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No. 97863-8

SUPREME COURT OF THE STATE OF WASHINGTON

S. MICHAEL KUNATH, et al.,

Respondents,

vs.

CITY OF SEATTLE, et al.,

Petitioners.

**LEVINE AND BURKE RESPONDENTS' ANSWER TO AMICI
WASHINGTON STATE SENATORS ET AL., WASHINGTON
STATE LABOR COUNCIL ET AL., AND WASHINGTON STATE
INSURANCE COMMISSIONER MIKE KREIDLER**

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Three amicus briefs have been filed in support of the City of Seattle and EOI's Petitions for Review of Division I's decision to invalidate Seattle's graduated income tax: one on behalf of a collection of labor organizations and community groups; one on behalf of a group of eight Washington state representatives and seven state senators; and one on behalf of Washington State Insurance Commissioner Mike Kreidler. Brief of Amicus Curiae Washington State Senators *et al.* ("Legislative Amicus"); Brief of Amicus Curiae Washington State Labor Council *et al.* ("Labor and Community Group Amicus"); Brief of Amicus Curiae Washington State Insurance Commissioner Mike Kreidler ("Kreidler Amicus"). Respondent taxpayers respond to each of these briefs herein.

None of the amici in support of the petition for review identifies any compelling reason that this Court should disregard stare decisis and change more than eighty years of Washington taxation law and policy. None of them even addresses the statutory issues relating to a city's authority to enact an income tax, the resolution of which would lead to an affirmance of Division I's decision without ever reaching the question of whether the state constitution prohibits graduated income taxes.

Most tellingly, however, each of these amici typifies the very sorts of political actors who have played, and can continue to play, a role in the

democratic process whereby the people of Washington decide if they want to change the long-standing structure of state taxation. Ten unsuccessful attempts to change that law at the ballot box show that Washington's voters do not want that change. If these amici disagree with the voters' judgment, they are especially well positioned to continue their political efforts to change voters' views, rather than seeking to achieve that change through Seattle and EOI's politically-minded petition to this Court.

A. Amici Have Not Identified Any Compelling Reason for This Court to Overturn *Culliton*

Amici's arguments largely repeat those made by Seattle and EOI, arguments Respondent taxpayers addressed in their answer. Levine and Burke Respondents' Answer to City of Seattle's and EOI's Petitions for Review ("Taxpayers' Answer"), at 10-20. While amici cite some additional Washington case law stating that stare decisis is not inviolable, each of those cited cases also recognizes that precedent can only be overturned if there is a clear showing not only that it is incorrect, but also harmful. *See Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 282, 358 P.3d 1139 (2015) ("In deciding whether to abandon the 'strict adequacy' requirement, we apply our stare decisis doctrine: we will not abandon precedent unless it is determined to be incorrect and harmful.") (citation omitted), *cited in* Kreidler Amicus at 7; *In re Rights to Waters of*

Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (abandoning stare decisis requires a “clear showing that an established rule is incorrect and harmful”), *quoted in* Legislative Amicus at 2 and Labor and Community Group Amicus at 5; *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) (requiring harm), *cited in* Legislative Amicus at 2 and Labor and Community Group Amicus at 5; *State v. Abdulle*, 174 Wn.2d 411, 420, 275 P.3d 1113 (2012) (requiring harm), *cited in* Labor and Community Group Amicus at 5; *State v. Barber*, 170 Wn.2d 854, 863-64, 248 P.3d 494 (2011) (requiring harm), *cited in* Labor and Community Group Amicus, at 5.

As the Taxpayers’ Answer explained, what would be harmful is overturning more than 80 years of law establishing the basic structure of statewide taxation that voters have again and again affirmed. Taxpayers’ Answer at 14-18. None of the authorities cited by amici shows this Court overturning a precedent upon which Washington citizens and corporations so seriously rely, and which has been a part of driving our state’s impressive growth. Instead, in the *Rose* decision discussed in the Kreidler Amicus, the Court was careful to note that the employment law precedent it was overturning “fails to serve any legitimate employer interest.” 184 Wn.2d at 282. Similarly, in *Stranger Creek*, the court noted that “there has been no showing that an established status quo will, in fact, be disrupted

by an alteration in precedent.” 77 Wn.2d at 652. Nothing could be further from true about the rule established by *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933) and its progeny. While amici may disagree with taxpayers about the benefits and costs of the particular system of taxation Washington has adopted and maintained for decades, there can be no serious question that changing our system would change an established status quo, and that the state has a legitimate interest in its maintenance.

Nor do any of the authorities that amici cite show this Court overturning a precedent that has been reaffirmed repeatedly by popular vote. In *Stranger Creek*, by contrast, this Court overturned a precedent after the legislature had stepped in to enact measures that made the prior rule unnecessary. 77 Wn.2d at 652. Similarly, in *State v. Devin*, before overturning a rule, the Court noted that the legislature had enacted a statute that arguably had already changed it. 158 Wash. 2d at 167-68. Rather than reflecting the evolving preferences of the electorate, overturning *Culliton* and its progeny would run counter to the repeatedly expressed views of Washington voters.

This also puts in perspective amici’s descriptions of the harm they believe has been caused by the state rule prohibiting graduated income taxes. Legislative Amicus at 3-10; Labor and Community Group Amicus at 6-10. While people can certainly disagree about the relative benefits and

disadvantages of different taxation systems, amici have made no effort to address the impact to the state of changing such a rule, particularly by imposing a graduated income tax in a single city. Where abandoning a longstanding precedent would itself cause significant harm, an outcome that Washington voters have time and time again rejected, it is not the role of the Courts to impose that outcome based on their own weighing of state priorities.

B. Amici Have Not Addressed the Multiple, Dispositive, Issues Regarding Municipal Authority

Particularly notable, also, is the complete failure of amici to address the multiple statutory issues related to a city's authority to enact an income tax at all. None of the amicus briefs filed in support of the petition even mentions these issues, much less argues that Seattle ought to have such authority. By this glaring omission, amici ignore the multiple statutory obstacles to Seattle's Ordinance that formed the basis for the trial court's decision, and that will require affirmance of Division I's opinion even without reaching the *Culliton* question.

C. Amici Are Political Actors Who Can Continue to Work Within the Political Process

Most importantly, the interest shown by amici underscores that the appropriate forum for this debate is the democratic process in which they are all active participants.

While some state legislators and senators think a graduated state income tax is good policy, many others disagree. Those who signed the Legislative Amicus have a formal ability and obligation to speak directly with their colleagues, and use the legislative process in which they operate, to try to change this rule at a statewide level. Thus far, all such efforts have failed. The conclusions of the Washington State Tax Structure Study Committee upon which the Legislative Amicus heavily relies have been around for almost 20 years but have not succeeded in changing the minds of the legislature or the electorate. *See* Legislative Amicus at 5-6, 9-10. Only Seattle and EOI's attempt to use city politics to bring an unpopular statewide issue to this Court has succeeded in getting this far – it would be troubling were the Court to allow itself to be an instrumentality of Seattle and EOI's political agenda, in opposition to the will of the people of Washington and their representatives.¹

Likewise, the groups that joined the Labor and Community Groups Amicus represent some of the most powerful organizational lobbying groups in the state.² They are effective and sophisticated participants in the

¹ EOI itself is a sophisticated political actor, whom the City of Seattle paid almost \$50,000 to help orchestrate this effort. Taxpayers' Answer at 7.

² The Washington State Labor Council is Washington's branch of the AFL-CIO. <https://www.wslc.org/>. AFT Washington is the union representing Washington's teachers. <http://wa.aft.org/>. SEIU 925 represents other education and public sector workers. <http://www.seiu925.org/>.

political process. In response to the recent federal tax reform bill, one of these groups stated: “We know what to do to reverse this. Stand together, vote, and make sure we elect representatives who advance our values and invest in ladders of opportunity for all, not in the wealth of the already wealthy.” Press Release, AFT Washington, We Lose, Wealthiest Win in GOP Tax Reform Bill (Dec. 20, 2017), <http://wa.aft.org/press/we-lose-wealthiest-win-gop-tax-reform-bill> . This is the same method these groups can and should use to express their disapproval of state and local fiscal policies and priorities.

Finally, Commissioner Kreidler’s amicus brief asserting the benefits of using a potential future state graduated income tax as part of making health insurance policy shows the incredible breadth of what this Court is being asked to do. This priority is not one that was advanced in Seattle’s Ordinance, nor has it been endorsed by the Washington legislature. Commissioner Kreidler’s own belief that using a statewide graduated income tax as a penalty for Washingtonians who do not have health insurance is a good way to address state health care policy is one he needs to advance within the legislative process in any scenario.

There are always uses to which additional government tax revenues can be put, but the complicated questions of how the state of Washington should conduct its fiscal affairs is not properly before this

Court. All that is here is Seattle and EOI's effort to use a municipal tax, for which there is no statutory authority in the first place, to draw this Court into statewide political questions that the voters have already, repeatedly and emphatically, resolved. We believe this Court should decline review.

RESPECTFULLY SUBMITTED this 10th day of February, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Answer to Amici Washington State Senators *et al.*, Washington State Labor Council *et al.* and Washington State Insurance Commissioner Mike Kreidler to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated February 10, 2020.

s/Robert M. McKenna _____
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