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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 CROSS-RESPONSE AND REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 7

A. The Superior Court Correctly Denied Washington's Motion to Vacate the Award Based on More Than 50 Pages of Uncontested Determinative Findings of Fact 7

1. The Panel Properly Exercised Its Contractual Authority to Decide the Parties' NPM Adjustment Dispute 10

2. Washington Law Does Not Support Vacatur Based on an Assertion of Non-Dispositive Legal Error 19

B. The Superior Court Erred by Entering a Declaratory Judgment on a Non-Justiciable Matter 25

1. Washington's So-Called "Recurring Dispute" Over "Units Sold" Does Not Satisfy the Elements of Justiciability 27

2. Putative Legal Questions Are Not Exempt from the Requirements of Justiciability 32

3. Washington Cannot Manufacture Justiciability by Artificially Excluding the "Units Sold" Issue from the Scope of the MSA's Arbitration Clause 36

4. Washington Cannot Ignore Justiciability on Grounds of "Efficiency" 44

5. Washington's Belated Attempt to Invoke the "Major Public Importance" Exception to Justiciability Falls Short 45

6. Washington Concedes the Superior Court's Error in Granting Declaratory Judgment Based on the State's Asserted Interest in "Enforcing the Qualifying Statute Correctly" 50

7. The PMs Did Not "Waive" The Superior Court's Substantive Error 56

C. Washington Fails to Cure Its Lack of Standing .. 63

III. CONCLUSION 68

TABLE OF AUTHORITIES

Page(s)

Cases

Matter of Adoption of T.A.W.,
186 Wn.2d 828, 383 P.3d 492 (2016) 55

Barnes v. Logan,
122 F.3d 820 (9th Cir. 1997) 20

Berman v. Tierra Real Estate Grp.,
23 Wn. App. 2d 387, 515 P.3d 1004 (2022) 41

Bottomer v. Progressive Casualty Ins. Co.,
816 A.2d 1172 (Pa. Super 2003) 43

Boyd v. Davis,
127 Wn.2d 256, 897 P.2d 1239 (1995) 35

Boyd v. Davis,
75 Wn. App. 23, 876 P.2d 478 (1994) 17, 41

Branson v. Port of Seattle,
152 Wn.2d 862, 101 P.3d 67 (2004) 32

Broom v. Morgan Stanley DW Inc.,
169 Wn.2d 231, 236 P.3d 182 (2010) 22, 23

Burgess v. Lithia Motors, Inc.,
196 Wn.2d 187, 471 P.3d 201 (2020) 12, 31, 32, 34

Central Hudson Gas & Electric Corporation v. Benjamin F. Shaw Co.,
465 F. Supp. 331 (S.D.N.Y. 1978) 43

Chiron Corp. v. Ortho Diagnostic Sys.,
207 F.3d 1126 (9th Cir. 2000) 41

City of Snoqualmie v. King Cnty. Exec. Dow Constantine,
187 Wn.2d 289, 386 P.3d 279 (2016) 48

Commonwealth v. Philip Morris USA, Inc.,
114 A.3d 37 (Pa. Commw. Ct. 2015)................................. 13

Cook v. Selland Constr., Inc.,
81 Wn. App. 98, 912 P.2d 1088 (1996)............................. 35

Coutee v. Barington Capital Grp., LP,
336 F.3d 1128 (9th Cir. 2003).. 21

Cove v. Wash. Dep't of Fish & Wildlife,
17 Wash.App.2d 856, 488 P.3d 894 (2021)........................ 65

Cummings v. Budget Tank Removal & Env't Servs., LLC,
163 Wn. App. 379, 260 P.3d 220 (2011)...................... 16, 17

Cummings v. Fedex Ground Package Sys., Inc.,
404 F.3d 1258 (10th Cir. 2005)... 43

David Terry Invs. v. Headwaters Dev. Grp.,
13 Wn. App. 2d 159, 463 P.3d 117 (2020)......................... 40

Davidson v. Hensen,
135 Wn.2d 112, 954 P.2d 1327 (1998).............................. 16

Davidson v. Hensen,
85 Wn. App. 187, 933 P.2d 1050 (1997)............................ 35

Dekrypt Capital, LLC v. Uphold Ltd.,
No. 82606-9-I, 2022 Wash. App. LEXIS 22
(Wash. Ct. App. Jan. 10, 2022)... 41

Dexnaxas v. Sandstone Court,
148 Wn.2d 654, 63 P.3d 125 (2003).................................. 45

Dickson v. U.S. Fid. & Guar. Co.,
77 Wn.2d 785, 466 P.2d 515 (1970).................................. 50

Diversified Indus. Dev. Corp. v. Ripley,
82 Wn.2d 811, 514 P.2d 137 (1973)............................ 26, 54

Douglas Fin. Corp. v. Pa. Power & Light Co.,
858 F.2d 825 (2d Cir. 1988).. 43

*E*Trade Fin. Corp. v. Deutsche Bank AG*,
420 F. Supp. 2d 273 (S.D.N.Y. 2006)................................ 44

State ex rel. Edmisten v. Tucker,
312 N.C. 326, 323 S.E.2d 294 (1984)................................ 52

Federated Services Insurance Co. v. Personal Representative of Estate of Norberg,
101 Wn. App. 119, 4 P.3d 844 (2000).......................... 22, 23

Fid. Fed. Bank, FSB v. Durga Ma Corp.,
386 F.3d 1306 (9th Cir. 2004).. 13

Foote v. State,
364 Or. 558, 437 P.3d 221 (2019)...................................... 52

Garrett Ranches LLC v. Larry Honn Family LLC,
No. 33175-0-III, 2016 Wash. App. LEXIS 237
(Wash. Ct. App. Feb. 25, 2016).. 23

State ex rel. Greitens v. Am. Tobacco Co.,
509 S.W.3d 726 (Mo. 2017)... 12

Hansen v. Friend,
118 Wn.2d 476, 824 P.2d 483 (1992)................................ 46

Hanson v. Shim,
87 Wn. App. 538, 943 P.2d 322 (1997)............................. 35

Hollingsworth v. Perry,
570 U.S. 693 (2013)... 28

Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC,
876 F.3d 900 (7th Cir. 2017)... 14

Int'l Union of Operating Eng'rs v. Port of Seattle,
176 Wn.2d 712, 295 P.3d 736 (2013)................................ 61

Johnson v. Gruma Corp.,
614 F.3d 1062 (9th Cir. 2010).. 12

Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.,
341 F.3d 987 (9th Cir. 2003) 14

Lakehaven Water & Sewer Dist. v. City of Fed. Way,
195 Wn.2d 742, 466 P.3d 213 (2020) 66

Lewis Cnty. v. State,
178 Wn. App. 431, 315 P.3d 550 (2013) 47

MagnaDrive Corp. v. Magna Force, Inc.,
No. 69769-2-I, 2014 Wash. App. LEXIS 210
(Wash. Ct. App. Jan. 27, 2014) 41

Magney v. Truc Pham,
195 Wn.2d 795, 466 P.3d 1077 (2020) 65

Mainline Rock & Ballast, Inc. v. Barnes, Inc.,
8 Wn. App. 2d 594, 439 P.3d 662 (2019) 17, 23

Marbury v. Madison,
5 U.S. 137 (1803) 26

Mendez v. Palm Harbor Homes, Inc.,
111 Wn. App. 446, 45 P.3d 594 (2002) 41

Munsey v. Walla Walla College,
80 Wn. App. 92, 906 P.2d 988 (1995) 31

New Hampshire Right to Life v. Gardner,
99 F.3d 8 (1st Cir. 1996) 28

Nollette v. Christianson,
115 Wn.2d 594, 800 P.2d 359 (1990) 26

Oxford Health Plans LLC v. Sutter,
569 U.S. 564 (2013) 13, 14, 15, 16

In re Parentage of G.W.-F.,
170 Wn. App. 631, 285 P.3d 208 (2012) 46

Pizelo v. Heinemann,
9 Wn. App. 2d 1011, 2019 WL 2343866 (2019).......... 12, 13

Qwest Corp. v. Wash. Utils. & Transp. Comm'n,
140 Wn. App. 255, 166 P.3d 732 (2007)............................ 24

In re Rodriguez,
21 Wn. App. 2d 585, 506 P.3d 1256 (2022)....................... 64

Saleemi v. Doctor's Assocs., Inc.,
176 Wn.2d 368, 292 P.3d 108 (2013)........................... 20, 25

Salewski v. Pilchuck Veterinary Hosp., Inc., P.S.,
189 Wn. App. 898, 359 P.3d 884 (2015)............................ 16

Satomi Owners Ass'n v. Satomi, LLC,
167 Wn.2d 781, 225 P.3d 213 (2009)................................. 13

Schoenduve Corp. v. Lucent Technologies,
442 F.3d 727 (9th Cir. 2006).. 41

Shell Gulf of Mex. Inc. v. Ctr. for Biological Diversity, Inc.,
771 F.3d 632 (9th Cir. 2014).. 28

Simula, Inc. v. Autoliv, Inc.,
175 F.3d 716 (9th Cir. 1999).. 41

Spokane Cnty. Health Dist. v. Brockett,
120 Wn.2d 140, 839 P.2d 324 (1992)................................. 55

State of Connecticut v. Philip Morris, Inc.,
905 A.2d 42, 279 Conn. 785 (2006) 41, 42

State v. Philip Morris, Inc.,
123 A.3d 660 (Md. App. 2015)... 13

State v. Philip Morris USA Inc.,
945 A.2d 887 (Vt. 2008) 12

State v. Sponburgh,
84 Wn.2d 203, 525 P.2d 238 (1974)................................... 38

Stevens Cnty. v. Stevens Cnty Sheriff's Dep't,
20 Wn. App. 2d 34 (2021) 51

T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.,
592 F.3d 329 (2d Cir. 2010).. 42, 43

Thomas v. French,
99 Wn.2d 95, 659 P.2d 1097 (1983) 20

To-Ro Trade Shows v. Collins,
144 Wn.2d 403, 27 P.3d 1149 (2001)..................... 26, 28, 29

Townsend v. Quadrant Corp.,
153 Wn. App. 870, 224 P.3d 818 (2009) 41

Wash. State Coalition for the Homeless v. Dep't of Social and Health Servs.,
133 Wn.2d 894, 949 P.2d 1291 (1997) 47

Weidert v. Hanson,
178 Wn.2d 462, 309 P.3d 435 (2013) 45

Wiese v. Cach, LLC,
189 Wn. App. 466, 358 P.3d 1213 (2015) 40

Yakima County Fire Prot. Dist. No. 12 v. City of Yakima,
122 Wn.2d 371, 858 P.2d 245 (1993) 53

Statutes

9 U.S.C. § 2 13

9 U.S.C. § 9 13

9 U.S.C. § 10(a)(4) 11

Wash. Rev. Code § 1.16.080 64

Wash. Rev. Code § 7.04.160(4) 23

Wash. Rev. Code § 7.04A.230 13

Wash. Rev. Code § 7.04A.230(1)(d)........................... 11, 16, 23

Wash. Rev. Code § 7.24.130 64
Wash. Rev. Code § 43.06.45 62
Wash. Rev. Code § 43.06.465(3) 63
Wash. Rev. Code § 70.157.005(f) 54
Wash. Rev. Code § 70.157.010 38
Wash. Rev. Code § 70.157.010(j) 2, 57

Other Authorities

Wash. R. App. P. 2.5(a) 46
Wash. R. App. P. 18.17 69

I. INTRODUCTION

This is not a statutory interpretation case. It is an attempt by Washington (1) to vacate a *fact-based* final arbitration Award[1] entered against the State, and (2) to isolate and decide one aspect of all ongoing and future arbitrations piecemeal before the relevant facts are even known. Both efforts should be denied.

In its Award, the Panel concluded based on more than 50 pages of determinative factual findings that Washington failed to diligently enforce its Qualifying Statute in 2004 and is therefore subject to the 2004 NPM Adjustment, reducing its allocated tobacco settlement payment for that year. The Superior Court correctly denied the State's motion to vacate the Award because Washington does not and cannot contest any of the Panel's dispositive factual findings. That resolved the only live controversy between Washington and the PMs and should have concluded the Superior Court's work.

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[1] Capitalized terms have the same meaning here as in Appellants' Joint Opening Brief (the "PMs' Brief" or "PMs Br.").

But the Superior Court also took up Washington's alternative request for an advisory opinion, in the guise of a declaratory judgment, directed to "ongoing" and "future" arbitrations not before the Superior Court, without regard to the potential for evidence of changed factual circumstances in future arbitration years. It entered an Order isolating and purporting to declare the abstract meaning of "units sold" under RCW 70.157.010(j), notwithstanding that pertinent facts in future arbitrations could change and that this individual question does not present a justiciable controversy. In so doing, the Superior Court misconstrued the Panel's Award by artificially separating the statutory meaning of "units sold"—on which the Panel and the Superior Court essentially agreed—from the underlying fact-bound question of "diligent enforcement" that actually shaped the Panel's findings and final Award.

The Respondent/Cross-Appellant's Brief (the "State's Brief" or "St. Br.") submitted by Washington attempts (1) to contest the Superior Court's denial of the State's motion to

vacate the Award, and (2) to defend the Superior Court's entry of a declaratory judgment with respect to "ongoing" and "future" arbitrations. Both efforts fail, for three reasons.

First, Washington's cross-appeal of the Superior Court's ruling denying its motion to vacate the Award fails because the State cannot escape the reality that the Panel expressly based its final Award on more than 50 pages of determinative factual findings that Washington *has not contested*. The Panel also explicitly stated that the only factual finding the State challenges—Washington's lack of diligence with respect to tribal cigarette sales—was *not* determinative of its Award. As the Superior Court correctly held, that means Washington cannot prevail in its attempt to vacate the Award, because the only error the State asserts, even if decided in its favor, would not have resulted in a different outcome. The Panel correctly exercised its arbitral authority to decide the parties' diligent-enforcement dispute. Washington's attempt to create a non-existent *per se* rule that any supposed "facial error" in the Award requires vacatur,

regardless of whether it would change the result, is unsupportable and directly contrary to precedent.

Second, Washington's defense of the Superior Court's entry of declaratory judgment fails because the State cannot overcome the Superior Court's mistake in entering an abstract and factually ungrounded advisory opinion dictating how "ongoing" and "future" arbitration panels must apply the phrase "units sold" under Washington's Qualifying Statute with respect to tribal cigarette sales. That is not a justiciable controversy; rather, it is part of the arbitrable determination of whether Washington is exempt from a payment reduction pursuant to the "NPM Adjustment" under the MSA. Ongoing and future arbitrations present no "actual, present and existing dispute" between Washington and the PMs subject to a "final and conclusive" judicial determination in the absence of a developed evidentiary record and a final arbitration award.

Washington's belated attempt for the first time on appeal to invoke the "major public importance" exception also fails. The

State waived the argument by failing to raise it below, and in any event this case presents a contractual disagreement over the calculation of a monetary payment, which by definition does not satisfy the "major public importance" test. Washington additionally failed to respond to the PMs' argument, and thus appears to concede, that the State's interest in "correctly" enforcing its Qualifying Statute does not present a justiciable controversy.

Washington's assertion that the PMs "waived" the Superior Court's substantive error is likewise wrong. (St. Br. at 1, 55-56). As explained in the eight pages the PMs devoted to this issue in their opening brief (*see* PMs Br. at 53-61), the Superior Court erred because it conflated the Panel's statutory interpretation of the meaning of "units sold"—on which the Superior Court largely agrees with the Panel—with the Panel's *factual* finding that Washington failed to diligently enforce with respect to cigarettes it considered to be "units sold" at the relevant time (i.e., back in 2004). Washington has no answer for

this error, and its assertion that the Superior Court correctly interpreted "units sold" consistent with the Panel's interpretation misses the point.

Third, Washington fails to adequately rebut the PMs' showing that Washington lacks standing. Washington relies on an inapposite statutory definition of "person," and fails to respond to the point that the State lacks standing as an alleged contracting "person" to obtain a declaratory judgment on an abstract question of statutory construction.

For each of these reasons, the Superior Court correctly denied Washington's motion to vacate, but erred in granting Washington's alternative motion for declaratory judgment. This Court should affirm with respect to the denial of the motion to vacate and reverse the entry of declaratory judgment.

II. ARGUMENT

A. The Superior Court Correctly Denied Washington's Motion to Vacate the Award Based on More Than 50 Pages of Uncontested Determinative Findings of Fact

The Superior Court correctly decided the only actual dispute presented in this case when it denied Washington's motion to vacate the Award. That was an easy decision, because Washington does not assert any error with respect to any of the Panel's more than 50 pages of determinative factual findings. CP 709-764. The Panel unanimously concluded that "Washington failed to diligently enforce its Qualifying Statute during calendar year 2004 and, therefore, is subject to an NPM Adjustment," based on numerous enforcement failures, including the State's:

- 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, 731-764. Each of these failures involved cigarette sales that Washington concedes were "units sold" subject to escrow and that were sales of taxed and stamped cigarettes sold in Washington on non-tribal lands. *See id*.

Washington did not contest any of these dispositive factual findings below, and it contests none of them here. The only finding the State contests is the Panel's additional conclusion that Washington also failed to enforce escrow on tribal compact sales. CP 763. But, with respect to that finding, the Panel clearly stated: "Washington's failure to enforce escrow on compact sales *was*

not determinative of the Panel's decision on diligent enforcement. *The state's other lapses, independent of our ruling on compact sales, were determinative* on the issue of diligence." CP 763 n. 116 (emphases added).

Washington denigrates this unambiguous statement of the basis for the Panel's Award as a "'cure all sins' footnote" and a "fleeting footnote." (St. Br. at 25, 64, 66). These deprecatory phrases, however, cannot alter the Award's unambiguous text: The 50+ pages of factual findings Washington does *not* challenge were determinative, while the one finding Washington challenges was *not* determinative. The Panel plainly acted within its authority when it made its factual findings, and when it differentiated its determinative findings from the non-determinative issue of tribal compact sales. Thus, even if Washington were to prevail on its single claim of error by the Panel with respect to its finding of lack of diligence in failing to pursue escrow on tribal compact sales—though the Panel did not err, as discussed in § II.B.6, *infra*—it makes no difference to the

outcome. And because the asserted error did not alter the result, the Superior Court correctly denied the State's motion to vacate.

1. The Panel Properly Exercised Its Contractual Authority to Decide the Parties' NPM Adjustment Dispute

Washington courts have a narrow and circumscribed statutory role in reviewing the Panel's final Award. The parties contractually committed their dispute over diligent enforcement to a Panel of three former Article III federal judges to decide. Judicial review of the Panel's Award considers only whether the Panel performed its contractually-assigned role, not whether the Panel decided correctly. Here, the Panel performed its arbitral role by issuing dozens of pages of factual findings that were "determinative" of the 2004 NPM Adjustment dispute. That ends the vacatur inquiry. The Panel had clear contractual authority under the MSA to resolve the parties' diligent-enforcement dispute, and it properly acted within its contractual authority to find that Washington was not diligent based on factual findings that the State does not contest.

Washington lacks any statutory basis to vacate the Award, regardless of whether this Court applies the Federal Arbitration Act ("FAA"), as the MSA requires, or the Washington Uniform Arbitration Act ("WUAA"), on which the State relies. Washington ignores the FAA and cites a single provision of the WUAA, which states, "the court shall vacate an award if … (d) An arbitrator exceeded the arbitrator's powers." RCW 7.04A.230(1)(d). (St. Br. at 63). But the MSA adopts the FAA as its governing statute. *See* CP 256 (MSA § XI(c)) ("The arbitration shall be governed by the United States Federal Arbitration Act."). The FAA's counterpart provision states that the court "may make an order vacating the award … (4) where the arbitrators exceeded their powers[.]" 9 U.S.C. § 10(a)(4). Washington evidently prefers the WUAA over the FAA because the WUAA uses the word "shall" rather than "may." (St. Br. at 63). But the result is the same under either statute: the arbitrators on the Panel did not exceed their powers, and the Award cannot be vacated.

Where, as here, the parties elect to resolve their dispute "through binding arbitration under the FAA," Washington courts respect the parties' contractual choice and apply the FAA to review the arbitration. *Burgess v. Lithia Motors, Inc.*, 196 Wn.2d 187, 191, 471 P.3d 201, 204 (2020) (applying FAA and federal law to determine the court's authority to review a challenge to the arbitration agreement once the claims have been submitted to arbitration); *see also Pizelo v. Heinemann*, 9 Wn. App. 2d 1011, 2019 WL 2343866, at *3 (2019) (unpublished) (holding that FAA governs over WUAA where the statutes conflict and applying FAA vacatur standard). "[W]here the FAA's rules control arbitration proceedings, a reviewing court must also apply the FAA standard for vacatur." *Johnson v. Gruma Corp.*, 614 F.3d 1062, 1067 (9th Cir. 2010). Consistent with the MSA's plain language, multiple courts have applied the FAA's vacatur standard to prior challenges to arbitral awards deciding NPM Adjustment disputes. *See State ex rel. Greitens v. Am. Tobacco Co.*, 509 S.W.3d 726, 735 (Mo. 2017); *State v. Philip Morris*

USA Inc., 945 A.2d 887, 895 (Vt. 2008).[2]

The Panel did not exceed its authority under the FAA. A party seeking to demonstrate that the arbitrators "exceeded their powers" as grounds for vacatur under the FAA "bears a heavy burden." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013). "It is not enough . . . to show that the [arbitrator]

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[2] Washington has previously relied on a handful of outlier rulings finding that a state's arbitration statute governs judicial review of an MSA arbitration award and drawing a dubious distinction between the arbitration *proceeding* and judicial review of the arbitration *award*. *See State v. Philip Morris, Inc.*, 123 A.3d 660, 673 (Md. App. 2015); *Commonwealth v. Philip Morris USA, Inc.*, 114 A.3d 37, 56 (Pa. Commw. Ct. 2015). The FAA, WUAA, and MSA draw no such distinction. *See* 9 U.S.C. §§ 2, 9; RCW 7.04A.230; CP 256 (MSA § XI(c)). Nor does precedent, which holds that the FAA governs a motion to vacate even where the contract generally chooses state substantive law. *See Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1311-12 (9th Cir. 2004) (holding FAA governed motion for vacatur despite contract providing for application of state substantive law). Indeed, to the extent the FAA and WUAA dictate different results, the FAA preempts the conflicting provision of the WUAA. *See Pizelo*, 2019 WL 2343866, at *3 (affirming trial court's ruling that FAA preempts conflicting provisions of WUAA); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 806, 225 P.3d 213 (2009) (holding FAA preempts judicial enforcement provision of Washington Condominium Act).

committed an error—or even a serious error." *Id*. (citation omitted). Because the parties "'bargained for the arbitrator's construction of their agreement,' an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its []merits." *Id.* (citations omitted). The "question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all"; if "he did, [he] therefore did not 'exceed his powers'" under the FAA. *Id*. at 572-73. Accordingly, "[n]either erroneous legal conclusions nor unsubstantiated factual findings" justify vacatur. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 994 (9th Cir. 2003); *see also Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC*, 876 F.3d 900, 902 (7th Cir. 2017) (similar).

Here, there is no dispute the Panel construed and applied the MSA to arrive at its Award. Indeed, there is no dispute it did so correctly. Over the course of more than 50 pages, the Panel found one fact after another supporting its ultimate determination

that Washington did not diligently enforce its Qualifying Statute and was therefore subject to the NPM Adjustment for 2004. CP 709-764. The Panel also clearly stated that these factual findings, and not the one factual finding Washington challenges, were "determinative" of its Award. CP 763 n. 116. Washington does not and cannot challenge any of the Panel's dispositive findings.

Thus, Washington got what it bargained for. A panel of three former Article III federal judges reviewed the entire factual record, judged credibility and the weight of the evidence, and entered a final Award applying the determinative facts to the MSA and concluding that Washington was not diligent in 2004 and therefore subject to the NPM Adjustment for that year. Even if the Superior Court had been persuaded the Panel committed "grave error," that "is not enough" to warrant vacatur. *Oxford Health Plans*, 569 U.S. at 572. "The potential for those mistakes is the price of agreeing to arbitration." *Id*. at 572-73. In *Oxford Health Plans*, the U.S. Supreme Court declined to vacate an arbitrator's award based on claims that the arbitrator "badly

misunderstood" the contract, finding the merits argument "is not properly addressed to a court," and so long as the arbitrator was "'arguably construing' the contract—which this one was—a court may not correct his mistakes under § 10(a)(4)." *Id*. at 572 (citation omitted). So too here. Washington "chose arbitration, and it must now live with that choice." *Id*. at 573.

The outcome would be no different if this Court were to apply the WUAA. Judicial review of an arbitral award under the WUAA, as under the FAA, "is exceedingly limited" and "does not include a review of the merits of the case." *Davidson v. Hensen*, 135 Wn.2d 112, 119, 954 P.2d 1327, 1330 (1998). Vacatur for "exceed[ing] the arbitrator's powers" under RCW 7.04A.230(1)(d) is available only "if the alleged error appears on the face of the award." *Cummings v. Budget Tank Removal & Env't Servs., LLC*, 163 Wn. App. 379, 388–89, 260 P.3d 220, 226 (2011) (quotation marks omitted). This "facial legal error standard is a very narrow ground[.]" *Salewski v. Pilchuck Veterinary Hosp., Inc., P.S.*, 189 Wn. App. 898, 904, 359 P.3d

884, 888 (2015). To support vacatur, an arbitrator's error "should be recognizable from the language of the award, as, for instance, where the arbitrator identifies a portion of the award as punitive damages in a jurisdiction that does not allow punitive damages." *Cummings*, 163 Wn. App. at 389. Courts "may not search the arbitral proceedings for any legal error," "do not look to the merits of the case," and "do not reexamine evidence." *Mainline Rock & Ballast, Inc. v. Barnes, Inc.*, 8 Wn. App. 2d 594, 609-10, 439 P.3d 662, 670-671 (2019). Washington courts "do not even review the arbitration decision under an arbitrary and capricious standard." *Id*. at 610; *see also Boyd v. Davis*, 75 Wn. App. 23, 26, 876 P.2d 478, 480 (1994).

Washington identifies no facial error supporting vacatur of the Panel's final Award. It presents no error on the face of the more than 50 pages of factual findings on which the Panel relied in determining that Washington failed to diligently enforce its Qualifying Statute, nor in the Panel's conclusion that these facts were "determinative" of the Award. Indeed, Washington plainly

goes *beyond* the face of the award, asking this Court to discredit or disbelieve the Panel's unambiguously stated conclusion that Washington's tribal enforcement failings were "not determinative" of its ultimate decision. CP 763 n. 116.

Consequently, even if the Superior Court were persuaded the Panel erred in determining that Washington lacked diligence in failing to pursue escrow deposits on tribal compact sales as "units sold," that would not satisfy the "facial error" standard with respect to the final Award. Washington was still non-diligent in 2004 on the face of the Award, because the Award unambiguously declares that Washington's failure with respect to compact sales "was not determinative" of diligent enforcement, and the State's "other lapses, independent of" compact sales "were determinative" of the issue. CP 763 n. 116. Thus, as the Superior Court correctly held, the Panel's Award is not subject to vacatur even if its determination with respect to tribal compact sales were found to be plain error. CP 1204.

2. <u>Washington Law Does Not Support Vacatur Based on an Assertion of Non-Dispositive Legal Error</u>

Lacking any cognizable error by the Panel with respect to its outcome-determinative factual findings, Washington attempts to create a new *per se* vacatur principle for arbitrations that Washington has never recognized. The State asserts that the existence of *any* purported legal error on the face of an arbitration award mandates vacatur under the WUAA, regardless of whether—as is the case here—the purported error was harmless and the result would remain the same in its absence. (St. Br. at 62-67). But even if the WUAA applied here, which it does not as discussed in § II.A.1, *supra*, Washington offers no support for its proposed new rule and governing precedent is directly to the contrary.

Washington law is clear that an arbitrator's asserted error will not support vacatur if the error does not change the outcome. The Washington Supreme Court has joined "the emerging consensus of courts" that a party "must show prejudice as a

condition of relief from [an] arbitration award." *Saleemi v. Doctor's Assocs., Inc.*, 176 Wn.2d 368, 380, 292 P.3d 108, 114 (2013) (denying motion to vacate trial court's order compelling arbitration following entry of final arbitration award). Requiring prejudicial error "promotes prime purposes of arbitration, speed and convenience," and aligns with the "well established" rule in civil cases that "error without prejudice is not grounds for reversal." *Id*. (quoting *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983)). "Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial." *Id*. (quoting *Thomas*, 99 Wn.2d at 104).

The Washington Supreme Court has further adopted the reasoning of the Ninth Circuit that an arbitrator's failure to apply the correct law "was not reversible error when it appeared to be harmless," and that even an arbitrator's "*incorrect* choice of law" ruling "was not grounds for reversal unless the arbitrator *could not have made* the award under the properly chosen law." *Saleemi*, 176 Wn.2d at 381 (emphases added) (citing *Barnes v.*

Logan, 122 F.3d 820, 823 (9th Cir. 1997); *Coutee v. Barington Capital Grp., LP*, 336 F.3d 1128, 1134 (9th Cir. 2003); and collecting other cases).

Washington has not shown and cannot show prejudice as a result of its assertion that the Panel committed facial error with respect to tribal compact sales. The State does not meet its burden of showing that the Panel would not (or could not) have made its Award if it had decided the tribal compact sales issue differently. Quite the opposite: the Panel was perfectly clear that it *would have made* the same Award with or without its finding regarding tribal compact sales, because its Award was determined solely based on Washington's "other lapses, independent of" compact sales, which Washington does not challenge. CP 763 n. 116.

Washington has no answer to this. It instead mischaracterizes the Superior Court's ruling, asserting that the Superior Court "usurp[ed]" the Panel's function by "anticipat[ing] that another arbitration panel would come to the same conclusion on the State's diligence after considering the

impact and implications of excluding cigarettes that are not 'units sold.'" (St. Br. at 64-65). But the Superior Court did not "anticipate" how "another arbitration panel" would rule; it acknowledged how the existing Panel *already ruled* when 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." CP 1204.

The case law Washington cites for its proposed *per se* rule lends no support. Washington relies upon *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 236 P.3d 182 (2010); and *Federated Services Insurance Co. v. Personal Representative of Estate of Norberg*, 101 Wn. App. 119, 4 P.3d 844 (2000). (St. Br. at 51, 62-63). In *Broom*, the alleged error was outcome-determinative; the arbitrators erroneously applied state statutes of limitations to bar most of the respondents' claims. 169 Wn.2d at 234-35. Under these circumstances, the *Broom* Court found

"facial legal error" can be "an instance in which arbitrators 'exceeded their powers,' thus permitting vacation of the award." *Id*. at 237. At the same time, the Court emphasized that "the facial legal error standard is a very narrow ground for vacating an arbitral award" and had been applied "carefully" in only four prior instances. *Id*. at 239.[3] Likewise, in *Federated Services*, the alleged error again determined the outcome; the court vacated an award of damages based on probable future inheritance because Washington law does not authorize such damages. 101 Wn. App. at 127-28.

In both *Broom* and *Federated Services*, therefore, the asserted legal error was not just a "facial legal error," but also a

[3] *Broom* also interpreted a prior, broader version of RCW 7.04.160(4). Subsequent cases question whether "facial legal error" remains a basis to vacate an arbitral award following amendment of the WUAA to its present form. *See Garrett Ranches LLC v. Larry Honn Family LLC*, No. 33175-0-III, 2016 Wash. App. LEXIS 237, at *21 (Wash. Ct. App. Feb. 25, 2016) (unpublished); *see also Mainline*, 8 Wn. App. 2d at 620 (concurring) ("A solid argument can be made that *Boyd's* construction of former RCW 7.04.160(4) does not survive the intentionally narrower language of RCW 7.04A.230(1)(d).").

prejudicial legal error. In *Broom*, respondents were deprived of the opportunity to assert claims that the arbitrators erroneously found to be time-barred under misapplied statutes of limitations. In *Federated Services*, the arbitrators erroneously awarded damages that were not recoverable under Washington law. Neither case adopts anything resembling Washington's proposed *per se* rule that any putative "facial error," however harmless, mandates vacatur under the WUAA.

Indeed, a rule holding that arbitrators "exceed[] their powers" and mandating vacatur when the arbitrators commit non-prejudicial errors would subject arbitral awards to far greater scrutiny than civil judgments. *See, e.g., Qwest Corp. v. Wash. Utils. & Transp. Comm'n*, 140 Wn. App. 255, 260, 166 P.3d 732 (2007) ("Error without prejudice is not grounds for reversal, and error is not prejudicial unless it affects the case outcome." (citation omitted)). Such a rule would invite parties disappointed by the outcome of an arbitration to scour the award for any "facial error" and, as Washington has done here, to seek vacatur

based on matters that did not sway the outcome. *Saleemi* makes clear that Washington courts do not countenance collateral attacks of this kind on arbitral awards. 176 Wn.2d at 380-81.

B. <u>The Superior Court Erred by Entering a Declaratory Judgment on a Non-Justiciable Matter</u>

When the Superior Court correctly denied Washington's motion to vacate the Award, it decided the one and only justiciable controversy pending before it. Washington's alternative request for declaratory judgment with respect to the meaning of "units sold" in all "ongoing" and "future" NPM Adjustment arbitrations sought an impermissible advisory opinion. The request for declaratory relief presented no actual, present, or existing dispute subject to final and conclusive judicial determination. Ongoing and future arbitrations are, by definition, committed to an arbitration panel to decide based on the facts and evidence presented to that panel, and only the final award is subject to limited judicial review.

Washington attempts to solve its justiciability problem by conflating justiciability under the UDJA with judicial review

under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). (St. Br. at 26). Although nobody disputes the "province and duty" of the judicial branch "to say what the law is," or that "state courts are the ultimate arbiters of state law" (St. Br. at 26), that does not mean a state court can or should decide every legal question it is asked. Nor does it mean a state court can intervene piecemeal in an incomplete arbitration.

To obtain a declaratory judgment, Washington must "steadfastly adhere[] to the virtually universal rule that, before the jurisdiction of a court may be invoked under the [UDJA], there must be a justiciable controversy." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149, 1153 (2001) (citation omitted). Justiciability requires: (1) an "actual, present and existing dispute," (2) "between parties having genuine and opposing interests," (3) involving "interests that must be direct and substantial," and (4) a "judicial determination of which will be final and conclusive." *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 State fails to establish these elements. Washington concedes that "the determination of diligence in NPM Adjustment arbitrations is solely within the province of the arbitration panel." (St. Br. at 64). Yet it seeks to carve out the so-called "discrete" question of whether tribal compact cigarettes fall within the statutory definition of "units sold" from the "ultimate factual determination of whether the State was diligent" in a particular year, calling that a "question of law" for the Superior Court to decide rather than a "question of fact" for the Panel to decide. (St. Br. at 41). That misstates the law, misconstrues the MSA's arbitration clause, and misapprehends what constitutes a justiciable dispute under the UDJA.

1. Washington's So-Called "Recurring Dispute" Over "Units Sold" Does Not Satisfy the Elements of Justiciability

Washington pays lip service to the elements of justiciability, asserting in conclusory strokes that the "recurring dispute" over "units sold" satisfies the four justiciability

requirements. (St. Br. at 28-29). But what the State calls a "recurring dispute" is non-justiciable; it is at most one question attendant to the actual factual dispute between Washington and the PMs—whether Washington diligently enforced its Qualifying Statute in a given year and is subject to the NPM Adjustment for that year. And that dispute is, by Washington's own admission, committed exclusively to arbitration. (*Id*. at 64).

A justiciable dispute does not exist under the UDJA merely because there is an *issue* on which the parties disagree. "Inherent in" the four justiciability requirements is "the federal case-or-controversy requirement." *To-Ro Trade Shows*, 144 Wn.2d at 411. "Not every dispute is a case or controversy." *New Hampshire Right to Life v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996). "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself" to satisfy justiciability. *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (citation omitted); *see also Shell Gulf of Mex. Inc. v. Ctr. for Biological Diversity, Inc.*, 771 F.3d 632, 637 (9th Cir. 2014)

(holding a sincere "legal disagreement" alone does not "create a justiciable case or controversy" because "[i]t is axiomatic that differing views of the law are not enough"). Rather, the four justiciability factors "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*, 144 Wn.2d at 411 (citation omitted).

Here, what Washington is calling a "recurring dispute" over "units sold" does not present a complete case or controversy subject to determination through entry of a final judgment. At most, it concerns one subsidiary issue that has come up in two arbitrations and may recur in ongoing or future arbitrations as to particular years, but is subsumed within the larger factual and legal framework of each arbitration proceeding. The *only* relevance of Washington's "recurring dispute" over "units sold" is to whether Washington "diligently enforced" its Qualifying Statute—an issue that Washington does not dispute is arbitrable. That means the authority to decide the "units sold" issue resides

in the first instance with the arbitrators. Justiciability arises at the conclusion of the arbitration proceeding, when a final award is entered and a court is empowered to undertake limited judicial review of the award in accordance with the FAA. *See* § II.A, *supra*.

Washington points to the 2003 and 2004 NPM Adjustment Arbitrations, and the "diametrically opposed" outcomes of the two arbitrations with respect to Washington (even though they concern different time periods), as proof of the existence of the "recurring dispute," the "stark contrasts" of the opposing "direct and substantial" interests, and the need for a "conclusive and binding" state court determination. (St. Br. at 28-31). But Washington's admission that this "dispute" arises *through arbitration* makes plain the issue is inextricably part of the arbitration.

By definition, a case committed to arbitration is not justiciable except at the outset to compel the matter to arbitration and at the conclusion to review the final award as permitted by

the FAA. The Washington Supreme Court has adopted the "majority" rule that court involvement is limited "to the 'bookends' of arbitration: initial enforceability and review of the final arbitration award." *Burgess*, 196 Wn.2d at 191-197 (collecting cases). That rule "precludes any judicial intervention" outside of the two "bookend" roles. *Id* at 191. This division is dictated by the FAA—which "is silent regarding judicial review between gateway disputes and review of the final award"—and its "underlying intent" to enforce "the parties' agreement to resolve their dispute in arbitration, instead of in court." *Id*. at 192-96*; see also Munsey v. Walla Walla College*, 80 Wn. App. 92, 94-96, 906 P.2d 988 (1995) (holding the Superior Court exceeded its review authority by ruling on discrete issues regarding the payment of arbitral fees outside arbitration).

Washington's request for declaratory judgment ignored the Superior Court's "bookend" role and asked it to intervene in both an "ongoing" arbitration proceeding and "future" arbitrations by making a piecemeal determination of one fact-

bound issue and directing the arbitrators how to decide it. That does not comport with either the Superior Court's "gateway" role to compel arbitration or its "review" role with respect to the final award. *Burgess*, 196 Wn.2d at 189. By stepping outside its prescribed roles with respect to the 2005-2007 NPM Adjustment arbitration and all future NPM Adjustment arbitrations, the Superior Court took up a matter on which the four justiciability factors do not "coalesce" because, until such time as the arbitrators complete their function and a final award issues, the Superior Court lacks authority to render a final judgment. By doing so, the Superior Court "step[ped] into the prohibited area of advisory opinions." *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004) (citation omitted).

2. <u>Putative Legal Questions Are Not Exempt from the Requirements of Justiciability</u>

Washington spends much of its argument on justiciability attempting to differentiate the "units sold" issue from the diligent-enforcement determination the State admits is subject to mandatory arbitration under the MSA. Washington asserts that

the meaning of “units sold” is a “pure legal question” for a court to decide, not a factual question for an arbitration panel to decide. (St. Br. 50). That is wrong as a matter of law.

Washington’s argument draws a false distinction between the justiciability of factual and legal questions in the context of an arbitration proceeding. Relying solely on general pronouncements regarding the “province and duty” of the judiciary “to say what the law is,” the State broadly (and wrongly) insists that state courts retain exclusive power to make “conclusive” declarations of state law that are “binding on arbitration panels,” with the arbitrators’ role limited to “applying the statute, as interpreted in the declaratory judgment action, to the particular facts.” (St. Br. at 26, 31-32, 50-52). Washington asserts that this does not “intrude on the role of the arbitrators,” because arbitration panels will still make the “ultimate findings of diligence or non-diligence” and decide “factual issues” and “the application of particular facts” subject to a Washington state court’s guidance. (*Id*. at 31-32, 39-41).

Under the State's view, then, every arbitration proceeding would have to be bifurcated into "questions of law" for a court to decide and "questions of fact" for the arbitrators to decide, with judicial review of the individual questions of law occurring at any time and applied to ongoing and future arbitral proceedings. That is not how arbitrations work, and indeed would be antithetical to the policy of allowing parties to contract for arbitrations to address and resolve their disputes without court involvement. Though saying "what the law is" remains a judicial function, it takes on a different tenor when a dispute (particularly a dispute concerning historical facts) is submitted to arbitration. In such instances, as already discussed, courts perform their judicial role at the "bookends" of the arbitration, enforcing the arbitration agreement in the initial stages and reviewing the final arbitration award at the end. *Burgess*, 196 Wn.2d at 191.

Between these two bookends, there is no artificial distinction between the justiciability of factual and legal

questions in arbitrations, and courts do not "say what the law is" in a piecemeal fashion and impose their pronouncements on ongoing or future arbitrations. Rather, the arbitrator "becomes the judge of *both the law and the facts*." *Cook v. Selland Constr., Inc.*, 81 Wn. App. 98, 101, 912 P.2d 1088, 1089 (1996) (emphasis added) (quoting *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239, 1242 (1995) (internal citation omitted)); *see also Hanson v. Shim*, 87 Wn. App. 538, 545, 943 P.2d 322 (1997). Assigning both legal and factual issues to the arbitrator comports with the "purpose of arbitration" to "settle controversies without litigation," and subject to only "limited" judicial review confined "to the face of the award." *Davidson v. Hensen*, 85 Wn. App. 187, 192, 933 P.2d 1050 (1997).

This does not mean that Washington courts are "preclude[d]" from "interpreting Washington law," as the State wrongly asserts. (St. Br. at 1). It does mean Washington courts must perform their role at the prescribed time—following entry of a final award, not during ongoing or in advance of future

arbitrations—and in the prescribed manner set forth in the FAA, rather than through piecemeal intervention in incomplete arbitrations.

3. Washington Cannot Manufacture Justiciability by Artificially Excluding the "Units Sold" Issue from the Scope of the MSA's Arbitration Clause

Washington next attempts to carve out the "units sold" issue from the scope of the MSA's arbitration clause, in an effort to re-litigate an issue it already lost. Washington contends that the "units sold" issue falls outside of the MSA's arbitration clause because it does not pertain to "calculations" or "determinations" of the "Independent Auditor." (St. Br. at 41-49). That argument is irreconcilable with the law of the case set by the Superior Court's prior rulings, as well as clear governing precedent.

Section XI(c) of the MSA expressly requires arbitration 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 (emphasis added). The “application of” the NPM Adjustment to Washington under the MSA unequivocally depends in significant part on whether Washington “diligently enforced” its Qualifying Statute with respect to “units sold” during a given year. CP 236-238, 457-461.

As the Superior Court held in 2006, the plain language of section XI(c) “compels the finding that the parties, clearly and without ambiguity, agreed that disputes of this nature would be subject to arbitration.” CP 624. The Superior Court expressly rejected essentially the same argument Washington makes here in a different incarnation, that the words “calculations” and “determinations” should be read to exclude “determinations of diligent enforcement,” holding that “it would make no sense in the context of the MSA to have that issue addressed” by state courts rather than by the arbitration panel. *Id*. The Superior Court reaffirmed its holding in 2016, ordering that the Panel “will have

sole discretion to decide what claims or issues shall be further resolved" in the 2004 NPM Adjustment Arbitration. CP 634. These rulings are law of the case. *State v. Sponburgh*, 84 Wn.2d 203, 208, 525 P.2d 238 (1974).

Washington's current argument is just a new variation of the same rejected theme—this time that "calculations" and "determinations" should be read to exclude "units sold" rather than "diligent enforcement," and that individual state courts rather than an arbitration panel should individually decide the significance of the "units sold" issue as it relates to diligent-enforcement proceedings. But that argument still "make[s] no sense" in the context of the MSA, because whether Washington "diligently enforced" its Qualifying Statute depends on whether Washington enforced against NPMs that did not make escrow deposits on "units sold." CP 459-461; RCW 70.157.010 *et seq*. Thus, the "units sold" issue is relevant only to the question of Washington's diligent enforcement, which—as the Superior Court already held and as Washington now admits—arises out of

and relates to the Independent Auditor's determination whether to apply the NPM Adjustment to its annual payment calculations and thus must be arbitrated.

Indeed, Washington itself expressly concedes that the meaning of "units sold" relates to the Independent Auditor's calculation of annual payments, arguing: "The interpretation of this term implicates Washington's ability to receive its full $135 million annual payment from the PMs." (St. Br. at 29). Thus, the State itself admits that its request for declaratory judgment is a dispute "arising out of" and "relating to" the exact same "determination of diligence" it admits "is solely within the province of the arbitration panel." (St. Br. at 64).

As Washington further acknowledges, the "units sold" issue on which it sought declaratory judgment has thus far come up twice before—in the "2003 and 2004 NPM Adjustment Arbitrations." (*Id*. at 29, 31). Washington further admits that the Superior Court's declaration regarding "units sold" will continue to be used exclusively in the context of NPM Adjustment

arbitrations, with ongoing and future arbitration panels obliged to "apply[] the statute, as interpreted in the declaratory judgment action, to the particular facts." (*Id*. at 31). According to the State's own arguments, therefore, determining the "units sold" issue necessarily decides a dispute arising out of and relating to the arbitrable determination of diligent enforcement and application of the NPM Adjustment.

Washington precedent further confirms that the "units sold" issue must be arbitrated insofar as it concerns the arbitrable question of diligent enforcement. Washington attempts to cast the MSA's arbitration clause as "narrow." (St. Br. at 44-49). But all governing precedent is to the contrary. As set forth in the PMs' Brief, the MSA's use of the phrase "arising out of or relating to" requires the broadest construction of the arbitration clause, and requires all doubts to be resolved "in favor of arbitrability." (PMs Br. at 39-40 (citing *Wiese v. Cach, LLC*, 189 Wn. App. 466, 477, 358 P.3d 1213 (2015); *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)). Washington has no answer to these authorities; it simply ignores them.[4]

For example, Washington cites *State of Connecticut v. Philip Morris, Inc.*, 905 A.2d 42, 53, 279 Conn. 785 (2006), for the inapt proposition that the MSA's arbitration provision does not cover issues "far removed from the independent auditor's role." St. Br. at 49. But the State ignores the Connecticut

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[4] The vast weight of Washington case law similarly construes arbitration clauses using the phrases "arising out of" and "relating to" broadly in favor of arbitrability. *See, e.g., Berman v. Tierra Real Estate Grp.*, 23 Wn. App. 2d 387, 396, 515 P.3d 1004, 1010 (2022); *Dekrypt Capital, LLC v. Uphold Ltd.*, No. 82606-9-I, 2022 Wash. App. LEXIS 22, at *14 (Wash. Ct. App. Jan. 10, 2022) (unpublished); *MagnaDrive Corp. v. Magna Force, Inc.*, No. 69769-2-I, 2014 Wash. App. LEXIS 210, at *6 (Wash. Ct. App. Jan. 27, 2014) (unpublished); *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 887, 224 P.3d 818 (2009); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 457, 45 P.3d 594, 601 (2002). Federal authority agrees that the phrases "arising out of" and "relating to" connote the broadest scope of arbitrable disputes. *See, e.g., Schoenduve Corp. v. Lucent Technologies*, 442 F.3d 727, 732 (9th Cir. 2006); *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1131 (9th Cir. 2000); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720-21 (9th Cir. 1999).

Supreme Court's ruling that the MSA's arbitration clause "employs broad language in defining the scope of the disputes that fall within that subject matter" by covering "'[a]ny dispute, controversy or claim *arising out of or relating to*' the independent auditor's calculations and determinations." 905 A.2d at 49. The Connecticut court concluded that the NPM Adjustment dispute is arbitrable because it directly involves the Independent Auditor's determination of whether to apply the adjustment and calculation of annual payments. In doing so, the court rejected "the state's reliance on cases in which the parties' contract either restricted the scope of the arbitration provision to require judicial resolution of certain issues prior to arbitration or explicitly required that certain conditions be satisfied prior to arbitration," finding that the MSA's arbitration provision "does not refer to any preconditions to arbitration." *Id.* at 51-54.

Washington's out-of-state authorities likewise provide no support for ignoring the MSA's mandatory arbitration clause. Quite the opposite: in *T.Co Metals, LLC v. Dempsey Pipe &*

Supply, Inc., 592 F.3d 329 (2d Cir. 2010), the Second Circuit *rejected* appellant's "structural and policy arguments" against "deferring to the arbitrator's interpretation," holding it is "hardly controversial to acknowledge that the FAA allows arbitrators to operate with considerable autonomy." *Id*. at 345.[5]

[5] Washington's other cases involve inapposite or unique circumstances, such as an agreement with no arbitration clause, a unique provision of a state arbitration statute, or very narrow and distinct arbitration clauses. *See Central Hudson Gas & Electric Corporation v. Benjamin F. Shaw Co.*, 465 F. Supp. 331, 332-33 (S.D.N.Y. 1978) (declining to dismiss a declaratory judgment action brought on a mutual general release agreement with no arbitration clause that was separate from an arbitration proceeding involving a subcontract with an arbitration clause); *Bottomer v. Progressive Casualty Ins. Co.*, 816 A.2d 1172, 1175, 2003 PA Super 44, ¶ 12 (2003) (allowing declaratory judgment action to proceed in parallel with arbitration based on a unique provision of the Pennsylvania Arbitration Act of 1927, "unlike … the Uniform Arbitration Act," allowing "a court of law to correct an arbitration award on the basis of an error of law"); *Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 827, 832 (2d Cir. 1988) (finding arbitration clause "narrow" where it only provided for appointment of independent tax counsel to address a specific disagreement "with any Owner's computation of the amount of the required indemnity payment or refund thereof"); *Cummings v. Fedex Ground Package Sys., Inc.*, 404 F.3d 1258, 1259 (10th Cir. 2005) (addressing "narrowly drawn arbitration clause" limited strictly to claims for wrongful

4. <u>Washington Cannot Ignore Justiciability on Grounds of "Efficiency"</u>

The State also argues that committing the "units sold" issue to a court rather than an arbitrator would be more "efficient" than arbitration because the parties would not have to re-litigate the issue "year after year, in perpetuity." (St. Br. at 43). The premise of Washington's argument is wrong. As set forth in § II.B.6, *infra*, there is general consensus among the 2003 Panel, 2004 Panel, and Superior Court as to the statutory construction of "units sold." Their different rulings have been based predominately on facts, not law, and a declaratory judgment thus adds no efficiency.

But even were it assumed *arguendo* that some "efficiency" might be achieved by declaring the meaning of "units sold" in the abstract and in advance of future arbitrations, rewriting the

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termination of agreement); *E*Trade Fin. Corp. v. Deutsche Bank AG*, 420 F. Supp. 2d 273, 285 (S.D.N.Y. 2006) (addressing "narrow" arbitration clause limited "only to the 'Closing Balance Sheet,'" and adjustments "identified within 30 days of its delivery").

parties' bargain based on the Court's assessment that a different arrangement might be more efficient is contrary to governing law. Under both the FAA and WUAA, "[a]n agreement to submit a controversy to arbitration is valid, enforceable, and irrevocable" absent grounds for revocation, and "[t]here is no support for the notion that a court may ignore an otherwise valid arbitration agreement on equitable grounds." *Weidert v. Hanson*, 178 Wn.2d 462, 465, 309 P.3d 435, 436-37 (2013); *see also Dexnaxas v. Sandstone Court*, 148 Wn.2d 654, 670, 63 P.3d 125 (2003) ("This court cannot rewrite a contract to force a bargain that the parties never made.").

5. Washington's Belated Attempt to Invoke the "Major Public Importance" Exception to Justiciability Falls Short

Tacitly acknowledging the weakness of its position on justiciability, Washington belatedly makes an alternative argument it did not advance below—that declaratory judgment is appropriate due to the "public importance" of the "units sold" question. (St. Br. at 33-38). Washington has waived that

argument by raising it for the first time on appeal, and in any event the "units sold" question does not satisfy the "major public importance" exception to justiciability.

Washington never argued the major public importance exception as a basis for declaratory judgment in its moving papers or reply brief to the Superior Court. *See* CP 23-50, 999-1010. Accordingly, the State has waived the argument and the Court should refuse to review it. *See* RAP 2.5(a); *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483, 488 (1992) ("An appellate court will generally not consider arguments raised for the first time on appeal, and we decline to do so here."); *In re Parentage of G.W.-F.*, 170 Wn. App. 631, 649 285 P.3d 208, 217 (2012) ("Generally, appellate courts will not consider an issue raised for the first time on appeal, unless it is a manifest error affecting a constitutional right[.]").

Regardless, the major public importance exception does not apply here. As set forth in the PMs' Brief, and uncontested by Washington, the exception applies only in "rare cases" where

the interest is "overwhelming," and a purely monetary interest does not qualify. (PMs Br. at 47-50 (citing *Lewis Cnty. v. State*, 178 Wn. App. 431, 438-41, 315 P.3d 550 (2013); *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)). Washington has made no showing that this is such a "rare case."

The State argues that the "units sold" issue qualifies as a matter of public interest because it "will impact Indian tribes throughout the State," and asserts that adding escrow costs to tribal cigarette sales would "upend" the tribal compact system and "threatens the delicate balance" and "grand bargain" represented by the compact legislation. (St. Br. 33-38). That is false. Whatever the outcome of the NPM Adjustment arbitrations, there is no demonstrable "impact" on tribes. Washington's argument simply misapprehends how the Qualifying Statute actually works.

Under the Qualifying Statute, escrow is deposited by the *manufacturer* and included in the sale price to *non-tribal*

consumers. Moreover, the NPM Adjustment is a contractual term impacting MSA settlement payments to the *State*, not tribes. Under no circumstances can an arbitration panel compel Washington to "upend" its "grand bargain" with tribes. The most the arbitrators can do is find Washington failed *in the past* to diligently enforce escrow on "units sold" to non-tribal consumers, in which case the consequence is Washington gets a smaller MSA settlement payment—a purely monetary interest. This case thus bears no resemblance to Washington's principal authority, which concerned a direct constitutional challenge to the manner in which tribes compensate counties for public services provided to tribal exempt properties. *See City of Snoqualmie v. King Cnty. Exec. Dow Constantine*, 187 Wn.2d 289, 297, 386 P.3d 279 (2016).

Unlike an attempt to interfere with how tribes receive public services, Washington offers nothing beyond its bare, vague assertion that tribes would be harmed by an arbitration panel's finding that the State failed to diligently enforce its

Qualifying Statute. Indeed, if "public importance" is relevant at all, the record is quite clear that the balance of "public importance" tilts strongly in favor of the 2004 NPM Adjustment Panel's view that Washington should have taken enforcement action against NPM compact sales to non-tribal members. As detailed in the PMs' Brief, and not contested by Washington: when the Legislature passed the compact legislation, it "had no intention of impacting" the Qualifying Statute; "both the statute authorizing the tribal compacts, and the compacts themselves, specifically provide that the tribal compacts should not affect the MSA"; and exempting tribal sales to non-tribal members from the Qualifying Statute undermines "the intent and purposes of the MSA" by allowing cheap cigarettes to flood the market in direct contravention of the MSA's public health objectives. (PMs Br. at 19-20; CP 700-701, 703-705). That is why Washington's own OAG held the view, in 2004, that tribal compact sales were "units sold" and were subject to enforcement. (*Id.*). Because the tribal compact legislation and tribal compacts were never intended to

affect the MSA or the Qualifying Statute, Washington's ostensible concerns about interfering with the "critical public policy goals" of the tribal compact system are mere make-weight. (*See* St. Br. at 35-38).

6. **Washington Concedes the Superior Court's Error in Granting Declaratory Judgment Based on the State's Asserted Interest in "Enforcing the Qualifying Statute Correctly"**

In its motion papers to the Superior Court, Washington asserted its need for a declaratory judgment to advance its putative "interest in enforcing the qualifying statute correctly," and the Superior Court recognized that interest by granting the State's motion. *See* CP 46, 1001. The PMs' Brief explained how the State's asserted interest required a purely advisory opinion and was not cognizable under Washington law. (*See* PMs Br. at 41-47). Washington did not respond, conceding the argument and failing to address numerous dispositive points and authorities. *See Dickson v. U.S. Fid. & Guar. Co.*, 77 Wn.2d 785, 787-88, 466 P.2d 515, 517 (1970) ("Contentions may not be

presented for the first time in the reply brief.”). Washington’s non-response confirms that the Superior Court’s declaratory judgment—issued to guide how the State should “enforce[e] the qualifying statute correctly”—is precisely the kind of advisory opinion that should be reversed under Washington law.

First, Washington fails to address or distinguish recent precedent from this Court holding that a government’s interest in enforcing the law is not cognizable in a declaratory judgment action. *See* PMs Br. at 41-42 (citing *Stevens Cnty. v. Stevens Cnty Sheriff’s Dep’t*, 20 Wn. App. 2d 34, 42-43 (2021)). In *Stevens*, this Court held that a county did *not* have standing to seek a declaratory judgment even though it was “charged with enforcing the statute.” *Stevens Cnty.*, 20 Wn. App. 2d at 42-43. This case is indistinguishable. Washington cannot assert a governmental interest in enforcing the law separate from its non-justiciable contractual (and arbitrable) interest in escaping the NPM Adjustment under the MSA. *See* PMs’ Opening Br. at 3, 7, 12-15.

Second, Washington does not respond to the uniform body of precedent from around the country, holding, consistent with *Stevens*, that government entities may not seek declaratory relief against a party when the statute *is not enforceable against that party*. *See* PMs Br. at 43-36 (citing, *inter alia*, *Foote v. State*, 364 Or. 558, 571, 437 P.3d 221, 228 (2019), *and State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 323 S.E.2d 294 (1984)). Here, it is uncontested that any escrow obligation, by its own terms, does not apply against the PMs who are party to this proceeding and have complied with their undisputed MSA obligations.

The State cites no case allowing a government entity to pursue a declaratory judgment under these circumstances. Washington instead responds to a straw man argument, insisting that its dispute is "not with NPMs" because it agrees with the NPMs' view that escrow is not due on tribally tax stamped cigarettes. (St. Br. at 38-39). That is beside the point, which is that the appellant PMs, who have complied with their payment obligations under the MSA and are not subject to escrow

obligations, are not proper defendants to an action seeking a declaration of the meaning of the term "units sold" in the Qualifying Statute.

Third, Washington fails to respond to yet another binding Washington case, *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 379-80, 858 P.2d 245 (1993) ("*Yakima Fire*"), which held that a city may not seek a declaratory judgment based only on financial interests that are contingent on future events. Here, the State *admits* its interests are entirely contingent on future arbitrations. See St. Br. at 2 ("To be sure, there will be ongoing arbitrations and the legal interpretation of 'units sold' will be applied to the facts in each case.").

It is uncontested that the only conceivable import of the Superior Court's decision here is to bolster the State's arguments in an *ongoing* or *future* arbitration proceeding based on future, contingent interests—a result prohibited by *Yakima Fire*. *See id.* Regardless of how the term "units sold" is interpreted, the State

may be found diligent or non-diligent for any number of reasons in future arbitration proceedings concerning particular years. Accordingly, the Superior Court's decision will not be "final and conclusive" as to any real-world dispute. *See Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815. Washington is again silent on this point.

Fourth, the State has failed to explain how it has a "genuine" interest in *not* enforcing the Qualifying Statute that stands in "opposition" to the PMs' interests in having the Qualifying Statute diligently enforced. *See id.* The Qualifying Statute itself makes clear the State's only "genuine" interest is aligned with the PMs' interest in enforcing the law. The Qualifying Statute expressly provides that it would be "contrary to the policy of the State" to allow NPMs to exploit the "cost advantage" of the MSA to "derive large, short-term profits … without ensuring that the State will have an eventual source of recovery," and it is "thus in the interest of the State" to collect escrow and to prevent such an outcome. RCW 70.157.005(f).

This legislative statement of interest is at odds with the State's purported "genuine" interest in construing "units sold" narrowly to enforce fewer escrow payments from NPMs. *See Matter of Adoption of T.A.W.*, 186 Wn.2d 828, 840, 383 P.3d 492, 497 (2016) ("If the statute at issue . . . incorporates a relevant statement of purpose, our reading of the statute should be consistent with that purpose."); *Spokane Cnty. Health Dist. v. Brockett*, 120 Wn.2d 140, 151, 839 P.2d 324, 330 (1992) ("[T]he preamble or statement of intent can be crucial to interpretation of a statute."). Washington's "genuine" interest—as stated by the legislature itself—is aligned with the PMs when it comes to the applicability of the Qualifying Statute to certain tribal sales because both parties want the Qualifying Statute to be enforced against tobacco product manufacturers that opt not to join the MSA and make payments to increase the State's escrow fund. As expressed by the State's own OAG enforcers, the PMs and Washington shared the same interest in attempting to enforce the Qualifying Statute on tribal sales the State considered at the time

to be "units sold."

Finally, Washington cannot explain why its purported interest in "enforcing the law correctly" has any relevance to its *past* enforcement efforts, which are what is at issue. The only possible vindication of that interest would be for *future* enforcement efforts against NPMs. There is thus a critical temporal dimension that the State seeks to obscure in this lawsuit. If the State actually sought to advance its genuine interest in "enforcing the law correctly," it would have brought a declaratory judgment action back in 2004 (or earlier).

7. The PMs Did Not "Waive" The Superior Court's Substantive Error

Washington inexplicably asserts multiple times in the State's Brief that the PMs have "waived" any challenge to the Superior Court's substantive error on the "units sold" issue, because the PMs supposedly "do not argue" and "do not address the merits" of the Superior Court's declaratory judgment. (St. Br. 1, 55-56). That is patently untrue. The PMs devoted eight pages of their opening brief to the Superior Court's substantive error.

(*See* PMs Br. at 53-61). And it is Washington that has failed to respond to the Superior Court's error.

As set forth in the PMs' Brief, the Superior Court erred by interjecting its advisory opinion into a quintessential factual determination under the guise of interpretating the statutory meaning of "units sold." (PMs Br. at 54-55). The reality is that there was no material difference, as a matter of pure statutory construction, between how the Panel and the Superior Court construed the meaning of "units sold" under RCW 70.157.010(j). The Panel determined that "units sold" are cigarettes "sold in the State" that are "both stamped and taxed," that is, cigarettes "bearing the excise tax stamp of the State." CP 79-80. The Superior Court likewise determined that "units sold" are cigarettes "contained in packs bearing the excise tax stamp of the State[.]" CP 1203, 1205. These interpretations are essentially interchangeable, and both further align with how the 2003 NPM Adjustment Panel construed "units sold," defining it as individual cigarettes sold in the State and "bearing the excise tax

stamp of the State[.]" *See* CP 478-79.

Thus, contrary to Washington's assertion that the two Arbitration Panels—and, by extension, the Superior Court—"reached diametrically opposed interpretations" of "units sold," in fact all three adjudicative bodies rendered similar statutory interpretations. Where they differed was not on the *interpretation* of "units sold," but on its *application* to the "particular facts" relating to Washington's enforcement efforts in 2004—a determination Washington admits must be left to the arbitrators and not the Superior Court. (St. Br. at 39-40).

The Panel undertook a detailed examination of the testimony and substantial accompanying documentary evidence demonstrating the State's own position at the time that tribal cigarette sales were "units sold." *See* PMs Br. at 55-59 (citing CP 678-82, 684-709). The Panel concluded on the basis of its weighing of the evidence that Washington's failure even to *attempt* to collect escrow on cigarettes the State itself considered to be "units sold" at the time evidenced lack of diligent

enforcement. *See id*. This was a factual determination based on the contemporaneous evidence of the State's understanding that tribal compact sales were "units sold" at the time of the enforcement failures under consideration.

The Superior Court's substantive error was to strip away this factual context and to conclude in the abstract that tribal compact cigarettes are not within the statutory definition of "units sold," and thus that the Panel's ruling treating tribal compact cigarettes as "units sold" "constituted plain error." CP 1203-1204. That conflates the statutory interpretation question as to the meaning of "units sold"—an issue on which the Panel and the Superior Court agreed—with the Panel's factual determination that Washington's failure even to attempt to enforce its Qualifying Statute with respect to cigarettes the State considered (rightly or wrongly) to be "units sold" at the time evidenced its lack of diligence. The ultimate statutory construction of "units sold," whether by the Arbitration Panels or the Superior Court, is simply not material to the Panel's

correct factual determination that the State's decision not to act in the face of its contemporaneous understanding of "units sold" demonstrated a failure of diligence. And it was error for the Superior Court to call this "plain error," particularly where Washington contests none of the Panel's supporting findings of fact.

The PMs described the Superior Court's substantive error as to "units sold" at length in the opening PMs' Brief. (*See* PMs Br. at 53-61). Washington offers no response in the State's Brief, instead groundlessly asserting a "waiver," and then proceeding to defend the Superior Court's statutory interpretation—which matched the Panel's statutory interpretation. (St. Br. at 55-62). Washington's discussion barely references the extensive factual evidence cited by the Panel regarding the State's contemporaneous understanding of "units sold" at the time it failed to act. Although acknowledging the Panel "spent almost 20 pages" scrutinizing the proof of Washington's understanding at the time, it brushes the evidence off in its entirety as a mere

"policy debate" and states that is not how statutes are interpreted. (St. Br. at 58-62 (citing CP 104-122)). Washington again ignores the point that the Panel was engaged in fact-finding, not statutory interpretation. CP 678-709. It was error for the Superior Court to rewrite the Panel's well-supported factual findings under the guise of statutory interpretation. *See Int'l Union of Operating Eng'rs v. Port of Seattle*, 176 Wn.2d 712, 716 n.1, 295 P.3d 736 (2013) ("Courts do not review an arbitrator's factual determinations."). What swayed the Panel was not the abstract statutory meaning of "units sold," but the factual evidence of the State's lack of diligence based on its understanding of the Qualifying Statute at the time of its inaction.

More than that, it is clear that the fact-bound nature of the inquiry must necessarily continue after 2004. As but one example, beginning in mid-2005, there were tribal compact sales that generated tax revenue for the *State*, and not just the compacting tribe. Washington castigates the Panel for its supposed "gross misunderstanding" of the law when it found that

the compact system "authorized compact tribes to collect the same tax that the state imposes." (St. Br. at 60-61). The State insists the tribal tax is "collected by a different government, administered by a different government, and used by a different government." (*Id*. at 61).

Washington is mischaracterizing a more complicated and fact-driven question. In fact, as set forth in the PMs' subsequent Motion for Clarification of the Superior Court's Order, which is the subject of a separate appeal pending before this Court (*see* Appeal No. 84691-4), the State's arguments are inapplicable to cigarettes sold beginning in mid-2005 under the Puyallup Tribe's compact. That compact was the subject of separate compact legislation "due to the very different nature of the cigarette trade on the Puyallup Indian reservation," and addressed "the substantial distinctions" through enacting legislation setting forth a different tax arrangement. RCW 43.06.465 Notes, Findings. Specifically, the cigarette tax agreement under any compact with the Puyallup Tribe "must include a provision

requiring the tribe to transmit thirty percent of the tribal tax revenue on all cigarette sales to the state." RCW 43.06.465(3).

Thus, tax-stamped tribal compact sales by the Puyallup Tribe beginning in 2005 *were* "units sold," because the tax stamps represented state taxes and not just tribal taxes. By failing to consider the fact-depending nature of the ongoing 2005-2007 Arbitration, however, the Superior Court's Order would seem to hold that these sales are not "units sold" based on an unsubstantiated characterization of the nature of tribal tax stamps that, as applied to the Puyallup Tribe's compact, is wrong. This highlights the need for arbitration panels to consider all relevant facts for a given year and to issue a final award before the Superior Court undertakes its limited review role under the FAA.

C. Washington Fails to Cure Its Lack of Standing

Lastly, Washington fails to adequately address its lack of standing to assert a declaratory judgment claim in its capacity as enforcer of the Qualifying Statute. (*See* PMs Br. at 50-53). Washington first attempts to expand the UDJA's definition of

"person" by grafting on Washington's "general definition" of "person" in RCW 1.16.080, which includes "the United States, this state, or any state or territory"—a phrase conspicuously omitted from the UDJA's separate definition of "person." RCW 7.24.130 (defining "'person,' wherever used in this chapter," to mean "any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever").

The State's attempt to expand a specific statutory definition of "person" that omits the terms it needs, by importing a more general definition that includes its desired terms, violates basic canons of statutory construction. First, it violates the "general-specific rule … which favors a more specific statute over a more general one if [the] two are in conflict." *In re Rodriguez*, 21 Wn. App. 2d 585, 588, 506 P.3d 1256, 1258 (2022). Second, it violates the canon of *expressio unius est exclusio alterius*, under which "[w]here a statute specifically designates the things or classes of things upon which it operates,

an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature." *Cove v. Wash. Dep't of Fish & Wildlife*, 17 Wash.App.2d 856, 876, 488 P.3d 894, 905 (2021) (quoting *Magney v. Truc Pham*, 195 Wn.2d 795, 803, 466 P.3d 1077 (2020) (internal citation omitted)).

Here, the UDJA contains a specific definition of "person" that omits any reference to the State, contrasting sharply with the Washington's general definition of "person," which includes the State. The specific governs over the general, and the legislature's omission of the State from its definition of "person" under the UDJA—where it could have included the State or simply left "person" undefined and defaulted to the general definition—evidences a legislative intention to omit the State from the class of "persons" with standing to sue for declaratory judgment.

Washington next cites three past cases in which the State has purported to bring a declaratory judgment action. (St. Br. at 53). But as discussed in the PMs' Brief, none of these cases

considered the statutory definition of "person," and thus they provide no useful guidance. (PMs Br. at 51-52). The PMs, by contrast, cite authority specifically addressing this issue and holding that the State and related governmental entities do not satisfy the definition of "person." *See, e.g., 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 next argues that excluding it from the definition of "person" would subject it to "absurd results" because it could be subject to suits for declarations of its contractual obligations, but could not bring such actions on its own behalf. (St. Br. at 53-54). But that merely reinforces the State's justiciability problem. To the extent the State could have standing as a contracting "person" under the UDJA, it must satisfy the same standards of justiciability as any other contracting "person," meaning, in the context of an arbitration agreement, that it must await a final

award before it can seek judicial review. *See* § II.B.1-3, *supra*. It cannot act in its sovereign capacity as enforcer of the Qualifying Statute and demand a declaration of the abstract meaning of the law while disregarding its contractual commitment to arbitration.

Washington attacks the distinction between its "private and sovereign capacities," arguing that the UDJA "draws no such distinction for standing purposes." (St. Br. at 54). That is true: the UDJA simply excludes the State from statutory standing altogether, as should this Court. But to the extent the State might be deemed a "person" at all, it could only be as a contracting party, not as a sovereign. And as a contracting party to the MSA, Washington has committed disputes such as this to binding arbitration. Washington also repeats its erroneous assertion that state courts may interfere with an arbitration under the MSA to "interpret state law[.]" (*Id*.). That is wrong, for the reasons set forth in § II.B.2, *supra*. Either the State lacks standing, or its declaratory judgment claim lacks justiciability, or both. In all events, it cannot bring a declaratory judgment to decide one issue

in isolation and impose its views on all ongoing and future arbitration proceedings.

III. CONCLUSION

Washington has failed to present any viable basis to reverse the Superior Court's denial of its motion to vacate the Panel's Award, which was well-supported by more than fifty pages of determinative factual findings the State does not challenge. Washington has also failed to offer any viable defense of the Superior Court's erroneous decision to enter an advisory opinion on an isolated, non-justiciable question and to impose its abstract judgment on ongoing and future NPM Adjustment arbitration panels that must make fact-intensive determinations. 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.

DATED this 16th day of December, 2022.

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 11,794 words, which is within the limits of RAP 18.17.

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

DATED in Seattle, Washington, this 16th day of December, 2022.

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