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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PACIFIC BELLS, LLC; BRUNSWIKST.,
LLC; WOW DISTRIBUTING, INC.;
MELISSA JOHNSTON; LENA MADDEN;
JUDI CHAPMAN; KATHERINE SOLAN;
JOHN EDMUNDSON; and MIKE LINDBO,
on their own behalf and on behalf of
similarly situated entities or persons,

Plaintiffs,

v.

JAY INSLEE, Governor of the State of
Washington; CAMI FEEK, Commissioner of
the Washington Employment Security
Department; JILMA MENESES,¹ Secretary
of the Washington Department of Social and
Health Services; and THE LONG-TERM
SERVICES AND SUPPORTS TRUST
FUND,

Defendants.

C21-1515 TSZ

ORDER

On November 9, 2021, plaintiffs commenced this class action to challenge the
validity of RCW Chapter 50B.04, the statute creating the Long-Term Services and

¹ Pursuant to Federal Rule of Civil Procedure 25(d), Secretary Meneses, who was appointed in
January 2022, is hereby SUBSTITUTED for defendant Acting Secretary Donald Clintsman.

1 Supports (“LTSS”) Trust Program, also known as “WA Cares.” *See* Compl. (docket
2 no. 1); *see also* <https://wacaresfund.wa.gov>. In adopting WA Cares, Washington became
3 the first state in the nation to enact a long-term care (“LTC”) benefit program that is
4 independent of Medicaid. *See* Foutch Decl. at ¶ 18 (docket no. 25); Ex. A to Birmingham
5 Decl. (docket no. 21-1 at 2). Plaintiffs assert the following four claims: (1) WA Cares²
6 is preempted by the Employee Retirement Income Security Act (“ERISA”);
7 (2) WA Cares violates ERISA, as well as the Fourteenth Amendment of the United States
8 Constitution; (3) WA Cares violates ERISA, as well as the Age Discrimination in
9 Employment Act of 1967, as amended by the Older Workers Benefit Protection Act (the
10 “ADEA”); and (4) the LTSS Trust Fund is a multiple employer welfare arrangement, as
11 defined by ERISA, operating without a certificate of authority, and “the forfeiture
12 provisions [of WA Cares], the offering of impermissible benefits, and the setting of
13 premiums based on income violate ERISA,” as well as defendants’ “fiduciary duties
14 under ERISA and at common law, and insurance law.” Compl. at ¶¶ 7.1–7.8.³

16
17 ² Beginning on July 1, 2023, WA Cares requires that employers collect premiums from their
18 non-exempt employees through payroll deductions and remit such amounts to the Washington
19 Employment Security Department. RCW 50B.04.080(1)–(2). Certain individuals are exempt
20 from the assessment of premiums, including employees who timely apply for an exemption on
the ground that they purchased LTC insurance before November 1, 2021, *see* RCW 50B.04.085,
and persons who are employed in Washington, but whose permanent residence is outside the
State, *see* Laws of 2022, ch. 2, § 2. Self-employed persons, who do not have wages from which
a premium can be automatically deducted, may voluntarily elect coverage. RCW 50B.04.090.

21 ³ Plaintiffs also pleaded a claim for restitution, *see* Compl. at ¶¶ 7.9–7.10, but given the delay in
22 implementation of WA Cares (from January 1, 2022, to July 1, 2023), plaintiffs intend to
23 withdraw this claim. *See* Pls.’ Prop. Am. Compl. at ¶ 7.10, Ex. K to Birmingham Decl. (docket
no. 21-11 at 27–28).

1 Defendants have brought a motion, docket no. 17, seeking to dismiss each of the
2 claims for lack of subject-matter jurisdiction. For the reasons set forth in this Order, the
3 Court concludes it does not have jurisdiction for two reasons. First, WA Cares is not
4 governed or preempted⁴ by ERISA, as alleged by plaintiffs, and thus ERISA does not
5 confer jurisdiction on the Court. Second, the Court lacks jurisdiction by operation of the
6 Tax Injunction Act, which provides that the Court may not “enjoin, suspend or restrain
7 the assessment, levy or collection of any tax under State law,” if “a plain, speedy and
8 efficient remedy may be had in the courts of such State,” 28 U.S.C. § 1341. The Court is
9 persuaded that the challenged WA Cares premium constitutes a tax, and the Tax
10 Injunction Act “drastically” limits federal district court jurisdiction “to interfere with so
11 important a local concern as the collection of taxes.” *Rosewell v. LaSalle Nat’l Bank*, 450
12 U.S. 503, 522 (1981). As a result, the Court cannot consider the merits of plaintiffs’
13 claims and must dismiss this action without prejudice. Any legal challenge to WA Cares
14 must be brought in state court.

15 **Discussion**

16 Pursuant to Federal Rule of Civil Procedure 12(b)(1), defendants present a facial,
17 rather than a factual, jurisdictional challenge. A facial attack asserts that the allegations
18 of the complaint are insufficient on their face to invoke federal jurisdiction. *See Safe Air*
19 *for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). With respect to a facial

21 ⁴ Section 514 provides that, with certain exceptions, ERISA “shall supersede any and all State
22 laws insofar as they may now or hereafter relate to any [non-exempt] employee benefit plan.”
23 29 U.S.C. § 1144(a).

1 jurisdictional challenge, a plaintiff is entitled to the same safeguards that apply to a
2 Rule 12(b)(6) motion to dismiss for failure to state a claim. *See Friends of Roeding Park*
3 *v. City of Fresno*, 848 F. Supp. 2d 1152, 1159 (E.D. Cal. 2012). The allegations of the
4 complaint are presumed to be true, *id.*, and the Court may not consider matters outside
5 the pleading without converting the motion into one for summary judgment, *see White v.*
6 *Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A federal court is presumed to lack
7 jurisdiction in a particular matter unless a contrary showing is made, *see Friends of*
8 *Roeding Park*, 848 F. Supp. 2d at 1159 (citing *Gen. Atomic Co. v. United Nuclear Corp.*,
9 655 F.2d 968, 968–69 (9th Cir. 1981)), and plaintiffs bear the burden of establishing that
10 the Court has subject-matter jurisdiction, *see Nat’l Wildlife Fed’n v. Johanns*, No. C04-
11 2169, 2005 WL 1189583, at *4 (W.D. Wash. May 19, 2005).

12 **A. Federal Question**

13 Relying solely on ERISA,⁵ plaintiffs assert that the Court has federal-question
14 subject-matter jurisdiction. *See* Compl. at ¶ 2.1; *see also* 28 U.S.C. § 1331. ERISA
15 § 502(e)(1), codified at 29 U.S.C. § 1132(e)(1), confers on federal district courts
16 “exclusive jurisdiction of civil actions” under Subchapter I of ERISA, except for claims
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18 ⁵ In their operative pleading, plaintiffs also mention specific provisions of the Constitution, as
19 well as 42 U.S.C. § 1983, the ADEA, and the Declaratory Judgment Act, *see* Compl. at ¶¶ 1.2,
20 2.3, 5.29–5.32, 7.4, & 7.6, but they do not allege that federal-question jurisdiction may be
21 premised on the Constitution or any statutes other than ERISA. *See id.* at ¶ 2.1. Indeed, a state
22 and related entities and officials may assert Eleventh Amendment immunity from suit under
23 § 1983 and/or the ADEA, *see Will v. Mich. Dep’t of State Police*, 491 U.S. 58 (1989); *see also*
Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000), and the Declaratory Judgment Act, 28 U.S.C.
§§ 2201–02, cannot serve as an independent basis for subject-matter jurisdiction, *see Fiedler v.*
Clark, 714 F.2d 77, 79 (9th Cir. 1983).

1 brought under § 502(a)(1)(B), as to which state courts have concurrent jurisdiction.
2 ERISA enumerates the types of claims that may be asserted and the categories of persons
3 who may assert them, and for purposes of the legal theories tendered in this matter,
4 plaintiffs must be either participants or beneficiaries of an “employee benefit plan.” *See*
5 29 U.S.C. §§ 1132(a)(2)–(3); *see also* 29 U.S.C. §§ 1002(7)–(8). In moving to dismiss,
6 defendants did not raise the issue of whether plaintiffs can, as a matter of law, establish
7 that WA Cares constitutes an “employee benefit plan” as to which they are participants or
8 beneficiaries. Because the question relates to the Court’s jurisdiction, the parties were
9 directed to provide additional briefing, and counsel were afforded an opportunity to
10 present oral argument on the topic.

11 ERISA applies to “any employee benefit plan if it is *established or maintained* --
12 (1) by any employer engaged in commerce or in any industry or activity affecting
13 commerce; or (2) by any employee organization or organizations representing employees
14 engaged in commerce or in any industry or activity affecting commerce; or (3) by both.”
15 29 U.S.C. § 1003(a) (emphasis added); *see also* 29 U.S.C. §§ 1002(1)–(3) (defining
16 “employee benefit plan” and its possible components, *i.e.*, an “employee welfare benefit
17 plan” and/or an “employee pension benefit plan”). WA Cares is a creation of the
18 Washington Legislature, which, in this context, is neither an employer nor an employee
19 organization as defined by ERISA. *See* 29 U.S.C. §§ 1002(4)–(5) (defining “employee
20 organization” and “employer”); *see also* *Howard Jarvis Taxpayers Ass’n v. Cal. Secure*
21 *Choice Ret. Sav. Program*, 997 F.3d 848, 859–60 (9th Cir. 2021). Because WA Cares is
22 not “established or maintained” by an employer and/or employee organization, it is not an
23

1 “employee benefit plan” and it is not governed by ERISA. *See Howard Jarvis*, 997 F.3d
2 at 859–63.

3 Plaintiffs attempt to distinguish *Howard Jarvis*, arguing that employees of the
4 State of California were not required to participate in the state-managed retirement
5 savings plan challenged in that case, but employees of the State of Washington will be
6 subject to the premiums related to WA Cares. Plaintiffs reason that, because WA Cares
7 will impact state employees, as well as employees of private entities, the Washington
8 Legislature operated as an “employer,” within the meaning of ERISA, in establishing
9 WA Cares. Plaintiffs further contend that, because WA Cares will extend benefits to
10 more than a *de minimis* number of private employees, WA Cares cannot qualify as a
11 “governmental plan” that is exempt from ERISA pursuant to 29 U.S.C. § 1003(b)(1).
12 Plaintiffs’ creative contentions have no merit.

13 WA Cares is designed to assess premiums and offer LTC benefits regardless of
14 whether a person is employed by the State of Washington. For example, an individual
15 might begin working for the State prior to July 2023, when WA Cares premiums will
16 become due, but then shift to the private sector and retire in July 2033; such person will
17 have paid WA Cares premiums for ten years and will be eligible for LTC benefits if
18 needed,⁶ even though he or she was not employed by the State during the latter years of
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21 ⁶ *See* RCW 50B.04.060(2) (indicating that a “qualified individual” may become eligible for
22 WA Cares benefits by filing an application and being evaluated as requiring assistance with at
23 least three activities of daily living); RCW 50B.04.050(1)–(2) (defining a “qualified individual”
as someone who has paid premiums for (a) a total of ten years “without interruption of five or

1 the standard vesting period. Thus, unlike when a state acts in its capacity as an employer
2 in offering health and/or pension plans that extend or accrue benefits only while
3 individuals are employed by the state, the State of Washington enacted WA Cares in its
4 role as sovereign. Contrary to plaintiffs' assertion, ERISA does not provide the Court
5 with jurisdiction in this matter.

6 **B. Tax Injunction Act**

7 The Tax Injunction Act “has its roots in equity practice, in principles of
8 federalism, and in recognition of the imperative need of a State to administer its own
9 fiscal operations.” *Rosewell*, 450 U.S. at 522 (quoting *Tully v. Griffin, Inc.*, 429 U.S. 68,
10 73 (1976)). The latter consideration was “the principal motivating force” behind the Tax
11 Injunction Act. *Id.* When Congress passed the Tax Injunction Act, it “knew that state tax
12 systems commonly provided for payment of taxes under protest with subsequent refund
13 as their exclusive remedy.” *Id.* at 523. This protocol for challenging the validity of a tax
14 law and/or its specific application allows “the States and their various agencies to survive
15 while long-drawn-out tax litigation is in progress.” *Id.* (quoting S. Rep. No. 75-1035, at 1
16 (1937)); *see also California v. Grace Brethren Church*, 457 U.S. 393, 410 (1982) (“If
17 federal declaratory relief were available to test state tax assessments, state tax
18 administration might be thrown into disarray During the pendency of the federal
19 suit the collection of revenue under the challenged law might be obstructed, with

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22 more consecutive years”; (b) three years within the last six years from the date of application for
benefits; or (c) at least one year, if the person was born before January 1, 1968).

1 consequent damage to the State’s budget, and perhaps a shift to the State of the risk of
2 taxpayer insolvency.” (quoting *Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971)
3 (Brennan, J., concurring in part and dissenting in part))). To determine whether the
4 Tax Injunction Act deprives the Court of jurisdiction, the Court must address whether
5 the WA Cares premium is a tax and, if so, whether plaintiffs have a “plain, speedy and
6 efficient” remedy in Washington’s courts. *See* 28 U.S.C. § 1341.

7 **1. Tax or Fee**

8 For purposes of the Tax Injunction Act, “[n]ot every exaction by state authorities
9 is a tax.” *Hexom v. Or. Dep’t of Transp.*, 177 F.3d 1134, 1135 (9th Cir. 1999). Thus,
10 courts addressing the applicability of § 1341 have had to distinguish between taxes and
11 fees. *See id.* at 1136; *see also Lavis v. Bayless*, 233 F. Supp. 2d 1217, 1219 (D. Ariz.
12 2001) (describing the “classic ‘tax’” and the “classic ‘regulatory fee’”). The Ninth
13 Circuit has adopted a three-part test and, in addressing the question of whether the
14 challenged WA Cares premium is a tax, the Court must consider: “(1) the entity that
15 imposes the assessment; (2) the parties upon whom the assessment is imposed; and
16 (3) whether the assessment is expended for general public purposes, or used for the
17 regulation or benefit of the parties upon whom the assessment is imposed.” *Bidart Bros.*
18 *v. Cal. Apple Comm’n*, 73 F.3d 925, 931 (9th Cir. 1996) (citing *San Juan Cellular Tel.*
19 *Co. v. Pub. Serv. Comm’n of P.R.*, 967 F.2d 683 (1st Cir. 1992)); *see also Qwest Corp. v.*
20 *City of Surprise*, 434 F.3d 1176, 1183 (9th Cir. 2006); *Lavis*, 233 F. Supp. 2d at 1220–23.

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1 **a. Factor 1: The Entity Imposing the Assessment**

2 When an assessment is imposed directly by a legislature, as opposed to an
3 administrative agency, it is more likely to be a tax. *Bidart*, 73 F.3d at 931. As plaintiffs
4 concede, *see* Pls.’ Resp. at 6 n.4 (docket no. 20), this factor weighs in favor of the
5 WA Cares premium being a tax.

6 **b. Factor 2: The Parties Required to Pay the Assessment**

7 When an assessment is imposed upon a broad, rather than a narrow, subset of the
8 population, it is more likely to be a tax. *Bidart*, 73 F.3d at 931. This factor also weighs
9 in favor of the WA Cares premium being a tax. Beginning July 1, 2023, the premium
10 must be paid by anyone who has not applied for and been granted an exemption and who
11 is employed by an “employer,” meaning (i) an individual or organization (other than the
12 United States of America) having any person in employment, (ii) the State and its
13 institutions and agencies, and (iii) any unit of local government, *see* RCW 50B.04.010(8)
14 & RCW 50A.05.010(7). *See* RCW 50B.04.080 & .085; *see also* Laws of 2022, ch. 2, § 2.
15 Plaintiffs contend, however, that the WA Cares premium does not apply to a broad group
16 of parties because it is “optional” for (i) certain employees that acquired private LTC
17 insurance, (ii) persons with a permanent residence outside Washington, certain veterans,
18 certain military spouses or domestic partners, and temporary workers with nonimmigrant
19 visas, (iii) self-employed individuals, and (iv) federally-recognized tribes.⁷

21 ⁷ Offering federally-recognized tribes the option to opt in or opt out of WA Cares “at any time
22 for any reason,” *see* RCW 50B.04.095, is consistent with principles of sovereign immunity. *See*
23 *Confederated Tribes & Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1084

1 At the Court’s request, the parties provided the following estimates concerning the
2 number of individuals potentially affected by WA Cares:

- 3 • Employees within Washington in 2023: 4.1 million
- 4 • Employees required to pay WA Cares premiums in 2023: 3.4 million
- 5 • Approved applications for private-LTC-insurance exemption⁸: 473,510
- 6 • Persons potentially exempt pursuant to Laws of 2022, ch. 2, § 2: 235,529
- 7 • Self-employed persons in 2023: 233,191
- Self-employed persons likely to opt in to WA Cares: less than 40,000

8 Defs.’ Supp. Br. at 1 (docket no. 44); Amundson Decl. at ¶¶ 2–11 (docket no. 45); *see*
9 *also* Pls.’ Supp. Br. at 2–3 (docket no. 46). Neither these figures nor the allegations in
10 the operative pleading support plaintiffs’ proposition that the quantity of people who may
11 and/or will “opt out” or who are not covered is so large as to render WA Cares applicable
12 to only a narrow range of employees.⁹

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14 (9th Cir. 2011) (“The Constitution vests the Federal Government with exclusive authority over
15 relations with Indian tribes . . . , and in recognition of the sovereignty retained by [the] tribes
16 . . . , Indian tribes and [registered] individuals generally are exempt from state taxation within
their own territory.” (alterations in original, quoting *Okla. Tax Comm’n v. Chickasaw Nation*,
515 U.S. 450, 455 (1995))). Extending this courtesy to federally-recognized tribes does not
indicate that the WA Cares premium is not a tax.

17 ⁸ This exemption is a transitional measure, intended as a safe harbor for adults who already
18 have LTC coverage; neither minors nor persons who purchase private insurance on or after
19 November 1, 2021, can invoke this exemption, and application for the exemption must be made
20 by December 31, 2022. *See* RCW 50B.04.085. In other words, current employees who did not
have LTC policies before November 1, 2021, or do not apply for the exemption by the deadline,
and who are not otherwise exempt, as well as all of Washington’s children, as they age and join
the work force, will be subject to withholding pursuant to WA Cares, regardless of whether they
also buy private LTC insurance.

21 ⁹ Contrary to plaintiffs’ apparent assertion, the exemptions and exclusions at issue do not
22 distinguish WA Cares premiums from other assessments in Washington that are undisputedly
23 taxes. For example, (i) a variety of entities and types of revenue are exempt from Washington’s
business and occupation tax, *see* RCW Chapter 82.04; (ii) an entire chapter of the Revised Code

1 c. **Factor 3: The Ultimate Use of the Assessment**

2 When the first and second factors lead to contradictory results, courts emphasize
 3 the third inquiry, which evaluates how “the revenue is ultimately spent.” *See Qwest*, 434
 4 F.3d at 1183; *see also Bidart*, 73 F.3d at 932. Given, however, the consistent outcomes
 5 in this matter under the first and second tests, the Court does not give any extra weight to
 6 the third factor. The Ninth Circuit has observed that, although assessments placed in
 7 special funds and used for only special purposes are less likely to be taxes, their
 8 segregation from the general revenues of a state does not mean they are not taxes, for
 9 purposes of the Tax Injunction Act, if they are or will be expended to provide “a general
 10 benefit to the public.” *Bidart*, 73 F.3d at 932.

11 Although *Bidart* articulates the standards applicable to the Court’s decision in this
 12 matter, *Bidart* is factually distinguishable.¹⁰ Unlike the fees at issue in *Bidart*, WA Cares

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 14 of Washington is devoted to setting forth the numerous exemptions from property taxes, *see*
 15 RCW Chapter 84.36; and (iii) certain transactions are exempt from retail sales taxes, *see*
 16 RCW Chapter 82.08. Indeed, like WA Cares, the retail sales tax scheme respects state
 17 boundaries and either does not apply to, or authorizes an exemption in the form of a refund with
 respect to, certain purchases by non-residents, provided that certain requirements are met. *See*
 RCW 82.08.0264, .0266, .0268, .0273, .0279, & .700. Neither the number nor the types of
 exemptions set forth in RCW Chapter 50B.04 suggest that WA Cares is something other than a
 tax.

18 ¹⁰ In *Bidart*, a major producer of apples in California sought declaratory and injunctive relief
 19 from a fee on apples that was assessed, with legislative authorization, by the California Apple
 Commission. 73 F.3d at 927 & 931. The assessment was imposed only upon apple producers,
 20 placed in a segregated fund, and used only for Commission purposes, which was primarily to
 promote the purchase of California apples. *Id.* at 932–33. Upon termination of the Commission,
 21 by a vote of the majority of California’s apple growers, the collected funds were to be returned to
 the regulated businesses, and not transferred to the state’s general fund. *Id.* at 928 & 932. The
 22 Ninth Circuit reasoned that the Commission’s expenditures to educate the public about the
 “healthful properties” and “nutritional value” of apples was only “an indirect public benefit” and
 that, because the Commission’s assessments were “ultimately imposed by a non-legislative body

1 premiums are mandated by the Washington Legislature, as opposed to an agency or
2 commission with delegated authority, can be appropriated by the Legislature for another
3 purpose¹¹ (subject to the requirement that notice with statutorily-specified content be
4 provided by mail to all qualified individuals, see RCW 50B.04.100(3)), and will be used
5 to directly¹² benefit all members of the public who paid premiums for the requisite period
6 and meet the criteria for receiving LTC services.

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9 on a small number of organizations, kept segregated from general California funds, and spent
10 only for a purpose that does not directly benefit the public at large,” the apple fees were not taxes
within the meaning of the Tax Injunction Act. Id. at 932–33.

11 ¹¹ Plaintiffs’ contention that WA Cares premiums may not be used for other purposes relies on a
12 misinterpretation of RCW 50B.04.100(2), which states: “The revenue generated pursuant to this
13 chapter shall be utilized to expand long-term care in the state. These funds may not be used
14 either in whole or in part to supplant existing state or county funds for programs that meet the
definition of approved services.” This provision does not preclude WA Cares revenue from
being used outside the LTC arena; rather, it seeks to preserve other sources of LTC funding, like
Medicaid, by prohibiting the use of WA Cares benefits as a substitute for them.

15 ¹² Plaintiffs argue that defendants identify only an “indirect” benefit from WA Cares, namely
16 “keeping a very small percentage of individuals off of Medicaid.” Pls.’ Resp. at 9 (docket
17 no. 20). Such benefit seems direct, not indirect, and characterizing the percentage as “small”
18 ignores the legislative findings underlying WA Cares. According to the Washington Legislature,
19 the “majority of people over sixty-five years of age will need long-term services and supports
20 within their lifetimes.” RCW 50B.04.900(2) (emphasis added). The population of seniors in
Washington currently exceeds one million and is projected to more than double by 2040. Id. In
21 the absence of LTC insurance, seniors must rely on family care and spend their savings down to
22 poverty levels before they can access LTC services through Medicaid. Id. In 2015, more than
850,000 unpaid family caregivers provided assistance valued at \$11 billion, and those who left
the workforce lost an average of \$300,000 in income, as well as health and retirement benefits.
Id. The current ratio of potential family caregivers for each senior is 7-to-1, but by 2030, the
ratio is expected to decrease to 4-to-1. RCW 50B.04.900(4). Washington currently spends
roughly six percent (6%) of its operating budget on LTC services and supports, and anticipates
needing, by 2030, an additional \$6 billion in funds for such purposes. RCW 50B.04.900(5).
Based on caseload and demographic estimates, WA Cares is predicted to save the Medicaid
program \$898,000,000 in 2051–2053. RCW 50B.04.900(8).

1 **i. General Versus Specific Revenue**

2 Plaintiffs argue that WA Cares premiums will not be expended for the public
3 good, citing *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722
4 (7th Cir. 2011) (en banc). According to plaintiffs, the Seventh Circuit has defined a tax
5 as an assessment that, not only recovers the specific costs for which the assessment is
6 imposed (*i.e.*, in this case, the amounts to be disbursed as LTC benefits), but also
7 generates general revenues for the state. *See* Pls.’ Resp. at 8–9 (docket no. 20) (citing
8 651 F.3d at 728–29 & 730). *Empress Casino* does not stand for such proposition.
9 Writing for the en banc majority in *Empress Casino*, Judge Posner observed that, if an
10 exaction merely reflects a reasonable estimate of the amount “imposed by the person
11 required to pay” it, then the assessment is a “user fee,” but if the exaction is calculated
12 not only to recover a cost incurred by the governmental entity, but also to generate
13 revenues to offset unrelated expenses or confer unrelated benefits, then it is a “tax.” *See*
14 *id.* at 728–29. Contrary to plaintiffs’ assertion, nothing in *Empress Casino* suggests that
15 a tax (as opposed to a fee) must both “recover the cost for which the assessment is
16 imposed” and generate extra “revenue that can be used for the public good.” *See* Pls.’
17 Resp. at 8–9 (docket no. 20) (emphasis removed). Moreover, this tax-versus-fee
18 paradigm is ill-suited to an analysis of WA Cares, which does not involve or envision any
19 services provided by, or reimbursement to, the State; rather, Washington intends to
20 collect from the population of non-exempt workers funds with which they may in the
21 future, if necessary, pay third parties to assist them with the activities of daily living.

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1 **ii. Similarity to Unemployment Compensation**

2 As aptly noted by defendants, WA Cares is analogous to the unemployment
3 insurance scheme, payments pursuant to which are undisputedly taxes.¹³ Plaintiffs’
4 arguments to the contrary lack merit. Plaintiffs’ assertion that, whereas WA Cares uses
5 the term “premium,” unemployment compensation exactions are denominated as “taxes”
6 is simply incorrect. Washington uses the label “contributions,” not taxes, to describe “the
7 money payments due to the state unemployment compensation fund” or to “the special
8 account in the administrative contingency fund.” RCW 50.04.070; see also Bates v.
9 McLeod, 11 Wn.2d 648, 657, 120 P.2d 472 (1941) (Chapter 162 of the Laws of 1937,
10 codified in RCW Title 50, “imposes a tax, or, as the act phrases it, a ‘contribution,’ for
11 the privilege of employing others”). Moreover, the vocabulary used in the state statutes
12 is irrelevant because whether an assessment is a “tax” for purposes of the Tax Injunction
13 Act is a question of federal, not state, law. See Empress Casino, 651 F.3d at 728 & 730
14 (also observing that “tax” is an “unpopular” and therefore avoided designation); MCI
15 Commc ’ns Servs., Inc. v. City of Eugene, 359 F. App’x 692, 695 (9th Cir. 2009) (“the fact
16 that Ordinance No. 20083 labels a charge as a ‘fee’ rather than a ‘tax’ is not controlling”).
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18 _____
19 ¹³ Under the Federal Unemployment Tax Act (“FUTA”), employers must pay an excise tax on
20 wages paid to employees in “covered” employment, but they are entitled to a credit of up to
21 ninety percent (90%) of the federal tax for contributions they make to a federally-approved state
22 unemployment compensation program. See Grace Brethren, 457 U.S. at 396–97 (citing 26
23 U.S.C. §§ 3301–3311). In Grace Brethren, the Supreme Court held that the Tax Injunction Act
deprived the federal courts of jurisdiction over the claims of certain religious schools in which
they asserted FUTA and its related state laws violated the Establishment and Free Exercise
Clauses of the First Amendment. See id. at 407–19.

1 Equally unavailing are plaintiffs' attempts to distinguish WA Cares on the grounds
2 of being the first of its kind and/or a stand-alone state program, in contrast to FUTA,
3 which plaintiffs characterize as "a traditional exercise of police power" that establishes
4 "a federal-state social partnership," Pls.' Resp. at 11 (docket no. 20). Novelty of a state's
5 revenue-generating scheme is not dispositive. *See MCI Commc'ns*, 359 F. App'x at 695
6 (concluding that the "unusual" nature of Eugene's challenged ordinance, which allowed
7 the City to accept telecommunications services as in-kind payment of the challenged tax,
8 "does not prove decisive"). Similarly, the absence of a federal mandate is not an
9 appropriate consideration. The Tax Injunction Act was designed to limit, not necessitate,
10 federal interference "with so important a local concern as the collection of taxes,"
11 *Rosewell*, 450 U.S. at 522, and plaintiffs cite no authority to support a theory that state
12 taxes imposed without a concomitant federal program are subject to challenge in federal
13 courts.¹⁴

14
15 ¹⁴ Plaintiffs further contend that WA Cares does not enjoy the same ERISA exemption as
16 unemployment compensation plans. ERISA does not apply to an "employee benefit plan" if it
17 "is maintained solely for the purpose of complying with applicable workmen's compensation
18 laws or unemployment compensation or disability insurance laws." 29 U.S.C. § 1003(b)(3).
19 The way this exception functions is best illustrated by examining Washington's workmen's
20 compensation (or industrial insurance) scheme. With respect to industrial insurance, the State
21 allows an employer to either pay into the State's industrial insurance funds or qualify as a self-
22 insurer. RCW 51.14.010. A self-insured employer may reinsure up to eighty percent (80%) of
23 its liabilities. *See* RCW 51.14.020(5). This reinsurance would be excluded from ERISA
coverage because it would be maintained by an employer solely to comply with the State's
workmen's compensation requirements. *See* 29 U.S.C. § 1003(b)(3). In contrast, Washington's
various industrial insurance funds are not subject to ERISA for an entirely different reason,
namely, because they are creatures of the Washington Legislature, were not established or
maintained by an employer or an employee organization, and are not "employee benefit plans."
See 29 U.S.C. §§ 1002(1)–(3). The same is true of the State's unemployment compensation
scheme, which requires employers to contribute to the State's special funds, *see* RCW 50.16.010

1 Finally, plaintiffs’ description of unemployment compensation fund contributions
2 (paid by the employer) as “pre-tax” and WA Cares premiums (paid by the employee) as
3 “after-tax” is inaccurate. Under Washington law, the unemployment compensation fund
4 contributions paid by employers “shall not be deducted, in whole or in part, from the
5 remuneration of individuals in employment of the employer.” RCW 50.24.010. In other
6 words, the taxes paid by employers are not part of employees’ wages and should not
7 appear on employees’ paystubs as either “pre-tax” or “after-tax” deductions. WA Cares
8 does not itself specify whether premiums, which are to be collected via payroll
9 deductions, should or should not be included as gross income, or in other words,
10 whether the premiums are “after-tax” or “pre-tax” deductions, respectively. *See*
11 RCW 50B.04.080(2)(a).¹⁵ Plaintiffs’ presumption that WA Cares premiums will be
12 treated the same way as private insurance premiums¹⁶ is speculative, and it ignores the

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15 & 50.24.010, and plaintiffs’ reliance on the ERISA exception set forth in § 1003(b)(3) is
misplaced.

16 ¹⁵ Plaintiffs’ assertion that WA Cares premiums cannot be deducted “pre-tax” is not supported by
17 the statute they cite, namely 26 U.S.C. § 125(f). The referenced provision of the federal tax code
18 applies to cafeteria plans, which are written plans under which “all participants are employees”
19 and the participants “may choose among 2 or more benefits consisting of cash and qualified
benefits.” *Id.* at § 125(d). Long-term care insurance is not a “qualified benefit” for purposes of a
20 cafeteria plan. *Id.* at § 125(f)(2). Thus, WA Cares is not a cafeteria plan for two reasons: (i) it
21 does not offer a choice among two or more benefits; and (ii) it does not involve any “qualified
22 benefits.” Section 125(f) does not govern.

23 ¹⁶ Private (self-paid) LTC insurance premiums are currently deductible (if the federal taxpayer
itemizes) as a component of “medical, dental, etc.” expenses, to the extent that all “medical,
dental, etc.” expenses exceed seven and a half percent (7.5%) of adjusted gross income. *See* 26
U.S.C. §§ 213(a) & (d)(10) (limiting the deductible amount of LTC insurance premiums to a
range between \$200 and \$2,500, depending on the age of the taxpayer). Plaintiffs offer the

1 possibility that the federal tax code might undergo revision to take into account the
 2 differences between state-mandated premiums and private insurance. Moreover, whether
 3 WA Cares premiums are excluded from gross income or deductible from adjusted gross
 4 income is not dispositive of whether they constitute taxes.¹⁷

5 In sum, all three *Bidart* factors indicate that WA Cares premiums are taxes for
 6 purposes of the Tax Injunction Act, and thus, the Court must proceed to evaluate whether
 7 plaintiffs have “a plain, speedy and efficient remedy” available in state court. *See* 28
 8 U.S.C. § 1341.

9 **2. Remedies in State Court**

10 The no “plain, speedy and efficient remedy” exception to § 1341 is narrowly
 11 construed. *Ret. Fund Tr. of the Plumbing, Heating & Piping Indus. of S. Cal. v.*
 12 *Franchise Tax Bd.*, 909 F.2d 1266, 1273 (9th Cir. 1990) (citing *Grace Brethren*, 457 U.S.
 13 at 413). The Tax Injunction Act requires only that an available state-court remedy satisfy
 14 “certain minimal *procedural* criteria.” *Rosewell*, 450 U.S. at 512. If taxpayers may, in
 15 state court, “press [their] constitutional [and/or other federal] claims while preserving the

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 17
 18 flawed syllogism that a “tax” is not something deductible as a “medical, dental, etc.” expense
 and therefore WA Cares premiums are not taxes.

19 ¹⁷ Indeed, not all state and local taxes are exempt from federal income taxation. *See* 26 U.S.C.
 20 § 164 (only (1) state, local, and foreign real property taxes, (2) state and local personal property
 21 taxes, (3) state, local, and foreign income, war profits, and excess profits taxes, and (4) the
 22 generation-skipping transfer tax imposed on income distributions are deductible); *see also* IRS
 Topic No. 503 Deductible Taxes (available at <https://www.irs.gov/taxtopics/tc503>) (indicating
 that estate and inheritance taxes, certain local benefit taxes, and transfer (stamp) taxes on the sale
 of property are not deductible, and that any deduction for state and local income, sales, and
 property taxes is capped at \$10,000).

1 right to challenge the amount of tax due,” and will receive a “full hearing and judicial
2 determination” of the controversy, then the federal court must withhold relief. *See id.* at
3 512–14. The usual delay in obtaining a state-court ruling does not mean that the remedy
4 is not “speedy.” *See id.* at 518–21 (holding that a two-year wait did not fall “outside the
5 boundary” of a “speedy” remedy). Moreover, a legislative refusal to provide interest on
6 refunded taxes does not render the state-court remedy inadequate. *Id.* at 522–28. Finally,
7 requiring a party to pay the tax at issue before challenging it, or to make payment under
8 protest and force the government to apply for judgment in state court, does not make the
9 state remedies inefficient. *Ret. Fund*, 909 F.2d at 1273.

10 Plaintiffs offer two reasons why they should not be left to litigate this matter in
11 state court: (a) according to plaintiffs, ERISA vests this Court with exclusive jurisdiction
12 as to their claims; and (b) Washington’s procedures are allegedly neither speedy nor
13 efficient, and delay will cause hardship to the employers who are plaintiffs in this matter.
14 Plaintiffs’ invocation of § 502(e), ERISA’s exclusive-jurisdiction provision, fails because
15 (i) WA Cares is not an “employee benefit plan” established or maintained by an employer
16 and/or an employee organization, *see* 29 U.S.C. §§ 1003(a) & 1132(e)(1); *Howard*
17 *Jarvis*, 997 F.3d at 859–60; and (ii) Ninth Circuit jurisprudence makes clear that
18 ERISA’s exclusive-jurisdiction provision does not trump the Tax Injunction Act. *See*
19 *Chase Manhattan Bank, N.A. v. City & County of San Francisco*, 121 F.3d 557, 558–60
20 (9th Cir. 1997); *Ashton v. Cory*, 780 F.2d 816, 823 (9th Cir. 1986) (concluding that
21 “Congress did not intend section 502(e)(1) of ERISA as an exception to the Tax
22 Injunction Act”).
23

1 Plaintiffs’ criticisms of the State’s remedial processes do not show the requisite
 2 lack of a “plain, speedy and efficient remedy.” *See* 28 U.S.C. § 1341. Plaintiffs have
 3 two avenues for challenging WA Cares, namely an administrative adjudication and a
 4 lawsuit brought pursuant to the Uniform Declaratory Judgments Act.¹⁸ Plaintiffs contend
 5 that the administrative approach would not be “efficient” because they are required to
 6 contest premiums before one agency and benefit determinations before a different
 7 agency.¹⁹ Plaintiffs do not, however, even claim in this action that they are entitled to
 8 benefits under WA Cares.²⁰ Plaintiffs fail to show how an inability to bring an omnibus
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10 ¹⁸ The validity of a state statute or a municipal ordinance or franchise may be challenged
 11 pursuant to the Uniform Declaratory Judgments Act, and if the statute, ordinance, or franchise is
 12 alleged to be unconstitutional, the Washington State Attorney General must be served and is
 13 entitled to be heard. *See* RCW 7.24.110; *see also Clark v. Seiber*, 49 Wn.2d 502, 503, 304 P.2d
 708 (1956) (“The purpose of this provision is to protect the public, should the parties be
 indifferent to the result. The state is interested in the constitutionality of its statutes as they affect
 the public welfare.”).

14 ¹⁹ WA Cares permits appeals from determinations made by Washington’s Health Care Authority
 15 (“HCA”), Department of Social and Health Services (“DSHS”), and Employment Security
 16 Department (“ESD”). *See* RCW 50B.04.120. HCA and DSHS decisions are subject to appeal in
 accordance with the Administrative Procedure Act (“APA”), and those two agencies are required
 17 to adopt standards for eligibility and benefit determinations. RCW 50B.04.120(1). Claims
 relating to premium liability and premium collection fall within the purview of ESD.
 18 *See* RCW 50B.04.120(2). ESD has already promulgated regulations related to WA Cares and
 adopted the Model Rules of Procedure. *See* WAC 192-925-005. The Model Rules of Procedure
 state that they are not intended to “diminish the constitutional rights of any person or to limit or
 19 modify additional requirements imposed by statute.” WAC 10-08-220. ESD regulations broadly
 define an “aggrieved party,” who may file an appeal to ESD, as any interested party (who may
 20 be a current or former employee or employer) who receives an adverse decision from (i) ESD,
 as to which the department has provided notice of appeal rights, (ii) the Office of Administrative
 Hearings, or (iii) the ESD Commissioner’s review office. WAC 192-900-005 & -025.

21 ²⁰ Plaintiffs Pacific Bells, LLC, BrunswikSt., LLC, and WOW Distributing, Inc. are employers,
 22 who would not themselves be eligible for WA Cares benefits. Plaintiff Melissa Johnston, who
 resides in Eagle Point, Oregon, now qualifies for an exemption from WA Cares, *see* Laws of
 23 2022, ch. 2, § 2, and plaintiffs Lena Madden and Mike Lindbo, who are considering retiring in

1 adjudicative action concerning both premiums and benefits renders the State's
2 administrative remedies inadequate.²¹

3 Plaintiffs also argue that the state remedies are not "speedy" because they must
4 wait over a year from now to commence an administrative proceeding to challenge the
5 premiums, which will not be collected until July 1, 2023, and over four years from now
6 to appeal a determination concerning benefits, which will not be disbursed until July 1,
7 2026. Plaintiffs' position runs contrary to the principles underlying the Tax Injunction
8 Act. The Court must "guard against interpretations of the Tax Injunction Act which
9 might defeat its purpose and text." *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520
10 U.S. 821, 827 (1997). The Tax Injunction Act "is grounded in the need of States to

11 _____
12 another state, seek to avoid paying premiums because they do not expect to benefit from the
13 WA Cares program. Only three plaintiffs might eventually seek WA Cares benefits, but
apparently not for another ten years.

14 ²¹ The APA allows any person to "petition an agency for a declaratory order with respect to the
15 applicability to specified circumstances of a rule, order, or statute enforceable by the agency."
16 RCW 34.05.240(1). A petition must set forth "facts and reasons" showing that (a) "uncertainty
17 necessitating resolution exists," (b) an actual controversy exists "such that a declaratory order
18 will not be merely an advisory opinion," (c) the uncertainty "adversely affects the petitioner,"
19 (d) the "adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or
20 on the general public that may likely arise from the order requested," and (e) the petition
21 complies with any additional requirements established by the agency. *Id.* Plaintiffs contend that
22 these requirements are "burdensome" and would have a "chilling effect" on their ability to seek
23 declaratory relief. Pls.' Resp. at 16 (docket no. 20). Plaintiffs fail to explain, however, how
these criteria are more onerous than the burdens plaintiffs must carry to prevail on the claims
they have asserted in this matter and to obtain the type of class-wide injunctive and declaratory
remedies contained in their prayer for relief. *See* Compl. at § VIII (docket no. 1 at 20–21);
see also eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (articulating the standard
for issuing a permanent injunction); Fed. R. Civ. P. 23 (setting forth the requirements for
certifying a class). Moreover, the declaratory-order procedure is optional, and plaintiffs may
pursue an adjudicative proceeding or administrative appeal without petitioning for a declaratory
order.

1 administer their fiscal affairs without undue interference from federal courts,” *id.* at 832,
2 and it strikes a balance in favor of states “defin[ing] and elaborat[ing] their own laws
3 through their own courts and administrative processes,” *id.* at 826. The “proper office”
4 of federal courts is not “to ‘reform’ state fiscal policies by providing a federal forum for
5 state taxpayers who object to the form or substance of laws designed to raise revenues for
6 state purposes.” *Empress Casino*, 651 F.3d at 728. Plaintiffs inappropriately ask the
7 Court to assume that exact role and to invalidate a state’s fiscal statute before it is fully
8 implemented or interpreted by the state’s own administrative and judicial system.

9 With respect to an action pursuant to the Uniform Declaratory Judgments Act,
10 plaintiffs assert that the state court lacks jurisdiction under ERISA, *see* Pls.’ Resp. at 17
11 n.8 (docket no. 20), but plaintiffs’ view is incorrect for the reasons set forth in this Order.
12 Plaintiffs also dispute whether litigation seeking declaratory relief would be “speedy” and
13 “efficient” because they might need to first exhaust their administrative remedies. For
14 support, plaintiffs cite merely a motion for summary judgment in which the defendants
15 in a state court case raised a lack of standing, as opposed to a failure to exhaust
16 administrative remedies. *See id.* (citing Ex. J to Birmingham Decl. (docket no. 21-10 at
17 15–17)). The two concepts, lack of standing and failure to exhaust, are entirely different,
18 and plaintiffs have cited to no authority that would inhibit them from immediately
19 proceeding in state court under the Uniform Declaratory Judgments Act. The WA Cares
20 premium constitutes a tax, plaintiffs have a “plain, speedy and efficient” state remedy,

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1 and the Tax Injunction Act deprives the Court of subject-matter jurisdiction.²² In light of
2 the Court’s rulings, defendants’ additional grounds for dismissal, namely lack of ripeness
3 and/or standing, as well as Eleventh Amendment immunity, need not be addressed.

4 **Conclusion**

5 For the foregoing reasons, the Court ORDERS:

6 (1) Defendants’ motion to dismiss, docket no. 17, is GRANTED, and this
7 action is DISMISSED without prejudice for lack of subject-matter jurisdiction.

8 (2) The motions to intervene, docket nos. 24 and 30, brought by Service
9 Employees International Union Local 775, the Puget Sound Advocates for Retirement
10 Action, and AARP, are STRICKEN as moot.

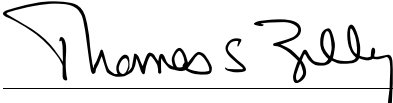
11 (3) The Clerk is directed to CLOSE this case and to send a copy of this Order
12 to all counsel of record.

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16 ²² During oral argument, plaintiffs’ counsel sought a ruling from the Court that the WA Cares
17 premium constitutes an income tax that is barred by the Washington State Constitution. To the
18 extent that plaintiffs intend to challenge WA Cares as violating Article VII, Section 1 of the
19 Washington State Constitution, which requires that all taxes “be uniform upon the same class of
20 property within the territorial limits of the authority levying the tax,” such aim underscores
21 exactly why this matter should be litigated within the State’s administrative and/or judicial
22 system. *See Kunath v. City of Seattle*, 10 Wn. App. 2d 205, 216 & n.43, 444 P.3d 1235 (2019)
(observing that “Washington courts have the power to hear constitutional challenges to tax
23 laws”). Moreover, because plaintiffs might raise this argument in other proceedings, the Court
hereby clarifies that its treatment of the WA Cares premium as a “tax” is solely for purposes of
the Tax Injunction Act and ascertaining whether the Court has subject-matter jurisdiction. This
decision has no preclusive effect on a state agency, administrative tribunal, or court in addressing
the merits of plaintiffs’ claims, as currently formulated or later revised or supplemented.

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IT IS SO ORDERED.

Dated this 21st day of April, 2022.



Thomas S. Zilly
United States District Judge