No. 84265-0

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

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

R.J. REYNOLDS TOBACCO COMPANY, et al.,

Appellants/Cross-Respondents.

APPELLANTS' JOINT OPENING BRIEF

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I. INTRODUCTION

This appeal and cross-appeal arise out of an unsuccessful attempt by the State of Washington (the "State" or "Washington") to vacate an arbitration award entered unanimously by a panel of three former Article III federal judges (the "Panel"). The Panel ruled against the State in a dispute concerning the calculated amount of an annual payment to the State under the 1998 tobacco Master Settlement Agreement ("MSA"). The Superior Court correctly denied Washington's motion to vacate the Panel's award, and Appellants do not challenge that ruling here.[1] The Superior Court went on, however, to grant Washington's request for an advisory opinion framed as a declaratory judgment, purporting to dictate how ongoing and future arbitrators determining similar payment calculation disputes between the State and Appellants must decide one discrete issue. Appellants respectfully request that

[1] The State is cross-appealing the Superior Court's denial of its motion to vacate the award.

this Court reverse the latter ruling, because the State's request for an advisory opinion was not justiciable under Washington's Uniform Declaratory Judgment Act ("UDJA"), the State lacks standing, and the advisory ruling exceeds the limited authority conferred to Washington courts to address arbitration awards.

The challenged arbitration arises out of the landmark MSA that Washington, 45 other States, the District of Columbia, and 5 territories (collectively, the "States") entered into with Appellants, who are tobacco product manufacturers known as Participating Manufacturers ("PMs"). Under the MSA, the PMs make annual settlement payments to the States in perpetuity, calculated annually based on a multi-part formula with various market-based adjustments, and then allocated to the various States. Disputes like this one concerning the calculation of that annual payment are committed to mandatory binding arbitration.

Washington contests the Award determining its 2004 MSA settlement payment. After years of fact-intensive proceedings between the State and Appellants, the Panel—which

included a former federal judge that Washington itself selected—unanimously issued a 93-page Common Case Findings and State Specific Findings and Interim Award for the State of Washington (Sept. 1, 2021) (the "Award"), concluding that Washington's allocated share of the MSA settlement payment for 2004 was subject to an adjustment known as the "NPM Adjustment." To reach that result, the Panel answered one specific question dictated by the terms of the MSA: Did Washington "diligently enforce" its "Qualifying Statute" in 2004? The Qualifying Statute requires Washington to enforce escrow deposits on "units sold" by tobacco manufacturers that did not join the MSA—known as Non-Participating Manufacturers ("NPMs"). Under the MSA, Washington can avoid application of the NPM Adjustment to its allocation of the MSA settlement payment only if it proves it "diligently enforced" its Qualifying Statute, RCW 70.157.010 *et seq*., during the year at issue.

The Panel concluded in the Award that Washington failed to diligently enforce its Qualifying Statute. The Panel supported

its answer with more than 50 pages of determinative factual findings enumerating the State's enforcement failures. CP 709-764. Among these failures, the Panel found that Washington skimped on enforcement resources, coordinated poorly among departments, unreliably collected and verified data, and allowed widespread escrow evasion. *Id*. All of these failures pertained to cigarette sales that Washington acknowledges were "units sold" and subject to escrow; that is, sales of stamped, state excise tax ("SET")-paid cigarettes on non-tribal lands. Due to these enforcement failures, the Panel concluded Washington's MSA payment for 2004 was subject to the NPM Adjustment.

Washington has not challenged any of the Panel's "determinative" findings in the Award. Instead, it has contested only an additional finding in the Award, which the Panel expressly indicated was "not determinative of the Panel's decision on diligent enforcement." CP 763 at n.116. The Panel found Washington also lacked diligence because it did not attempt to enforce the Qualifying Statute's escrow requirements

on tribal compact sales; that is, sales of stamped, tribal tax-paid cigarettes on tribal lands to non-tribal members. The Panel found this failure, too, reflected non-diligence in 2004, based on an extensive record demonstrating that, at the time, Washington itself considered these tribal compact sales to be "units sold," notwithstanding that it later changed its position.

Based solely on its disagreement with the Panel's non-determinative finding regarding tribal compact sales, Washington asked the Superior Court to: (1) vacate the Award and remand for further proceedings; and (2) enter a declaratory judgment applicable to all ongoing and future arbitration proceedings. CP 23-50. Both requests turned on the same basic argument: that tribal compact sales are categorically outside the meaning of "units sold" under the Qualifying Statute. The State did not touch the Panel's other 50 pages of conclusions about the State's "other lapses," which "were determinative on the issue of diligence." CP 763 at n.116.

The Superior Court's Order Denying State's Motion to Vacate Arbitration Award and Granting State's Motion for Declaratory Judgment (the "Order"), CP 1257-1263, correctly denied the State's request to vacate the Award. CP 1259 ¶ 7; CP 1260 ¶ 1. The Superior Court then improperly issued a "declaratory judgment"—in reality an advisory opinion—as to the meaning of "units sold," and "declared" how that term is to be interpreted and applied in a separate ongoing arbitration proceeding and "any future arbitration." CP 1258-1260. The PMs appeal that portion of the Order, which should be reversed for three reasons.

First, the meaning of "units sold" under the Qualifying Statute does not present a justiciable controversy under the UDJA, RCW 7.24, which requires, among other elements, an "actual, present and existing dispute" that is subject to a "final and conclusive" judicial determination. *Nollette v. Christianson*, 115 Wn.2d 594, 599, 800 P.2d 359 (1990) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137

(1973)). The only actual dispute between Washington and the PMs is a purely contractual dispute under the MSA, which asks whether Washington diligently enforced its Qualifying Statute and is exempt from application of the NPM Adjustment. That dispute must be arbitrated under the MSA and therefore is not subject to judicial determination by the Superior Court at all, much less a preemptive determination inserted into a pending arbitration proceeding and all future arbitration proceedings. Washington law prohibits the Superior Court from usurping the arbitrators' exclusive role under the MSA. Nor can the State evade the MSA's express arbitration provision by seeking a declaration of the meaning of "units sold" directly under the statute, because such a declaration amounts to a pure advisory opinion satisfying none of the justiciability requirements.

Second, Washington lacks standing to obtain a declaratory judgment on the meaning of "units sold." Only a "person" has standing to seek relief under the UDJA. To the extent the State can qualify as a "person" at all with respect to the present dispute,

it is only in the context of its role as a contracting party to the MSA, and those disputes are firmly committed to arbitration.

Third, the Superior Court's ruling illustrates why advisory opinions are disallowed under the UDJA, as it erroneously interjects an abstract and advisory statutory construction into a factual dispute in which the Superior Court has no fact-finding role. The Panel did not issue the Award in a vacuum or declare as a matter of law that tribal sales are "units sold." Rather, the Panel concluded, based on the evidentiary record before it, that one of the many reasons Washington failed to diligently enforce was that it made no attempt to address tribal compact sales under the Qualifying Statute when the evidence unequivocally reflected the State's view ***at the time*** that compact sales were "units sold" and were subject to such enforcement. Whether or not the Superior Court retrospectively agrees with that position 18 years later, the Panel was entitled to conclude in the specific context of the dispute under arbitration that Washington's failure to act on its then-prevailing view was a failure of diligent

enforcement. It is error to take that fact question out of the arbitrators' hands.

II. ASSIGNMENT OF ERROR

The Superior Court erred in granting declaratory relief to Washington on the meaning of "units sold," where the declaratory relief constitutes a purely advisory opinion regarding a non-justiciable controversy and intrudes on fact-finding in ongoing and future arbitration proceedings. CP 1257-1263.

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

Must the Superior Court's declaratory judgment be vacated because it (a) decides a non-justiciable dispute under the UDJA by entering an advisory ruling on a matter committed to arbitration under the MSA's binding arbitration provision, (b) grants declaratory relief to the State when it lacks standing to seek such relief, and (c) improperly interjects an abstract advisory opinion into an evidence-based arbitral Award.

IV. STATEMENT OF THE CASE

A. The Master Settlement Agreement

The MSA is a complex settlement agreement resolving tobacco-related claims asserted by the States against four tobacco manufacturers—the Original Participating Manufacturers ("OPMs"). Since execution of the MSA in 1998, more than 50 additional tobacco companies, the Subsequent Participating Manufacturers ("SPMs"), have agreed to be bound by its terms. The OPMs and SPMs, together, are referred to as the PMs. The PMs have significant obligations under the MSA, including making annual payments, in perpetuity, totaling billions of dollars, and agreeing to substantial restrictions on marketing activities. CP 200-214, 219-225, 230-252 (MSA §§ III, VI, IX).

Each OPM makes an annual aggregate payment to the States based on its nationwide cigarette sales volume during each calendar year. CP 230-247 (MSA § IX(a)-(h)). Each SPM makes an annual payment based on the ratio of its market share to the OPMs' aggregate market share. CP 248-249 (MSA § IX(i)). An

Independent Auditor, PricewaterhouseCoopers LLP, calculates the PMs' annual payments, including any adjustments required by the MSA. CP 255-256 (MSA § XI(a)-(b)).

Tobacco manufacturers that have not joined or agreed to the MSA are referred to as NPMs. CP 193 (MSA § II(cc)).

B. The NPM Adjustment

When negotiating the MSA, the parties recognized that the significant costs and restrictions of the MSA would place the PMs at a competitive disadvantage relative to NPMs and would jeopardize the public health gains of the MSA. CP 233-246 (MSA § IX(d)); CP 457-458 (MSA Ex. T, Findings and Purpose §§ (a)-(f)). This disadvantage threatens to shift sales from PMs to NPMs as consumers seek cheaper products, thereby diminishing the States' annual MSA payments and weakening the MSA's public health provisions. *Id.* When NPM sales increase at the expense of PM sales, the market shifts from PMs that have agreed to be bound by the MSA's terms to NPMs that have not. As a result, as the MSA is undermined, the number of

cigarettes that are subject to the MSA's marketing and advertising restrictions are reduced and the States lose money.

To address these concerns, the MSA's NPM Adjustment provision incentivizes States to enact and diligently enforce a Qualifying Statute requiring NPMs to make per-unit escrow deposits approximating the per-unit costs incurred by PMs under the MSA. CP 233-246 (MSA § IX(d)). The NPM Adjustment provision employs a carrot-and-stick approach. The stick is the NPM Adjustment itself, which reduces the PMs' aggregate annual MSA payment to the States for any year in which the disadvantages of the MSA were a "significant factor" contributing to the PMs' loss of more than 2% market share to NPMs. CP 234-236 (MSA § IX(d)(1)(C)). The carrot is a single exemption under which a State can avoid application of the NPM Adjustment to its share of the MSA settlement payment. A State is exempt from an otherwise applicable NPM Adjustment only if it enacted and "diligently enforced" a Qualifying Statute during the full year at issue. CP 236-237, 238, 457-461 (MSA §§

IX(d)(2)(B), (E) & Ex. T). The MSA directs that a diligent State's shares of the NPM Adjustment are reallocated (*i.e.* transferred) to the non-diligent States, meaning those States receive a reduced annual payment. CP 237-238 (MSA §§ IX(d)(2)(C), (D)). Thus, while a State is not required to enact or diligently enforce a Qualifying Statute, it must do so if it wants the benefit of contractual exemption from the NPM Adjustment.

The MSA contains a Model Statute that "constitute[s] a Qualifying Statute" if enacted by the State. CP 238, 457-461 (MSA § IX(d)(2)(E) & Ex. T). The Model Statute requires each tobacco product manufacturer to either join the MSA and generally perform its financial obligations as a PM, or make escrow deposits on "units sold" calculated to mirror the PMs' per-cigarette payment obligations. CP 459-461 (MSA Ex. T, Requirements). The Model Statute defines "units sold" as "the number of individual cigarettes sold in the State by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer or similar intermediary or intermediaries)

during the year in question, as measured by excise taxes collected by the State on packs (or 'roll-your-own' tobacco containers) bearing the excise tax stamp of the State." CP 459 (MSA Ex. T, Definitions § (j)). Washington's Qualifying Statute conforms to the Model Statute. *See* RCW 70.157.010 *et seq*.

Under the Qualifying Statute, NPMs are required to make escrow deposits into a qualified escrow fund. CP 458-461 (MSA Ex. T, Definitions § (f); Requirements). The deposits remain in escrow for 25 years unless used to pay a judgment against the NPMs or settle with the State. CP 460-461 (MSA Ex. T, Requirements § (b)(2)(A)-(C)). The escrow deposits thus provide a source of recovery should a State sue or settle with NPMs on claims like those the States resolved in the MSA, and avoid the risk that NPMs would otherwise use their MSA-related "cost advantage to derive large, short-term profits . . . and then becom[e] judgment-proof before liability [to the State] may arise." CP 457-458 (MSA Ex. T, Findings and Purpose §§ (a)-(f)). Accordingly, the NPM Adjustment is designed both to

"protect the public health gains achieved by" the MSA and to "fully neutralize[] the cost disadvantages" of the PMs vis-à-vis the NPMs by incentivizing the States to enact and diligently enforce a Qualifying Statute. CP 233 (MSA § IX(d)(1)); CP 238 (MSA § IX(d)(2)(E)).

C. All Disputes Concerning the NPM Adjustment Are Subject to Binding Arbitration

As discussed further below, the MSA expressly commits disputes over diligent enforcement to mandatory arbitration by a panel of three former Article III federal judges—one selected by the PMs, one selected by the States, and a third selected by those arbitrators. CP 256 (MSA § XI(c)). The Superior Court held in 2006 and confirmed in 2016—and Washington has not challenged either ruling—that the question of whether the State diligently enforced its Qualifying Statute in a given sales year, and therefore whether it is exempt from or subject to the NPM Adjustment for that year, is exclusively committed to arbitration under the MSA. CP 623-639. To date, there have been arbitration hearings regarding Washington's enforcement of its Qualifying

Statute for 2003 and 2004, and there is an ongoing arbitration proceeding for 2005 to 2007.

The present appeal arises out of Washington's collateral challenge to the unanimous Award entered by the 2004 NPM Adjustment Panel, comprised of: the Honorable Stanley F. Birch, who served 20 years as a judge on the Eleventh Circuit Court of Appeals; the Honorable Benson Everett Legg, who served 21 years as a judge in the District of Maryland, including as Chief Judge of that court; and the Honorable Philip M. Pro, who served 35 years as a district judge and magistrate judge for the District of Nevada.

D. Washington's 2004 NPM Adjustment Hearing Considered Evidence Regarding the State's Lack of Diligent Enforcement with Respect to Both Non-Tribal and Tribal Cigarette Sales, But Only the Non-Tribal Sales Were Determinative

It is undisputed that the PMs lost market share to the NPMs in 2004 and that the disadvantages of the MSA were a "significant factor" contributing to the loss. CP 654-655. Accordingly, the parties agree that the NPM Adjustment applies

to the PMs' aggregate 2004 MSA settlement payments. It is also undisputed that Washington had in effect a Qualifying Statute throughout 2004. CP 677. Thus, the 2004 Arbitration with respect to Washington concerned only whether it diligently enforced its Qualifying Statute in 2004 and is thus exempt from application of the 2004 NPM Adjustment to its share of the 2004 MSA settlement payments.

To answer this question, the Panel considered significant documentary evidence and testimony from fact and expert witnesses, presented over several hearing days, regarding the State's efforts (or lack thereof) to enforce its Qualifying Statute. CP 672-676. The Washington hearing addressed all aspects of the State's enforcement activities, including collection and verification of data, audits and inspections, sanctions, lawsuits and administrative enforcement actions, escrow deposit rates, reporting compliance, resource allocation, and inter-agency coordination. CP 725-764. Most of the evidence—and all of the evidence figuring into the Panel's "determinative" findings—

concerned the State's lack of diligence with respect to sales both sides agreed were "units sold" and subject to escrow, that is, sales of stamped, SET-paid cigarettes on non-tribal lands. *See id*.

The Panel also separately found that the State failed to diligently enforce its Qualifying Statute with respect to a contested category of cigarettes: stamped, tribal tax-paid sales to non-tribal members on "compact" tribal lands; but the Panel expressly found that this was "not determinative" of its Award. *See* CP 708-709, 763 at n.116.

Prior to 2001, tribal sales to non-tribal members in the State were subject to SET, and these SET-stamped cigarettes were undisputedly "units sold" subject to escrow requirements. CP 681-682. But in 2001, two years after enactment of the Qualifying Statute, the State adopted legislation permitting the governor to enter into "compacts" with certain tribes pursuant to which those tribes collected a "tribal" tax "in lieu of" SET, at a rate equal to 100 percent of the SET rate after a phase-in period. CP 682. That law made clear the "intent of the legislature that

the negotiations and the ensuing [tribal compacts] shall have no impact on the state's share of the proceeds under the [MSA]." CP 687 (quoting RCW 43.06.450). Nevertheless, the State ceased enforcing the Qualifying Statute with respect to sales of NPM cigarettes on compact tribal lands to non-tribal members, even though the cigarettes were stamped and subject to a tribal tax in lieu of SET.

At the Washington-specific hearing, the parties presented voluminous evidence and extensive briefing on whether the State should have made efforts to enforce its Qualifying Statute on these tribal compact sales. *See* CP 678-709. The PMs argued that, pursuant to the predominant view of Washington's own Office of the Attorney General ("OAG") enforcement personnel at the time, the tribal compact sales were "units sold" and were subject to enforcement under the Qualifying Statute. *See id*. As the OAG had explained in 2004, multiple justifications supported its then-current position that compact sales remained subject to escrow, including:

> (1) the compact legislation provided that the tribal tax stamp is directly "in lieu" of the SET tax stamp;
>
> (2) "but for the cigarette tax compact, the cigarettes would be subject to the state's excise tax and the packs would bear the state's excise tax stamp";
>
> (3) "when the Legislature passed the cigarette tax compact bill, it had no intention of impacting the NPM law";
>
> (4) "both the statute authorizing the tribal compacts, and the compacts themselves, specifically provide that the tribal compacts should not affect the MSA"; and
>
> (5) taking a contrary view would undermine "the intent and purposes of the MSA and the cigarette tax contract legislation," both of which were aimed at "leveling the playing field and under the MSA, reducing the level of smoking, and preventing minors from smoking."

CP 700-701, 703-705.

Accordingly, the PMs argued that Washington's failure even to attempt to enforce its Qualifying Statute with respect to tribal compact sales at the time was evidence of a lack of diligence. Washington argued that the tribal compact sales were not "units sold," regardless of the contrary position its own enforcers took at the time, and therefore its failure to enforce against such sales cannot constitute lack of diligent enforcement.

The Panel ultimately agreed with the PMs, but it also expressly found the issue non-determinative of its final conclusion that Washington failed to diligently enforce its Qualifying Statute. CP 708-709, 763 at n.116. That conclusion rested on the State's myriad failures with respect to sales that all parties agreed were "units sold."

E. The Panel Correctly Found the State Was Not Diligent in 2004

The Panel entered a 93-page Award (CP 672-764) on September 1, 2021, unanimously determining "that Washington failed to diligently enforce its Qualifying Statute during calendar year 2004 and, therefore, is subject to an NPM Adjustment." CP 764. Though the State has focused its post-Award briefing exclusively on tribal sales, more than 50 pages of the Award addressed the State's numerous failures to diligently enforce its Qualifying Statute with respect to non-tribal sales that all parties agree were "units sold." CP 709-764. The State's numerous "lapses" include its:

- Failure "to devote sufficient resources to escrow enforcement";
- Failure "to make effective use of retail inspections as an escrow enforcement tool";
- Failure "to create and execute an effective data collection and audit regimen";
- Failure to coordinate between "departments that played an enforcement role";
- Failure to adequately collect "complete and reliable data on NPM cigarette sales from NPMs and distributors" and "cross-check[] data received from these two sources";
- Failure to adequately "audit[] the data received from distributors and NPMs";
- Failure to adequately "impos[e] reasonable sanctions on distributors and NPMs that failed to report accurately and on time"; and
- Failure to adequately "analyze and audit NPM and distributor sales data," which "enabled widespread escrow evasion."

CP 726-728, 731-752, 762-763.

The Panel also found the State "failed to enforce escrow on [tribal] compact cigarette and [roll-your-own] sales that met the definition of [u]nits sold under the state's escrow statute," but

stated this finding was ***not*** determinative of the State's lack of diligence. CP 763 at n.116. The Panel thoroughly analyzed Washington law, weighed the evidence, and agreed with the PMs—and the State's own OAG enforcement personnel at the time—that escrow should have been sought on compact sales to non-tribal members in 2004. CP 708-709. As the Award found, the State's OAG had amply justified the position that compact sales were subject to escrow. *See* §IV.D, *supra*.

Despite these well-reasoned bases to pursue enforcement, the State ultimately declined to follow the recommendation of key OAG personnel. The State also disregarded the view of the National Association of Attorneys General ("NAAG") that "[c]ertainly the intent of the statute would have been to count these cigarettes," and "[i]f the [] stamp—either [sic] state or tribal—is required by WA law, then I think you have a good argument that the stamp is a stamp of the State." CP 705-706. Following a ten-minute meeting in 2005, newly-elected Attorney General Robert McKenna, who succeeded Attorney General

Christine Gregoire upon her election as governor, "announced his decision that compact sales were not subject to escrow." CP 707-708.

F. The Proceedings Below

On November 30, 2021, the State filed a motion to vacate the Award and for a declaratory judgment that tribal compact sales are not units sold under the MSA or the Qualifying Statute. CP 20-568. The State's motion focused solely on the Panel's non-determinative ruling that tribal compact sales to non-tribal members are units sold and did not challenge the Panel's other determinative findings of non-diligence. *Id*. The PMs opposed the State's motion. CP 585-969, 1079-1191.

The Superior Court held oral argument on February 11, 2022, and ruled on February 16, 2022. It denied the State's motion to vacate but granted the request for a declaratory judgment. CP 1257-1263. The Superior Court held the Panel's ruling on tribal sales was not determinative and thus did not warrant vacatur of the Award. CP 1259 ¶ 7. Nevertheless, the

Superior Court granted Washington's request for a declaratory judgment that tribal sales are not "units sold," and purported to apply its declaration to "the currently ongoing 2005-2007 NPM Adjustment Arbitration, as well as any future arbitration, over whether Washington diligently enforced its qualifying statute for a particular calendar year." CP 1260 ¶¶ 2-4.

The PMs filed notices of appeal from the portion of the Superior Court's order granting the State's motion for a declaratory judgment on March 14, 2022. CP 1209-1263. The State requested direct review by the Supreme Court pursuant to RAP 4.2(a)(4) of the portion of the order denying its motion to vacate. The PMs opposed the State's request for direct review, arguing that the Superior Court's order presented no urgent issue of broad public import and that the case involves a purely contractual dispute between the State and the PMs regarding application of the NPM Adjustment. The Supreme Court rejected the State's request for direct review on July 13, 2022, and

ordered the case be transferred to Division I of the Court of Appeals.

V. ARGUMENT

It is undisputed that any disagreement concerning the applicability of the NPM Adjustment to the State's MSA payment, including whether Washington diligently enforced its Qualifying Statute, is exclusively committed to arbitration under the express terms of the MSA. That common ground should resolve this appeal. In any controversy between the State and the PMs, the meaning of "units sold" is relevant only to the extent it informs an arbitration panel's diligent enforcement determination under the MSA, and therefore the application of the NPM Adjustment, during the disputed years in question. Thus, any action by the State seeking a declaration of the meaning of "units sold" with respect to the PMs is non-justiciable under the UDJA because that determination is committed to arbitration. And any action by the State seeking an abstract declaration regarding the State's statutory enforcement

obligations with respect to non-parties to this lawsuit is non-justiciable because it seeks an impermissible advisory opinion.

The standard of review is *de novo*, as the central question presented on appeal is whether the Superior Court was permitted to grant declaratory relief to Washington as a matter of law. *Borton & Sons, Inc. v. Burbank Props., LLC*, 196 Wn.2d 199, 205, 471 P.3d 871 (2020). Additionally, because the Superior Court made no findings of fact with respect to its entry of declaratory judgment, and purported to rule as a matter of law on a question of statutory interpretation, its conclusions are reviewed *de novo*. *See Nollette*, 115 Wn.2d at 600.

A. The Superior Court Erred by Granting a Declaratory Judgment on a Non-Justiciable Dispute Subject to Arbitration

The Superior Court erroneously granted declaratory relief on a non-justiciable dispute committed exclusively to arbitration under the express terms of the MSA. The UDJA does not permit state courts to carve out discrete issues from arbitrable disputes and declare their resolution while leaving the underlying

controversy in the arbitrators' hands. Nor does it permit advisory opinions on abstract questions of statutory construction involving non-parties to the immediate suit. Thus, however the State characterizes its claims on appeal, the Superior Court's declaratory judgment ruling should be reversed.

1. The "Units Sold" Question Is a Non-Justiciable Diligent Enforcement Issue Committed Exclusively to Arbitration

Invocation of the UDJA requires a "justiciable controversy" or "an issue of major public importance." *Republican Party v. Public Disclosure Comm'n*, 141 Wn.2d 245, 283-84, 4 P.3d 808 (2000). A justiciable controversy is:

> (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Nollette, 115 Wn.2d at 599 (quoting *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815). A court may not pick and choose

among the justiciability requirements; all four "must 'coalesce' to ensure that the court will be rendering a final judgment on an actual dispute between opposing parties with a genuine stake in the resolution." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (quoting *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815). "Absent these elements, the court 'steps into the prohibited area of advisory opinions.'" *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004) (quoting *Diversified Indus.,* 82 Wn.2d at 815).

Here, there is no justiciable controversy between Washington and the PMs with respect to the meaning of "units sold" because that question arises only in connection with the State's contractual diligent enforcement disputes under the MSA, which are committed exclusively to arbitration and are not subject to judicial determination. Thus, the Superior Court erred in finding the "units sold" question justiciable because the issue was not an "actual, present, and existing" dispute subject to a "final and conclusive" determination by Washington courts. The

two requirements do not and cannot "coalesce" here. Because court review of arbitral awards is narrow and deferential, it was improper for the Superior Court to artificially isolate the question of how to interpret and apply the definition of "units sold" from an arbitrable dispute and declare its outcome for all ongoing and potential future disputes.

Washington moved for declaratory judgment in a specific context—as alternative relief to its request to vacate the Panel's Award based on its assertion that the Panel misconstrued the meaning of "units sold" with respect to the non-determinative tribal sales issue. CP 23-25. The State argued that the Panel's decision should be vacated because of the supposed "significant impact [the tribal sales had] on the Panel's overall decision that Washington was not diligent during the 2004 sales year." CP 25. Washington then requested that the Superior Court "should also issue a declaratory judgment to finally and fully resolve this issue ***for ongoing and future MSA arbitrations***," because "[t]wo arbitration panels have reached exactly opposite conclusions,

and the issue is recurring for every sales year." *Id*. (emphasis added). The State reiterated on reply that it was seeking a declaration to resolve the "actual and recurrent dispute" in "***NPM Adjustment proceedings***" over "whether the State's ***diligent enforcement obligations*** under the MSA include cigarettes that bear tribal tax stamps and are tribal tax revenue." CP 1000-1001 (emphases added).

By Washington's own admission, therefore, the "actual, present, and existing" dispute in which it seeks a declaration of the meaning of "units sold" is, in reality, an ongoing and potential future ***arbitrated*** dispute between the State and the PMs under the MSA regarding whether Washington has diligently enforced its Qualifying Statute and is exempt from the NPM Adjustment for a given year. That dispute is not subject to a "final and conclusive" judicial determination at all. Obviously, no final arbitration decisions have been reached in the ongoing 2005-2007 NPM Adjustment arbitration, and it is unclear whether or when future arbitrations will even take place.

To the contrary, the MSA's exclusive arbitration clause and Washington law prohibit such judicial intervention into arbitration proceedings. Section XI(c) of the MSA requires arbitration before a panel of three former Article III federal judges of "[a]ny dispute, controversy or claim arising out of or relating to calculations performed by, or any determinations made by, the Independent Auditor," including "any dispute concerning the operation or ***application of any of the adjustments*** . . . and allocations described in subsection IX(j) or subsection XI(i))," one of which is the NPM Adjustment. CP 256 (MSA § XI(c) (emphasis added)).

Consistent with this plain language, the Superior Court held in 2006, and reaffirmed in 2016, that all disputes concerning application of the NPM Adjustment, including whether the State diligently enforced its Qualifying Statute, are subject to arbitration. CP 623-639. The court rejected the State's request for a declaratory judgment regarding its alleged diligent enforcement of the Qualifying Statute, holding:

> Review of the MSA compels the finding that the parties, ***clearly and without ambiguity, agreed that disputes of this nature would be subject to arbitration***. The mandatory arbitration clause, Section XI(c), requires that all disputes arising out of or relating to the calculations and determinations of the Independent Auditor must be arbitrated.
>
> That section cannot reasonably be read to imply the limitation argued by the State – that the Auditor base its calculations in part on determinations of diligent enforcement made by each state.
>
> Apart from what is the clear meaning of the Agreement language, ***it would make no sense in the context of the MSA to have that issue addressed independently by the various state courts***, for both procedural and substantive reasons. It is manifest from the Agreement that the parties were concerned that there be uniformity when addressing any NPM adjustment, and that objective would be significantly impaired were the State's approach adopted.

CP 624 (emphases added).

The Superior Court reaffirmed the arbitrators' broad authority in 2016, ordering, "the [2004] arbitration panel . . . will have sole discretion to decide what claims or issues shall be further resolved during and as part of the arbitration of the 2004 NPM adjustment arbitration." CP 634. That ruling is now final, and every State to consider this issue other than Montana has

likewise held that diligent enforcement disputes are exclusively committed to arbitration under the MSA. *See, e.g.*, *State ex rel. Balderas v. Philip Morris, U.S., Inc.*, No. A-1-CA-36199, 2019 N.M. App. Unpub. LEXIS 382, at *2 (N.M. App. Sept. 25, 2019) (citing *State ex rel. King v. Am. Tobacco Co.*, 2008-NMCA-142, 145 N.M. 134, 194 P.3d 749 (N.M. App. 2008)); *State ex rel. Greitens v. Am. Tobacco Co.*, 509 S.W.3d 726, 747 (Mo. 2017); *Commonwealth ex rel. Kane v. Philip Morris, Inc.*, 128 A.3d 334, 355 (Pa. Commw. Ct. 2015); *State v. Philip Morris, Inc.*, 25 Md. App. 214, 253-58, 123 A.3d 660 (Md. Ct. Spec. App. 2015); *cf. Montana ex rel. Bullock v. Philip Morris, Inc.*, 2009 MT 261, ¶¶ 15-27, 352 Mont. 30, 217 P.3d 475 (Mont. 2009). Washington did not challenge that ruling (and does not purport to do so here); indeed, it is currently actively arbitrating applicability of the NPM Adjustment for 2005 to 2007.

The commitment of diligent enforcement disputes between the State and PMs to arbitration under the MSA has clear and dispositive implications for Washington's request for

declaratory relief. Washington sought a judicial declaration regarding the meaning and application of "units sold" specifically in the context of "ongoing" and "future" MSA arbitrations about its diligent enforcement. But because diligent enforcement disputes must be arbitrated, the Superior Court could not carve out and decide a single issue in the abstract.

"There is a strong public policy in Washington State favoring arbitration of disputes." *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765, 934 P.2d 731 (1997). Accordingly, an agreement to arbitrate "limits the superior court's authority," constraining the Superior Court to "confirm, vacate, modify, or correct the arbitration award," and requiring it not to intervene to decide arbitrable matters prospectively and outside of the agreed arbitration process. *Munsey v. Walla Walla College*, 80 Wn. App.

92, 95-96, 906 P.2d 988 (1995).[2] In *Munsey*, the Court of Appeals held the Superior Court erred by ruling on discrete issues regarding the payment of arbitral fees that were committed to arbitration.

Here, as in *Munsey*, the Superior Court exceeded its limited authority when it granted declaratory relief. Its statutory role ended when it denied Washington's motion to vacate the Award. CP 1260. Having concluded that the Panel's actions did not support vacatur, modification, or correction of the Award because the tribal sales issue was "not determinative" of the Award, the Superior Court's statutory function was at an end. CP 1259-1260. Its next step of declaring the meaning of "units sold" in the "ongoing 2005-2007 NPM Adjustment Arbitration, as well as any future arbitration" is directly at odds with and exceeded

[2] *See also Dayton v. Farmers Ins. Grp.*, 124 Wn.2d 277, 279-80, 876 P.2d 896 (1994) (holding that arbitration proceedings "are controlled by statute," "[t]he statutes governing arbitration strictly limit the superior court's authority to review the arbitration award," and courts do "not have collateral authority to go behind the face of an award").

its limited authority to confirm, vacate, modify, or correct an arbitration award ***after*** the arbitration has concluded. The contractual agreement to arbitrate in the MSA affords Washington a "completely adequate remedy," and the only remedy to which it is entitled; and consequently, it "is not entitled to relief by way of a declaratory judgment." *King Cnty. v. Boeing Co.*, 18 Wn. App. 595, 602, 570 P.2d 713 (1977).

2. Washington's Asserted Interest Against the PMs on the Meaning of "Units Sold" Can Only Arise Under the MSA and Must Be Arbitrated

The Superior Court also erred insofar as it accepted Washington's assertion that the "units sold" issue could be decided outside the bounds of the MSA, as a question of pure statutory construction. *See* CP 46-47, 1001-1004. The Superior Court cannot enter a "final and conclusive" judicial determination of an abstract question of statutory construction, and a declaratory judgment directed to that goal "steps into the prohibited area of advisory opinions." *Branson*, 152 Wn.2d at 877. Thus, the "definitive ruling on the units sold issue" sought

by Washington to advance the State's putative "interest in enforcing the qualifying statute correctly," *see* CP 46, 1001, crossed the line into an impermissible advisory opinion.

Any effort to exclude the "units sold" issue from the scope of arbitration under the MSA is nothing more than an attempt to relitigate the same issue Washington already lost in 2006. As discussed above, the Superior Court rejected the State's essentially identical argument in 2006 that arbitration is limited to the Independent Auditor's "calculation" and the Superior Court could still "determine" Washington's diligent enforcement. CP 624. The Superior Court correctly held that construction was contrary to the clear and unambiguous language of the MSA, and "would make no sense in the context of the MSA[.]" *Id*. Washington did not appeal the 2006 ruling, and it is law of the case. *Tornetta v. Allstate Ins. Co.*, 94 Wn. App. 803, 809, 973 P.2d 8 (1999) ("A final order from which no appeal is taken becomes the law of the case."). Any argument that only disputes regarding the "calculation" of the NPM Adjustment are

arbitrable and that the meaning of "units sold" as applied to "diligent enforcement" is for a Superior Court to decide is just another way of saying "diligent enforcement" is for a court to decide. The State has already lost that issue.

The plain text of the MSA admits of no other interpretation. Section XI(c) does not just encompass "calculations performed by the Independent Auditor," but also "[a]ny dispute, controversy or claim ***arising out of or relating to*** calculations performed by, ***or any determinations made by***, the Independent Auditor," specifically including "any dispute concerning ***the operation or application of***," *inter alia*, the NPM Adjustment. CP 256 (emphases added). Washington courts have repeatedly held that the phrases "arising out of" and "relating to" connote the broadest commitment of disputes to arbitration, and "all doubts are to be resolved in favor of arbitrability." *Wiese v. Cach, LLC*, 189 Wn. App. 466, 477, 358 P.3d 1213 (2015) (quoting *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999)); *see also, e.g., David Terry Invs. v. Headwaters Dev.*

Grp., 13 Wn. App. 2d 159, 167, 463 P.3d 117 (2020); *Boyd v. Davis*, 75 Wn. App. 23, 27, 876 P.2d 478 (1994). Here, the meaning and application of "units sold" in determining whether Washington diligently enforced its Qualifying Statute is unquestionably a dispute "arising out of" or "relating to" the application of the NPM Adjustment, and thus is committed to arbitration.

3. Washington's Abstract Interest in "Enforcing the Law" Is Not Cognizable Under the UDJA

Even as the State sought to obtain a declaratory judgment applicable to ongoing and future arbitrations, it also argued that it was seeking to vindicate its direct interest in "enforcing the qualifying statute correctly." CP 46. To the extent the Superior Court relied on that purported "interest," it also erred because such an interest is limitless and not directed to any actual, present, and existing dispute between Washington and the PMs. The State may desire the Court's advice on how to enforce the Qualifying Statute, or any number of other statutes, but the UDJA does not allow for such advisory legal opinions. Put

simply, the State cannot sever the meaning of "units sold" from the NPM Adjustment arbitration based on its abstract interest in enforcing the law "correctly."

First, by its plain terms, the State's interest in "correctly" enforcing the Qualifying Statute's escrow requirements does not apply to the PMs here, which are not subject to those requirements. *See* RCW 70.157. Washington's enforcement of the Qualifying Statute is instead directed against noncompliant tobacco manufacturers that are ***not*** parties to this suit and owe escrow deposits. Thus, there is no direct "present and existing dispute" between the State and the PMs under the Qualifying Statute; rather, the only existing dispute is the arbitrable contractual diligence dispute under the MSA. *See Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815.

The Court of Appeals recently rejected the same "interest" the State asserts here, concluding that being "charged with enforcing [a] statute" does not confer standing to seek a declaration of its constitutionality. *Stevens Cnty. v. Stevens Cnty.*

Sheriff's Dep't, 20 Wn. App. 2d 34, 42-43, 499 P.3d 917 (2021), *review denied*, 506 P.3d 639 (2022) ("The County's interest in protecting the rights of unidentified individuals who are not named as parties is not an interest that is protected or regulated by the [statute in question]."); *compare* CP 46 (asserting "interest in enforcing the qualifying statute correctly"). Thus, the State's abstract interest in "correctly" enforcing a statute against third parties like the NPMs cannot provide the basis for a UDJA action against Appellants.

Second, Washington's requested remedy confirms the State has no "genuine and opposing interest" to the PMs outside the context of the MSA. The State sought the Superior Court's prospective declaration of the meaning of "units sold" only in the specific context of "ongoing and future MSA arbitrations." CP 25; *see also* CP 1000-1001. That statement is a telling admission that the State's only actual dispute with the PMs is the contractual and exclusively arbitrable dispute under the MSA concerning Washington's ***past*** enforcement of the Qualifying

Statute—and on that issue, the State's interests extend only to the amount of its MSA payments. Declaring the meaning of "units sold" generically thus "would not terminate the uncertainty or controversy giving rise to the proceeding" and is not a suitable matter for declaratory judgment. RCW 7.24.060; *see also Port of Seattle v. Wash. Utilities & Transp. Comm'n*, 92 Wn.2d 789, 806, 597 P.2d 383 (1979).

Third, to the extent the State wants guidance on how to enforce the Qualifying Statute "correctly" in the future—outside the context of MSA payment disputes—the courts cannot direct any such relief against the PMs here. They are not parties to the State's enforcement actions, there is no claim that they owe escrow under the Qualifying Statute, and the State's claims are not redressable by the PMs in this lawsuit. Nor is Washington the right party to bring such an action, as it is the statutory enforcer, not an NPM subject to enforcement. *See, e.g.*, *Stevens Cnty.*, 20 Wn. App. 2d at 42-43 (dismissing UDJA suit because County's "responsibility to enforce a statute" is not "an interest within the

zone of interests protected or regulated by the statute"); *Gortmaker v. Seaton*, 252 Or. 440, 442-45, 450 P.2d 547, 548-49 (1969) (District Attorney charged with enforcing criminal laws is the wrong party to bring a declaratory judgment action to clarify the law).

Indeed, if an abstract interest in "enforcement" were sufficient to confer a "right" under the UDJA, then the identity of the defendant would not matter at all. The State could just as easily have sued tribal *amici* or any other entity or private company. *See KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 136, 272 P.3d 876 (2012) (incorporating federal principles of causation and redressability and noting difficulty of proving standing where suit depends on third-party action or inaction). Washington courts cannot deliver effective relief against any entity on an abstract statutory question.

Fourth, Washington has no cognizable "interest" in a declaratory judgment against a party that is not subject to the provisions of the statute the State enforces. State entities have no

cognizable "interest" in an advisory opinion on how to enforce the law. *See Stevens Cnty.*, 20 Wn. App. 2d at 42-43. In this respect, *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 323 S.E.2d 294 (1984), is persuasive. There, the North Carolina Attorney General brought a declaratory judgment action against judges who had found portions of the Safe Roads Act (which altered the criminal offense of drunk driving) unconstitutional. *Id.* at 329-30. The question presented was "whether the State can bring an action to declare 'what the law is' and have it ultimately brought to this Court for review." *Id.* at 337. The North Carolina Supreme Court held the State could not, explaining, "although the Attorney General has a 'compelling interest' in the enforcement of the criminal laws, such an interest does not entitle him to maintain a declaratory judgment proceeding." *Id.* at 346. Decisions from Washington and elsewhere reinforce this principle that a mere interest in an interpretation of the law does not confer standing. *See Pasado's Safe Haven v. State*, 162 Wn. App. 746, 749, 259 P.3d 280 (2011) ("regardless of our

resolution of the merits of the various challenges made, at the end of this case the status quo would necessarily prevail" and any decision "would be nothing more than an advisory one"); *Foote v. State*, 364 Or. 558, 571, 437 P.3d 221, 228 (2019) ("[The District Attorney's] asserted interest in certainty about his prosecutorial duties with respect to the effect of a criminal statute is not an interest that can confer standing[.]").

Fifth, a declaratory judgment will not resolve the present dispute because, even if the State had a cognizable interest in the interpretation of "units sold" for future disputes (it does not), that interest is not "actual," "direct," or "substantial" here. *Yakima Cnty. Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 379-80, 858 P.2d 245 (1993) ("*Yakima Fire*") (fire district lacked standing to invalidate landowners' agreements because its purported financial interests depended on future events and were indirect and speculative). The Superior Court's declaration on the meaning of "units sold" was advisory in every sense. *See Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815. While the Order

purportedly applied to ongoing and future arbitrations, any factual or legal disputes arising in those arbitrations—as in the 2004 arbitration—are firmly committed to the arbitration panels. *See* § IV.A.1, *supra*. The results of those future arbitrations—much like the contracts in *Yakima Fire*—depend on speculative future events. *See Yakima Fire*, 122 Wn.2d at 379-80; *Lewis Cnty. v. State*, 178 Wn. App. 431, 438-39, 315 P.3d 550 (2013) (rejecting argument that "amount of money at stake in the future creates a direct and substantial interest," and finding county lacked standing to seek declaratory judgment holding that the State, not the County, was responsible for official acts of County judges and other judicial employees); *see also Ames v. Pierce Cnty.*, 194 Wn. App. 93, 116-19, 374 P.3d 228 (2016).

4. This Dispute Does Not Satisfy the "Major Public Importance" Exception to Justiciability

Washington has never argued that a declaratory judgment is proper under the narrow "major public importance" exception to the justiciability requirements, and it cannot assert any such argument on appeal. *See State v. Riley*, 121 Wn.2d 22, 31, 846

P.2d 1365 (1993) ("Arguments not raised in the trial court generally will not be considered on appeal."). But even if it could, the exception plainly does not apply here.

The "major public importance" exception applies only in "rare cases" where the interest is "overwhelming," *Lewis Cnty.*, 178 Wn. App. at 440, and the issue is ripe, *League of Educ. Voters v. State*, 176 Wn.2d 808, 820, 295 P.3d 743 (2013). A purely monetary interest does not satisfy the exception. *See Lewis Cnty.*, 178 Wn. App. at 440-41; *see also Wash. State Coalition for the Homeless v. Dep't of Social and Health Servs.*, 133 Wn.2d 894, 917-18, 949 P.2d 1291 (1997) ("issues of major public importance" include "questions of salary, tenure and eligibility to stand for office," matters "directly affecting the freedom of choice in the election process," the constitutionality of state tax statutes, and the duty of the State to develop and implement a comprehensive and coordinated plan for providing services to homeless children).

Here, Washington seeks a declaratory judgment on the meaning of "units sold" in the context of its NPM Adjustment arbitrations with the PMs. These purely contractual disputes regarding the application of one adjustment to an annual monetary settlement payment do not satisfy the narrow "major public importance" exception. Indeed, the Supreme Court has already rejected the State's request for direct review, reflecting its determination that this case does not present an "urgent issue of broad public import." RAP 4.2(a)(4).

Courts must "examine not only the public interest which is represented by the subject matter of the challenged statute, but the extent to which public interest would be enhanced by reviewing the case." *Snohomish County v. Anderson*, 124 Wn.2d 834, 841, 881 P.2d 240 (1994) (collecting cases). Washington has not identified and cannot identify any enhancement of the public interest from affording a judicial imprimatur to reduced enforcement of the Qualifying Statute, thus allowing cheap cigarette sales to flow unabated on tribal lands, reducing both the

number of cigarettes subject to the MSA's public health provisions and the MSA payments received by the State.

B. Washington Lacks Standing to Obtain a Declaratory Judgment on the Statutory Meaning of "Units Sold"

Much as Washington cannot satisfy the UDJA's justiciability requirements, the State also lacks statutory standing to bring an action as a "person" under the statute. The UDJA grants standing only to "[a] person interested under a … written contract" or "whose rights, status or other legal relations are affected by a statute" to "obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020. A person asserting standing "must show [it is] being affected or denied some benefit"; a "mere interest" is "not sufficient" to confer standing. *Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 528, 219 P.3d 941 (2009).

Washington is not a "person" under the UDJA, which specifically defines the term as "any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever." *See*

RCW 7.24.130. These words must be given their ordinary meaning. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). Washington does not satisfy either the statutory or ordinary meaning of a "person." *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 58 (1989) ("[I]n common usage, the term 'person' does not include a State."); *see also Lakehaven Water & Sewer Dist. v. City of Fed. Way*, 195 Wn.2d 742, 770, 466 P.3d 213 (2020) (water and sewer districts "do not have personhood like private corporations do" for purposes of asserting due process vagueness challenge under the UDJA).

The State argued below that it is a "person" insofar as it is seeking a declaratory judgment as a contracting party to the MSA, citing inapposite cases in which the court did not consider whether the State is a "person" under the UDJA. *See* CP 1000 (citing *Dep't of Game v. Puyallup Tribe, Inc.*, 70 Wn.2d 245, 248, 422 P.2d 754 (1967) not considering whether State is a "person" under UDJA while allowing State departments to bring declaratory action to declare treaty rights as an alternative to

multiple criminal actions against tribal members); *State v. Kaiser*, 161 Wn. App. 705, 715, 254 P.3d 850 (2011) (addressing request for declaratory relief by the State under Consumer Protection Act, not the UDJA, and not considering whether State is a "person"); *State v. Grays Harbor Cnty.*, 98 Wn.2d 606, 607, 656 P.2d 1084 (1983) (addressing request for declaratory relief regarding payments for intergovernmental services and not considering whether State is a "person")).

Even assuming, *arguendo*, that Washington could qualify as a "person" in its capacity as a contracting party to the MSA—though the UDJA contains no such exception—the State contracted to arbitrate its diligent enforcement disputes and therefore lacks a justiciable declaratory judgment claim in its contracting capacity. *See* § IV.A, *supra*. To the extent Washington asserts its declaratory judgment claim in its capacity as enforcer of the Qualifying Statute, it is plainly acting as a sovereign and not as a contracting "person," and thus lacks standing as a "person" under the UDJA. *See State v. Sims*, 193

Wn.2d 86, 94-95, 441 P.3d 262 (2019) (distinguishing between cases in which State acts in a private capacity pursuant to contract and cases in which it acts as a sovereign). This further reinforces the point that, because Washington has expressly tied its request for declaratory judgment to ongoing and future NPM Adjustment arbitrations concerning the enforcement of its Qualifying Statute, it lacks both justiciability and standing.

C. The Superior Court Erred by Interjecting Its Advisory Opinion into a Factual Dispute the Panel Correctly Decided Based on the Evidentiary Record in the 2004 Arbitration

The PMs' justiciability and standing arguments are not procedural technicalities; the Superior Court's decision will disrupt the MSA's entire dispute resolution process. Indeed, this case readily illustrates why Washington law does not permit advisory opinions under the UDJA. The Superior Court construed "units sold" in the abstract and interposed its views on all ongoing and future NPM Adjustment arbitrations, while failing to consider the context in which the 2004 NPM Adjustment Panel construed and applied "units sold" to the

factual question of whether Washington diligently enforced its Qualifying Statute in the year 2004. CP 1258-1260.

Notably, the Award's "common" findings (applicable to all arbitrating States) first discussed the statutory meaning of "units sold" under the Qualifying Statute, and articulated the statutory definition quite similarly to the Superior Court's putative declaration of the meaning of "units sold." The Panel found "no ambiguity" in the definition of "units sold" set forth in the MSA, concluding that it means "the number of individual cigarettes sold in the State by a tobacco product manufacturer" that were both "stamped and taxed." CP 665. The Superior Court likewise stated that the meaning of "units sold" is "plain and unambiguous" and includes "[o]nly cigarettes in packs bearing the excise tax stamp of the State[.]" CP 1258.

The Superior Court, however, then went on to declare—without addressing the factual context of the Panel's contrary determination—that cigarettes sold under the State's tribal compact system do not meet the statutory definition of "units

sold" because they are stamped and taxed by tribes and not by the State. CP 1259. It further stated that, "[t]he 2004 Panel's ruling that compact cigarettes were 'units sold' within the scope of Washington's Qualifying Statute constituted plain error." *Id*.

The Superior Court misconstrued the Panel's Award. The Panel did conclude (as a non-determinative finding) that Washington's failure to attempt to enforce its Qualifying Statute upon sales of tribal cigarettes as "units sold" was evidence of a lack of diligence in 2004, but this was a factual finding based on Washington's then-prevailing view of its authority to enforce against tribal cigarette sales as "units sold," not a statutory construction of the abstract meaning of "units sold." The Superior Court's declaratory judgment severed the 2004 Panel's ruling from its context, stripped the Panel of its contractual fact-finding role, and imposed an abstract construction of "units sold" to all ongoing and future NPM Adjustment arbitrations. That erroneously interposed a judicial advisory opinion into a quintessential fact question.

The Panel's State-specific discussion of "units sold" in the context of tribal cigarette sales began with a discussion of the legal framework for tribal and State taxes under Washington law, followed by a discussion of the history of tribal sales in Washington under both the pre-compact allocation system and the compact system. CP 678-682. The Panel then detailed the extensive witness testimony and evidence regarding the question of whether Washington should have sought to enforce its Qualifying Statute with respect to tribal cigarette sales to meet the contractual standard of diligence in 2004. CP 684-708. This question focused largely on the position taken by the State ***at the time*** of the adoption of the compact system and with respect to sales of tribal cigarettes in 2004 under the compact system. *Id*.

The Panel received considerable evidence of OAG's prevailing view at the time that tribal cigarette sales ***were*** "units sold" and that NPMs were obligated to deposit escrow on tribal-stamped and tribal-taxed sales of NPM cigarettes to non-tribal members. The evidence included that: Washington considered

roll-your-own ("RYO") tobacco to be "units sold" even though there was no attendant requirement of a stamp on an RYO container (CP 691); OAG enforcers believed escrow was required on compact sales of NPM cigarettes and consistently held to that position until 2005, when newly elected Washington Attorney General Robert McKenna decided over the objection of his staff that compact sales would not be subject to escrow (CP 692-694); contemporaneous emails reflected Department of Revenue staff believed and were telling wholesalers that compact sales needed to be included in their NPM reports as subject to escrow (CP 694); Washington's public position at the time was that escrow was due on compact sales (CP 696); the consensus view of OAG's enforcement staff, as summarized in 2003 and 2004 memoranda, was that compact cigarettes should be included as units sold for purposes of collecting escrow under the Qualifying Statute (CP 699-705); when Washington's enforcement personnel reached out to NAAG for advice, NAAG's counsel agreed that compact sales should be counted as

units sold (CP 705-707); and Washington's enforcement personnel warned in 2005 that a decision to exempt compact cigarettes from units sold would open a "very large hole" in the Qualifying Statute to the detriment of public health. CP 707.

Based on its consideration of the contemporaneous evidence—including "[t]he position taken by the AGO Staff, including Hankins, Horn, Costello, Calkins, Casparian, and Walsh" (CP 708)—the Panel concluded that Washington's failure to "enforce escrow on compact cigarette and RYO sales that met the definition of Units sold" under the Qualifying Statute constituted a failure of diligent enforcement, albeit one that was "not determinative of the Panel's decision on diligent enforcement." CP 708-709, 763 & n.116. In context, then, the Panel's Award and its discussion of "units sold" with respect to Washington's failure to enforce against tribal compact sales was a factual determination based on the contemporaneous evidence of the State's predominant view at the time that compact sales were units sold, and its failure to pursue escrow with respect to

such sales thus constituted a failure of diligent enforcement based on its own understanding of the Qualifying Statute during the relevant time period.

The Superior Court's conclusion almost two decades later that Washington's understanding of its own Qualifying Statute during 2004 was mistaken is beside the point. The fact question before the Panel was whether Washington diligently enforced its Qualifying Statute in 2004, and the Panel was permitted to consider and account for the State's failure even to attempt to collect escrow on compact sales that it contemporaneously believed, throughout the relevant 2003 and 2004 time period, qualified as units sold.

The Superior Court's finding that the Panel committed "plain error" based on an abstract statutory construction, without considering the surrounding factual evidence and circumstances, thus impermissibly interjected an advisory opinion into the Panel's well-supported and well-reasoned factual findings. The Panel correctly determined, based on the evidence before it, that

Washington's decision to adopt a policy of not requiring escrow deposits on tribal compact sales was inconsistent with diligent enforcement at the relevant time.

The State admittedly did essentially nothing to enforce the Qualifying Statute with respect to compact tribal sales at a time when its enforcers unequivocally believed such sales were subject to escrow. Presented with evidence of Washington's conscious choice not to attempt to require escrow deposits on tens of millions of compact tribal NPM sales to non-tribal members that it believed were subject to escrow, the Panel correctly measured Washington's diligence against its views at the time, and found its diligence wanting with respect to tribal sales. It was error for the Superior Court to sever the question of "units sold" from its factual context, declare its meaning in

isolation, and impose its advisory views on all ongoing and future arbitrations without regard to the surrounding facts.[3]

VI. CONCLUSION

The Superior Court correctly held that the record presented no basis to vacate or modify the Panel's Award. Its ruling should have ended there. By proceeding to take up Washington's request for declaratory relief, announcing its views in the abstract on the meaning of "units sold," and imposing those views upon all ongoing and future NPM Adjustment arbitration panels, the Superior Court erred. It

[3] The dangers of a prospective ruling on the meaning of "units sold," separated from the relevant factual context, is clear, as it leaves the parties or arbitrators to ascertain the implications of the Superior Court's abstract statutory construction in fact-bound contexts. For example, if a substantial percentage of the tax collected on stamped cigarettes sold pursuant to a tribal compact goes to the State in accordance with the terms of the compact, those sales should satisfy the definition of "units sold." But, it is still unclear how the Superior Court's ruling that "for all future proceedings . . . compact cigarette sales shall not, as a matter of law, be considered to meet the definition of 'units sold' under the MSA or RCW 70.157.010(j)" would (or could) apply under such circumstances.

entered an advisory opinion on a non-justiciable question, intruded on the exclusive fact-finding role of the Panel and ongoing and future arbitration panels, exceeded its statutory authority in reviewing an arbitral award, awarded declaratory relief to the State despite its lack of standing, and impermissibly interjected its views into ongoing and future arbitration proceedings. For these reasons, the Court should vacate the Superior Court's Order insofar as it entered declaratory relief in favor of Washington and against the PMs, and grant such other and further relief as the Court deems necessary or appropriate.

The undersigned certifies that the number of words contained in this document, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits) is 10,416 words, which is within the limits of RAP 18.17.

DATED this 1st day of September, 2022.

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APPENDIX

1. **Order Denying State's Motion Vacating Arbitration Award (CP 1257-63)**
2. **RCW 70.157.010**

1

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. AMERICAN TOBACCO CO., et al., Defendant.	NO. 96-2-15056-8 SEA ORDER DENYING STATE'S MOTION TO VACATE ARBITRATION AWARD AND GRANTING STATE'S MOTION FOR DECLARATORY JUDGMENT

THIS MATTER is before the Court on State's Motion to Vacate Arbitration Award and for Declaratory Judgment. Having heard oral argument, including the parties' illustrative demonstratives, and having considered the pleadings and files of record, and in particular the materials submitted by the parties and others for the motion, the latter of which includes the following:

1. State's Motion to Vacate Arbitration Award and for Declaratory Judgment;
2. Declaration of Rene D. Tomisser;
3. Notice of Intent to File Opposition;
4. Participating Manufacturers' Response to State's Motion to Vacate Arbitration Award and for Declaratory Judgment;
5. Declaration of John A. Tondini;
6. Defendants Philip Morris USA, Inc. and Sherman's 1400 Broadway N.Y.C., LLC's Opposition to State's Motion to Vacate Arbitration Award and for Declaratory Judgment;

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7. Notice of Joinder in Oppositions Submitted by Other Participating Manufacturers in Response to Washington's Motion to Vacate Arbitration Award and for Declaratory Judgment;

8. Notice of Joinder in Opposition to Washington's Motion to Vacate Arbitration Award and for Declaratory Judgment;

9. Motion for Leave to File Amicus Curiae Brief of Indian Tribal Governments Who Are Parties to Cigarette Tax Compacts With the State of Washington;

10. Reply in Support of State's Motion to Vacate Arbitration Award and for Declaratory Judgment;

11. Declaration of Rene D. Tomisser in Support of State's Motion to Vacate Arbitration Award and for Declaratory Judgment;

12. Participating Manufacturers' Response to Amicus Curiae Brief of Indian Tribal Governments Who Are Parties to Cigarette Tax Compacts With the State of Washington; and

13. Amicus Curiae Brief of Indian Tribal Governments Who Are Parties to Cigarette Tax Compacts with the State of Washington.

The Court hereby FINDS, DECLARES, and RULES as follows:

1. This Court has continuing jurisdiction over interpretation of the Master Settlement Agreement and disputes arising out of that Agreement pursuant to a Consent Decree.

2. The meaning of "units sold" as defined in RCW 70.157.010(j) is plain and unambiguous.

3. Only cigarettes in packs bearing the excise tax stamp of the State meet this definition of "units sold."

4. Under the MSA, Washington State shall not be subject to an NPM Adjustment if it continuously had its Qualifying Statute (RCW 70.157.020) in full force and effect during the entire calendar year immediately preceding the year in which the payment is due, and diligently enforced the provisions of its Qualifying Statute during such entire calendar year. The Qualifying Statute defines the Cigarettes that are the subject of diligent enforcement. Tribal compact cigarettes are not within the definition of "units sold" under the Qualifying Statute. Tribal compact cigarettes are thus outside the scope of Washington's Qualifying Statute. Cigarettes

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sold under the tribal compact system described in RCW 43.06 and contained in packs of cigarettes bearing the excise tax stamp of a Native American tribe are not "units sold" as defined in RCW 70.157.010(j) because those packs of cigarettes do not bear the excise tax stamp of the State of Washington.

5. Cigarettes sold under the compact system described in RCW 43.06 are taxed by sovereign Native American tribes. The authority for these tribes to tax sales of these cigarettes is derived from the inherent authority of those tribes as sovereigns. RCW 43.06 does not create the authority for tribes to impose these taxes. Rather, RCW 43.06 provides that the State will forego imposing its own excise taxes on the sales of these cigarettes if the tribes meet certain conditions contained in the statute and any applicable compact negotiated between the State and the tribe.

6. The 2004 Panel's ruling that compact cigarettes were "units sold" within the scope of Washington's Qualifying Statute constituted plain error. Washington law applies to this dispute.

7. Under RCW 7.04A.230(3), this Court has discretion to determine whether to order a rehearing. Regardless of the Panel's error regarding tribal compact sales and "units sold", in footnote 116 of its decision, the Panel stated that Washington's decision not to collect escrow for compact sales was "not determinative" of its decision that Washington did not diligently enforce its qualifying statute in 2004, and that other lapses in its enforcement were an independent ground for its diligence determination. Accordingly, this Court denies the State's motion to vacate the Arbitration Award.

8. The Court also has jurisdiction under the Declaratory Judgment Act to declare the rights of the parties on an ongoing basis.

9. With respect to Washington, the issue of whether compact cigarettes are units sold is justiciable, and is not subject to mandatory arbitration.

The Court therefore ORDERS as follows:

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1. The State's motion to vacate the Arbitration Award is DENIED.

2. The State's motion for a declaratory judgment that tribal compact cigarettes fall outside the scope of Washington's Qualifying Statute and shall not, as a matter of Washington law, be considered to meet the definition of "units sold" under the MSA or RCW 70.157.010(j) is GRANTED.

3. The finding, declarations, and rulings in this Order shall apply to the currently ongoing 2005-2007 NPM Adjustment Arbitration, as well as any future arbitration, over whether Washington diligently enforced its qualifying statute for a particular calendar year.

4. In sum, for all future proceedings, included but not limited to the currently ongoing 2005-2007 NPM Adjustment Arbitration, only cigarettes contained in packs bearing the excise tax stamp of the State shall be considered "units sold" as defined under the MSA and RCW 70.157.010(j). This necessarily means that compact cigarette sales shall not, as a matter of law, be considered to meet the definition of "units sold" under the MSA or RCW 70.157.010(j).5.The findings, declarations, and rulings in this Order constitute a binding declaration of the rights of the parties to this proceeding under the MSA and Washington law, pursuant to the Declaratory Judgment Act and the Consent Decree.

DATED this 16th day of February, 2022.

Electronic Signature Attached
THE HONORABLE REGINA S. CAHAN
King County Superior Court

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King County Superior Court
Judicial Electronic Signature Page

Case Number:	96-2-15056-8
Case Title:	WASHINGTON STATE OF VS AMERICAN TOBACCO CO INC ET AL
Document Title:	ORDER RE ON STATE MOTIONS

Signed By:	Regina Cahan
Date:	February 16, 2022

Judge: Regina Cahan

This document is signed in accordance with the provisions in GR 30.

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2

West's Revised Code of Washington Annotated
Title 70. Public Health and Safety (Refs & Annos)
Chapter 70.157. National Uniform Tobacco Settlement--Nonparticipating Tobacco Product Manufacturers

West's RCWA 70.157.010

70.157.010. Definitions

Currentness

(a) "Adjusted for inflation" means increased in accordance with the formula for inflation adjustment set forth in Exhibit C to the Master Settlement Agreement.

(b) "Affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, the terms "owns," "is owned" and "ownership" mean ownership of an equity interest, or the equivalent thereof, of ten percent or more, and the term "person" means an individual, partnership, committee, association, corporation or any other organization or group of persons.

(c) "Allocable share" means Allocable Share as that term is defined in the Master Settlement Agreement.

(d) "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (1) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one individual "cigarette".

(e) “Master Settlement Agreement” means the settlement agreement (and related documents) entered into on November 23, 1998 by the State and leading United States tobacco product manufacturers.

(f) “Qualified escrow fund” means an escrow arrangement with a federally or State chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least $1,000,000,000 where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing or directing the use of the funds' principal except as consistent with RCW 70.157.020(b).

(g) “Released claims” means Released Claims as that term is defined in the Master Settlement Agreement.

(h) “Releasing parties” means Releasing Parties as that term is defined in the Master Settlement Agreement.

(i) “Tobacco Product Manufacturer” means an entity that after the date of enactment of this Act directly (and not exclusively through any affiliate):

(1) manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer (as that term is defined in the Master Settlement Agreement) that will be responsible for the payments under the Master Settlement Agreement with respect to such cigarettes as a result of the provisions of subsections II(mm) of the Master Settlement Agreement and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States);

(2) is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

(3) becomes a successor of an entity described in paragraph (1) or (2).

The term "Tobacco Product Manufacturer" shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within any of (1)-(3) above.

(j) "Units sold" means the number of individual cigarettes sold in the State by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer or similar intermediary or intermediaries) during the year in question, as measured by excise taxes collected by the State on packs bearing the excise tax stamp of the State or "roll-your-own" tobacco containers. The department of revenue shall promulgate such regulations as are necessary to ascertain the amount of State excise tax paid on the cigarettes of such tobacco product manufacturer for each year.

Credits
[1999 c 393 § 2.]

OFFICIAL NOTES

Captions not law--Effective date--1999 c 393: See notes following RCW 70.157.005.

West's RCWA 70.157.010, WA ST 70.157.010
Current with all effective legislation from the 2022 Regular Session of the Washington Legislature. Some statute sections may be more current, see credits for details.

CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 1st day of September, 2022, a true copy of the foregoing was served on each and every attorney of record herein via email:

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

DATED in Seattle, Washington, this 1st day of September, 2022.

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