The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT REGINALD COMENOUT SR., et al., Plaintiffs, v. ERIC BELIN, employee of the City of Puyallup, et al., Defendants.	NO. 3:16-CV-05464 PAUL JOHNSON'S MOTION TO DISMISS PURSUANT TO FRCP 12(B)(1), AND (6) NOTE ON MOTION CALENDAR: DECEMBER 1, 2017 WITHOUT ORAL ARGUMENT

Defendant PAUL JOHNSON moves for an Order dismissing all claims[1] in Plaintiffs Fourth Amended and Supplemental Complaint against him and the Washington Department of Licensing, under Fed. R. Civ. P. 12(b)(1), 12(b)(6) and Local Rule 7. The Complaint fails for at least four reasons: (1) The Tax Injunction Act, 28 U.S.C. § 1341 (2012), bars Plaintiffs claims; (2) Plaintiffs do not have Article III standing and their claims are not ripe; (3) Johnson is being sued in his official capacity as an employee of the Washington Department of

[1] Claims against Johnson are scattered throughout Plaintiffs' Amended Complaint, but are most obviously stated in claim five. Dkt. No. 79 at 20-21, ¶ 37.

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Licensing, and the suit is barred by the Eleventh Amendment and the State's sovereign immunity; and (4) comity principles bar Plaintiffs' claims.

I. STATEMENT OF FACTS

Plaintiff Robert Reginald Comenout, Sr., is an enrolled member of the Tulalip Indian Tribe, and Plaintiff Edward Amos Comenout III, is an enrolled member of the Muckleshoot Tribe of Indians. Fourth Am. Compl., Dkt. No. 79 at 4, ¶ 4; 10, ¶ 17–18. They are both part owners of what may generally be described as an off-reservation Indian Allotment located in Puyallup, Washington, and operate a store at that location. *Id.* at 4, ¶ 4-6. The store sells convenience items and Indian wares. *Id.* Plaintiffs make no allegation that they currently supply, transport, distribute, import, store, or sell motor vehicle fuel. However, they express a desire to "obtain shipments of goods from the Yakama Indian Reservation, other than commercial cigarettes, to the Allotment in Indian-to-Indian transportation without interference of Defendants. The shipments will include motor fuel." *Id.* at 6, ¶ 9. Based on that desire, they seek a declaratory ruling that "a Yakama Indian distributor can ship motor fuel and gas from the Yakama Nation to Plaintiffs, destined for the Allotment, without compliance with state licensing or tax laws." *Id.* at 6–7, ¶ 10. Specifically, Plaintiffs have filed suit against Johnson "in his official capacity in order to obtain a prospective injunction against licensing or taxing Plaintiffs." *Id.* at 12, ¶ 21.

Washington law imposes an excise tax upon fuels used for the propulsion of motor vehicles upon the highways of the state. Wash. Rev. Code § 82.38 (2016). The Washington Department of Licensing (DOL) imposes fuel taxes at the wholesale level, when fuel is removed from a fuel terminal facility or imported into the state. Wash. Rev. Code

§ 82.38.030(9). The tax is imposed at the time and place of the first taxable event and upon the first taxable person in the state. Wash. Rev. Code § 82.38.031. The tax revenues are deposited into the motor vehicle fund in the state treasury and are used for highway purposes in accordance with the Washington Constitution. Wash. Rev. Code §§ 82.38.290, 46.68.070, 46.68.090; Wash. Const. art. II, § 40.[2]

Washington fuel taxes are collected through a licensing system administered by Washington DOL, an agency within the executive branch of government of Washington State. *See* Wash. Rev. Code §§ 82.38.020, 83.38.030, 82.38.031, 82.38.090, 82.38.110. Washington DOL is authorized to assess taxes, penalties, interest, and forfeiture against persons who import fuel into the state without a state license and without paying state fuel taxes. Wash. Rev. Code §§ 82.38.170, 82.38.360.

II. STANDARD ON MOTION TO DISMISS

A complaint must be dismissed under Fed. R. Civ. P. 12(b)(1) if the action: (1) does not arise under the Constitution, law, or treatises of the United States, or does not fall within one of the other enumerated categories of Article III, Section 2 of the Constitution; (2) is not a case or controversy within the meaning of the Constitution; or (3) is not described by any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186 (1962). When considering a facial challenge to subject-matter jurisdiction, a court presumes the factual allegations of the complaint to be true and draws all reasonable inferences in favor of the plaintiff. *Doe v. Holy See*, 557 F.3d 1066, 1073

[2] A Yakama business obtained a favorable ruling by the State of Washington Supreme Court opposing application of the tax to fuel transported by that business. *Cougar Den Inc., v. Wash. Dep't of Licensing*, 392 P.3d 1014 (Wash. 2017). A petition for writ of certiorari to the United States Supreme Court is pending (no. 16-1498) on which the Court has recently invited the views of the United States. The State of Washington's position in that litigation is that the State Supreme Court ruling is erroneous and that the Ninth Circuit's holding in *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), should control. *King Mountain* holds that there is no "right to trade" in the Yakama treaty and state laws may impose fees on goods transported by Yakama businesses. 768 F.3d at 997–98. In any event, the state's power to tax wholesale fuel is not at issue in this motion to dismiss.

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(9th Cir. 2009). Accordingly, if the allegations of jurisdiction contained in the Complaint are insufficient on their face to establish subject-matter jurisdiction, this Court must dismiss the Complaint. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). When considering a motion to dismiss for lack of standing or sovereign immunity pursuant to Rule 12(b)(1), the court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence. *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009).

Pursuant to Fed. R. Civ. P. 12(b)(6), a complaint should be dismissed for failure to state a claim if the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Geraci v. Homestreet Bank*, 347 F.3d 749, 751 (9th Cir. 2003). A complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

III. ARGUMENT

Defendant Johnson moves to dismiss Plaintiffs' Complaint on alternative grounds, any one of which should result in dismissal. First, this Court lacks subject-matter jurisdiction under the Tax Injunction Act, 28 USC § 1341. Fed. R. Civ. P. 12(b)(1). Second, this Court lacks subject-matter jurisdiction because Plaintiffs lack standing and their claims are not ripe. Fed. R. Civ. P. 12(b)(1). Third, the suit is barred by the Eleventh Amendment and the State's sovereign immunity, which the State has not waived. Fed. R. Civ. P. 12(b)(1), 12(b)(6). Fourth, Plaintiffs fail to state a claim because comity principles require dismissal. Fed. R. Civ. P. 12(b)(6).

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A. This Court Lacks Subject Matter Jurisdiction Under The Tax Injunction Act, 28 U.S.C. § 1341.

Plaintiffs request a ruling that "Yakama Indian distribution of motor fuel from Oregon to the Allotment (1) for personal use of Plaintiffs and or (2) sale at retail may be accomplished without stoppage en route by the state agents or employees, the Department of Licensing, Department of Revenue or the State Liquor and Cannabis Board[3] and without Washington State tax or licensing fees being assessed or collected." Dkt. No. 79 at 21, ¶ 37. The Tax Injunction Act precludes this Court from exercising subject matter jurisdiction over Plaintiffs' claims.

1. The Tax Injunction Act Bars Claims for Declaratory or Injunctive Relief Brought by Individuals Such as Plaintiffs.

The Tax Injunction Act, 28 U.S.C. § 1341, is a "broad jurisdictional bar" which prohibits federal district courts from preventing collection of state taxes. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 470 (1976). It provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

The United States Supreme Court has interpreted the phrase "enjoin, suspend, or restrain" as precluding claims for declaratory relief, as well as injunctive relief, that interferes with the assessment or collection of state taxes. *California v. Grace Brethren Church*, 457 U.S. 393, 408–11 (1982); *Amarok Corp. v. Nev. Dep't of Taxation*, 935 F.2d 1068, 1069 (9th Cir. 1991). Here, Plaintiffs seek a declaration that Washington DOL may not impose and shall be enjoined from imposing any tax assessments on Plaintiffs related to motor fuel. Dkt. No. 79

[3] Neither the Department of Revenue, nor the Liquor and Cannabis Board are defendants in this suit. Indeed, both were previously voluntarily dismissed. Stip. Volun. Dismiss., Dkt. No.17.

at 21, ¶ 37. That relief is clearly precluded by the Tax Injunction Act, as made clear in *Comenout v. Washington*, 722 F.2d 574, 575–77 (9th Cir. 1983).

In *Comenout*, plaintiffs[4] filed a civil rights action under 42 U.S.C. § 1983, alleging subject matter jurisdiction under 28 U.S.C. §§ 1331(a), 1342, against Washington State agencies and officials. *Id.* at 575. They alleged that enforcement of Washington liquor and cigarette tax laws was illegal on Indian trust land in Puyallup, Washington, where they operated a cigarette and liquor store, and should be enjoined. *Id.* The Ninth Circuit held that the relief sought was barred by the Tax Injunction Act since it was an attempt to enjoin, suspend, or restrain enforcement of the Washington tax scheme, and adequate state remedies were available. *Id.* at 576-578.

As in *Comenout*, Plaintiffs here seek declaratory and injunctive relief against a state tax scheme citing the general federal-question jurisdiction statute, 28 U.S.C. § 1331, and 42 U.S.C. § 1983, as the basis for this Court's subject matter jurisdiction. Dkt. No. 79 at 8, ¶ 14; 9, ¶ 15. Assertion of these claims is contrary to the clear holding in *Comenout* and Plaintiffs' claims should be dismissed. *See also Patel v. City of San Bernardino,* 310 F.3d 1138, 1141 (9th Cir. 2002), ("[r]ead together, *Fair Assessment* and *National Private Truck* bar use of § 1983 to litigate state tax disputes in either state or federal court.").

Plaintiffs cite federal-question jurisdiction, 28 U.S.C. § 1331, as the basis for this Court's subject matter jurisdiction. Dkt. No. 79 at 8, ¶ 14; 9, ¶ 15. The federal-question statute

[4] Plaintiffs were brothers Edward Comenout, Jr., Robert Comenout, and their mother Anna Jack Harris. *Comenout*, 722 F.2d at 576. According to Plaintiffs' Complaint, Edward Comenout, Jr., died on June 4, 2010, Dkt. No. 79, at 7, ¶ 11, and Plaintiff Edward Amos Comenout III is Edward Comenout, Jr.'s grandnephew. Dkt. No. 79 at 10, ¶ 18.

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does not override the Tax Injunction Act, however.[5] *See Comenout*, 722 F.2d at 575-77. Nor does it matter that Plaintiffs assert that Washington fuel taxes are preempted by a federal law. Dkt. No. 79 at 9, ¶ 15. Assertions that a state tax is preempted by federal law do not overcome the Tax Injunction Act's bar to federal court jurisdiction if a state court remedy is available. *Amarok*, 935 F.2d at 1069–70 (Indian law preemption claims did not overcome jurisdictional bar of 28 U.S.C. § 1341); *Ashton v. Cory*, 780 F.2d 816, 819-20 (9th Cir. 1986).

The Plaintiffs may point out that the Tax Injunction Act does not preclude Indian tribal *governments* from bringing federal court actions to enjoin state taxes or declare them invalid. Where an "Indian tribe" is the plaintiff, 28 U.S.C. § 1362 allows the tribe to challenge a state tax in federal court if a federal question is involved. *Moe*, 425 U.S. at 472-75, n.13. This would be irrelevant because Section 1362 does not permit tax-injunction suits by individual tribal members or their businesses, however. *E.g.*, *Amarok*, 935 F.2d at 1070-71 (private Indian-owned business); *Comenout*, 722 F.2d at 577 (individual Indian business owners); *Dillon v. Montana*, 634 F.2d 463, 469 (9th Cir. 1980) (individual Indians).

Similarly, Plaintiffs citation to 42 U.S.C. § 1983 as the basis for this Court's subject matter jurisdiction is unavailing. Dkt. No. 79 at 7, ¶ 12. *Comenout* stands for the proposition that the Court looks to the effect of Plaintiffs' requested remedies when determining whether the Tax Injunction Act bars the suit. *See Comenout,* 722 F.3d at 577-78. Here, DOL levies a tax on motor vehicle fuel. Wash. Rev. Code § 82.38. It enforces the tax by assessing taxes,

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[5] Plaintiffs also allege subject matter jurisdiction based on the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. Dkt. No. 79 at 7, ¶12. The Declaratory Judgment Act is procedural only and does not provide an independent basis for subject matter jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950). No authority suggests it bypasses the bar in 28 U.S.C. § 1341. In addition, the Declaratory Judgment Act requires there be "a case of actual controversy" and that the court "may declare the rights and other legal relations of any interested party…." 28 U.S.C. § 2201(a). As addressed in Section B *infra*, there is no actual controversy and Plaintiffs cannot establish they are an interested party.

penalties, and interest against persons who import fuel into the state without a state license and without paying state fuel taxes. Wash. Rev. Code § 82.38.170. Therefore, the requested declaratory and injunctive remedies, if granted, would interfere with the state's operation of its tax scheme and are barred by the Tax Injunction Act.

2. Plaintiffs Have a Plain, Speedy and Efficient Remedy in the Washington State Courts.

The jurisdictional bar of the Tax Injunction Act applies "where a plain, speedy and efficient remedy may be had in the courts of [the] State." 28 U.S.C. § 1341. To be "plain, speedy and efficient," a state-court remedy need only meet "certain minimal *procedural* criteria." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512 (1981) (emphasis in original). A state court remedy is "plain" if it is certain. *May Trucking Co. v. Or. Dep't of Transp.*, 388 F.3d 1261, 1270 (9th Cir. 2004). The state court must provide the taxpayer with a full hearing and a judicial determination at which the taxpayer may raise any objections to the tax that are based on federal law or the United States Constitution. *Rosewell*, 450 U.S. at 514; *May Trucking*, 388 F.3d at 1270; *Ashton*, 780 F.2d at 819-20. State-court remedies are "efficient" when the state court remedy does not impose an unusual hardship requiring ineffectual activity or an unnecessary expenditure of time or energy. *May Trucking Co*, 388 F.3d at 1271. Finally, whether a remedy is "speedy" is fact dependent. *Rosewell*, 450 U.S. at 518-21 (concluding that the two-year pendency of tax refund claim without interest constituted a "speedy" remedy).

Here, Plaintiffs have not even taken the first steps either to import, distribute, or store fuel, or to properly seek an exemption.[6] Rather, Plaintiffs have only made a bald assertion that they "seek to obtain" motor fuel from the Yakama Indian Reservation, Dkt. No. 79 at 6, ¶ 9,

[6] See standing and ripeness argument, *infra*.

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that Edward Amos Comenout III both "seeks to continue to live on the Allotment and establish a business use," Dkt. No. 79 at 10, ¶ 18, and that Plaintiffs "intend to import fuel shipped to the Allotment for use by Plaintiffs and/or eventual sale to retail customers." Dkt. No. 79 at 21, ¶ 37. Other than one interaction with Johnson in May 2017, that did not result in any documented or official action, they have not asserted what, if any, threatened taxation exists.

If the Department were to take action imposing taxes, the Plaintiffs could seek administrative review. Wash. Admin. Code. § 308-77-102. Judicial review of state agency orders is also allowed under the Washington Administrative Procedure Act (APA), Wash. Rev. Code ch. 34.05. *See* Wash. Rev. Code §§ 34.05.570; 82.38.300. The Washington APA "establishes the *exclusive* means of judicial review of agency action," unless the sole issue is money damages or de novo review or jury trial review is "expressly authorized by provision of law." Wash. Rev. Code § 34.05.510 (emphasis added). Neither exception applies to Plaintiffs' cause of action.

Under Wash. Rev. Code § 34.05.570(3), a court may address any legal objections to a final agency order rejecting an appeal from an imposition of taxes or other agency action, including objections based on federal law. Given that the state court can address a federal question, the United States Supreme Court may also review the action. *See Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson Cty.*, 849 P.2d 646 (Wash. 1993) (in a judicial review under former Wash. Rev. Code § 34.04.130, holding that Federal Power Act did not preempt a stream flow requirement that state agency had included in a water quality certificate), *aff'd*, 511 U.S. 700 (1994). Indeed, state courts frequently address whether a federal treaty preempts state law. *See Puyallup Tribe v. Dep't of Game*, 391 U.S. 392 (1968) (affirming Washington Supreme Court interpretation of an Indian treaty).

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The judicial review procedures of the state APA are designed to be efficient. Review is conducted on a record, which must be submitted to the court within a certain time. Wash. Rev. Code §§ 34.05.558–.566. In most cases, there is no discovery. *See* Wash. Rev. Code § 34.05.562. Venue may be in the superior court of the petitioner's county of residence or place of business. Wash. Rev. Code § 34.05.514(1). This process does not impose hardship or an unnecessary expenditure of time or energy. *See generally Hickethier v. Dep't of Licensing*, 244 P.3d 1010, 1013 (Wash. Ct. App. 2011) (describing judicial review process).

In *May Trucking*, a case involving Oregon's fuel taxes, the Ninth Circuit concluded that the judicial review procedures of the Oregon Administrative Procedures Act satisfied the "plain, speedy and efficient remedy" requirement of the Tax Injunction Act. 388 F.3d at 1271-72. This Court should therefore conclude that the judicial review procedures of the Washington APA satisfy the "plain, speedy and efficient" requirement. Thus, the Court lacks subject matter jurisdiction over claims against Defendant Johnson, under Fed. R. Civ. P. 12(b)(1), and 28 U.S.C. § 1341, and those claims should be dismissed.

B. This Court Lacks Subject Matter Jurisdiction Because Plaintiffs Cannot Establish Standing and Their Claims are Not Ripe.

Plaintiffs bear the burden of demonstrating standing for each claim it seeks to press and for each form of relief sought. *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). In order to establish constitutional standing, a plaintiff must "have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l., Inc. v. Static Control Components, Inc.*, __ U.S. __, 134 S. Ct. 1377, 1386 (2014).

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Here, Plaintiffs request:

> [A] declaration that they and each of them may import motor fuel transported from Oregon to the Yakama Indian Reservation by Yakama Indian distributors to be stored in a safe manner for Plaintiffs' personal use in their vehicles without state interference, state license or payment of state gas tax. For an additional declaration that Plaintiffs and each of them may sell motor vehicle fuel from the Allotment to retail customers who drive onto the Allotment without state interference, without obtaining motor vehicle fuel licenses and f[r]ee of any state motor vehicle gas tax.

Dkt. No. 79 at 22, ¶ 5. Yet, Plaintiffs have asserted no facts establishing they have suffered or are likely to suffer any injury. They do not allege they operate a fuel station. They do not allege their property can be used as a fuel station or for fuel storage. They do not allege they have an agreement with the Yakama Indians to acquire fuel. They have suffered no concrete injury that is particularized, actual, or imminent. To the contrary, any injury here is conjectural and hypothetical. Consequently, Plaintiffs have not established standing and their claims related to Johnson and Washington DOL's tax authority should be dismissed.

Even if Plaintiffs have standing, which they do not, the Court still need not adjudicate their claims. Plaintiffs here seek relief from Washington DOL imposing taxes on their intended fuel acquisition. Dkt. No. 70, at 21, ¶ 37. They have made no allegation that they have acquired, or even attempted to acquire, fuel and been taxed by Washington DOL. Indeed, Plaintiffs do not even allege they currently operate a fuel station; rather, they currently operate a convenience store. Dkt. No. 79 at 4, ¶ 6. Their claims are not ripe.

Like standing, the ripeness doctrine is based in part on Article III requirement that courts decide only cases or controversies. *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102 (1974). If a case is not ripe for review, then there is no case or controversy. *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 669 (9th Cir. 2005) (Case brought pursuant to the

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Declaratory Judgment Act). The jurisdictional question for ripeness purposes is whether the defendant's engagement in the challenged conduct is contingent on future events whose nonoccurrence might deprive the plaintiff of an injury-in-fact. *Mulhall v. Unite Here Local 355*, 618 F.3d 1279 (11th Cir. 2010). Particular to requests for declaratory judgment, the action's ripeness "depends upon 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *United States v. Braren,* 338 F.3d 971, 975 (9th Cir. 2003). In deciding whether an issue is ripe, the court evaluates both the fitness of the issues for judicial decision, and the hardship to the parties of withholding court consideration. *Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm'n*, 659 F.2d 903, 670 (9th Cir. 1981).

There is no allegation Plaintiffs have acquired fuel or been assessed any tax by Johnson or Washington DOL. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Their claims are not fit for resolution since there has been no final agency action or sufficiently developed facts and there is no immediate controversy. *See Principal Life Ins. Co.*, 394 F.3d at 671. Further, there is no current dilemma between Plaintiffs' potential future intentions to acquire fuel from the Yakama Nation and Washington DOL's taxing scheme. *See id.* There is no hardship to the Plaintiffs. This Court should not address Plaintiffs' hypothetical and abstract issues that have not concretely affected the parties and their claims against Johnson should be dismissed.

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C. This Suit is Barred by the Eleventh Amendment and the States' Sovereign Immunity.

Even if Plaintiffs' Complaint survived the Tax Injunction Act, and the Court concluded Plaintiffs have standing and their claims are ripe, the Eleventh Amendment to the United States Constitution still requires dismissal of the claims against Johnson and the relief sought against Washington DOL.

Plaintiffs name Johnson, in his official capacity, as a defendant, not the Washington DOL. This is an apparent attempt to avoid an assertion of Eleventh Amendment sovereign immunity by the State and to circumvent the established principles of sovereign immunity by explicitly invoking the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). Dkt. No. 79 at 8, ¶ 12. As described below, this is an ineffective use of the *Ex Parte Young* doctrine as Washington DOL is the real party in interest and it is immune from suit.

Under the Eleventh Amendment, states and state agencies are immune from suit in federal court. *E.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267–69 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996); *Yakama Indian Nation v. Wash. Dep't of Revenue*, 176 F.3d 1241, 1245 (9th Cir. 1999). But, courts recognize three exceptions to the prohibition against suing a state: (1) A state may consent to suit, *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)[7]; (2) legislation may express a congressional abrogation of state sovereign immunity, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985); and (3) the *Ex Parte Young* doctrine may permit suits against state officials that directly affect state policy

[7] The State has not waived its sovereign immunity here. *See* Wash. Rev. Code § 82.38.205 ("No injunction or writ of mandate or other legal or equitable process may be issued in any suit, action, or proceeding in any court against this state or against any officer of the state to prevent or enjoin the collection under this chapter of any tax or any amount of tax required to be collected.").

and resources. 209 U.S. at 159-60. Here, Plaintiffs assert the third exception grants this Court jurisdiction to hear their claims related to Johnson.

An *Ex Parte Young* action is generally available where a plaintiff seeks prospective non-monetary relief against a state official allegedly acting in violation of federal law. *See Yakama Indian Nation v. Locke*, 176 F.3d 467, 469 (9th Cir. 1999) (holding plaintiff's claim for damages against state governor in his official capacity was barred by the Eleventh Amendment because any such judgment would run against the State's treasury). But, to succeed under an *Ex Parte Young* rationale, a plaintiff must name officials that are responsible for the ongoing implementation of the allegedly unlawful practice—the named official must have "the requisite enforcement connection to the challenged law for the *Ex Parte Young* exception to apply." *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (internal citation omitted) (holding tribal official allegedly responsible for administering and collecting a challenged tax was not immune from suit seeking declaratory and injunctive relief; but, claim against tribal official who was not responsible for enforcing the tax was barred by tribal sovereign immunity); *see also Yakama Indian Nation*, 176 F.3d at 469 (holding Indian tribe could not seek injunction against state governor pursuant to *Ex Parte Young* exception to Eleventh Amendment immunity inasmuch as Governor lacked requisite connection to activity sought to be enjoined). Otherwise, the lawsuit is in reality just a suit against the state and barred by sovereign immunity. *See Yakama Indian Nation*, 176 F.3d at 469. Such is the case here.

Washington DOL, not Johnson, is the real party in interest and Plaintiffs cannot maintain a suit against Washington DOL because it has sovereign immunity. *Seminole Tribe v. Florida*, 517 U.S. 44, 73-75(1996) (*Ex Parte Young* exception to sovereign immunity will not

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apply when the state, rather than the state official, is the real party in interest.). The *Ex Parte Young* doctrine does not provide a valid basis for this Court to adjudicate either the scope of the State's taxing authority or whether Plaintiffs are subject to taxation by Washington DOL related to motor vehicle fuel.

By seeking a declaration from this court regarding motor vehicle fuel taxes, the resolution of Plaintiffs' claims will necessarily and fundamentally impact Washington DOL's statutory authority, as opposed to simply limiting any actions individually taken by Defendant Johnson. *See Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1160–61 (9th Cir. 2002) (A suit will be barred by sovereign immunity "when the requested relief will require affirmative actions by the sovereign or disposition of unquestionably sovereign property."). Plaintiffs make no allegation that Johnson, a program manager at Washington DOL, Dkt. No. 79 at 12, ¶ 21, has enforcement responsibility for Washington DOL's statutory licensing and taxation scheme for fuel. The relief Plaintiffs seek would, on its face, operate against Washington DOL. Johnson is simply a substitute for Washington DOL against which the requested relief would purportedly operate and which cannot be sued because of its sovereign immunity.

Washington DOL is the real party in interest as the state's taxing authority for fuel tax and the Eleventh Amendment bars suit against it. Plaintiffs' claims related to Johnson must be dismissed.

D. Principles of Comity Bar Plaintiffs' Claims.

Even if this Court were to conclude that the Tax Injunction Act and the Eleventh Amendment do not bar Plaintiffs' claims and that Plaintiffs have standing and their claims are

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ripe, the Complaint against Johnson nonetheless should be dismissed based on comity considerations. The comity doctrine is similar to the Tax Injunction Act, but encompasses a broader range of claims for relief, "restrain[ing] federal courts from entertaining claims for relief that risk disrupting state tax administration." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 417 (2010). Thus, like the Tax Injunction Act, the comity doctrine counsels that federal courts should be reluctant to interfere in state tax administration so long as an adequate state remedy exists. *Id.* at 421–22; *Chippewa Trading Co. v. Cox*, 365 F.3d 538 (6th Cir. 2004) (affirming comity-based dismissal of tribally-chartered corporation's claim that state cigarette tax enforcement scheme violated an Indian treaty). This is especially true when a plaintiff asks a federal court to examine state taxation of a commercial activity, such as the fuel business Plaintiffs are interested in exploring. *Levin*, 560 U.S. at 421.

The Supreme Court has held that there is "no significant difference" between the Tax Injunction Act's requirement of a "plain, speedy and efficient remedy" and the judge-made requirement that there be a "plain, adequate, and complete" state remedy in order for the principle of comity to apply. *Fair Assessment in Real Estate Ass'n v McNary*, 454 U.S. 100, 116 n.8 (1981). Here, as discussed above, Plaintiffs have a "plain, speedy and efficient remedy" in state court under the Tax Injunction Act. Accordingly, Plaintiff has a "plain, adequate, and complete" state remedy under the comity doctrine and the doctrine warrants dismissal of Plaintiffs' Complaint.

IV. CONCLUSION

This Court should dismiss the Complaint for lack of subject matter jurisdiction because the Tax Injunction Act, 28 U.S.C. § 1341, bars suit against Johnson and the Washington DOL's tax scheme. Further, the court lacks subject matter jurisdiction because Plaintiffs do not

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have standing and their claims are not ripe. Alternatively, this Court should dismiss the Complaint for failure to state a claim upon which relief can be granted because the Eleventh Amendment and the comity doctrine bars Plaintiffs' claims against Johnson and Washington DOL's tax scheme.

DATED October 30, 2017.

ROBERT W. FERGUSON
Attorney General

/s/Dionne Padilla-Huddleston
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PROOF OF SERVICE

I, hereby certify that on this October 30 2017, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to 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 30th day of October, 2017.

/s/Jennifer Bancroft
Jennifer Bancroft, Legal Assistant