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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.

BRIEF OF RESPONDENT CITY OF FEDERAL WAY

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I. INTRODUCTION

The legislature has authorized Washington cities, including Respondent the City of Federal Way (“City”), to levy excise taxes on the proprietary provision of utility services, even when those services are provided by another municipal corporation. The legislature has expressly delegated broad authority to cities to levy excise taxes on “all places and kinds of business” activities within their boundaries. RCW 35A.82.020. Exercising this authority, in 2018, the City extended the excise tax it has levied on other utilities for over 20 years to water and sewer utility services. *See* ch. 3.10 Federal Way Revised Code (“FWRC”). Specifically, the City levied an excise tax on the gross income of public and private utilities from the “business of selling or furnishing water services” and “furnishing sewer services” for “commercial, industrial, or domestic use or purpose.” FWRC 3.10.040(9), (10).

Appellants Lakehaven Water and Sewer District, Highline Water District, and Midway Sewer District (collectively, the “Districts”)—public utilities that provide water and/or sewer services in Federal Way—filed this lawsuit, claiming that governmental immunity shields them from the City’s tax. As the trial court properly ruled, however, immunity does not apply to the Districts’ proprietary, as opposed to governmental, activities. Because the City’s tax is levied only on the Districts’ proprietary

provision of utility services to billed customers, the trial court correctly held that RCW 35A.82.020 expressly authorizes the City's tax. The trial court's ruling is consistent with Washington cases on governmental tax immunity, including Washington Supreme Court precedent and a recent Court of Appeals decision directly on point, and should be affirmed.

The trial court's ruling also is consistent with over 100 years of precedent holding that municipal corporations such as the Districts possess dual powers—governmental and proprietary—which are treated differently in a variety of contexts, from taxes to torts to public contracting. The Districts urge the Court to abandon the governmental/proprietary distinction but they do not even attempt to meet the high burden for overturning precedent. This Court should deny the Districts' request and adhere to the doctrine of stare decisis.

The trial court also properly dismissed the Districts' constitutional claims under the Privileges and Immunities and Due Process Clauses. As municipal corporations, the Districts do not have standing to assert these claims, which claims fail on the merits in any event. This Court should affirm the trial court's dismissal of the challenges to the City's tax.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court correctly hold that the City has authority under RCW 35A.82.020 to tax public and private utilities' provision of

water and sewer services within city limits for commercial, industrial, or domestic use or purpose because governmental tax immunity does not apply to the proprietary activity of providing utilities to billed customers?

2. Did the trial court correctly hold, consistent with over 100 years of precedent, that municipal corporations such as the Districts should continue to be treated differently when they exercise delegated sovereign powers in their governmental capacity than when they act like any private business in their proprietary capacity?

3. Do municipal corporations such as the Districts have standing to claim violations of their constitutional rights under the Privileges and Immunities and Due Process Clauses of the Washington Constitution and the Fourteenth Amendment of the U.S. Constitution, which protect the rights of individuals from governmental interference?

4. Did the trial court correctly reject the Districts' due process vagueness challenge to the City's definition of "gross income," where the Districts failed to demonstrate that the definition is vague on its face or as applied to the Districts?

5. Did the trial court correctly hold that the City did not violate the Districts' alleged fundamental rights under the Privileges and Immunities Clause by abiding by the terms of its franchise agreement with the City of Tacoma ("Tacoma Franchise Agreement")?

III. COUNTERSTATEMENT OF THE CASE

On March 20, 2018, the City extended its existing utility excise tax to the provision of water and sewer utility services. CP 613–19 (the “Ordinance”). Under the Ordinance, public and private water and sewer utilities pay an excise tax “equal to 7.75 percent of the total gross income” from the “business of selling or furnishing water services” or “furnishing sewer services” in the City for “commercial, industrial, or domestic use or purpose.” FWRC 3.10.040(9), (10). The Ordinance extended the tax the City already levied on other utilities, including providers of telephone, gas, electricity, and solid waste services in the city, to providers of water and sewer service. *See* FWRC 3.10.040(1)–(8). Consistent with its existing utility excise tax provisions, the tax on water and sewer services is limited to “**business activities** engaged in or carried on in the city[.]” FWRC 3.10.040 (emphasis added); CP 613, 1316–17.

Before extending its utility excise tax to water and sewer utilities, the City identified and implemented cost-saving measures in an attempt to close the more than \$850,000 deficit it faced annually due to the statutory cap on real property taxes, unfunded equipment reserves for the police department, and higher jail costs, among other things. CP 609–10. Because those decreases in spending proved to be insufficient, the City considered several potential sources of new revenue. CP 610. Of the

various options it considered, the City found that extending its utility excise tax to water and sewer utilities was in the “best interest of the public.” CP 614. The City’s finding was based in part on its estimate that such a tax would raise at least \$980,000 in net collection per year. CP 610–11.¹ Also influencing the City’s decision was the fact that more than 150 Washington cities and towns rely on water and sewer utility taxes as a source of revenue. CP 610, 614.²

In extending its utility excise tax to water and sewer services, the City simply amended FWRC 3.10.040. CP 614–16. As a result, the definitions and procedures already in place for the City’s tax on other utility services also apply to the City’s tax on water and sewer services. *See* ch. 3.10 FWRC.³ Pursuant to existing procedures, the taxpayer initially determines the amount of taxable gross income to report to the City on a utility tax form. FWRC 3.10.110; CP 1320, 1402, 1510–11.

¹ For the purpose of estimating potential collections only, the City used the information it had available, which was the “Revenue” reported by Lakehaven under its franchise agreement (“Lakehaven Franchise Agreement”), as a proxy for the taxable gross income on which the water and sewer utility excise tax would be levied. CP 610–11. The City did not, however, intend to suggest that “Revenue” under the Lakehaven Franchise Agreement was the same as “gross income” subject to the utility excise tax and, in fact, those terms are defined differently. *See* CP 540, 610–11; FWRC 3.10.020.

² In its most recent Tax and User Fee Survey, the Association of Washington Cities reported that 166 out of 231 responding cities impose an excise tax on water utilities and 152 cities impose an excise tax on sewer utilities. CP 605–06; *see also City of Wenatchee v. Chelan Cty. Pub. Util. Dist. No.1*, 181 Wn. App. 326, 343 n.1, 325 P.3d 419 (2014) (relying on survey).

³ The City has relied on the same definition of “gross income” for purposes of its utility excise taxes since 1996, with only slight amendments which have “not substantively affect[ed] the levying and/or collecting of utility taxes.” CP 1407–8, 504–05, 610, 1512.

When filling out the form, the taxpayer may “submit questions” to the City for clarification. CP 1323, 1511. If an issue arises that requires further clarification or interpretation, the City’s Management Services Director or another person designated by the Mayor also has the authority to adopt rules and regulations to carry out the provisions of Title 3 FWRC. FWRC 3.05.020. The City’s Finance Director or a designee then reviews the tax form submitted by the taxpayer; requests and reviews the taxpayer’s records, if appropriate; and then makes a determination regarding the amount of tax due to the City. *See* FWRC 3.10.120(1); CP 1320, 1511. If the taxpayer disagrees with the Finance Director’s determination, the taxpayer has the right to appeal to a hearing examiner and then superior court. FWRC 3.10.190; CP 1511.

Rather than follow these established procedures, the Districts filed this lawsuit in King County Superior Court seeking to have the City’s Ordinance declared invalid. CP 1–4, 53–56. The Districts argued that they enjoy governmental immunity from the City’s tax based solely on their status as municipal corporations. CP 54, 651–52. In other words, the Districts argued that governmental tax immunity should extend to all municipal functions, both governmental and proprietary. CP 451, 650–51. The Districts also asserted claims under the Due Process and Privileges

and Immunities Clauses. CP 55, 456, 459. The City denied the Districts’ claims and asserted a counterclaim for a declaratory judgment. CP 61–63.

On cross motions for summary judgment, the trial court ruled that the City’s tax is valid and constitutional. CP 1529–30. Applying binding Washington precedent, the court determined that the Districts, “as governmental entities[,] act in both proprietary and governmental capacities” and that the City has express authority under RCW 35A.82.020 to impose an excise tax on the Districts “to the extent that income is derived from [their] proprietary functions[.]” CP 1527. The court further determined that the City’s tax properly applied to proprietary functions, namely, “the provision of water and sewer services to benefit directly billed customers who requested the services[.]” CP 1527. The court also rejected the Districts’ constitutional claims. CP 1528–29.

The Districts appealed the trial court’s decision and requested direct review by the Washington Supreme Court. The City agreed that direct review is warranted due to the broad public import of this appeal.

IV. ARGUMENT

A. Standard of Review.

This Court reviews “constitutional challenges and questions of statutory interpretation de novo.” *Watson v. City of Seattle*, 189 Wn.2d 149, 158, 401 P.3d 1 (2017). In doing so, this Court presumes city

ordinances are “valid and constitutional.” *Id.* The challenging party has the burden of showing otherwise beyond a reasonable doubt. *Id.*; *State v. Brayman*, 110 Wn.2d 183, 193, 751 P.2d 294 (1988).⁴ Here, the Districts failed to meet their heavy burden to invalidate the City’s Ordinance.

B. The Trial Court Correctly Held that the City Has Express Authority to Levy an Excise Tax on the Districts’ Proprietary Activities.

The City properly exercised its broad tax authority in extending its utility excise tax to water and sewer utilities. Although the City agrees that the Districts are governmental entities,⁵ they are not immune from the City’s tax. Under Washington law, governmental immunity is limited to municipal corporations’ governmental functions, not their proprietary functions. This Court should affirm the trial court’s determination that the City has express authority to tax the Districts’ proprietary activities.

1. The City’s express authority to tax “all” places and kinds of business includes taxation of public and private utilities.

The Constitution authorizes the legislature to grant municipal corporations the power to levy taxes for local purposes. *See Wash. Const.*

⁴ This Court also reviews summary judgment orders de novo. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). An action for declaratory judgment on legal questions is particularly appropriate for resolution by summary judgment. *See Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998). Despite asserting that summary judgment is a “drastic remedy,” the Districts agree this case should be resolved on summary judgment and cross-moved for summary judgment before the trial court. *See Districts’ Br.* at 13 n.16; CP 444–62.

⁵ The Districts devote substantial briefing to this issue, but the City does not dispute that the Districts are governmental entities, specifically municipal corporations.

art. VII, § 9, art. XI, § 12. The legislature’s delegation of tax authority must be express and for local purposes, but these constitutional provisions do not otherwise limit the objects or subjects of municipal taxation. *See Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 757–58, 131 P.3d 892 (2006), *as amended* (May 24, 2006); *see also Commonwealth Title Ins. Co. v. City of Tacoma*, 81 Wn.2d 391, 395, 502 P.2d 1024 (1972) (“It is inherent in the exercise of the power to tax that a state be free to select the objects or subjects of taxation and to grant exemptions.”). These constitutional provisions reflect Washington’s adoption of the “home rule” principle, which favors “autonomy in local governance” and is “particularly important with respect to local taxation authority.” *Watson*, 189 Wn.2d at 166–67.

Exercising this constitutional authority, the legislature expressly empowered code cities, including the City, to impose excises “in regard to all places and kinds of business . . . and any other lawful activity[.]” RCW 35A.82.020. Here, the City properly exercised its broad excise tax power under RCW 35A.82.020 in levying a city tax on private and public utility businesses. CP 1527.

The Districts’ argument that RCW 35A.82.020 does not expressly authorize the City to “impose utility taxes generally” (whether on public or private utilities), cannot be reconciled with RCW 35A.82.020’s

expansive language granting authority to levy “excises” on “all places and kinds of business . . . and any other lawful activity.”⁶ *See* Districts’ Br. at 17. Nor do the Districts explain how such an interpretation can be squared with the legislature’s undisputed intent in enacting chapter 35A.11 RCW “to confer the greatest power of local self-government[.]” CP 1369; *see also* RCW 35A.01.010 (“The purpose and policy of this title is to confer . . . the broadest powers of local self-government consistent with the Constitution of this state.”); Laws of 1965, Ex. Sess., ch. 115, § 2 at 2061 (convening special committee to prepare a code of laws for city governments with “a form of statutory home rule”).⁷

Contrary to the Districts’ assertions, the legislature has discretion to empower cities to levy taxes through as broad (or narrow) a statutory delegation as it wishes, so long as it does so expressly rather than by implication. *See, e.g., Watson*, 189 Wn.2d at 167–70 & n.8 (holding that general city excise tax statutes expressly authorize city tax on retail gun sales). There is no question that RCW 35A.82.020 expressly delegates broad excise tax power to cities. *See id.* at 170 n.8; *King Cty. v. City of Algona*, 101 Wn.2d 789, 792, 681 P.2d 1281 (1984); *City of Wenatchee v.*

⁶ In fact, the Washington Attorney General (“AG”) recently opined that the first-class city license tax statute—which is narrower than RCW 35A.82.020—grants “sufficiently broad authority to impose a public utility tax.” 2018 Op. Att’y Gen. No. 7, 2018 WL 4492839, at *2. *See* n.15, *infra*.

⁷ *See also* Hugh D. Spitzer, “Home Rule” vs. “Dillon’s Rule” for Washington Cities, 38 Seattle U. L. Rev. 809, 838–42 (2015) (detailing legislative history of code city laws).

Chelan Cty. Pub. Util. Dist. No. 1, 181 Wn. App. 326, 336–38, 325 P.3d 419 (2014); *see also* RCW 35A.01.010 (providing that “[a]ll grants” of power to code cities “shall be liberally construed . . . whether the grant is in specific terms or in general terms”).⁸

The Districts cite inapplicable cases on topics ranging from whether the legislature impliedly authorized a tax in a statute unrelated to taxation to the scope of a statute restricting city tax authority. *See* Districts’ Br. at 15; *Okeson v. City of Seattle*, 150 Wn.2d 540, 557–58, 78 P.3d 1279 (2003) (statute authorizing cities to provide electricity did not impliedly delegate tax powers); *Pac. First Fed. Sav. & Loan Ass’n v. Pierce Cty.*, 27 Wn.2d 347, 356, 178 P.2d 351 (1947) (port commissioners failed to consider cash surplus in determining the amount to be raised); *City of Seattle v. T-Mobile W. Corp.*, 199 Wn. App. 79, 82–86, 397 P.3d 931 (2017) (RCW 35.21.714 prohibited city tax on telephone roaming charges); *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 368–75, 89 P.3d 217 (2004) (ambulance statute authorizing excise tax did not also impliedly authorize general utility fee). None of these cases hold

⁸ The Districts argued below that the City’s authority under RCW 35A.82.020 conflicts with the Districts’ powers under RCW 57.08.005(3), (5). CP 647. But the City’s tax does not implicate the Districts’ powers under RCW 57.08.005 because the tax is an excise for revenue, not regulation. *See Watson*, 189 Wn.2d at 167–68. Regardless, the fact that Lakehaven may not operate freely on City roads without a franchise shows the limits on the Districts’ powers under RCW 57.08.005. CP 540–41, 1244.

that cities' broad excise tax authority under RCW 35A.82.020 should be narrowly construed.

Thus, the trial court correctly ruled that RCW 35A.82.020 expressly authorizes the City to levy excise taxes on utility businesses.

2. The governmental tax immunity doctrine does not apply to a municipal corporation's proprietary activities.

The Districts incorrectly contend that, as municipal corporations, they enjoy governmental immunity from taxation of their utility business unless a statute specifically authorizes the City to levy the tax on municipal corporations. Districts' Br. at 17–18. They claim immunity even though the City's tax applies only to income from the Districts' non-governmental, proprietary activities. This expansion of the governmental tax immunity doctrine conflicts with established Washington law.

A municipal corporation “possesses a twofold character.” *City of Seattle v. Stirrat*, 55 Wash. 560, 564, 104 P. 834 (1909). The first is “governmental,” in “which the municipal corporation acts as an agency of the state” and exercises its “sovereign power[s].” 2A Eugene McQuillin, *The Law of Municipal Corporations* § 10:5 (3d ed. updated July 2018); *see also Stirrat*, 55 Wash. at 564. The second is “proprietary” and involves the “accomplishment of private corporate purposes.” McQuillin, *supra* § 10:5; *see also Burns v. City of Seattle*, 161 Wn.2d 129, 155, 164

P.3d 475 (2007). Washington courts apply this distinction in numerous contexts, including taxation, tort liability, public contracts, and municipal authority. *See* sect. IV.D, *infra*.

The Washington Supreme Court first applied the governmental/proprietary distinction in the context of governmental tax immunity in *Algona*. The Court held that the City of Algona lacked authority to levy an excise tax on King County in connection with the county's operation of a solid waste transfer station. 101 Wn.2d at 794–95. In relying on *Algona*, the Districts ignore that the decision was predicated on the governmental character of the activity being taxed. *See* Districts' Br. at 22. Specifically, the *Algona* Court held, “**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. We hold that [the county] was operating in a governmental function.” 101 Wn.2d at 794 (emphasis added) (internal citations omitted). Put another way, the *Algona* Court acknowledged that although cities enjoy express authority to levy excise taxes on proprietary activities, a city must have an additional layer of specific authority to levy an excise tax on governmental functions. *See id.* at 794–95.

The City's authority to tax the Districts' proprietary activities is further supported by the Washington Supreme Court's subsequent

decision in *Burba v. City of Vancouver*, 113 Wn.2d 800, 783 P.2d 1056 (1989). In *Burba*, the Court recognized that the governmental immunity doctrine does not shield all municipal activities from taxation. *See id.* at 801. Specifically, the Court held that a city could constitutionally impose a utility tax on a city-owned water and sewer utility.⁹ *Id.* Unlike *Algona*, the challenged city tax applied to proprietary “business” activities (provision of water and sewer to billed customers). *Id.* at 807.

More than 25 years after *Algona*, in *Burns*, the Supreme Court reaffirmed the significance of the governmental/proprietary distinction in determining whether a municipal corporation is immune from local taxation. Although the question of taxing authority was not squarely presented in *Burns*, the Court recognized that, when read together, *Burba* and *Algona* “support” the position that a city has authority to tax the proprietary (as opposed to governmental) activities of another (as opposed to its own) public utility. 161 Wn.2d at 159–60. The *Burns* Court opined that *Algona* “arguably is distinguishable” because it addressed a governmental activity (operating a solid waste transfer station), not the

⁹ The Districts attempt to distinguish *Burba* on the basis that the city sought to tax its own municipal utility, Districts’ Br. at 18–19, but ignore that the *Burba* Court specifically upheld the tax on the sale of services to **nonresidents** as a tax on the “gross receipts of a business.” 113 Wn.2d at 807. Further, Washington cities levy excise taxes on a variety of utility providers, including public utility districts, city-operated utilities, and private companies. *See, e.g., id.* at 801–03; *Wenatchee*, 181 Wn. App. at 338. In extending its utility excise tax to water and sewer, the City properly considered widespread reliance on this revenue source and typical rates charged by more than 150 cities. CP 606, 610, 614.

proprietary activity of providing utility services to billed customers, and concluded that “it is by no means certain . . . that the doctrine of governmental immunity from taxation would prevent [cities] from imposing a utility tax on [another municipal utility.]” *Id.* at 159–60.

Most recently, the Court of Appeals squarely addressed the issue raised in *Burns* and confirmed that the *Algona* Court’s application of the governmental immunity doctrine was “predicated on the governmental character of the activity being taxed.” *Wenatchee*, 181 Wn. App. at 343. In *Wenatchee*, the court upheld the authority of the City of Wenatchee to tax a public utility district’s provision of water services. *Id.* at 330. In doing so, the court differentiated between the express authority necessary for a municipality to levy any tax and the additional layer of specific authority needed to overcome governmental immunity:

[W]hen governmental immunity is implicated, a two-layered express authorization is needed. Not only must the legislature provide an express grant of general taxing authority but, if it intends to tax governmental functions of a municipality, there must be an additional expressed intention overcoming what would otherwise be the implied immunity from tax of those functions.

Id. at 349. Because the activity taxed in *Wenatchee* was a proprietary function (provision of water services to billed customers), the court held that governmental immunity did not apply and that the first layer of tax authority in RCW 35A.82.020 was sufficient. *Id.* at 330, 336–38, 343.

Applying this clear line of authority, the trial court properly ruled that the City has express authority under RCW 35A.82.020 to tax the Districts' proprietary activities. CP 1526–27.

3. The Districts mischaracterize relevant precedent regarding governmental immunity.

The Districts' invocation of governmental immunity is based on their fundamental misreading of *Algona*. They ignore altogether the *Algona* Court's analysis of the governmental/proprietary distinction—the central issue in this appeal—and, instead, cherry pick language most favorable to their position. Districts' Br. at 15–18; *see Algona*, 101 Wn.2d at 794 (analyzing governmental/proprietary distinction). But even the selective quotes from *Algona* included in the Districts' brief contain language limiting the *Algona* Court's application of governmental immunity to the facts of that case, where the activity subject to taxation was governmental in nature, not proprietary. Districts' Br. at 17–18; *Algona*, 101 Wn.2d at 793 (city lacked necessary authority “in this case”).

The Districts' characterization of *Algona* also conflicts with the *Algona* Court's discussion of *City of Seattle v. State*, 59 Wn.2d 150, 367 P.2d 123 (1961), and *City of Bellevue v. Patterson*, 16 Wn. App. 386, 556 P.2d 944 (1976). Districts' Br. at 18 n.23. In *Seattle*, the Washington Supreme Court rejected a city park department's claim of governmental

immunity from the state B&O tax, ch. 82.04 RCW, because the legislature explicitly included “municipalities” in the definition of “persons” subject to the tax. 59 Wn.2d at 153–54. The Court determined it was “unnecessary to consider whether the particular activities [by the park department were] governmental or proprietary in nature,” as either would be subject to the tax. *Id.* at 154. The fact that the legislature expressly authorized the state to tax municipalities’ governmental functions does not answer the question presented here: whether the City has authority to tax the Districts’ proprietary activities. Districts’ Br. at 19 n.25. The City has never claimed it has authority to tax the Districts’ governmental functions.

Relying on *Seattle*, the court in *Bellevue* upheld a city excise tax on water and sewer districts under RCW 35.23.440 because “[m]unicipal corporations as a class enjoy no exemption from taxation.” 16 Wn. App. at 387–88. As *Algona* acknowledged, *Bellevue* analyzed the issue solely as a claim of tax exemption and did not discuss governmental immunity. 101 Wn.2d at 792–93. Importantly, *Algona* overruled *Bellevue* only “as to its provisions that are inconsistent with this opinion,” i.e., to the extent *Bellevue* suggested that, unless exempted, a municipality is subject to general taxes as to both its governmental and proprietary activities. *See id.* at 795; *see also Wenatchee*, 181 Wn. App. at 346–48. If, as the Districts contend, the governmental immunity doctrine dictates that general grants

of taxing power such as RCW 35.23.440 and RCW 35A.82.020 do not allow cities to levy excise taxes on public utilities at all, Districts’ Br. at 17–18, then *Algona* would have wholly overruled *Bellevue*, rather than simply overruling it in part.¹⁰ Thus, contrary to the Districts’ assertions, *Seattle* and *Bellevue* support the City’s reading of *Algona*.

Further, although this Court need not look beyond Washington law, *Algona* cited cases from other jurisdictions that also confine governmental immunity to a municipal corporation’s governmental, non-proprietary activities. For example, the *Algona* Court cited *Salt River Project Agricultural Improvement & Power District v. City of Phoenix*, 631 P.2d 553 (Ariz. Ct. App. 1981), in distinguishing between governmental and proprietary functions. *Algona*, 101 Wn.2d at 794. Contrary to the Districts’ contention that *Salt River* applied governmental immunity to a public utility district’s proprietary activities, Districts’ Br. at 22, the *Salt River* court determined that the activities subject to the tax were governmental in nature, not proprietary, and thus concluded that governmental immunity applied. 631 P.2d at 555–57. Specifically, the

¹⁰ The license tax statute for first-class cities at issue in *Bellevue* also is not as broad as RCW 35A.82.020. Compare RCW 35.23.440(8) (“License generally: To fix and collect a license tax for the purposes of revenue and regulation, upon all occupations and trades, and all and every kind of business authorized by law not heretofore specified.”), with RCW 35A.82.020 (granting authority “to impose excises for . . . revenue in regard to all places and kinds of business, production, commerce, entertainment, exhibition, and upon all occupations, trades and professions and any other lawful activity”).

court held that the City of Phoenix could not tax the district's sales to an irrigation district of "non-surplus electricity . . . used to accomplish the primary governmental purpose of each: drainage and irrigation." *Id.* at 557. As the trial court did in this case, the *Salt River* court distinguished "retail sales" of electricity to consumers, which are "proprietary business activities . . . , rather than governmental acts," and thus would not enjoy governmental tax immunity. *See id.* at 555.

Similarly, in *Village of Willoughby Hills v. Board of Park Commissioners of Cleveland Metropolitan Park District*, 209 N.E.2d 162 (Ohio 1965), cited in *Algona*, 101 Wn.2d at 794, the court held that a village lacked authority to levy an excise tax on a park district's operation of a public park, which the Districts concede is a governmental activity. *Willoughby Hills*, 209 N.E.2d at 163–64 (striking down city tax on public golf course); Districts' Br. at 4 n.4. The court nowhere stated that the park district was acting in a proprietary capacity, as the Districts suggest. Districts' Br. at 23. In fact, following *Willoughby Hills*, the Ohio Supreme Court held that governmental immunity does not shield a park district's proprietary functions from tort liability. *Schenkolewski v. Cleveland Metroparks Sys.*, 426 N.E.2d 784, 789 (Ohio 1981). The court noted that the "majority of states" follow this rule. *Id.* Thus, out-of-state authority also supports limiting governmental immunity to a municipal

corporation's governmental functions. *See also Town of Somerton v. Moore*, 119 P.2d 239, 239–40 (Ariz. 1941); *Town of Mulga v. Town of Maytown*, 502 So.2d 731, 734 (Ala. 1987).¹¹

Thus, when read as a whole, *Algona* does not stand for the proposition that all municipal functions are immune from taxation. Rather, *Algona* turned on the governmental nature of the activity subject to the tax and supports the trial court's distinction between taxation of proprietary activities and governmental functions.

4. Failed bills, unrelated statutes, and the separation of powers doctrine do not support the Districts' narrow interpretation of the City's broad excise tax powers.

In addition to mischaracterizing Washington case law, the Districts rely on unsuccessful legislative efforts and unrelated statutes that are irrelevant to the Court's interpretation of the City's broad excise tax authority under RCW 35A.82.020. There is no evidence that, as the Districts assert, "Washington's cities have historically believed" that their excise tax authority was insufficient to levy a tax on public water and

¹¹ The other out-of-state cases cited in *Algona* did not address the governmental/proprietary distinction. *See Algona*, 101 Wn.2d at 794 (quoting policy rationale for governmental tax immunity set forth in *Dickinson v. City of Tallahassee*, 325 So. 2d 1, 4 (Fla. 1975), and citing *City of Philadelphia v. Se. Pa. Transp. Auth.*, 8 Pa. Cmwlth. 280, 291, 303 A.2d 247 (1973)); *see also Canaveral Port Auth. v. Dep't of Revenue*, 690 So. 2d 1226, 1227–28 (Fla. 1996) (*Dickinson*'s policy rationale applies to the state and its agencies but not municipalities). The remaining out-of-state and federal court decisions the Districts cite are also inapposite. Districts' Br. at 16 n.22 & 25 n.34. Regardless, a handful of non-Washington decisions is not sufficient to demonstrate that Washington law is clearly wrong as required to overturn precedent. *See* sect. IV.D, *infra*.

sewer utilities' proprietary activities. Districts' Br. at 19. To the contrary, more than 150 cities levy taxes on water and sewer utilities. CP 606.

The other tax authority bills and statutes relied on by the Districts have no bearing on the broad excise tax power delegated under RCW 35A.82.020. The legislature rejected this method of statutory construction for delegation of powers in Title 35A RCW: "Any specific enumeration of municipal powers contained in this title or in any other general law . . . shall be construed as **in addition and supplementary to** the powers conferred in general terms by this title." RCW 35A.01.010. Further, RCW 35A.01.010 provides any specific enumeration "shall not be construed in any way to limit the general description of power contained" in Title 35A RCW.

Moreover, no inference regarding the legislature's intent as to the scope of RCW 35A.82.020 can be drawn from the failed legislative efforts in 2009–10. Districts' Br. at 19–20. The proposed legislation would have simultaneously tackled other issues such as annexation of unincorporated areas in King County (HB 2249 (2009)) and elimination of restrictions on the use of certain county taxes and voter-approved increases to the regular real property tax rate above the statutory maximum (HB 2637/2749 (2010)). Because "[m]yriad reasons may explain why" bills such as these did not pass, "'nonpassage' says nothing about the legislature's intent with

respect to the subject matter of the bill[s].” *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 213 n.3, 193 P.3d 128 (2008); *see also* *Philippides v. Bernard*, 151 Wn.2d 376, 385, 88 P.3d 939 (2004), *as amended* (May 4, 2004) (courts do “not assume that the [l]egislature intended to effect a significant change in the law by implication” (internal quotations omitted)). This principle applies with even greater force with respect to RCW 35A.82.020, given the legislature’s directive that specific grants of power should not be construed “in any way to limit the general description of power contained” therein, RCW 35A.01.010, and the undisputed legislative history reflecting the legislature’s intent to delegate broad home rule powers to code cities. *See* sect. IV.B.1, *supra*.¹²

The temporary statute related to public utilities in Renton did not, as the Districts contend, authorize Renton to levy an excise tax on public utilities akin to the City’s tax here. Districts’ Br. at 18 n.24 & 20 (citing RCW 35.13B.010). Rather, the statute merely authorized Renton to enter an interlocal agreement with a public utility district that designated “the district as the collection and pass-through entity” for a city tax on water and sewer services, “with revenues submitted to [Renton].” Laws of 2010, ch. 102, § 1 at 713. Further, the Renton statute was enacted shortly after

¹² In addition to not evincing legislative intent, the failed bills do not demonstrate any belief on the part of Washington cities that their excise tax authority was insufficient to tax the proprietary activities of public water and sewer utilities. Rather, it is more likely that cities lobbied for these bills in order to avoid costly litigation such as the present suit.

Burns, but before *Wenatchee*, when it was “an unresolved question” whether cities had the authority to tax other public utilities. *Burns*, 161 Wn.2d at 160. It is therefore understandable that Renton might seek certainty regarding the authority for its tax at that time. Once *Wenatchee* specifically addressed this question in favor of cities, however, there was no longer a need for a statute such as RCW 35.13B.010, which expired shortly after *Wenatchee* was decided. *See* 181 Wn. App. at 343.¹³

The Districts concede that there have been no similar legislative efforts since *Wenatchee* was decided five years ago. Districts’ Br. at 20. Nor has the legislature amended RCW 35A.82.020 since that time. If anything, the legislature’s inaction suggests its approval of *Wenatchee*’s interpretation of RCW 35A.82.020. *See State v. Coe*, 109 Wn.2d 832, 844–46, 750 P.2d 208 (1988) (legislative inaction for five to eight years deemed acquiescence in court interpretation of statute); *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 181, 149 P.3d 616 (2006).¹⁴

¹³ In summary judgment briefing, the Districts relied on comments in the temporary Renton statute’s legislative history regarding city authority to tax public utilities. CP 1470–79. These legislative materials do not contain any legal analysis and may have simply parroted the 1990 AG Opinion that the Washington Supreme Court called into question in *Burns*. *See Burns*, 161 Wn.2d at 159–60; 1990 Op. Att’y Gen. No. 3. Regardless, a conclusory statement of law in legislative materials for an unrelated bill enacted in 2010 sheds little, if any, light on the 1967 legislature’s intent in enacting broad city excise tax powers under RCW 35A.82.020.

¹⁴ The Districts criticize *Burns* and *Wenatchee* for not addressing the failed legislation. Districts’ Br. at 22, 24 n.30. But it would have been impossible for the *Burns* Court to do so: *Burns* was decided in 2007, before the bills were drafted in 2009 and 2010. And given the limited probative value of the bills, it is unsurprising that *Wenatchee* focused on

Likewise, the statute expressly authorizing cities to tax gross revenue from electricity sales, RCW 54.28.070, cannot be read to exclude public utilities from taxation under RCW 35A.82.020.¹⁵ Districts’ Br. at 19 n.25. The legislature adopted RCW 54.28.070 in 1941. More than 25 years later, the legislature adopted RCW 35A.82.020, expressly delegating general authority to impose excises “in regard to all places and kinds of business . . . and any other lawful activity.” Since then, there has been no need for the legislature to enact narrow delegations of tax authority on specific types of public utilities’ proprietary activities.¹⁶

Throughout their brief, the Districts also incorrectly assert that the Court should leave the issues presented to the legislative process. *See, e.g.,* Districts’ Br. at 10 n.15 & 20 n.26. But this case is not about

controlling authority: *Algona* and its progeny, the two local tax provisions in the Washington Constitution, and the broad excise power delegated under RCW 35A.82.020.

¹⁵ The AG Opinion that a first class city cannot tax electric services by public utility districts under its license tax authority (RCW 35.22.280(32)) in light of RCW 54.28.070 is immaterial. Districts’ Br. at 19 n.25. RCW 54.28.070 applies only to electric services, not water and sewer services. As the AG also acknowledged, RCW 35.22.280(32)—which is narrower than the City’s excise tax power under RCW 35A.82.020—authorizes first class cities to tax other types of “**public** utility” services. *See* 2018 Op. Att’y Gen. No. 7, 2018 WL 4492839, at *2 (emphasis added). Further, the AG specifically “limited” the Opinion to the statutes it reviewed. *Id.* at *1 n.1. Regardless, the AG’s opinions are “not controlling” authority. *Davis v. King Cty.*, 77 Wn.2d 930, 934, 468 P.2d 679 (1970); *Wash. Fed’n of State Emps., Council 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 165, 849 P.2d 1201 (1993) (the Court “remains the final authority on the proper construction of a statute” (internal quotations omitted)).

¹⁶ Likewise, the statute expressly authorizing counties to tax county-operated water and sewer utilities (RCW 36.94.160) has no bearing on city tax authority. *See* Districts’ Br. at 19 n.25. Notably, RCW 36.94.160 did not impact the Court’s decision in *Burba* to allow a city to tax a city-owned water and sewer utility even though that statute was enacted long before *Burba* and no similar statute existed for cities.

legislative tax policy. Any tax policy issues were resolved long ago when the legislature enacted RCW 35A.82.020. The Districts' challenge to the City's tax presents legal questions, specifically, whether RCW 35A.82.020 authorizes the City to tax public and private utilities' proprietary provision of water and sewer services and whether the Districts are entitled to claim common law governmental immunity from that tax. These questions of statutory and common law interpretation are squarely within the province of this Court, not the legislature. *See, e.g., Watson*, 189 Wn.2d at 167–70 & n.8 (holding that general city excise tax statutes expressly authorize city tax on retail gun sales); *Stirrat*, 55 Wash. at. 564–67 (applying governmental/proprietary distinction in 1909).

In sum, the trial court correctly held that RCW 35A.82.020 expressly authorizes the City to levy excise taxes on the provision of utility services, satisfying the first layer of express authority. The City does not need the additional, second layer of authority to impose its tax on the Districts because, as explained in the next section, the utility services taxed constitute proprietary functions, not governmental functions.

C. The Trial Court Correctly Held that the Water and Sewer Services Subject to the City's Tax Are Proprietary.

The City's authority under RCW 35A.82.020 to tax municipal corporations like the Districts depends on whether the tax applies to

proprietary or governmental functions. The trial court correctly held that the City's tax applies only to proprietary activities, CP 1527, specifically, the "business" of furnishing water and sewer services to billed customers for "commercial, industrial, or domestic use[.]" FWRC 3.10.040(9), (10).

In Washington, the "principal test for determining whether a municipal act involves a sovereign or proprietary function is whether the act is for the common good or whether it is for the specific benefit or profit of the corporate entity." *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 687, 202 P.3d 924 (2009) ("WSMLB").

Governmental functions are "for the benefit of all citizens," McQuillin, *supra* § 10:5, while proprietary functions are "for the special benefit and advantage of the urban community embracing within the corporation boundaries." *WSMLB*, 165 Wn.2d at 687 (quoting 1999 edition of McQuillin, *supra*). Whether a municipal act involves a governmental or proprietary function therefore hinges on the primary purpose of the act. *See id.*; *see also Stirrat*, 55 Wash. at 566 (act is proprietary if carried out "for purposes of private advantage and emolument" even if "the public may derive a common benefit" (internal quotations omitted)).

Washington courts have consistently held that the operation of a utility system serving billed customers is a proprietary function. *See, e.g.,*

Stirrat, 55 Wash. at 565; *Burns*, 161 Wn.2d at 155. “In the context of utilities, the focus is on whether the utility ‘operates for the benefit of its customers.’” *Wenatchee*, 181 Wn. App. at 342 (quoting *Okeson*, 150 Wn.2d at 550). “When the municipality undertakes to supply, to those inhabitants who will pay therefor, utilities and facilities of urban life, it is engaging in business upon municipal capital and for municipal purposes It is a public corporation transacting private business for hire.” *Stirrat*, 55 Wash. at 565 (internal quotations omitted). As set forth below, it is a settled principle of Washington law that the provision of water and sewer services is a proprietary function.

1. Provision of water services is a proprietary function.

It is well established in Washington that providing water services to paying customers is a proprietary function. *See Burns*, 161 Wn.2d at 155 (“In the erection and operation . . . of waterworks . . . a municipal corporation acts as a business concern.” (internal quotations omitted)); *Russell v. City of Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951) (same). The Districts do not dispute this. *See, e.g.*, CP 1245 (claiming immunity only for fire suppression, not water provision generally). Instead, they hang their claim that the provision of water services is a governmental function on *Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004), which is

inapposite. Districts' Br. at 32. There, the Court held that a board resolution requiring water districts to fluoridate water conflicted with the statute authorizing the districts to control the content of their water systems. 151 Wn.2d at 430. The Court did not consider whether the districts were acting in a governmental or proprietary capacity, nor did it analyze the issue in terms of governmental immunity. *See id.* at 432–35.

The Districts also mistakenly rely on cases holding that the maintenance of fire hydrants is a governmental function. Districts' Br. at 32–34. Although the City agrees this separate function is governmental, *Lane v. City of Seattle*, 164 Wn.2d 875, 882, 194 P.3d 977 (2008), the “fact that some of the [Districts'] water is used in fire protection” is “not material” to governmental immunity. *See Russell*, 39 Wn.2d at 553. More importantly, the City's tax does not apply to income from fire hydrants. On its face, the tax is limited to “business” activities for “commercial, industrial, or domestic use or purpose.” FWRC 3.10.040(9), (10). Thus, the tax does not apply to the City's payments to Lakehaven under its franchise agreement for the cost of maintaining fire hydrants within city limits or other income, if any, from fire hydrants. *See CP 543*, 1332–33.

2. Provision of sewer services is a proprietary function.

Similarly, the Districts fail to establish that furnishing sewer services is a governmental function. To the contrary, the Districts concede

that in at least one governmental immunity case such as the present suit, the Washington Supreme Court held that the operation of a sewer system is a proprietary function. Districts' Br. at 35 (citing *Hayes v. City of Vancouver*, 61 Wash 536, 539, 112 P. 498 (1911)). Additional Washington cases, which the Districts ignore, also hold that, like water and electricity, sewer services are proprietary for immunity purposes. *See, e.g., Smith v. Spokane Cty.*, 89 Wn. App. 340, 362, 948 P.2d 1301 (1997) (holding that municipalities are not immune from statutes of limitations when acting in a proprietary capacity, including furnishing of sewer services); *see also City of Algona v. City of Pacific*, 35 Wn. App. 517, 520, 667 P.2d 1124 (1983) (same); *Stirrat*, 55 Wash. at 566 (noting that “lay[ing] sewers” is “not a governmental or public function in the strict sense”); Hugh D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 Seattle U. L. Rev. 173, 206 (2016) (describing “electric, water, solid waste, and **sewer** and storm water utilities” as “fee-based ‘business-like’ proprietary activities” (emphasis added)). This authority is relevant to the issue here: whether sewer services are proprietary activities for governmental immunity purposes.

Instead, the Districts rely on eminent domain cases holding that a governmental entity's condemnation of private property for sewer purposes is supported by public use and necessity. Districts' Br. at 35

(citing *Town of Steilacoom v. Thompson*, 69 Wn.2d 705, 419 P.2d 989 (1966); *State ex rel. Church v. Super. Ct.*, 40 Wn.2d 90, 240 P.2d 1208 (1952); *Snavelly v. City of Goldendale*, 10 Wn.2d 453, 117 P.2d 221 (1941)). But the “public use and necessity” determination in eminent domain cases is materially different from whether an activity is governmental or proprietary in nature. See *Pub. Util. Dist. No. 2 of Grant Cty. v. N. Am. Foreign Trade Zone Indus., LLC*, 159 Wn.2d 555, 573, 151 P.3d 176 (2007); *WSMLB*, 165 Wn.2d at 688 (“The mere fact that a government [act] serves a public purpose . . . does not elevate it to the level of a sovereign act.”).

In fact, the Washington Supreme Court has held that other indisputedly proprietary functions are “public” or “governmental” for eminent domain purposes. See, e.g., *Grant Cty.*, 159 Wn.2d at 573 (“condemnation of private property by public utilities to generate electric power is a public use”); *Okeson*, 150 Wn.2d at 550 (operation of an “electric utility is a proprietary function of government”). The eminent domain cases the Districts cite are therefore not relevant to whether furnishing sewer services is governmental or proprietary. See Spitzer, 40 Seattle U. L. Rev. at 202, *supra* (cautioning against “borrow[ing] the ‘governmental’ or ‘proprietary’ label from a case generated in a different

field of law . . . without thinking about (or explaining) whether the application of the label makes sense in the case at hand”).¹⁷

The Districts’ reliance on *Algona* fares no better. Districts’ Br. at 34 n.42. In *Algona*, the Court held that the operation of a solid waste transfer station—not the provision of sewer services—is governmental. 101 Wn.2d at 794. A municipality’s operation of a governmental solid waste facility is not comparable to furnishing sewer services to billed customers. Tellingly, the Districts fail to cite any authority that providing solid waste removal as a billed service is a governmental function in the immunity context. Districts’ Br. at 34 (relying only on *City of Spokane v. Carlson*, 73 Wn.2d 76, 436 P.2d 454 (1968), which did not involve a billed service or governmental immunity). Relevant authority holds the opposite. *See, e.g., Hutton v. Martin*, 41 Wn.2d 780, 784–85, 252 P.2d 581 (1953) (holding that city was not immune from tort liability for operation of garbage truck, just as city is not immune in operating water system).¹⁸

¹⁷ Because *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1985), did not address the governmental/proprietary distinction or governmental immunity with regard to a city’s maintenance of its storm sewer system, *id.* at 229–31, the Districts’ reliance on that case is also misplaced. Districts’ Br. at 30–31.

¹⁸ That the Districts handle sewer sludge, which may be considered a solid waste for land use purposes, does not transform utility services for the primary benefit of paying customers into a governmental function. *See* Districts’ Br. at 9 n.14, 27–28; *Russell*, 39 Wn.2d at 553 (merely because some of the utility services are made “in connection with health and sanitation is not material” to governmental immunity).

Regardless, solid waste and sewage are distinguishable. Sewer services are more like other proprietary utilities such as water and electricity, which maintain the interconnected infrastructure necessary to provide these utility services to paying customers. *See, e.g., Burns*, 161 Wn.2d at 155 (water); *Okeson*, 150 Wn.2d at 550 (electricity). Indeed, public utility districts established under Title 54 RCW are empowered to operate water, sewer, and electricity utilities, but not to provide solid waste collection. *See* ch. 54.16 RCW. Thus, the provision of sewer services is indisputably a proprietary activity.

3. The Court should reject the invitation to reclassify proprietary water and sewer services as governmental.

As set forth above, Washington courts already have determined that water and sewer services are proprietary and this Court should reject the Districts' invitation to revisit those determinations. Regardless, the Districts' argument that both water and sewer services are governmental based on their impact on public health and safety fails. Districts' Br. at 37–40. The Washington Supreme Court rejected the same argument in *WSMLB*, holding: “Public health and safety are not the bases for distinguishing between governmental and proprietary functions of a municipality.” 165 Wn.2d at 688. Rather, the relevant question is whether the municipal corporation acts primarily for its own benefit, or for

the public’s benefit. *See id.* at 687–88; *see also Algona*, 101 Wn.2d at 794 (considering “primary purpose” of county’s act). As an example, the *WSMLB* Court cited the operation of a municipal water system to demonstrate that a proprietary function often also “serves a public purpose or grants an economic benefit.” 165 Wn.2d at 688–89 (comparing electricity and water utilities (proprietary functions) with street lights and traffic signals (governmental functions)); *see also Stirrat*, 55 Wash. at 566 (grading streets for the benefit of private property is proprietary, even “though the public may derive a common benefit therefrom”). Water and sewer services are provided to, and for the benefit of, billed customers; public health and safety benefits are incident to this objective.¹⁹

The Districts also incorrectly argue that water and sewer services are governmental because they “have no discretion in denying [such services] to anyone residing in” the City. Districts’ Br. at 39–40, 31–32. To the contrary, if a customer fails to pay for service, the Districts may “cut off all or part of the service.” RCW 57.08.081(5). Regardless, the customers’ request and payment for service—not the Districts’ denial of it—is the relevant consideration for the governmental/proprietary distinction. As the *Okeson* Court explained, utilities are proprietary

¹⁹ For this reason, the Districts’ hypotheticals focusing on the type of customer served are misplaced, as is their assertion that the trial court’s holding does not contemplate the incidental public health benefits of water/sewer services. Districts’ Br. at 26.

because they operate “for the comfort and use of individual customers” and utilities “will not provide [service] to a customer that does not request” it. 150 Wn.2d at 550 (internal quotations omitted).

The Districts further argue that sewer services are governmental because public utilities may “compel” connection to their system. Districts’ Br. at 31. But Lakehaven’s website states it “does not require connection to its water or sewer systems, except in some rare cases[.]” CP 1509. The Districts also discount their own assertion by conceding that some water and sewer services are obtained by private means (e.g., private wells and septic systems). Districts’ Br. at 31 & n.39. That public entities typically provide water and sewer services does not convert the provision of such services into a governmental function, as the Districts contend. Districts’ Br. at 29, 31. In determining whether a service is governmental or proprietary, the focus is on the purpose for which it is provided, not the entity providing the service. *Okeson*, 150 Wn.2d at 550.

The City’s comprehensive plan under the Growth Management Act, ch. 36.70A RCW (“GMA”), also does not demonstrate that “the [l]egislature has determined that water/sewer services are governmental” functions. Districts’ Br. at 35–37.²⁰ The GMA requires the City to adopt

²⁰ The Districts mischaracterize a 1950 AG Opinion, arguing the AG opined “that the provision of sewer services by a sewer district is governmental.” Districts’ Br. at 35. To the contrary, the AG was analyzing whether sewer districts have authority to hire a

a comprehensive plan setting forth its land use goals and policies. RCW 36.70A.040. The City’s plan addresses a wide range of facilities that impact growth and development in Federal Way, including those related to governmental functions (e.g., fire facilities) and proprietary functions (e.g., water, sewer, and electric facilities). See RCW 35.70A.070(4); City of Federal Way, Comprehensive Plan (2015), ch. 6 & 10.²¹ Regardless, as discussed above, even if water and sewer facilities benefit the public good, their primary purpose is proprietary. See *Okeson*, 150 Wn.2d at 550.²²

Finally, the fact that the Districts may spend a portion of their budgets on governmental activities is not relevant. Districts’ Br. at 4–6, 40–42 (citing *Okeson*). The City taxes the Districts’ gross **income**, not their **expenses**. See FWRC 3.10.040. *Okeson* does not support the Districts’ claims to the contrary. There, the Court held a utility could not pass its costs for maintaining streetlights (governmental function) to its customers as part of its rates for furnishing electric service (proprietary function). 150 Wn.2d at 543, 556. Instead, the Court held that the utility

publicity director and use funds for a publicity program to advise the electorate in connection with a bond election. 1949–51 Op. Att’y Gen. No. 246, 1950 WL 40867, at *1. The AG did not opine on the governmental or proprietary nature of the provision of sewer services to billed customers, which is the issue here. In any event, the AG’s opinions are “not controlling.” *Davis*, 77 Wn.2d at 934.

²¹ The City’s comprehensive plan is available at <http://www.cityoffederalway.com/content/comprehensive-plan> (last visited May 8, 2019).

²² Because *Cedar River Water & Sewer District v. King County*, 178 Wn.2d 763, 315 P.3d 1065 (2013), and *Thurston County v. Cooper Point Association*, 148 Wn.2d 1, 57 P.3d 1156 (2002), are limited to the GMA context, the Districts’ reliance on those cases is misplaced. Districts’ Br. at 4 n.2 & 36.

must adopt a duly authorized tax to recoup expenses from governmental functions. *Id.* at 556; *see also Lane*, 164 Wn.2d at 886 (utility cannot charge ratepayers for hydrant or fire suppression expenses as part of furnishing water service). Thus, under *Okeson*, the gross income taxed by the City, which consists of the rates the Districts charge their customers, cannot (and does not) include income from governmental functions.²³

As explained above, RCW 35A.82.020 expressly authorizes the City to levy excise taxes on other municipal corporations' proprietary, as opposed to governmental, activities. *See* sect. IV.B.2, *supra*. Because the City's tax applies only to the provision of utility services to billed customers—a proprietary function according to *Burns*, 161 Wn.2d at 155, and *Stirrat*, 55 Wash. at 566, among other authority—the City does not need a second layer of specific authority to tax the Districts. *See Algona*, 101 Wn.2d at 794; *Wenatchee*, 181 Wn. App. at 343, 349. RCW 35A.82.020 alone suffices. The trial court therefore correctly dismissed the Districts' claim that the Ordinance exceeds the City's tax authority and this Court should affirm.²⁴

²³ Lakehaven would violate *Lane* if, as suggested, “any shortfall” in fire hydrant costs (after applying the fees paid by the City under Lakehaven Franchise Agreement) is covered “by rates paid by all ratepayers.” Districts' Br. at 47 n.57.

²⁴ That the City's 7.75 percent tax rate “could potentially” impact the provision of services in the future has no bearing on the City's authority to levy the tax. Districts' Br. at 8 n.13. Moreover, the City's rate, which is the rate already levied on other utilities in the City, is below average for municipal water and sewer taxes across Washington.

D. This Court Should Not Overturn Precedent Distinguishing Between Governmental and Proprietary Functions.

The crux of the Districts’ challenge to the City’s tax is that they enjoy governmental immunity based solely on their status as municipal corporations. Districts’ Br. at 6–7, 29–31. Their position, however, conflicts with more than a century of Washington law treating municipal corporations differently when they exercise delegated sovereign powers in their governmental capacity than when they act like any private business in their proprietary capacity. *See* sect. VI.C, *supra*; *Stirrat*, 55 Wash. at 564–66. It is unclear whether the Districts are asking the Court to abandon the governmental/proprietary distinction altogether, formulate a new test under which water and sewer services would be reclassified as governmental, or create a new exception for purposes of governmental immunity. Regardless, this Court should not overturn an “established rule” such as the governmental/proprietary distinction absent “a clear showing” that the rule is “both incorrect *and* harmful.” *State v. Otton*, 185 Wn.2d 673, 678, 687–88, 374 P.3d 1108 (2016) (internal quotations omitted). The Districts do not even purport to make this showing.

Washington courts routinely apply the governmental/proprietary distinction in numerous contexts, including not only taxation, but also tort

FWRC 3.10.040; CP 606 (reporting tax rates of more than 150 cities on water and sewer utilities ranging from about 1.5 to 36 percent, averaging about 9 percent).

liability, public contracts, and municipal authority. Accordingly, whether an activity is governmental or proprietary often dictates the outcome of disputes involving local governments, such as (1) whether a tort victim can recover damages from a local government, *see Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987), *as amended* (Apr. 28, 1988) (public duty doctrine does not insulate the state from tort liability for proprietary activities); *Stiefel v. City of Kent*, 132 Wn. App. 523, 529, 132 P.3d 1111 (2006) (same, but for cities); (2) whether a public contract is enforceable, *see City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 589–90, 269 P.3d 1017 (2012) (where city acts in proprietary capacity, its contracts are interpreted in same manner as contracts involving private parties); and (3) whether a local government had authority to engage in an activity, *see City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 693–95, 743 P.2d 793 (1987) (where city acts in proprietary capacity, it “may engage in any undertaking necessary” to run its business). Any change to the governmental/proprietary distinction would have immediate and broad impacts felt throughout the state.

The Districts nowhere acknowledge, let alone refute, the widespread impact their request would have if granted. Tellingly, the Districts resort to a non-binding concurrence in *Wenatchee*, Districts’ Br. at 26–28, and the secondary authority they cite advises against abandoning

the distinction, proposing instead an alternative test under which the City still would prevail. *Id.* at 27 n.36; Spitzer, 40 Seattle U. L. Rev. at 206, *supra* (proposing two categories: taxable “governmental service activities” including water and sewer utilities, and immune “governmental sovereign powers” such as eminent domain).²⁵

The Districts may argue that the Court could create a special exception to the governmental/proprietary distinction solely for purposes of governmental immunity from taxation. Not only would this conflict with *Algona* and its progeny, *see* sect. IV.B.2, *supra*, but applying the governmental/proprietary distinction in the context of taxation is consistent with the principles underlying the governmental immunity doctrine. The common law doctrine of governmental tax immunity generally “provides that one municipality may not impose a tax on another” without specific statutory authorization for government-on-government taxation. *Algona*, 101 Wn.2d at 793. Governmental immunity is an implied doctrine and, on the intrastate level, is one aspect of the general doctrine of state sovereign immunity. *See id.* at 793–94 (noting that the majority of jurisdictions apply intrastate governmental immunity “on the theory that a local tax imposed on a political subdivision

²⁵ Neither the advisory 1990 AG Opinion—which the Washington Supreme Court called into question in *Burns*—nor the handful of out-of-state cases cited by the Districts demonstrate that more than a century of Washington law is “clearly” incorrect. Districts’ Br. at 22 n.29 & 25 n.34; *Burns*, 161 Wn.2d at 159–60; *see also* n.13, *supra*.

such as a county is tantamount to a tax imposed on the state”). Thus, it follows, that a municipal corporation enjoys sovereign immunity of the state only when acting on behalf of the state in a governmental function. *See Stirrat*, 55 Wash. at 564–66; sect. VI.C, *supra*. The same cannot be said when a municipal corporation acts in its proprietary capacity; in those circumstances, the municipal corporation should be placed on equal footing with any other business.

Moreover, it makes sense that excise taxes apply to a municipal corporation’s proprietary activities (just like any business), but not its governmental functions.²⁶ An excise tax is “levied upon the right to do business, not upon the right to exist.” *Watson*, 189 Wn.2d at 168 (internal quotations omitted). Thus, the Districts’ mere existence within city limits does not, standing alone, justify the City’s imposition of an excise tax. Rather, the City has authority to levy an excise tax based on the Districts’ enjoyment of the privilege of conducting business in Federal Way. The Districts fail to identify any principled justification to create a different rule for tax immunity, than for tort immunity, public contracts, etc.

For these reasons, the Districts fail to satisfy their heavy burden to overturn this Court’s decisions establishing the governmental/proprietary

²⁶ Notably, the Districts’ claim of an “aversion to allowing one municipality to tax another” relies solely on authority regarding property taxes, not excise taxes. *See* Districts’ Br. at 16 n.21.

distinction, applying the distinction in the context of governmental tax immunity, and classifying the provision of utility services to billed customers as proprietary functions. The Court should therefore reject the Districts' invitation to reinvent municipal law on this issue.

E. The Trial Court Properly Dismissed the Districts' Constitutional Claims.

The trial court's dismissal of the Districts' constitutional claims should be affirmed. The Districts, as municipal corporations, lack standing and their claims fail on the merits.

1. The Districts lack standing to assert constitutional claims.

Initially, this Court should affirm the dismissal of the Districts' constitutional claims because the Districts, as municipal corporations, lack standing to bring those claims. As the Washington Supreme Court has acknowledged, the Privileges and Immunities Clause specifically excludes municipal corporations from its reach. *Bilger v. State*, 63 Wash. 457, 469, 116 P. 19 (1911).²⁷ Washington courts have similarly held that municipal corporations cannot raise claims under the Due Process Clause, which protects individuals (as opposed to governments) against governments. *See Samuel's Furniture, Inc. v. State, Dep't of Ecology*, 147 Wn.2d 440, 463, 54 P.3d 1194 (2002); *City of Mountlake Terrace v. Wilson*, 15 Wn.

²⁷ "No law shall be passed granting to any . . . corporation **other than municipal**, privileges or immunities which upon the same terms shall not equally belong to all . . . corporations." Wash. Const. art. I, § 12 (emphasis added).

App. 392, 394, 549 P.2d 497 (1976); 2 McQuillin, *supra*, §§ 4:20–21, 27 (municipal corporations may not assert constitutional claims against the state or any creature of the state exercising delegated authority).²⁸ The U.S. Supreme Court has similarly held that municipal corporations lack standing under the Fourteenth Amendment. *See Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40, 53 S. Ct. 431, 77 L. Ed. 1015 (1933); *see also* 2 McQuillin, *supra*, §§ 4:18, 20–21.

Without analysis or citation to any authority, the trial court erroneously concluded that the Districts have standing. CP 1527. The Court should reverse this determination and dismiss the Districts’ constitutional claims on this ground alone. Regardless, the Court should affirm the trial court’s dismissal of the Districts’ constitutional claims because, as discussed in the next sections, they fail on the merits.

2. The City’s definition of “gross income” is not void for vagueness.

The trial court correctly dismissed the Districts’ vagueness claim because they failed to show beyond a reasonable doubt that the City’s definition of “gross income” is unconstitutionally vague. CP 1528–29. “Vagueness is not simply uncertainty as to the meaning of a statute.” *Am.*

²⁸ The single out-of-state case the Districts cite is inapposite because it concerned private individuals, not municipal corporations, asserting a constitutional claim against a city. *See* Districts’ Br. at 43 n.49; *DeFalco v. City of Hallandale Beach*, 18 So.3d 1126, 1127, 1129 (Fla. App. 2009).

Legion Post No. 149 v. Wash. State Dep't of Health, 164 Wn.2d 570, 613, 192 P.3d 306 (2008). A plaintiff must prove beyond a reasonable doubt that a statute is “so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application,” *see Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991) (internal quotations omitted), or that it lacks “adequate standards to protect against arbitrary, erratic, and discriminatory enforcement.” *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990).

Here, “gross income” is defined in the FWRC and is a term of common usage in the context of excise taxes. *See* FWRC 3.10.020. Washington courts have upheld, and jurisdictions throughout Washington currently employ, the same and substantially similar definitions of “gross income” with regard to excise taxes on utility services. *See Sprint Spectrum, L.P./Sprint PCS v. City of Seattle*, 131 Wn. App. 339, 343–37, 127 P.3d 755 (2006); *Puget Sound Energy, Inc. v. City of Bellingham, Fin. Dep't*, 163 Wn. App. 329, 338–40, 259 P.3d 345 (2011); CP 610 & 1404–05. The City has successfully used this definition to collect excise taxes on other types of utility services for more than 20 years, with only one non-substantive change that was in place for two years. *See* CP 610, 666, 1407–08, 1512; *see also State v. Reader's Digest Ass'n, Inc.*, 81 Wn.2d 259, 274, 501 P.2d 290 (1972) (laws with “special or technical words”

which are “well enough known” to those “expected to use them” will “generally be sustained against a charge of vagueness”).

The Districts’ contention that “the City unilaterally will decide” the amount of their gross income subject to taxation is incorrect. Districts’ Br. at 46–48. As described in Section III, *supra*, the FWRC sets forth procedures that protect taxpayers by empowering the taxpayer (not the City) to make the initial determination about taxable income, to seek clarification from the City, and to seek administrative and judicial review. *See* FWRC 3.10.110, .120(1), .190; CP 1320, 1323, 1402, 1510–11; *see also Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 353, 75 P.3d 1003 (2003) (rejecting vagueness challenge where ordinance provided for appeals process to hearing officer and then superior court). Further, if an issue arises that requires further clarification or interpretation, the City can engage in rulemaking. FWRC 3.05.020.

The Districts improperly seek to bypass these administrative processes under the FWRC, instead asserting that at some future date they “will” not be able to understand some unidentified aspect of the City’s definition of “gross income.” Districts’ Br. at 46. But the Districts—not the City—bear the heavy burden to show that the definition of “gross income” is unconstitutionally vague. *See Haley*, 117 Wn.2d at 739. The Districts have never identified any particular category of their income in

dispute, nor have they claimed that any “specific words” in the definition are vague. CP 1340; *see also* CP 407–13 (describing Lakehaven’s sources of income without identifying which, if any, it is unable to determine constitute “gross income”). Unless and until the Districts do so, their challenge cannot “be considered in light of the facts of the specific case before the court.” *See Am. Legion*, 164 Wn.2d at 612 (noting that facial vagueness challenges are improper absent First Amendment implications). Thus, as the trial court determined, the Districts’ vagueness claim is, at best, premature. *See Pac. Tel. & Tel. Co. v. City of Seattle*, 291 U.S. 300, 302–04, 54 S. Ct. 383, 78 L. Ed. 810 (1934) (refusing to entertain due process challenge where the taxpayer failed to identify the specific ways in which the tax ordinance was vague).

Likewise, the Districts’ hyperbolic argument that no one—not even their finance directors—can readily apply the City’s definition is unfounded. Districts’ Br. at 47. Tellingly, the Districts calculated the amount of their monthly gross income in order to deposit the disputed tax payments per the parties’ stipulation. CP 65–68, 1348, 1431, 1511. None of the Districts sought “clarification from Federal Way in determining these amounts[.]” CP 1347, 1511.²⁹ Subsequently, during discovery, the

²⁹ The trial court properly denied the Districts’ motion to strike the City’s reference to this stipulation, ruling that the City referred to the stipulated order for the legitimate purpose of showing that the Districts failed to seek clarification of the Ordinance, a fact

Districts identified their sources of income and, based on their descriptions, the City specified which sources are subject to taxation. *See* Districts’ Br. at 40 n.47; CP 1171, 1195–1208. The Districts have never disputed the City’s determinations.

The Districts also erroneously claim that the City’s tax is “indiscriminate” in taxing both proprietary and governmental activities. Districts’ Br. at 21 n.27, 47–48. To the contrary, on its face the Ordinance applies solely to “the business” of providing water and sewer services for “commercial, industrial, or domestic use or purpose”—not governmental activities—and the City has never suggested otherwise.³⁰ FWRC 3.10.040(9), (10); CP 1293, 1307, 1511. Nor does the governmental/proprietary distinction render the definition of “gross income” vague. As discussed above, Washington courts have long held that the provision of utility services to billed customers is a proprietary function. *See Burns*, 161 Wn.2d at 155; *Stirrat*, 55 Wash. at 566. In fact, Lakehaven admitted that it has not identified any revenue sources “where it does not know if the charges are governmental or proprietary[.]” CP 1343. And even if ambiguity exists (which it does not), the proper remedy would be for the Court to construe the term “gross income” as applied to

that rebuts the Districts’ self-serving declarations. VRP (Oct. 19, 2018) at 5:2–11. The Districts did not assign error to this evidentiary decision.

³⁰ For example, contrary to the Districts’ claim, Districts’ Br. at 47 n.57, the City has confirmed that its tax does not apply to income from fire hydrants, *see, e.g.*, CP 1171.

the disputed revenue, not invalidate the City’s definition of “gross income” applicable to all of its taxes on utility services. *See Am. Legion*, 164 Wn.2d at 613 (“A court should not invalidate a statute simply because it could have been drafted with greater precision.”). The trial court correctly held that the Districts failed to meet their burden to show that the term “gross income” is unconstitutionally vague.

3. The City’s compliance with the Tacoma Franchise Agreement does not violate the Privileges and Immunities Clause.

The trial court properly dismissed the Districts’ privileges and immunities claim. CP 1528. To state a privileges and immunities claim, the Districts must satisfy a two-prong test. First, courts consider “whether a challenged law grants a ‘privilege’ or ‘immunity’ for purposes of [the] state constitution.” *Schroeder v. Weighall*, 179 Wn.2d 566, 573, 316 P.3d 482 (2014).³¹ If the answer is yes, then courts “ask whether there is a ‘reasonable ground’ for granting that privilege or immunity.” *Id.* The Districts failed to satisfy either prong of this test.

Here, the Districts do not (and cannot reasonably) claim that the Ordinance itself violates the Privileges and Immunities Clause because it applies the same tax to “**everyone** engaged in” the business of furnishing

³¹ Only those benefits “implicating fundamental rights of state citizenship” constitute a “privilege” or “immunity.” *Schroeder*, 179 Wn.2d at 573 (internal quotations and alterations omitted).

water or sewer services. FWRC 3.10.040(9), (10) (emphasis added).³²

Rather, the Districts base their claim on the City’s decision to abide by the terms of the Tacoma Franchise Agreement, which the City entered into almost six years **before** the City extended its utilities excise tax to water and sewer services. CP 532. As the trial court correctly held, the City did not give Tacoma “preferential treatment” in violation of the Privileges and Immunities Clause because the Tacoma Franchise Agreement merely “set[s] forth a contractual agreement through which [the City] received” valuable consideration “in exchange for foregoing imposition of the utility tax[.]” CP 1528. The Court should affirm on this basis alone.

Moreover, contrary to the Districts’ assertion, the Tacoma Franchise Agreement does not implicate a protected privilege.³³ The City has not “suspended, surrendered or contracted away” its “power of taxation,” as evidenced by its passage of the Ordinance. Districts’ Br. at 49 (citing Wash. Const. art. VII, § 1). The City simply agreed not to **collect** the amount of any future tax levied by the City on utility services for a limited period of time in exchange for valuable consideration,

³² Because the Ordinance does not **exempt** Tacoma, the City does not need express statutory authorization to grant exemptions. *See* Districts’ Br. at 49 (citing *City of Spokane v. Horton*, 189 Wn.2d 696, 708, 406 P.3d 638 (2017)).

³³ In fact, the only fundamental right identified by the Districts is the right to be exempt ““from taxes or burdens which the property or persons of citizens of some other state are exempt from[.]” Districts’ Br. at 52. The Districts fail to articulate how the City made any distinctions based on state citizenship.

including Tacoma’s agreement to “bear full responsibility for Public Fire Protection and any associated costs.” CP 516. This was well within the City’s broad authority to contract for a mutually beneficial financial arrangement. *See Burns*, 161 Wn.2d at 154–55 (“The power to contract, like other specific and general powers conferred upon optional code cities, ‘shall be liberally construed in favor of the municipality.’” (quoting RCW 35A.01.010)).³⁴ Simply put, Washington municipal corporations like the Districts do not have a fundamental right to the same benefits granted by the City in a public contract to another Washington municipal corporation.

Even if a privilege or a fundamental right were implicated, the Districts cannot satisfy the “reasonable ground” portion of the test. *See Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 783, 317 P.3d 1009 (2014). The City adopted a tax that applies equally to all water and sewer utilities and fairly negotiated franchise agreements with utilities at arm’s length. By adhering to the terms of its franchise agreements, the City did not distinguish between classes of utilities as would be required for a violation of the Privileges and Immunities Clause. *See Cosro, Inc. v.*

³⁴ The Districts’ reliance on *King County Fire Protection Districts Nos. 16, 36, 40 v. Housing Authority of King County*, 123 Wn.2d 819, 872 P.2d 516 (1994) is misplaced, as that case concerned the distinct issue of whether a local housing authority was required to contract with fire protection districts for services. *Id.* at 825; Districts’ Br. at 54 n.61. But even if the District could establish that some provision of the Tacoma Franchise Agreement were invalid, the proper remedy would be invalidation of that provision, not the Ordinance. *See* CP 532 (severability provision).

Liquor Control Bd., 107 Wn.2d 754, 760, 733 P.2d 539 (1987). Any distinction made by the City was reasonably based on the terms of its franchise agreement. The Districts admit that, unlike Tacoma, they do not have a franchise agreement where the City agrees to forego taxing the Districts in exchange for valuable consideration. CP 500.³⁵ This Court should affirm the dismissal of the privileges and immunities claim.

V. CONCLUSION

Applying Washington precedent, the trial court correctly held 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 affirm that determination and decline to entertain the Districts' constitutional claims, or alternatively, affirm the determination that those claims fail on the merits.

RESPECTFULLY SUBMITTED this 9th day of May, 2019.

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³⁵ While Lakehaven had a similar provision to Tacoma's in a previous franchise agreement, CP 575, it accepted valuable consideration in exchange for removal of that provision, CP 543 & 552-53, and cannot return to its prior agreement because it is no longer happy with the current bargain. See *Bonney Lake*, 173 Wn.2d at 592-93.

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 9th day of May, 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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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of May, 2019.

s/ Sydney Henderson

PACIFICA LAW GROUP

May 09, 2019 - 4:55 PM

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