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No. 96585-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LAKEHAVEN WATER AND SEWER DISTRICT, HIGHLINE WATER
DISTRICT, and MIDWAY SEWER DISTRICT,

Appellants,

v.

CITY OF FEDERAL WAY, a municipal corporation,

Respondent.

**RESPONDENT CITY OF FEDERAL WAY'S RESPONSE TO
BRIEFS OF AMICI CURIAE ALDERWOOD WATER &
WASTEWATER DISTRICT, RENTAL HOUSING ASSOCIATION
OF WASHINGTON, AND WASHINGTON ASSOCIATION OF
SEWER & WATER DISTRICTS**

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I. INTRODUCTION

The narrow legal question before this Court is whether Respondent the City of Federal Way (the “City”) has authority to tax the proprietary activities of Appellants Lakehaven Water and Sewer District, Highline Water District, and Midway Sewer District (collectively, the “Districts”). The briefs of Amicus Curiae Alderwood Water & Wastewater District (“AWWD”), Rental Housing Association of Washington (“RHA”), and Washington Association of Sewer and Water Districts (“WASWD”) (collectively, “Amici”) do not assist the Court in answering this question. Instead, Amici largely advance irrelevant tax policy arguments, repeat the incorrect arguments of the Districts, and advocate for overturning precedent, without satisfying the grounds for doing so.

Even if the Court considers these irrelevant arguments, they are speculative, erroneous, and do not alter the conclusion that the City has express authority under RCW 35A.82.020 to tax the Districts’ proprietary provision of water and sewer services to billed customers. This Court should therefore affirm the trial court’s correct determination that the City properly exercised this authority by extending its excise tax to public and private utilities’ proprietary water and sewer services.

II. ARGUMENT

A. Amici's Policy Arguments Are Irrelevant and Without Merit.

Amici's policy arguments on the merits of the City's tax are not relevant to the legal question before this Court. *See, e.g.*, RHA Br. at 4–5; WASWD Br. at 16–17. The City Council decides policy, not advocacy organizations or the courts. *See Sonitrol Nw., Inc. v. City of Seattle*, 84 Wn.2d 588, 593–94, 528 P.2d 474 (1974) (“It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives, or to criticize the public policy which prompted the adoption of the legislation.” (internal quotations omitted)); *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 421, 334 P.3d 529 (2014) (rejecting amici's policy arguments). Regardless, these policy arguments fail on the merits.

Amici's fearmongering about excessive taxation is baseless. RHA Br. at 4–5; WASWD Br. at 5, 16. The political process appropriately constrains the City's exercise of its broad excise tax authority, including its taxation of water and sewer utilities. Here, the City's tax was passed by the elected members of the City Council after public comment and signed into law by the elected Mayor. *See* CP 619; *see also* CP 614 (“[T]he City Council desires to balance the City's need for new revenue sources to pay for basic municipal services with the burden of an excise

tax on public and private water and sewer utilities...[and] has determined that [a 7.75 percent tax] is in the best interest of the public[.]”¹ The City Council employed the same tax rate already levied on other utilities in Federal Way and, in addition, specifically provided a referendum process for voters to put the tax on the ballot at the next election. *See* Federal Way Revised Code (“FWRC”) 3.10.040(1)–(8); CP 617. The City’s reasoned decision to extend its utility tax to water and sewer utilities is an example of the democratic process, which entrusts elected officials to make sound policy decisions on behalf of their community.

Notably, while certain types of city taxes are subject to statutory rate caps, countless others are not. *See, e.g., Watson v. City of Seattle*, 189 Wn.2d 149, 165–66, 401 P.3d 1 (2017) (statutory rate cap does not apply to city tax on firearms and ammunitions sales); *Revenue Guide for Washington Cities & Towns*, Mun. Research Servs. Ctr., at 85 (Nov. 2019) (no limitation on tax rate for solid waste or stormwater utilities).²

Although rate caps do not apply to many city taxes, the same political checks applicable to the City’s tax here (e.g., adoption by elected officials, referendum process, etc.) have prevented the parade of horrors prophesied by Amici.

¹ Amici do not dispute the reasonableness of the City’s 7.75 percent rate.

² Available at <http://mrsc.org/getmedia/d3f7f211-fc63-4b7a-b362-cb17993d5fe5/Revenue-Guide-For-Washington-Cities-And-Towns.pdf.aspx?ext=.pdf>.

Moreover, by its terms, the City’s tax does not require the Districts to pass the tax on to their customers. RHA Br. at 3 (citing RCW 57.08.081); AWWD at 1–2. In fixing rates and charges, the Districts “may in [their] discretion” consider various factors, including their tax obligations. RCW 57.08.081(2). Critically, however, the Districts retain “full authority” and “control” over the price of their utility services. RCW 57.08.005(3).³ Even if the Districts choose to raise their rates, RHA acknowledges that the City has a Utility Tax Rebate Program to assist vulnerable populations such as low-income senior citizens and disabled individuals. RHA Br. at 5–6; FWRC 3.10.220–.240.

Nor is the City’s tax on water and sewer services novel, as Amici incorrectly suggest. WASWD Br. at 4. The City already taxed numerous other utilities in Federal Way. FWRC 3.10.040(1)–(8) (utility tax on telephone, gas, electricity, and solid waste). Further, more than 150 cities impose taxes on water and/or sewer services, including at least two that apply to public utilities. CP 605–06; Edgewood Municipal Code 5.08.030(E); Wenatchee City Code 5.84.020(3)(a). In any event, this Court has repeatedly held that the alleged innovation of a tax or charge has no bearing on its validity. *See King Cty. v. King Cty. Water Dists. Nos.*

³ Title 54 RCW public utility districts also have discretion in whether to pass on a tax to their water or sewer customers. *See* RCW 54.24.080.

20, 45,49, 90, 111, 119, 125, No. 96360-6, 2019 WL 6605260, at *1 (Wash. Dec. 5, 2019) (upholding “first-of-its-kind ordinance” requiring electric, gas, water, and sewer utilities to pay for the right to use the county’s rights-of-way); *Watson*, 189 Wn.2d at 165–70 (holding that city had authority to levy a new tax on firearms and ammunitions sales).⁴ Where, as here, a city acts within its delegated authority, the courts must uphold the tax.

Amici’s policy arguments are not relevant to the issues in this appeal and are meritless in any event. This Court should disregard these arguments.

B. WASWD Mischaracterizes This Court’s Authority on Governmental Tax Immunity.

WASWD mischaracterizes this Court’s authority applying governmental tax immunity to municipal corporations’ governmental functions, arguing it also should apply to their proprietary functions. Contrary to WASWD’s claims, this Court’s prior decision in *King County v. City of Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984) does not “bar **any** tax on another municipality.” WASWD Br. at 14 (emphasis in

⁴ Amici’s remaining arguments regarding the potential impacts of the City’s tax are speculative and do not alter the conclusion that RCW 35A.82.020 expressly authorizes the tax. AWWD Br. at 1–2 (asserting city water and sewer taxes would necessitate more expensive billing software and additional documentation for state audits); WASWD Br. at 1–2, 4–5, 16–21 (asserting the City’s tax “will destroy a mutually beneficial system between municipal water-sewer districts and cities” and require complex billing systems).

original). In *Algona*, the Court specifically applied the governmental/proprietary distinction to determine whether governmental immunity prevented the city from levying its tax on King County’s operation of a solid waste transfer station (a governmental activity). 101 Wn.2d at 794 (“Where the primary purpose in operating the transfer station **is public or governmental in nature**, the county cannot be subject to the city B & O tax, absent express statutory authority.” (emphasis added)).⁵ The Court’s analysis demonstrates that the decision to strike down the city’s tax was predicated on the governmental character of the activity being taxed. City’s Br. at 13, 20.⁶ Indeed, in *Burns v. City of Seattle*, 161 Wn.2d 129, 159, 164 P.3d 475 (2007), this Court recognized that *Algona* “arguably is distinguishable” because it addressed a governmental activity (operating a solid waste transfer station), not a proprietary activity like providing utility services to billed customers.

WASWD’s reliance on the *Algona* Court’s partial overruling of *City of Bellevue v. Patterson*, 16 Wn. App. 386, 556 P.2d 944 (1976), is also misplaced. WASWD Br. at 10, 14–16. In *Bellevue*, the Court of

⁵ The *Algona* Court also specifically limited to “the tax in this case” (i.e., the City of Algona’s tax on governmental activities) the allegedly “very clear and explicit” language WASWD quotes about the need for specific legislative authority to tax another municipality. *Algona*, 101 Wn.2d at 793; WASWD Br. at 11–12.

⁶ In addition to being wrong on the merits, WASWD’s brief is internally inconsistent, characterizing *Algona* as “plain” and “clear[,]” but also “ambiguous authority.” WASWD Br. at 8, 11, 14–15.

Appeals upheld a city excise tax on water and sewer utilities based in part on this Court's prior decision in *City of Seattle v. State*, 59 Wn.2d 150, 367 P.2d 123 (1961). 16 Wn. App. at 388–89. In *Seattle*, however, this Court upheld a state tax on a city on the basis that the state statute specifically authorized taxation of municipal corporations, and thus the Court held that it need not address the governmental/proprietary distinction. 59 Wn.2d at 153–54. Unlike the state tax statute at issue in *Seattle*, however, the city tax statutes at issue in *Bellevue* and *Algona* did not provide this additional layer of specific authority to tax another municipal corporation. *Algona*, 101 Wn.2d at 793. Accordingly, the *Algona* Court correctly rejected *Bellevue*'s reliance on *Seattle*. *Id.* at 793–94. Further, the *Algona* Court rejected the *Bellevue* court's approach of analyzing the issue "only in terms of exemptions from taxation," as opposed to considering whether governmental immunity applied to the tax. *Id.* at 792–93 (emphasis omitted).

Importantly, however, the *Algona* Court did not hold that governmental immunity in fact barred Bellevue's tax on water and sewer districts as WASWD suggests. *See id.* at 792–95. Nor did the *Algona* Court suggest that the provision of water and sewer services is governmental and, thus, entitled to governmental immunity. *See id.* If the *Algona* Court had reached these conclusions, it would have overruled

Bellevue in total, which it did not do. *Id.* at 795. Instead, the *Algona* Court partially overruled *Bellevue* only “as to its provisions that are inconsistent with this opinion.” *Id.* This was necessary in light of *Bellevue*’s improper reliance on *Seattle* and approach to analyzing the issue as solely one of exemption from taxation rather than also whether governmental immunity applied. In short, *Algona*’s partial overruling of *Bellevue* supports the conclusion that whether governmental immunity applies depends on the governmental or proprietary nature of the activity taxed.⁷

In sum, read as a whole, *Algona* holds that the governmental immunity doctrine, and thus the need for an additional layer of specific authority to tax another municipal corporation, applies only where the municipal corporation is operating in a governmental capacity.⁸ 101 Wn.2d at 794. Unlike the tax at issue in *Algona*, the City’s tax applies solely to the Districts’ proprietary water and sewer activities. Thus, governmental immunity does not apply.

⁷ The Court of Appeals’ decision in *City of Wenatchee v. Chelan County Public Utility District No. 1*, 181 Wn. App. 326, 346–49, 325 P.3d 419 (2014) also provides a helpful discussion of *Algona*’s treatment of *Bellevue*.

⁸ Amici also ignore the *Algona* Court’s reliance on the case law of other jurisdictions, which limits governmental immunity to governmental functions. See City’s Br. at 18–20 (discussing *Salt River Project Agric. Improvement & Power Dist. v. City of Phoenix*, 631 P.2d 553 (Ariz. Ct. App. 1981), and *Vill. of Willoughby Hills v. Bd. of Park Comm’rs of Cleveland Metro. Park Dist.*, 209 N.E.2d 162 (Ohio 1965)).

C. Amici’s Arguments on the Governmental/Proprietary Distinction Fail.

Amici erroneously contend that the provision of water and sewer services to billed customers is (or should be) a governmental function immune from taxation. They base their claim on arguments already raised by the Districts: that the governmental/proprietary distinction depends on whether a municipal corporation provides “essential public services,” makes a profit, or “normally” provides such services. AWWD Br. at 1, 3–4, 6–7; RHA Br. at 6–7. Because the role of an amicus curiae is to put forward new relevant material, not to retread covered ground, Amici’s duplicative arguments should be disregarded. *See* RAP 10.3(e) (amicus should “avoid repetition of matters in other briefs”). In any event, these arguments fail on the merits.

1. Amici’s recitation of case law related to the provision of water and sewer services to billed customers is incorrect.

Amici correctly acknowledge this Court’s precedent holding that the provision of water services to billed customers is proprietary. AWWD at 3–4; RHA Br. at 3; *see also* City’s Br. at 27–28 (collecting cases). Further, like the Districts, Amici ignore Washington cases holding that sewer services are proprietary for immunity purposes and fail to cite a single case to argue otherwise. *See* City’s Br. at 28–29 (collecting cases). This authority dictates the outcome of this appeal.

In the face of this overwhelming case law, Amici follow the Districts' lead by focusing on factors that are irrelevant to the governmental/proprietary distinction. For example, AWWD and WASWD emphasize public health issues, AWWD Br. at 7; WASWD Br. at 8, but ignore this Court's holding that "[p]ublic health and safety are not the bases for distinguishing between governmental and proprietary functions of a municipality." *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 688, 202 P.3d 924 (2009) ("WSMLB"). Instead, as this Court and the City have stated, in Washington the "principal test" for distinguishing proprietary from governmental functions is "whether the act is [performed] for the common good or whether it is for the special benefit or profit of the corporate entity." *Id.* at 687. Dating back to at least 1909 and to as recently as December 2019, this Court has consistently held that utilities operate for the benefit of their customers, not the general public. *City of Seattle v. Stirrat*, 55 Wash. 560, 565, 104 P. 834 (1909); *King Cty. Water Dists.*, 2019 WL 6605260, at *12. Such services are therefore proprietary, not governmental.

Similarly, AWWD's assertion that the Districts' water and sewer services are governmental because they are not generating profit is unsupported and irrelevant. AWWD Br. at 1, 4. As this Court has

explained, “[w]hether [a municipal corporation] actually made a profit when viewed from the standpoint of proper accounting practice is immaterial.” *Hutton v. Martin*, 41 Wn.2d 780, 784, 252 P.2d 581 (1953). A utility acts in a proprietary capacity when it “charg[es] for the service it rendered...and [is] in business at least for the purpose of defraying the cost of the service rendered.” *Id.*⁹

That public entities more often provide water and sewer services to paying customers than private businesses is also beside the point under the established governmental/proprietary test, as explained above. AWWD Br. at 6; *Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003); City’s Br. at 34. Further, it was well established that the provision of utility services to billed customers is proprietary when the legislature adopted and repeatedly amended the enabling legislation for the formation of public water and sewer utility districts. *See, e.g.*, Laws of 1913, ch. 161; Laws of 1929, ch. 114; Laws of 1982, 1st ex. sess., ch. 17; Laws of 1996, ch. 230; *Stirrat*, 55 Wash. at 566; *Hayes v. City of Vancouver*, 61 Wash. 536, 539, 112 P. 498 (1911); *Russell v. City of Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951). Because the legislature

⁹ The reverse is also true: a municipal corporation may generate profit while acting in its governmental capacity. *See Kilbourn v. City of Seattle*, 43 Wn.2d 373, 380, 261 P.2d 407 (1953) (operation of park remains governmental function despite revenue from for-profit concession stand); *WSMLB*, 165 Wn.2d at 688–95 (operation of stadium remains governmental function despite profit from ticket sales).

acquiesced in this Court's precedent, the Court should not take it upon itself to reverse course and fundamentally alter the legal framework applicable to public water and sewer utility districts. *See State v. Roggenkamp*, 153 Wn.2d 614, 630, 106 P.3d 196 (2005) (legislature is presumed to be aware of, and acquiesce in, court precedent); City's Br. at 37–38 (describing impact of abandoning or altering governmental/proprietary distinction); WSAMA/AWC Br. at 16–20; *see also* Sect. II.C.2, *infra*.

AWWD re-states the Districts' meritless argument that furnishing sewer services to billed customers is a governmental function because a municipality's operation of a solid waste transfer station is a governmental function. AWWD Br. at 7–8. Again, the nature of a public utility's function depends on whether it provides a service for the "comfort and use of individual customers" (proprietary function), or whether it "operate[s] for the benefit of the general public" (governmental function). *Okeson*, 150 Wn.2d at 550 (internal quotations omitted). Furnishing of sewer services to billed customers is akin to collecting garbage from individual customers that have paid for the service, which this Court has held is a proprietary function. *See Hutton*, 41 Wn.2d at 784–85; City's Br. at 31. By contrast, the operation of a solid waste transfer station is akin to operation of facilities for the public benefit, such as streetlights and fire

hydrants (governmental functions), because “customers have no control over the provision or use” of such establishments. *See Okeson*, 150 Wn.2d at 550.¹⁰ That a municipal corporation’s provision of a service, as opposed to its operation of a facility, is a proprietary function is further evidenced by the fact that for years Washington cities have imposed an excise tax on “businesses collecting solid waste.” *See* CP 325–36, 1155.

Further, the legislature’s waiver of sovereign immunity in the 1960s does not, as AWWD contends, distinguish this Court’s precedent that billed water utilities are proprietary. AWWD Br. at 3–4, 6. Citing pre-waiver tort cases, AWWD erroneously contends these decisions are premised solely on the concern that tort victims would otherwise be unable to recover damages. *Id.* at 4. But the cases AWWD cites hold that water services are proprietary because the services are provided to paying customers, rather than the general public. *See Bjork v. City of Tacoma*, 76 Wash. 225, 226, 228, 135 P. 1005 (1913) (noting that “residents” could “obtain water” from the city “for pay” and the “people so supplied with water were provided with keys and required by the city to keep the cover at all times locked”); *Aronson v. City of Everett*, 136 Wash. 312, 314, 316, 39 P. 1011 (1925) (stating the city was “engaged in the business of

¹⁰ Water and sewer services also are distinguishable from a solid waste transfer station because the former are liquids and part of an interconnected system. *See* City’s Br. at 32; CP 1295.

supplying water for domestic and drinking purposes to the citizens and inhabitants thereof **for a consideration**” (emphasis added)); *Shandrow v. City of Tacoma*, 188 Wash. 389, 391, 62 P.2d 1090 (1936) (“In the construction and the operation of its water plant, including the mains **servicing its inhabitants**, the City acts in a proprietary capacity[.]” (emphasis added)); *see also Russell*, 39 Wn.2d at 553 (city owned and operated a water plant “for the purpose of furnishing a domestic water supply to its inhabitants”). Moreover, this Court reaffirmed the same rationale and holding in contexts other than tort immunity and in decisions after the legislature’s waiver of sovereign immunity. *See, e.g., Burns*, 161 Wn.2d at 155 (validity of public contract); *Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Town of Newport*, 38 Wn.2d 221, 227–28, 228 P.2d 766 (1951) (scope of municipal authority); *Stirrat*, 55 Wash. at 566 (applicability of estoppel to municipal corporation). Further, even after the legislature’s sovereign immunity waiver, the governmental/proprietary distinction continues to dictate whether the public duty doctrine insulates municipal corporations from tort liability. *See Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987), *as amended* (Apr. 28, 1988).

Thus, the legislature’s waiver of sovereign immunity is not grounds for reaching a different result. To the contrary, that the legislature acknowledged the governmental/proprietary distinction in waiving

sovereign immunity and has not changed the doctrine since then, further demonstrates the legislature’s acquiescence in this fundamental principal of municipal law. *See* RCW 4.92.090 (waiving immunity of the state “whether acting in its governmental or proprietary capacity); RCW 4.96.010 (similar for local governmental entities); *Roggenkamp*, 153 Wn.2d at 630.¹¹

In sum, Amici fail to rebut settled precedent that the provision of water and sewer services is a proprietary function.

2. Amici do not provide any bases to overturn the well-established governmental/proprietary distinction.

Amici’s argument that the Court should abandon or change the governmental/proprietary distinction also fails on the merits. Like the Districts, Amici do not even address the standard for overturning precedent, let alone make a “clear showing” that the governmental/proprietary distinction is “both incorrect **and** harmful.” *State v. Otton*, 185 Wn.2d 673, 678, 687–88, 374 P.3d 1108 (2016) (internal quotations omitted and emphasis in original).

Amici do not provide a new perspective or additional authority for the claim that the governmental/proprietary distinction is incorrect. Like

¹¹ The legislature waived sovereign immunity for local governmental entities in 1967. Laws of 1967, ch. 164, § 1. The 1961 statute cited by AWWD waived sovereign immunity as to the state. AWWD Br. at 4 and n.1 (citing Laws of 1961, ch. 136, § 1).

the Districts, WASWD and AWWD rely on Judge Fearing’s non-binding concurrence in *City of Wenatchee v. Chelan County Public Utility District No. 1*, 181 Wn. App. 326, 325 P.3d 419 (2014). WASWD Br. at 5–7; AWWD Br. at 7 n.2; Districts’ Br. at 26–28.¹² Although Judge Fearing argued there are multiple inconsistent tests, he acknowledged that there is one “principal” test, ignored the context surrounding the other so-called “tests” cherry-picked from more than a century of Washington precedent, and failed to provide any alternative standard that he believed would achieve a more just result. *Wenatchee*, 181 Wn. App. at 352 (Fearing, J., concurring). Regardless, Judge Fearing ultimately agreed with the majority that “under the current state of the law, the provision of domestic water is a proprietary function and thus the city of Wenatchee may collect a tax from the Chelan County Public Utility District[.]” *Id.* at 351; *see also* Hugh D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 Seattle U. L. Rev. 173, 180 (2016) (advising against abandoning the distinction and arguing that public utilities providing services to billed customers should continue to be taxed like private utilities). In short, Amici fail to provide any basis for this

¹² RHA does not argue that the distinction is incorrect.

Court to determine that the governmental/proprietary distinction is incorrect.

In addition to failing to establish that the governmental/proprietary distinction is incorrect, Amici also fail to identify any harm in maintaining that distinction. WASWD incorrectly argues that taxing public utilities' proprietary functions is inconsistent with the purpose of the governmental tax immunity doctrine, which WASWD asserts (without citing any authority) is "to protect municipal corporations from taxation which will 'limit their ability to carry out governmental functions.'" WASWD Br. at 8 (quotation marks in original). Even assuming that is the doctrine's purpose, the City agrees that governmental tax immunity shields the Districts' governmental functions from taxation. But this justification does not make sense when the Districts act in a proprietary capacity like any private business. While WASWD speculates that the City's tax will decrease the amount of money available for fire suppression, the City's tax does not apply to this governmental function. WASWD Br. at 8-9; City's Br. at 46 n.30. The City's tax applies to the Districts' income from furnishing water and sewer to billed customers, which cannot be used to pay for fire suppression or other governmental functions. *See Lane v. City of Seattle*, 164 Wn.2d 875, 886, 194 P.3d 977 (2008) (utility cannot charge

ratepayers for hydrant or fire suppression expenses as part of furnishing water service).¹³

Likewise, the prospect of additional litigation does not provide a basis to reject the governmental/proprietary distinction. WASWD mischaracterizes the trial court’s decision below as purportedly “recogniz[ing] that definitions and governmental/proprietary distinctions will likely require additional litigation.” WASWD Br. at 4 and n.4 (citing CP 1529). To the contrary, the trial court simply acknowledged that the “[s]pecific determination” of whether certain income derives from proprietary activities subject to the City’s tax “**may** be the subject of future litigation[.]” CP 1529 (emphasis added). In this case, however, the trial court rejected the Districts’ vagueness challenge to the City’s definitions because, among other things, they never identified any particular category of their income in dispute. CP 1528–29. This is unsurprising given that these questions (i.e., whether particular activities carried on by municipal corporations are governmental or proprietary) have been litigated in Washington for more than a century in a wide variety of contexts from tort liability to contract law. Moreover, as

¹³ Contrary to WASWD’s contention, public utility districts have other methods at their disposal for raising revenue to pay for fire suppression. WASWD Br. at 8–9. For example, under a franchise agreement, the City pays Appellant Lakehaven Water and Sewer District’s costs for providing fire suppression services in Federal Way. CP 543.

discussed above, Washington courts have already definitively held that the provision of water and sewer to billed customers is proprietary. *See* Sect. II.C.1, *supra*; City’s Br. at 25–32.

Finally, Amici ignore the substantial harm that would result from discarding or changing the governmental/proprietary distinction. As the City and Amici the Washington State Association of Municipal Attorneys and the Association of Washington Cities have explained, the distinction applies in numerous contexts across municipal law, including not only taxation, but also tort liability, public contracts, and municipal authority. City’s Br. at 37–38; WSAMA/AWC Br. at 16–20. Any change would have far-reaching consequences for local governments, residents, and other stakeholders across Washington. *Id.*¹⁴

In sum, Amici fail to demonstrate that the governmental/proprietary distinction is “incorrect and harmful” as required to justify overturning more than 100 years of precedent.

III. CONCLUSION

While Amici disagree with the City’s decision to extend its utility tax to private and public water and sewer utilities, the merit of the City’s tax policy is not before this Court. The question presented is whether

¹⁴ Abolishing the distinction in only the tax context would still lead to these harmful consequences, which Amici do not refute. *See* City’s Br. at 39–41.

governmental tax immunity applies to the proprietary function of providing water and sewer services to billed customers. It does not. Accordingly, the Court should affirm the trial court's holding that the City has express authority under RCW 35A.82.020 to tax public and private utilities' provision of water and sewer services.

RESPECTFULLY SUBMITTED this 26th day of December, 2019.

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CERTIFICATE OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, over the age of 21 years, and not a party to this action. On the 26th day of December, 2019, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon the parties listed below:

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DATED this 26th day of December, 2019.



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December 26, 2019 - 10:51 AM

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