No. 97863-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

S. MICHAEL KUNATH, et al.,

Respondents,
v.
CITY OF SEATTLE, et al.,

Appellants.

KUNATH ANSWER TO PETITIONS FOR REVIEW

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I. INTRODUCTION

The Court urgently needs to accept review in this case, but not for the issues raised in the petitions. Nothing has changed that would cause this Court to revisit its 1933 decision holding that the constitutional definition of "property" includes income that has been earned and received. However, the Court of Appeals opinion completely rewrote the law concerning the single subject rule in Article II, Section 19 of the Constitution. The Court of Appeals opinion would replace well over a century of deference to the Legislature and liberal interpretation in favor of constitutionality with a requirement that bills have a "true unifying theme," and the established rule was rejected because it "would set a low bar for rational unity." Opinion at 25. Moreover, the Court of Appeals defied a significant line of this Court's decisions on the common fund doctrine. Although this Court has held many times that the common fund doctrine is not limited to the creation or preservation of monetary funds, but extends to situations where a litigant confers some other substantial benefit on an ascertainable class, the Court of Appeals denied common fund fees for a recurring $140 million annual benefit because "merely benefiting another is not sufficient." Opinion at 29.

The Court should reverse the Court of Appeals holding that SSB 4313 violated the single subject rule in Article II, Section 19 of the Constitution, affirm the trial court's decision on the merits, and award common fund attorney fees to Kunath.

II. ANSWER TO PETITIONS

Pursuant to RAP 13.4, this Court accepts review only when a petition for review presents pressing legal issues of great importance. The petitions for review here do not even present a legal issue. They instead ask this Court

to make policy decisions and to impose those decisions on the people. Petitioners in effect are asking the members of this Court to violate their judicial oaths and amend the Constitution by judicial fiat.

In *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933), this Court was called on to interpret the definition of "property" in the 14th Amendment to Washington's constitution, which had been adopted by the people just three years earlier. The City asks the Court to overrule that decision, but it never explains how the Court should interpret that definition.

The language at issue here is the constitutional definition of property for tax purposes: "The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership." To its credit, the City does accurately state the rules that apply when this Court interprets the Constitution.

> We interpret statutes and ordinances to discern and implement the legislative body's intent. We give effect to a statute's plain meaning as a statement of legislative intent. A statute's plain meaning can be discerned from the language of the statute itself, other provisions of the same act, and related statutes. Terms in a statute are read with their common and ordinary meaning, absent ambiguity or a statutory definition. A dictionary can supply an undefined term's ordinary meaning. "Only when the plain, unambiguous meaning cannot be derived through such an inquiry will it be appropriate [for a reviewing court] to resort to aids to construction."

City Petition at 10-11 (footnotes omitted, brackets in original). However, the City never applies that standard to its argument.

The first question is whether the meaning of that sentence is clear from its language alone. Where the meaning of a provision is "plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). This Court very recently summarized the

rules in the related context of an initiative to the people in *The Associated Press v. The Washington State Legislature*, 95441-1 (December 19, 2019).

> "'[I]n determining the meaning of a statute enacted through the initiative process, the court's purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure.'" *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 210, 189 P.3d 139 (2008) (quoting *Amalg. Transit*, 142 Wn.2d at 205). We read an initiative in light of its various provisions, rather than in a piecemeal approach, in relation to the surrounding statutory scheme, and we strive to give effect to all the language in the statute. *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008). "Where the voters' intent is clearly expressed in the statute, the court is not required to look further." *Amalg. Transit*, 142 Wn.2d at 205. Thus, "[w]here the language of an initiative enactment is 'plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation [or construction].'" *Id.* at 205 (quoting *State v. Thorne*, 129 Wn.2d 736, 762-63, 921 P.2d 514 (1996)).

The City, however, never addressed whether the constitutional definition of "property" is plain on its face.

The Court also would do well to consider Justice Madsen's words in her concurrence in *Madison v. State*, 161 Wn.2d 85, 113,163 P.3d 757 (2007) (Madsen, J., concurring).

> Finally, Justice Chambers' concurrence in the dissent is also flawed. This court's analysis of the privileges and immunities clause is not in its infancy. There are cases as far back as 1905 analyzing this provision. Contrary to Justice Chambers' view, we are not in a better position to determine its meaning than were all of the jurists who have preceded us. We do not do justice to the precedent created by this court when we announce a new constitutional analysis that conflicts with our historical analysis and with the significant body of law that has existed for nearly the entirety of this state's existence. We should not simply ignore what has been said in favor of what we think ought to have been said. Such an approach is directly at odds with the often recognized precept that an interpretation of the state constitution made closest to the adoption of that document provides the best evidence of the drafters' intent. 161 Wn.2d 114 *See State ex rel. Gallwey v. Grimm*, 146 Wash.2d 445, 462, 48 P.3d 274 (2002); *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 120, 937 P.2d 154, 943 P.2d 1358 (1997); *State v. Reece*, 110 Wash.2d 766, 779, 757 P.2d 947 (1988); *see also, e.g., Gerberding v. Munro*, 134 Wash.2d 188,

> 199-201, 949 P.2d 1366 (1998); *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 645, 771 P.2d 711 (1989); *State ex rel. Gowan v. Superior Court of King County*, 81 Wash. 18, 20, 142 P. 452 (1914); *see generally* Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L.Rev. 491, 521 (fall 1983).

Culliton was decided three years after the 14th Amendment was adopted. This Court has cited *Culliton* for the proposition that income is property many times. *See, e.g., Washington Public Ports Ass'n v. State, Dept. of Revenue*, 148 Wn.2d 637, 650 n. 12, 62 P.3d 462 (2003); *Apartment Operators Ass'n of Seattle, Inc. v. Schumacher*, 56 Wn.2d 46, 47, 351 P.2d 124 (1960); *Power, Inc. v. Huntley*, 39 Wn.2d 191, 194, 235 P.2d 173 (1951).

Against this backdrop, one might well ask why the City believes that the Court should overrule its interpretation of a definition. In truth, its arguments have nothing to do with the definition of property. Instead, the City asks the Court to overrule the definition of "property" on policy grounds.

> Present conditions point the need of a new subject matter for taxation, which should be based on the ability to pay. Earnings for a given period are a fair measure of such ability.'" *Culliton*, 174 Wash. at 372 (quoting initiative). The same is true today. Washington has the most regressive tax structure in the nation, with our low- and moderate-income earners paying a greater share of their income in taxes than high-income households. CP 373, 562-63. And Seattle's tax structure has been characterized as the most regressive of all cities in Washington. Raising new revenue within the existing tax structure harms low- and moderate-income earners and limits the City's ability to meet increasing need for City services. *Culliton* and its progeny have created and exacerbated this harm.

City Petition at 17 (footnote omitted).

The City's assertion that "*Culliton* and its progeny have created and exacerbated this harm" is both mistaken and revealing. *Culliton* did not

prohibit a graduated income tax; the people prohibited a graduated income tax when they adopted the 14th Amendment. *Culliton* merely acknowledged the clear language of the existing constitution.

The City's remedy is not to ask this Court to overrule established precedent, but to ask the people to amend the Constitution. Amending the Washington Constitution is difficult but far from impossible. In 131 years of statehood, the people of Washington have amended their Constitution 109 times or almost once per year. However, the City will not propose a constitutional amendment because it knows that the people have rejected such amendments five times. H.J.R. 32 in 1934 (56.6% voting no); S.J.R. 7 in 1936 (77.8% voting no); S.J.R. 5 in 1938 (66.9% voting no); H.J.R. 4 in 1942 (68.7% voting no); H.J.R. 42 in 1970 (68.4% voting no); and H.J.R. 37 in 1973 (77.1% voting no). In addition, the people have rejected three initiatives for a graduated income tax, most recently in 2010. Initiative 158 (1944) (70% voting no); Initiative 435 (1982) (66% voting no); Initiative 1098 (2010) (64% voting no). These amendments and initiatives are collected by the Secretary of State at https://www.sos.wa.gov/elections/research/income-tax-ballot-measures.aspx.

The City is asking this Court to impose an income tax on the people of Washington against their will. In its petition, the City argues that the Court should grant review under RAP 13.4(b)(3) "because determining the nature of an income tax is a significant constitutional question." The Constitution never mentions a property tax. The relevant question is the nature of property, and that has been decided. The City reveals too much when it argues that the Court should grant review under RAP 13.4(b)(4) "because

determining whether the City may impose a personal income tax to support government services without exacerbating income inequality is an issue of substantial public importance." Income inequality is a policy issue for the Legislature and the people, not this Court. RAP 13.4(b)(4) applies to important legal issues, not important policy issues.

The Court should decline to overrule its interpretation of the clear definition of "property" in Article VII, Section 1, and should refuse to legislate from the bench. The petitions should be denied.

III. ADDITIONAL ISSUES FOR REVIEW

Pursuant to RAP 13.4(d) Kunath requests that the Court grant review of two issues that were not raised in the petitions. These issues merit the Court's attention.

A. The Court Should Accept Review of the Court of Appeals Decision that RCW Chapter 36.65 Violates the Single Subject Rule.

EOI intervened below to argue that the statute barring city, county, or city-county income taxes, RCW 36.65.030, violated the single subject rule in Article II, Section 19 of the Constitution. RCW 36.65.030 provides that "A county, city, or city-county shall not levy a tax on net income." EOI based its argument on its claim that

> Substitute Senate Bill 4313 ("SSB 4313") was entitled "CITY-COUNTY MUNICIPAL CORPORATIONS - CLARIFICATION AN ACT Relating to local government; and adding a new chapter to Title 36 RCW."

CP 272. EOI claimed that the subject of SSB 4313 therefore was city-county municipal corporations, and that including cities and counties in RCW 36.65.030 added subjects to the bill.

In truth, the title of SSB 4313 was "AN ACT Relating to local government; and adding a new chapter to Title 36 RCW." CP 771, 796-98.

The language ""CITY-COUNTY MUNICIPAL CORPORATIONS – CLARIFICATION" was added to the session laws by the Code Reviser long after the bill was enacted. CP 775. The trial court dismissed EOI's claim in large part because it misstated the title of the bill. CP 1505.

On appeal, EOI abandoned its argument about the Code Reviser heading and instead argued that RCW 36.655.030 lacked rational unity because it prohibited city income taxes and "SSB 4313's general *topic* is indisputably the combined city-county form of government." EOI Brief at 29 (emphasis in original).

The standard for rational unity was clearly established in *Gruen v. State Tax Commission*, 35 Wn.2d 1, 211 P.2d 651 (1949).

> All matters which are germane to the subject may be embraced in one act. Under the true rule of construction, the scope of the general title should be held to embrace any provision of the act, directly or indirectly related to the subject expressed in the title and having a natural connection thereto, and not foreign thereto. Or, the rule may be stated as follows: Where the title of a legislative act expresses a general subject or purpose which is single, all matters which are naturally and reasonably connected with it, and all measures which will, or may, facilitate the accomplishment of the purpose so stated, are properly included in the act and are germane to its title. Id. at 22-23.

The *Gruen* court's words have endured. This Court has cited that statement thirteen times. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000); *Kueckelhan v. Federal Old Line Ins. Co.*, 418 P.2d 443, 69 Wn.2d 392 (1966); *Treffry v. Taylor*, 408 P.2d 269, 67 Wn.2d 487 (1965); *Engen v. Arnold*, 379 P.2d 990, 61 Wn.2d 641 (1963); *Miller v. City of Tacoma*, 378 P.2d 464, 61 Wn.2d 374 (1963); *Goodner v. Chicago, M., St. P. & P. R. Co.*, 377 P.2d 231, 61 Wn.2d 12 (1962); *Price v. Evergreen Cemetery Co. of Seattle*, 357 P.2d 702, 57 Wn.2d 352 (1960); *Keeting v.*

Public Utility Dist. No. 1 of Clallam County, 306 P.2d 762, 49 Wn.2d 761 (1957); *Washington Toll Bridge Authority v. State*, 304 P.2d 676, 49 Wn.2d 520 (1956); *Snyder v. Ingram*, 296 P.2d 305, 48 Wn.2d 637 (1956); *State v. Canyon Lumber Corp.*, 284 P.2d 316, 46 Wn.2d 701 (1955); *Mahler v. Tremper*, 243 P.2d 627, 40 Wn.2d 405 (1952); *State ex rel. Bugge v. Martin*, 232 P.2d 833, 38 Wn.2d 834 (1951).

Given the title of "An Act relating to local government," prohibiting net income taxes by any form of local government plainly is germane to the subject stated in the title. Moreover, according to a committee report prepared while SSB 4313 was being drafted, cities and counties were included in RCW 36.65.030 out of necessity because Article XI, Section 16 (Amendment 58), which permits the formation of city-counties, provides that:

> No legislative enactment which is a prohibition or restriction shall apply to the rights, powers and privileges of a city-county unless such prohibition or restriction shall apply equally to every other city, county, and city-county. of the Constitution requires that any restriction imposed on a city-county also be imposed on cities and counties.

Kunath Brief at 16 (citing CP 856). This Court has held that "Provisions necessary to one another understandably share rational unity." *Citizens for Responsible Wildlife Management v. State*, 149 Wn.2d 622, 638, 71 P.3d 644 (2003).

The Court of Appeals nonetheless held that SSB violated the single subject rule, and that the entirety of RCW Chapter 36.65 is unconstitutional. Instead of considering whether the prohibition against city and county income taxes was "directly or indirectly related to the subject expressed in the title" or "naturally and reasonably connected with it," the Court of

Appeals based its decision on whether SSB 4313's "myriad subparts are connected by a common unifying theme." Opinion at 21. The term "unifying theme" appears in Justice Talmadge's dissent in *Wash. Fed'n of State Emps. v. State*, 127 Wn.2d 544, 556, 901 P.2d 1028 (1995) and has never been used in any other single subject case except this one.

It would be hard to describe how different the "unifying theme" test is from established law. This court's precedent does not require complete rational unity, only that there be "some rational unity." *Washington Ass'n for Substance Abuse and Violence Prevention v. State*, 174 Wn.2d 642, 656, 278 P.3d 632 (2012); *Washington Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 370, 70 P.3d 920 (2003); *State v. Broadaway*, 133 Wn.2d 118, 127, 942 P.2d 363 (1997); *State Finance Committee v. O'Brien*, 105 Wn.2d 78, 81, 711 P.2d 993 (1986); *State v. Grisby*, 97 Wn.2d 493, 498, 647 P.2d 6 (1982).

Similarly, the subject of a bill need not be completely germane to each other, just "reasonably germane" *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 782, 357 P.3d 1040 (2015); *Morin v. Harrell*, 161 Wn.2d 226, 232, 164 P.3d 495 (2007); *Washington State Grange v. Locke*, 153 Wn.2d 475, 498, 105 P.3d 9 (2005); *Citizens for Responsible Wildlife Management*, 149 Wn.2d at 633.

The Court of Appeals, however, stated that the best test for rational unity is "is whether a bill's myriad subparts are connected by a common unifying theme." Opinion at 21. Instead of asking whether the subjects had "some" rational unity, the Court of Appeals said that Kunath had "fail[ed] to identify the required rational unity between all five operative sections of the bill."

Id. at 24. It commented that finding rational unity because all of the subjects related to the title of "local government" would be "so expansive that literally any set of legislative enactments affecting any aspect of towns, cities, or city-counties would purport to satisfy the rational unity test, thus undermining the purpose of the single subject rule." *Id.* at 25.

In the end, the Court of Appeals held that "The city-county form of government is not a true unifying theme for these disparate subsections," and that accepting Kunath's arguments based on the *Gruen* standard "would set a low bar for rational unity." *Id.* at 25. It is difficult to imagine how any comprehensive bill could survive the test used by the Court of Appeals.

The Court of Appeals decision will cause significant harm if allowed to stand. The standards for satisfying the single subject rule have been developed by this Court over many years to balance the right of the Legislature to legislate and the purposes of Article II, Section 19. The Court should take all necessary steps to maintain the balance it has struck. This issue presents an important issue of constitutional law and an issue of great public importance. The Court should accept review under RAP 13.4(b)(1), (3) and (4).

B. <u>Common Fund Attorney Fees</u>.

As the City states in its Petition, its income tax would have cost Seattle residents $140 million per year on an ongoing basis. City Petition at 5. After the City enacted the income tax, it would take effect unless declared invalid by a court. Because the income tax was unconstitutional, one might expect that the Attorney General would take action to oppose the income tax ordinance, but Attorney General Ferguson was served with the complaints

in this action and refused to participate. CP 128. As a result, this citizen action was the only thing standing in the way of the tax.

Lawsuits brought to obtain a benefit for many people serve an important purpose, and the common fund doctrine provides for an award of attorney fees to successful plaintiffs in such actions for that reason. *Covell v. City of Seattle*, 127 Wn.2d 874, 891-92, 905 P.2d 324 (1995); *Bowles v. Dept. of Retirement Systems*, 121 Wash.2d 52, 70-71, 847 P.2d 440 (1993); *Public Utility Dist. 1 v. Kottsick*, 86 Wash.2d 388, 390, 545 P.2d 1 (1976).

Although the common fund doctrine once applied only to cases that created an immediate monetary fund, this Court has clearly and repeatedly said that it has extended the rule to any situation where a lawsuit confers a substantial benefit on an ascertainable class of people.

> The appellants also claim that they fall within the 'common fund' exception to the no-attorney-fees rule. We first applied this exception to cases where the litigant preserved or created a specific monetary fund for the benefit of others as well as himself. *Peoples Nat'l Bank of Washington v. Jarvis*, 58 Wash.2d 627, 364 P.2d 436 (1961). This court broadened the exception in that it is no longer limited to situations where the litigant preserved or created a specific monetary fund. The exception now extends to situations where the litigant confers a substantial benefit on an ascertainable class. *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, 112 P. 647 (1911); *Grein v. Cavano*, 61 Wash.2d 498, 379 P.2d 209 (1963).

Kottsick, 86 Wn.2d at 390-91.

> The exception now extends to situations where the litigant confers a substantial benefit on an ascertainable class.

Miotke v. City of Spokane, 101 Wn.2d 307, 339, 678 P.2d 803 (1984).

> The principle has been broadened so that it is not limited to the creation or preservation of monetary funds, but extends to situations where a litigant confers some other substantial benefit on an ascertainable class, such as preserving the rights of corporate shareholders.

Weiss v. Bruno, 83 Wn.2d 911, 912-13, 523 P.2d 915 (1974).

> This court broadened the exception in that it is no longer limited to situations where the litigant preserved or created a Specific monetary fund. The exception now extends to situations where the litigant confers a substantial benefit on an ascertainable class.

Seattle School Dist. No. 1 of King County v. State, 90 Wn.2d 476, 543, 585 P.2d 71 (1978).

When the Courts said that the common fund had been extended to situations where the litigant confers a substantial benefit on an ascertainable class, it necessarily meant that a substantial benefit is a common fund. In *Miotke*, 101 Wn.2d at 339, for example, the Court observed that

When those courts said that the common fund had been extended to situations where the litigant confers a substantial benefit on an ascertainable class, they necessarily meant that a substantial benefit is a common fund. In *Miotke*, 101 Wn.2d at 339, for example, the Court observed that

> The common fund **may be monetary**; it **may be the enrichment of a corporation** by securing the return of the value of stocks and bonds as in Baker v. Seattle-Tacoma Power Co., 61 Wash. 578, 112 P. 647 (1911); the common fund also **may be preservation of funds by forcing proper accounting** and bookkeeping procedures as in Grein v. Cavano, 61 Wash.2d 498, 379 P.2d 209 (1963).

(emphasis added). For example, In *Bowles*, 121 Wn.2d at 71, the Supreme Court held that the plaintiffs "created or preserved a fund because the suit secured additional pension benefits for many other PERS I members." Those additional pension benefits would be received over many years and were not a monetary fund. *Id.*

When those courts said that the common fund had been extended to situations where the litigant confers a substantial benefit on an ascertainable class, they necessarily meant that a substantial benefit is a common fund. In *Miotke*, 101 Wn.2d at 339, for example, the Court observed that a common fund need not be monetary at all.

> The common fund may be monetary; it may be the enrichment of a corporation by securing the return of the value of stocks and bonds as in Baker v. Seattle-Tacoma Power Co., 61 Wash. 578, 112 P. 647 (1911); the common fund also may be preservation of funds by forcing proper accounting and bookkeeping procedures as in Grein v. Cavano, 61 Wash.2d 498, 379 P.2d 209 (1963).

The Court likewise has held that future benefits can be a common fund. In *Bowles*, 121 Wn.2d at 71, the Supreme Court held that the plaintiffs "created or preserved a fund because the suit secured additional pension benefits for many other PERS I members." Those additional pension benefits would be received over many years and were not a monetary fund. *Id.*

No one has ever disputed that as a direct consequence of this action, Seattle residents will retain $140 million per year that otherwise would have been paid in income taxes. Nor has anyone disputed that this savings constitutes a substantial benefit. The Court of Appeals rejected Kunath's request for common fund fees because it said that conferring a substantial benefit on others is only "part of the common fund doctrine." Opinion at 29. The court then ruled that "merely benefiting another is not sufficient." *Id.*

In considering Kunath's request that the Court grant review of his common fund fee request, the Court should consider two of its prior opinions on the subject. The first is *Covell v. City of Seattle*, 127 Wn.2d 874, 876-77, 905 P.2d 324 (1995), and the second is *Bowles v. Department of Retirement Sys.*, 121 Wn.2d 52, 847 P.2d 440 (1993).

In *Covell*, the plaintiffs challenged a Seattle ordinance for the collection of a street utility charge of $2.00 per month against every house and $1.35 per month against every multifamily dwelling unit for the use or availability of the streets. In 1993, two Seattle citizens filed a class action lawsuit alleging that the charge violated the uniformity requirement of Article II,

Section 1 because every house was charged the same irrespective of value. The trial court granted summary judgment to the City, and the citizens sought direct review by this Court, which was accepted. This Court ruled that the utility charge did violate the uniformity clause and ordered a refund of the payments that had been made. *Covell v. City of Seattle*, 127 Wn.2d 874, 876-77, 905 P.2d 324 (1995).

The citizen plaintiffs then brought a motion for common fund attorney fees. In an opinion authored by Justice Barbara A. Madsen, this Court then held that:

> Here, litigants Covell and Backus have sought and obtained a refund of street utility charges paid by Seattle residents. Thus, they have created a specific monetary fund and conferred a substantial benefit on an ascertainable class. The policy reasons for awarding attorney fees based on the common fund theory clearly are supported by authorizing such an award in this class action. Given our refusal to reach Appellants' federal law claims, however, we decline to award attorney fees pursuant to such law.

Id. at 891-92. *Covell* is distinguishable from this case only on the grounds that the action recovered a refund of taxes paid rather than preventing the collection of an unconstitutional tax. However, in light of this Court's statements that the common fund doctrine no longer requires a monetary fund and has been extended to situations where a lawsuit confers a substantial benefit, that is a distinction without a difference.

Bowles is even more significant. In *Bowles*, retired state employees sued the Public Employee Retirement System (PERS) because it changed the way it calculated final year income, which had the result of reducing participants' pensions. *Bowles*, 152 Wn.2d at 57. The trial court ruled in favor of the plaintiffs and required PERS to correct its calculations for future payments. *Id.* at 58. As a result, the affected participants would

receive slightly larger pension payments every month for the rest of their lives. *Id.* at 64.

The plaintiffs brought a motion for common fund attorney fees based on the future increases in pension payments. *Id.* at 70. The trial court ruled that the plaintiffs were entitled to an award of common fund fees, but the amount of the future increases could not be known and the payments were not yet due. Based on an estimate from the State Actuary, the trial court "found that the estimated present value of the class recovery was approximately $18.8 million." *Id.* at 61, 74. The trial court then determined that a common fund fee of $1.5 million (8%) was reasonable. *Id.* at 61.

The trial court still had a problem, however, because it could not award fees from future funds. The trial court had another problem because pension benefit information is strictly confidential, and it could not give the plaintiffs' attorneys access to that information. RCW 42.56.050. Common fund fees are paid by the people who benefit from the action, and awarding fees against PERS was not an option. *Id.* at 72.

As a result, the trial court exercised its equitable powers and ordered PERS to advance the fees to the plaintiffs and then obtain reimbursement as the future benefits were paid. *Id.* at 73-74. Unlike the plaintiffs, PERS was authorized to access the participants' benefit information. Because the value of the common fund was based on its present value, PERS would receive full reimbursement.

In a unanimous opinion authored by Justice Charles Johnson, this Court affirmed the trial court's fee award. The Court held that the future increase in pension payments was a common fund and entitled the plaintiffs to an award of common fund fees.

> The plaintiffs therefore have prevailed in increasing the funds available for payment of PERS I pensions. Because the plaintiffs have created a common fund for the benefit of others, their attorneys are entitled to attorney fees."

Id. at 71. The Court specifically approved the order requiring PERS to advance the common fund fee and obtain reimbursement. *Id.* at 74-75.

The *Bowles* approach works in this case for the same reasons that it worked in *Bowles*. Just as PERS had the ability to obtain the necessary pension information to obtain reimbursement, the City of Seattle can obtain the necessary tax information from the IRS. Most state and municipal governments base their income taxes on amounts from federal income tax filings, and 26 U.S.C. § 6103(d)(1) expressly permits them to obtain that information from the IRS. In fact, the income tax ordinance specifically provided that it would be enforced through such an agreement. SMC 5.65.200. The city can obtain the names, addresses and total income tax amounts for all taxpayers who report a Seattle address and total income over $250,000. *Id.*

Although the benefit conferred by this action will continue into the future, it is unlikely that the Court would need to resort to a present value calculation. Seattle residents would have paid $140 million of taxes on April 15, 2019 and would pay another $140 million on April 15, 2020.

The amount of a common fund fee award is determined on a percentage basis because the benefitted class is paying for the benefit it received. *Bowles*, 152 Wn.2d at 72. Although this Court said in *Bowles* that the "benchmark" fee amount is 25% of the benefit, a lower percentage is warranted when the common fund is extremely large as in this case. *Id.* Kunath defers to the Court's discretion as to the proper amount in this case.

IV. CONCLUSION

The Court should deny the petitions for review. However, the Court should grant review of the Court of Appeals ruling that RCW Chapter 36.65 violated the single subject rule in Article II, Section 19 of the Constitution. The Court should further grant review whether Kunath is entitled to common fund attorney fees.

DATED this 30th day of January, 2020.

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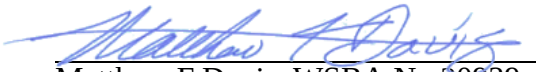

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Comments:

Please see attached Answer to Petition and Motion to Substitute party for deceased party.

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