, HB 2167 was a "title-only bill" and that the ten days for purposes of Article II, section 36 did not begin to run until the original bill was replaced by a substitute in the House Finance Committee. Complaint, ¶ 23. Plaintiffs thus invite precisely the game of "judicial peek-a-boo into legislative processes" that the enrolled bill doctrine precludes. *Brown*, 165 Wn.2d at 723; *Eyman*, 191 Wn.2d at 627 (Stevens, J., dissenting).

The legislative history of SHB 2167 demonstrates why Washington courts embrace the enrolled bill doctrine and refrain from examining legislative procedure, respecting the separation of powers.[3] Plaintiffs define a title-only bill as "[a] bill which contains nothing more than a title and a number." Complaint, ¶ 20 (quoting an online legislative glossary). But HB 2167 in its original form contained more than a title and a number; it also contained one section bearing legislative text.[4] A bill that contains even minimal legislative text is not a true

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[2] The House Journal is available online at: http://leg.wa.gov/House/HDJ/Documents/2019/HJ_19_105.pdf. The Senate Journal is also online at: http://leg.wa.gov/Senate/SDJ/Documents/2019/SJ_19_105.pdf.

[3] The full procedural history of SHB 2167, including relevant documents and versions of the bill, is available online at: https://app.leg.wa.gov/billsummary?BillNumber=2167&Year=2019&Initiative=false.

[4] HB 2167 as originally introduced is available online at: http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/House%20Bills/2167.pdf.

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"title-only" bill, even if it is casually described that way. More importantly, a bill that contains at least some legislative text meets internal procedures adopted by the Legislature and may be introduced. *See* former Joint Rule of the Senate and House of Representatives No. 13 (as adopted by House Concurrent Resolution 4402 (2015) (prohibiting the introduction of any "title-only" bill and requiring at least one section of text).[5] Thus, plaintiffs' argument necessarily depends on an inquiry into whether the original bill was "good enough" to satisfy the Constitution, inviting the very meddling into internal legislative processes and motives that the enrolled bill doctrine precludes. *Brown*, 165 Wn.2d at 723-24. And by introducing a bill bearing legislative text more than ten days before adjournment of session, the Legislature complied with the mandate of article II, section 36. For this additional reason, plaintiffs' first cause of action is legally deficient and does not raise any issue upon which declaratory relief may be granted.

B. Plaintiffs' Second Cause of Action Fails as a Matter of Law Because it Seeks Declaratory Relief When There Exists a Plain, Speedy, and Adequate Remedy at Law

Plaintiffs' second claim asks the Court to issue a declaratory judgment invalidating SHB 2167 under the dormant Commerce Clause. The procedure invoked by plaintiffs (declaratory judgment) is inconsistent with established principles of sovereign immunity, which dictate that when the Legislature has granted a right to seek review of a state excise tax, the right must be exercised in the manner provided by the statute. An aggrieved taxpayer will have ample opportunity to challenge SHB 2167 on dormant Commerce Clause grounds by paying the disputed tax and suing for refund in the manner provided by statute. What

[5] The former joint rules are available online at: http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bills/House%20Passed%20Legislature/4402.PL.pdf. The Legislature did not enact joint rules for its 2019 session, instead relying on the respective rules of each body and Reed's Rules, all of which are available online at: http://leg.wa.gov/LawsAndAgencyRules/Pages/default.aspx. But the former rules illustrate the Legislature's formal definition of what constitutes a title-only bill. Legislative rules thus would have allowed the introduction of HB 2167 in its original form even under prior rules that barred title-only bills.

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plaintiffs may not do is bypass the available statutory remedy and, instead, seek declaratory relief.

1. The Legislature has established a detailed statutory mechanism for seeking judicial review of excise taxes

SHB 2167 amends the state's B&O tax by imposing an additional tax on certain financial institutions. The B&O tax is one of several excise taxes administered by the Department of Revenue. *See generally* RCW 82.01.060 (powers and duties of Department). Procedures for challenging excise taxes administered by the Department are set out in RCW 82.32. That chapter affords two options for a taxpayer to contest the imposition of an excise tax like the B&O: an administrative appeal that is subject to eventual judicial review under the Administrative Procedure Act (APA), and a direct challenge in superior court.

The administrative option does not require payment of the challenged tax as a prerequisite to obtaining review. Rather, the taxpayer initiates the review by filing a written request with the Department. RCW 82.32.160 (first sentence). After the Department issues its final decision, an aggrieved taxpayer has a right to a de novo appeal before the Board of Tax Appeals. RCW 82.03.190. The Board's decision is subject to further appeal by the taxpayer or the Department by filing a petition for review in superior court under the APA. RCW 82.03.180; *see generally Dep't of Revenue v. Nord Nw. Corp.*, 164 Wn. App. 215, 222-23, 264 P.3d 259 (2011) (discussing procedure and standard of review in an appeal of a Board of Tax Appeals decision). Only then, to obtain superior court review, is payment of the disputed tax required. RCW 82.03.180.

Alternatively, a taxpayer may seek direct judicial review by filing a refund action in superior court. RCW 82.32.180. That option requires payment of the disputed tax before initiating the refund lawsuit. *Id.* Additionally, if the challenge involves the *assessment* of unpaid taxes by the Department, the taxpayer must pay all of the tax, penalty, and interest that

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has been assessed before challenging any portion of that tax. RCW 82.32.150; *AOL, LLC v. Dep't of Revenue*, 149 Wn. App. 533, 545, 205 P.3d 159 (2009).

The two statutory mechanisms for challenging state excise taxes allow for a pre-deprivation process (administrative appeal) and a post-deprivation process (refund lawsuit). What these statutes do not authorize is a claim for declaratory or injunctive relief, with one limited exception. RCW 82.32.150 allows a taxpayer to seek injunctive relief in superior court to challenge an *assessment* of unpaid taxes on constitutional grounds. Specifically, RCW 82.32.150 provides:

> All taxes, penalties, and interest shall be *paid in full* before *any* action may be instituted in *any* court to contest all or any part of such taxes, penalties, or interest. *No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax* or penalty or any part thereof, *except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state.*

RCW 82.32.150 (emphasis added).[6] According to the plain language of the statute, a court may enjoin only the payment of a tax *assessment* that violates the federal or state constitution. *AOL, LLC*, 149 Wn. App. at 546-47. Here, that is not an issue because the Department has not assessed either plaintiff for unpaid B&O taxes.

The "pay in full" language of RCW 82.32.150 supports society's strong interest in the efficient collection of taxes by preventing tax disputes from delaying collection of tax revenue unless the taxpayer raises a constitutional challenge to an assessment and establishes a likelihood of prevailing on the merits. *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 793-94, 796, 638 P.2d 1213 (1982); *see also Grace Brethren Church,* 457 U.S. at 410 n.23 (acknowledging the danger inherent in disrupting tax payments into state treasuries);

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[6] The phrase "restraining order or injunction" in RCW 82.32.150, properly read, should be construed to include declaratory relief. *See California v. Grace Brethren Church,* 457 U.S. 393, 407-08, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982) (construing the phrase "enjoin, suspend or restrain" in the federal Tax Injunction Act, 28 U.S.C. § 1341 , to include declaratory relief); *Nat'l Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 591, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995) (quoting *Grace Brethren Church* for the proposition that "there is little practical difference between injunctive and declaratory relief").

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Barry v. AT&T Co., 563 A.2d 1069, 1074 (D.C. 1989) (recognizing the "universal principle" that courts should refrain from imposing injunctions and declaratory relief in cases involving the collection of taxes absent clear proof of a lack of remedy at law and emphasizing that the "pay and sue" rule should be circumvented only in extraordinary circumstances).[7] Thus, except for constitutional challenges to tax assessments, an aggrieved taxpayer must pay the disputed tax "in full" and seek a refund under RCW 82.32.180.

As noted above, RCW 82.32.180 provides a post-deprivation avenue for taxpayers to proceed directly to superior court without first exhausting available administrative remedies. That statute outlines the procedures for seeking judicial review, including the specific venue in which the lawsuit must be filed. As relevant here, RCW 82.32.180 provides:

> Any person, except one who has failed to keep and preserve books, records, and invoices as required in this chapter and chapter 82.24 RCW, having paid any tax as required and feeling aggrieved by the amount of the tax *may appeal to the superior court of Thurston County*, within the time limitation for a refund provided in chapter 82.32 RCW or, if an application for refund has been made to the department within that time limitation, then within thirty days after rejection of the application, whichever time limitation is later. . . .

(Emphasis added). The procedures in RCW 82.32.180 for seeking direct review by the Thurston County Superior Court are mandatory and "no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided." *Id.* (third paragraph).

2. Plaintiffs' challenge to the B&O tax through a declaratory judgment action is inconsistent with established principles of sovereign immunity

The Washington Constitution provides that the Legislature "shall direct by law, in what manner, and in what courts, suits may be brought against the state." Const. art. II, § 26.

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[7] *See generally Washington Trucking Association v. Employment Security Department*, 188 Wn.2d 198, 211-12, 393 P.3d 761 (2017), in which the Washington Supreme Court explained that an action filed by a taxpayer against a taxing agency in state court for damages under U.S.C. § 1983 is generally not allowed under the principle of comity when there is an adequate remedy available under state law. In support of its holding, the Court explained that its "conclusion aligns with comity's underlying purpose, which is to avoid throwing state tax administration 'into disarray,' allowing taxpayers to 'escape the ordinary procedural requirements imposed by state law,' or obstructing 'the collection of revenue.'" *Id.* at 212 (some internal quotations omitted) (quoting *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 108 n.6, 102 S. Ct. 177, 70 L.Ed.2d 271 (1981)).

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This constitutional provision allows the Legislature, if it chooses, to waive state sovereign immunity. As the Supreme Court succinctly stated over a century ago:

> It is well settled that an action cannot be maintained against the state without its consent, and that the state, when it does so consent, can fix the place in which it may be sued, limit the causes for which the suit may be brought, and define the class of persons by whom it can be maintained. In other words, the state being sovereign, its power to control and regulate the right of suit against it is plenary; it may grant the right or refuse it as it chooses, and when it grants it may annex such conditions thereto as it deems wise, and no person has power to question or gainsay the conditions annexed.

State ex rel. Pierce County v. Superior Court, 86 Wash. 685, 688, 151 P. 108 (1915); *see also Deaconess Hosp. v. Wash. State Highway Comm'n*, 66 Wn.2d 378, 386, 403 P.2d 54 (1965) ("'A sovereign state cannot be sued without its consent. The immunity is absolute, and, when consent is given, it may be qualified or conditional . . .'") (quoting *State ex rel. Thielicke v. Superior Court*, 9 Wn.2d 309, 114 P.2d 1001 (1941)). Governmental immunity is a matter of state policy that only the Legislature can change. *Kelso v. Tacoma*, 63 Wn.2d 913, 915, 390 P.2d 2 (1964). Therefore, for a cause of action to exist against the State, the Legislature must expressly waive sovereign immunity and, when it does so, it may impose specific conditions on a person's right to sue.

Washington's appellate courts have long held that the right to sue the State or a state agency must be derived from statute, and the Legislature may establish conditions that must be met before that right can be exercised. *Nelson v. Dunkin*, 69 Wn.2d 726, 729, 419 P.2d 984 (1966). This principle applies in actions challenging an excise tax, including the B&O tax: "Since a right has been granted to plaintiffs to recover any overpayment of tax, the right must be exercised in the manner provided by the statute." *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 575, 403 P.2d 880 (1965).

Moreover, it is well-established that RCW 82.32.180—permitting excise tax refund actions only in Thurston County Superior Court—is a "conditional, partial waiver of the sovereign immunity afforded by Article II, § 26 of the Washington Constitution." *Lacey*

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Nursing Ctr., Inc. v. Dep't of Revenue, 128 Wn.2d 40, 52, 905 P.2d 338 (1995). Consequently, the right to bring an action against the State to challenge the imposition of tax "must be exercised in the manner provided by statute." *Id.* at 55 (quoting *Guy F. Atkinson Co.*, 66 Wn.2d at 575).

3. Declaratory relief also is not available in this matter because there is an adequate remedy available at law

The principle of sovereign immunity, particularly in the context of state tax administration, is vitally important in this case because plaintiffs are attempting to impede the imposition of a B&O tax that applies to large banking conglomerates without complying with statutory requirements that apply to *all taxpayers*, including large financial institutions. But any bank that is subject to the additional B&O tax may pay the tax and seek a refund under the established statutory method provided by RCW 82.32.180. No sound reason permits plaintiffs to side-step the statutory method for challenging a tax by seeking declaratory relief in the wrong county on behalf of potentially aggrieved financial institutions. *Cf., Wash. Trucking Assoc.*, 188 Wn.2d at 223-24 (a challenge to the "justness or correctness" of employment taxes administered by the Employment Security Department "must proceed" under the applicable tax administration statutes in Title 50 RCW).

Additionally, in Washington, declaratory relief is generally not available if the Legislature has provided an adequate statutory method for determining a particular type of case. *Seattle-King County Council of Camp Fire v. Dep't of Revenue*, 105 Wn.2d 55, 58, 711 P.2d 300 (1985). This principle prevents a party from seeking declaratory relief as a means of circumventing the special statutory remedy made available by the Legislature. *See generally* 22A Am. Jur.2d, *Declaratory Judgments* § 51 (2003) ("Where a statute provides a special form of remedy for a specific type of case, the statutory remedy shall be followed, and a party may not circumvent those special statutory proceedings by a declaratory judgment action."). Although this general principle may be subject to limitations when the State is not a party and

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the Legislature has not established "rigid procedural conditions" that must be followed to seek judicial review, *see New Cingular Wireless PCS, LLC v. City of Clyde Hill*, 185 Wn.2d 594, 603, 374 P.3d 151 (2016), no legal or logical reason exists to discard the principle here.[8]

RCW 82.32.180 provides a plain, speedy, and adequate remedy to aggrieved taxpayers. And it is undisputed that plaintiffs have not met the mandatory conditions for seeking review under that available statutory remedy. As a result, plaintiffs' second cause of action is deficient as a matter of law and should be dismissed. CR 12(b)(6); *Quality Loan Serv. Corp.*, 186 Wn. App. at 843-44.

C. If Plaintiffs Seek to Amend Their Complaint, Venue Lies in Thurston County

The additional tax enacted by SHB 2167 becomes effective January 1, 2020. *See* App. A §2(1). Thus, large financial institutions that are subject to the tax will soon have an opportunity to pay the tax and seek refunds under RCW 82.32.180. Plaintiffs may argue that they can cure the defects with respect to their second cause of action by amending their complaint to join as a party an aggrieved bank that *has paid* the tax. While that process is unnecessary (an aggrieved bank may file its own tax refund lawsuit rather than seek to join this lawsuit), it also creates an additional issue. Since excise tax refund actions must be filed in Thurston County Superior Court under RCW 82.32.180, adding an aggrieved bank would not be an adequate fix. At a minimum, this Court would need to transfer venue to Thurston County.

VI. CONCLUSION

For the reasons stated, defendants respectfully ask the Court to dismiss plaintiffs' Complaint.

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[8] *New Cingular Wireless* involved the challenge of a municipal fine through an action for declaratory judgment after all administrative remedies had been exhausted. *Id.* at 595, 599. In holding that the declaratory judgment action was proper under the circumstances, the Court distinguished situations where the Legislature had "enacted a statutory scheme that diverts the superior courts' jurisdiction into an alternative procedure that a party must use . . . ." *Id.* at 600. Thus, the holding in *New Cingular Wireless* does not undo the Court's prior holding that an action to challenge the imposition of a state tax must be "exercised in the manner provided by statute." *Guy F. Atkinson Co.*, 66 Wn.2d at 575.

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I certify that this memorandum contains 5,368 words, in compliance with the Local Civil Rules.

DATED this 25th day of November, 2019.

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PROOF OF SERVICE

I certify that on this day I served a copy of this document, via electronic mail per agreement, on the following:

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

DATED this 25th day of November, 2019, at Tumwater, WA.

Jamie Falter, Legal Assistant

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APPENDIX A

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 2167

Chapter 420, Laws of 2019

66th Legislature
2019 Regular Session

FINANCIAL INSTITUTIONS TAX

EFFECTIVE DATE: July 28, 2019

Passed by the House April 26, 2019
Yeas 53 Nays 43

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 28, 2019
Yeas 25 Nays 24

CYRUS HABIB

President of the Senate

Approved May 21, 2019 10:43 AM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Bernard Dean, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 2167** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BERNARD DEAN

Chief Clerk

FILED

May 21, 2019

Secretary of State
State of Washington

SUBSTITUTE HOUSE BILL 2167

Passed Legislature - 2019 Regular Session

State of Washington 66th Legislature 2019 Regular Session

By House Finance (originally sponsored by Representative Tarleton)

READ FIRST TIME 04/26/19.

AN ACT Relating to tax revenue; adding a new section to chapter 82.04 RCW; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature finds that in the decade since the great recession, some economic sectors have rebounded, stronger than ever, while many Washington families struggle to afford basic necessities, all while also carrying the burden of funding schools and essential services. The wealth disparity in the country between the wealthy few and the lowest income families is wider than in any other developed nation and continues to grow. Additionally, Washington's tax system disproportionately impacts those with the least ability to pay. As a percentage of household income, middle-income families in Washington pay two to four times the amount of taxes as compared to top earners in the state. Low-income Washington families pay six times more in taxes than the wealthiest residents. The legislature concludes that those wealthy few who have profited the most from the recent economic expansion can contribute to the essential services and programs all Washington families need.

NEW SECTION. **Sec. 2.** A new section is added to chapter 82.04 RCW to read as follows:

(1) Beginning January 1, 2020, in addition to any other taxes imposed under this chapter, an additional tax is imposed on specified financial institutions. The additional tax is equal to the gross income of the business taxable under RCW 82.04.290(2) multiplied by the rate of 1.2 percent.

(2) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Affiliated" means a person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with another person. For purposes of this subsection (2)(a), "control" means the possession, directly or indirectly, of more than fifty percent of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise.

(b) "Consolidated financial institution group" means all financial institutions that are affiliated with each other.

(c) "Consolidated financial statement" means a consolidated financial institution group's consolidated reports of condition and income filed with the federal financial institutions examination council, or successor agency.

(d) "Financial institution" means:

(i) Any corporation or other business entity chartered under Titles 30A, 30B, 31, 32, and 33 RCW, or registered under the federal bank holding company act of 1956, as amended, or registered as a savings and loan holding company under the federal national housing act, as amended;

(ii) A national bank organized and existing as a national bank association pursuant to the provisions of the national bank act, 12 U.S.C. Sec. 21 et seq.;

(iii) A savings association or federal savings bank as defined in the federal deposit insurance act, 12 U.S.C. Sec. 1813 (b)(1);

(iv) Any bank or thrift institution incorporated or organized under the laws of any state;

(v) Any corporation organized under the provisions of 12 U.S.C. Sec. 611 through 631;

(vi) Any agency or branch of a foreign depository as defined in 12 U.S.C. Sec. 3101 that is not exempt under RCW 82.04.315;

(vii) A production credit association organized under the federal farm credit act of 1933, all of whose stock held by the federal production credit corporation has been retired;

(viii) Any corporation or other business entity who receives gross income taxable under RCW 82.04.290, and whose voting interests are more than fifty percent owned, directly or indirectly, by any person or business entity described in (d)(i) through (vii) of this subsection other than an insurance company liable for the insurance premiums tax under RCW 48.14.020 or any other company taxable under chapter 48.14 RCW;

(ix)(A) A corporation or other business entity that receives more than fifty percent of its total gross income for federal income tax purposes from finance leases. For purposes of this subsection, a "finance lease" means a lease that meets two requirements:

(I) It is the type of lease permitted to be made by national banks (see 12 U.S.C. Sec. 24(7) and (10), comptroller of the currency regulations, part 23, leasing (added by 56 C.F.R. Sec. 28314, June 20, 1991, effective July 22, 1991), and regulation Y of the federal reserve system 12 C.F.R. Part 225.25, as amended); and

(II) It is the economic equivalent of an extension of credit, i.e., the lease is treated by the lessor as a loan for federal income tax purposes. In no event does a lease qualify as an extension of credit where the lessor takes depreciation on such property for federal income tax purposes.

(B) For this classification to apply, the average of the gross income in the current tax year and immediately preceding two tax years must satisfy the more than fifty percent requirement;

(x) Any other person or business entity, other than an insurance general agent taxable under RCW 82.04.280(1)(e), an insurance business exempt from the business and occupation tax under RCW 82.04.320, a real estate broker taxable under RCW 82.04.255, a securities dealer or international investment management company taxable under RCW 82.04.290(2), that receives more than fifty percent of its gross receipts from activities that a person described in (d)(ii) through (vii) and (ix) of this subsection is authorized to transact.

(e)(i) "Specified financial institution" means a financial institution that is a member of a consolidated financial institution group that reported on its consolidated financial statement for the previous calendar year annual net income of at least one billion

dollars, not including net income attributable to noncontrolling interests, as the terms "net income" and "noncontrolling interest" are used in the consolidated financial statement.

(ii) If financial institutions are no longer required to file consolidated financial statements, "specified financial institution" means any person that was subject to the additional tax in this section in at least two of the previous four calendar years.

(3) The department must notify the fiscal committees of the legislature if financial institutions are no longer required to file consolidated financial statements.

(4) To aid in the effective administration of the additional tax imposed in this section, the department may require a person believed to be a specified financial institution to disclose whether it is a member of a consolidated financial institution group and, if so, to identify all other members of its consolidated financial institution group. A person failing to comply with this subsection is deemed to have intended to evade tax payable under this section and is subject to the penalty in 82.32.090(7) on any tax due under this section by the person and any financial institution affiliated with the person.

(5) Taxes collected under this section must be deposited into the general fund.

Passed by the House April 26, 2019.
Passed by the Senate April 28, 2019.
Approved by the Governor May 21, 2019.
Filed in Office of Secretary of State May 21, 2019.

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