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SUPREME COURT
STATE OF WASHINGTON

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MASON CONSERVATION DISTRICT,

APPELLANT,

v.

JAMES R. CARY, individually, and **MARY ALICE CARY**, individually
and the marital community comprised thereof; **JOHN E. DIEHL**,
individually and **WILLIAM D. FOX, SR.**, individually;

RESPONDENTS

v.

MASON COUNTY, DEFENDANT.

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STATE OF WASHINGTON

**MASON CONSERVATION DISTRICT'S RESPONSE TO
AMICUS CURIAE MEMORANDUM OF EVERGREEN FREEDOM
FOUNDATION IN SUPPORT OF PETITION FOR REVIEW**

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I. INTRODUCTION

Mason Conservation District files this Response to the amicus curiae brief filed by the Evergreen Freedom Foundation (“EFF”).

II. OBJECTION TO AMICUS CURIAE BRIEF

EFF has filed an amicus curiae brief for the improper purpose of raising a new issue which was never argued either to the trial court or to the Court of Appeals.

This Court will not consider issues raised for the first time in an amicus curiae brief. *Madison v. State*, 161 Wn.2d 85, 104, ¶37 at fn.10, 163 P.3d 757 (2007); *In Re Detention of J.S.*, 124 Wn.2d 689, 702, 880 P.2d 976 (1994); *Mains Farm Homeowners Ass’n v. Worthington*, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993).

The parties have litigated one issue throughout this case: whether the assessment which the Washington State Legislature has specifically authorized local legislative authorities to impose for the benefit of conservation districts pursuant to RCW 89.08.400 constitutes a regulatory fee or a tax under the analysis presented by this Court in *Covell v. City of Seattle*, 127 Wn.2d 875, 905 P.2d 324 (1995).

That is how this matter has consistently been framed by both parties. CP 135-36 (Plaintiff's Motion for Summary Judgment) ("Whether a charge imposed by a governmental entity is a tax or a 'regulatory fee' in the broadest sense depends upon three factors identified in the leading case on this point, *Covell v. City of Seattle*, 127 Wn.2d at 879"); (Mason Conservation District's Response to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment) (also describing *Covell* as providing controlling factors).

The trial court accordingly used the *Covell* factors in rendering its decision in this case. CP 48 (Trial Court March 11, 2008 letter decision). ("*Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995) sets forth a framework for distinguishing between a fee and a tax. Pursuant to *Covell*, the Court will consider the following . . .").

That is also how the parties framed this matter to the Court of Appeals. See Appellant Mason Conservation District's Opening Brief, pp. 13-14 (describing and applying *Covell* test); Respondent/Cross Appellant's Response Brief, p. 29 ("Whether a charge imposed by a governmental entity is a tax or a 'regulatory fee' in the broadest sense depends upon three factors

identified in the leading case on this point, *Covell v. City of Seattle*, 127 Wn.2d at 879 . . .”).

And, it is the analytical framework which the Court of Appeals used to dispose of this case. *Cary v. Mason County*, 152 Wn. App. 959, 964 ¶9 et seq., 219 P.3d 952 (2009) (describing and applying the *Covell* factors).

EFF has now submitted an amicus curiae brief in order to argue, for the first time in this case, that *Covell* and its three part test do not apply, and that instead the validity of the charge should be analyzed pursuant to the criteria applicable to “special assessments” as defined in Art VIII, Sec. 9 of the Washington State Constitution. Because no one raised this issue below, the parties have never had the opportunity to introduce evidence with respect to, or to develop, this issue. Therefore, it is improper, and wholly unfair, for it to be raised by a non-party, for the first time, now.

EFF is not entitled to ask this Court to change the law, and to invalidate a long-established statute, based on a last-minute amicus curiae brief raising a new issue in this manner. The Court should decline to even consider the new issue raised by EFF for the first time in its Amicus Curiae Brief.

III. RESPONSE ON THE MERITS

Under the Washington Constitution, only the State is authorized to impose taxes. A local legislative body is not authorized to impose taxes, except where the Legislature has specifically delegated to it the authority to do so. Wash. Const. Art XI, Sec. 9, 11, 12; Art. VII, Sec. 9; *Covell v. City of Seattle*, 127 Wn.2d 875, 878-89, 905 P.2d 324 (1995). A local legislative body is, however, entitled to impose regulatory fees. *Id.*

Here, the Legislature has in fact very specifically delegated to county legislative authorities the power to impose this assessment. RCW.89.08.400. Because it is undisputed that the Legislature intended to delegate this authority to impose the assessment to the local legislative authority, EFF's argument reduces to the proposition that the assessment must be struck down because the Legislature chose to describe it as an "assessment," rather than as a "regulatory fee."

EFF is wrong. EFF simply ignores this Court's prior decisions in which this Court has squarely held that the constitutional validity of a governmental charge must be determined, not by reference to what the Legislature has named it, but by reference to its "incidents," or the

characteristics, associated with the charge. Those characteristics, and not the name, control. See, e.g., *Washington Public Ports Ass'n v. State, Dept. Revenue*, 148 Wn.2d 637, 650, 62 P.3d 462 (2003).

Therefore, the Mason Conservation District was entitled to defend the assessment as a regulatory fee, because—as the Court of Appeals squarely held—the assessment in fact possesses the “incidents” of a regulatory fee. The assessment possesses the "incidents" of a regulatory fee because the assessment's purpose is to regulate, by providing the assessed property owners with a targeted service and alleviating a burden—stormwater runoff—to which all assessed properties contribute; 152 Wn. App. at 964-65; the assessment funds are segregated and used only for water management, stormwater maintenance programs, and education; 152 Wn. App. at 965; and, the District uses the funds to manage/address the effects of stormwater runoff, thereby benefiting the assessed properties. *Id.* These are, under *Covell*, precisely the "incidents" of a regulatory fee.

These "incidents," and not the word the Legislature applied long ago when authorizing this regulatory fee, controls. EFF's claim that the parties,

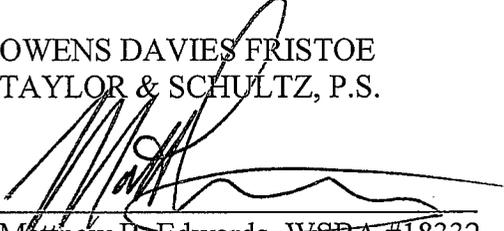
the trial court, and the Court of Appeals have all mistakenly applied the *Covell* factors to this case is thus utterly without merit.

IV. CONCLUSION

Because it impermissibly seeks to raise a new issue never considered below, the Court should not consider the issue raised in EFF's amicus curiae brief. In any event, EFF's position is wholly without merit and does not warrant Supreme Court review. The Court should determine that the Court of Appeals well-reasoned decision properly held the assessment which the Mason County Board of County Commissioners imposed for the benefit of the Mason Conservation District pursuant to express statutory authority to be a valid regulatory fee, and deny review.

DATED this 5th day of March, 2010.

OWENS DAVIES FRISTOE
TAYLOR & SCHULTZ, P.S.



Matthew B. Edwards, WSBA #18332

CERTIFICATE OF SERVICE

I hereby certify that I deposited a complete copy of the Appellant Mason Conservation District's Response to Amicus Curia Memorandum of Evergreen Freedom Foundation in Support of the Petition for Review, including this Certificate of Service, in the United States Mail, first class postage prepaid, addressed to the following this 5th day of March, 2010.

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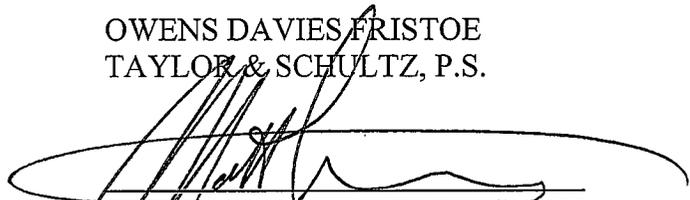
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