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No. 97863-8

SUPREME COURT OF THE STATE OF WASHINGTON

A. MICHAEL KUNATH, *et al.*,

Respondents,

v.

CITY OF SEATTLE,

Petitioner.

BRIEF OF *AMICUS CURIAE*

WASHINGTON STATE SENATORS LISA WELLMAN, SAM HUNT,
MARKO LIAS, LIZ LOVELETT, JOE NGUYEN,
REBECCA SALDAÑA AND BOB HASEGAWA AND STATE
REPRESENTATIVES EILEEN CODY, BETH DOGLIO, LAURIE
DOLAN, JOE FITZGIBBON, NOEL FRAME, MIA GREGERSON,
NICOLE MACRI, AND GERRY POLLET

IN SUPPORT OF PETITION FOR REVIEW

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are legislators from the Washington State House of Representatives and Washington State Senate who are interested in ensuring that this Court accept review to determine whether cities as well as the State may exercise their constitutional and statutory powers to raise revenues for essential public services – and to do so in ways that lessen the burden on low and middle income families imposed by Washington’s current tax system. The legislators signing on as *Amici Curiae* are State Senators Lisa Wellman, Sam Hunt, Marko Liias, Liz Lovelett, Joe Nguyen, Rebecca Saldaña and Bob Hasegawa and State Representatives Eileen Cody, Beth Doglio, Laurie Dolan, Joe Fitzgibbon, Noel Frame, Mia Gregerson, Nicole Macri and Gerry Pollet.

II. INTRODUCTION

This Court should accept review to determine the constitutionality of the graduated income tax passed by the City of Seattle and to find that the legal underpinnings that supported the Supreme Court precedent in the 1930’s no longer exist.

III. STATEMENT OF THE CASE

Amici Curiae adopt the City of Seattle’s Statement of the Case as presented in its Petition for Review to the Washington Supreme Court.

IV. ARGUMENT

A. THIS CASE PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION OF THE STATE OF WASHINGTON.

The Washington Supreme Court can reverse its own precedent when the grounds which supported that precedent are no longer valid. Here, there are sufficient grounds to overturn current precedent that an income tax is a tax on property making a graduated income tax is unconstitutional. The test to abandon stare decisis is a “clear showing that an established rule is incorrect and harmful.” *In re Rights to Waters of Stranger Creek*, 77 Wash.2d 649, 653, 466 P.2d 508 (1970). See also *Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 147, 94 P.3d 930 (2004).

An opinion can be incorrect when it was announced, or it can become incorrect because the passage of time and the development of legal doctrines undermine its bases. The current precedent as found in *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933) and *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936) is both incorrect and also harmful. These decisions, incorrect when they were made, are also incorrect now because the legal underpinnings have changed since their adoption.

This Court abandoned its precedent because the new information revealed that precedent’s harmful effects in *State v. Devin*, 158 Wash.2d 157, 142 P.3d 599 (2006). Here, this Court overruled the longstanding precedent of *State v. Furth*, 82 Wash. 665, 144 P. 907 (1914), which had

held that a defendant's death during the pendency of an appeal abates a criminal conviction. In 2006, this Court concluded that the *Furth* holding was incorrect because it was "based on the outdated premise that convictions and sentences serve only to punish criminals, and not to compensate their victims." *Devin*, 158 Wash.2d at 168; *Furth*, 82 Wash. at 667. This Court found the precedent harmful because it could deprive crime victims of restitution intended to compensate them for losses. *Devin*, 158 Wash.2d at 171–72.

This Court should accept review to determine that there is no longer a sound basis for the existing legal precedent.

B. THIS CASE INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT.

Existing precedent prohibiting a graduated tax on personal income has contributed to the creation of a statewide tax system that causes extreme harm to low and moderate-income families. The current precedent, found in *Culliton, supra* and *Jensen, supra* are both incorrect and harmful.

The graduated income tax, barely (by a 5 to 4 decision) ruled to be unconstitutional 85 years ago, is a restriction that has decimated the ability of the state legislature and local governmental entities to raise revenue in a way that does not cause additional harm to low and moderate income

families. There are increasing demands on public services such as education, health care, police, firefighting, transportation, and housing and homelessness services. Federal support for a social safety net has declined. Disparities in incomes between the affluent and middle and low income families have increased. The harm caused by the precedent is sufficient reason to reevaluate and abandon the precedent set by *Culliton* and *Jensen*.

The Institute on Taxation and Economic Policy has determined that Washington State's tax system has continued to become even more "regressive" since the Seattle ordinance was passed. The October 2018 report finds that "Washington has the most unfair state local tax system in the country." See "*Who Pays? A Distributional Analysis of the Tax System in All 50 States*," 6th Edition, Institute on Taxation and Economic Policy (October 2018) pp. 7, 127.¹ The Institute explains what is meant by "regressive," namely that lower-income people "are taxed at higher rates than top-earning taxpayers," and thus the share of family income allocated toward state and local taxes for lower income people is significantly higher than for more higher income taxpayers. *Id.* at p. 3.

The share of family income paid in state and local taxes has increased for Washington state's low-income families, who are paying

¹ See <https://itep.org/wp-content/uploads/whopays-ITEP-2018.pdf>

17.8% of their income in state and local taxes while the top 4% of taxpayers are paying only 4.7% and the top 1% of taxpayers are paying only 3% of their income respectively. *Id.* at pp. 7, 127. Middle-income families pay at a 10.9% rate, more than three times higher as a share of their family income than the wealthiest families. *Id.* The difference between the percent of income paid by those with the lowest and those with the highest income has increased from 14.4 percent to 14.8 percent between 2015 and 2018. Incomes are more unequal in Washington state after state and local taxes are collected than before. *Id.* at 127. This regressive tax system causes harm to low-income persons.

The Washington State Tax Structure Study Committee, formed as a result of legislation passed in 2001,² determined what has continued to this day: Washington's taxes are paid disproportionately by that segment of our citizens whose income is lowest.

The Committee concludes that our current system is fundamentally inequitable to low- and middle-income people, unfair to many businesses, and subject to sharp fluctuations in revenue. The Committee also finds that while our tax structure, which was put in place in 1935, might have worked well for a mid-twentieth century manufacturing economy, it doesn't work well in today's economy with its greater dependence on the service sector.³

² ESSB 6153, §138 (2001).

³ Tax Structure Final Report, Introduction and Summary, at iv:
<https://dor.wa.gov/about/statistics-reports/tax-structure-final-report>

...

Washington's tax structure is regressive. The lowest income households pay 15.7 percent of income for total excise and property taxes, while the highest income households pay 4.4 percent of income for the same taxes. Sales tax is the main cause of regressivity.⁴

The City of Seattle has one of the most regressive tax systems of any city in the United States. Here, state and local taxes take up 15.5% of the annual income for a low-income family.⁵ Seattle has the fourth highest tax burden on low-income families in the country as found in a study comparing tax rates and tax burdens on cities nationally.⁶ Seattle's taxes are also the most regressive in the state.⁷

In adopting a tax on "total income," the Seattle City Council delineated the harm caused by regressive taxes declaring that "regressive taxes contribute to the financial strain on low and middle-income households, deepen poverty, diminish opportunity for low and middle-

⁴ *Id.* at Chapter 4: Key Conclusions from the Evaluation of the Current Washington Tax Structure, at 23.

⁵ Balk, Gene, *Seattle taxes among nation's kindest to the rich – and harshest to the poor*, Seattle Times (March 7, 2017), available at <https://www.seattletimes.com/seattle-news/data/seattle-taxes-among-nations-kindest-to-the-rich-and-harshest-to-the-poor/>

⁶ See *Tax Rates and Tax Burdens in the District of Columbia – A Nationwide Comparison*, Government of the District of Columbia, (2016) p. 13, available at <https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/2015%2051City%20Tax%20Burden%20Study%20Final.pdf>

⁷ Balk, Gene, *Seattle taxes ranked most unfair in Washington – a state among the harshest on the poor nationwide*, Seattle Times (April 15, 2018), available at <https://www.seattletimes.com/seattle-news/data/seattle-taxes-ranked-most-unfair-in-washington-a-state-among-the-harshest-on-the-poor-nationwide/>

income families, disproportionately harm communities of color, hinder efforts toward establishing a more equitable city, and protect and reinforce the privilege of the wealthy.” CP 373, ¶ 5.

Raising revenue is clearly a power and responsibility of the legislature and it is for local governments as well. *Emwright v. King County*, 96 Wash.2d 538, 637 P.2d 656 (1981). Local governments as well as the State need a broad range of tools for raising revenues to fund essential public services.

In response to *McCleary v. State*, 173 Wash.2d 477, 269 P.3d 227 (2012), in the 2017 3rd Special Session, the Legislature adopted EHB 2242 to fund the actual costs of the state’s basic education program. Due to the recent increase in home values in the Seattle area, the increase in the statewide property tax disproportionately and adversely affects long-term lower income Seattle residents, imposing a significant burden on those homeowners and renters in the Seattle area.⁸ While the Legislature has increased the exemption for property tax relief for low-income seniors and veterans (RCW 84.36.381), many needy lower-income Seattle residents do not qualify for the exemption because their income is slightly greater than

⁸ Lee, Jessica ‘Enough is enough’: Some Seattle-area homeowners say latest property-tax hikes will force them to move, Seattle Times (April 2, 2018), available at <https://www.seattletimes.com/seattle-news/enough-is-enough-some-local-homeowners-say-this-years-property-tax-increase-will-force-them-to-move/>

the state's maximum. For those persons, increases in the statewide property tax may be devastating.

The regressive nature of the tax system in Washington state and on Seattle, in particular, is indisputable. When people cannot stay in their homes because of an inequitable tax burden, there is harm. When low-income families have to pay nearly 18% of their incomes in taxes while upper income families have to pay only 4%, there is harm. Given the current state of the economy and the failing social safety net, there is a need for local governments and the State to raise additional revenues to fund essential public services in a way that does not harm low-income and middle class families, and small, start-up and low margin businesses. As such, there is sufficient harm to justify overturning *Culliton* and *Jensen* and declare that they are no longer good law.

The existing tax system, developed as it is due to the existing precedent that an income tax is unconstitutional, also causes harm to government because it lacks transparency. Washington State has one of the least transparent tax systems in the country. See Conway, Richard *Washington State and Local Tax System: Dysfunction & Reform*, (2017).⁹ Transparency is a prerequisite for rational tax policy. When people have

⁹<https://www.seattlebusinessmag.com/sites/default/files/Washington%20Tax%20System%20Dysfunction%20and%20Reform%20%282017%29.pdf>

insufficient knowledge as to what they really pay, people have less confidence in what they are buying in government services. Consequently, lack of transparency leads directly to lack of confidence in government and thus causes harm.

Washington state's system is not transparent because, in large part, there is no personal income tax. Personal income taxes are totally transparent because people know how much their earned and unearned income is, and there is a corresponding amount that they then pay as taxes. The sales tax, on which this state relies, is much less transparent because the incremental amount is not apparent to the average taxpayer. The business and occupation (B & O) tax also is not transparent since businesses can and do pass the tax on to their customers in the form of higher prices; but consumers are unaware that they are ultimately paying that tax.

The Washington State Tax Structure Study Committee concluded in 2002 that the current structure is so flawed in meeting the most important criteria of transparency that it must be judged as unsatisfactory.¹⁰ The

¹⁰ See Tax Structure Final Report, Chapter 4: Key Conclusions, at 28, *available at* <https://dor.wa.gov/reports/tax-structure-final-report>

reasons that the Committee found that the tax system in Washington state was not transparent in 2002 remain true today.¹¹

V. CONCLUSION

This Court should accept review to review longstanding precedent prohibiting state and local governments from enacting graduated income taxes because such precedent is detrimental to the public interest and thus should encourage the Supreme Court to so rule.

DATED this 13th day of January, 2020.

Respectfully submitted,

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¹¹ Balk, Gene, *Seattle taxes ranked nearly last in new tax-transparency index*, Seattle Times (April 17, 2017), <https://www.seattletimes.com/seattle-news/data/washington-state-ranks-nearly-last-in-new-tax-transparency-index/>

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