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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 CITY OF SEATTLE'S AND EOI'S PETITIONS FOR REVIEW

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TABLE OF CONTENTS

I. IDENTITY OF RESPONDENTS 1

II. COURT OF APPEALS DECISION 1

III. ISSUES PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE 2

A. The Long-Standing, Repeatedly Reaffirmed, Rule in *Culliton* 2

B. EOI's "Local" Income Tax Strategy and Creating the Pathway to a Statewide Income Tax Through Seattle 5

C. Procedural Background 7

V. ARGUMENT 8

A. There Is No Significant Constitutional Question Posed by *Culliton* 10

1. *Culliton* was not erroneous 11

2. The rule in *Culliton* is not harmful 14

3. The underpinnings of *Culliton* and its progeny have not changed 18

B. If This Court Accepts Review, Issues Relating To Seattle's Statutory Authority To Enact An Income Tax Will Likely Resolve This Case Without Need to Address The Constitutional Question. 20

VI. CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Aberdeen Savings & Loan Ass'n v. Chase,
157 Wash. 351, 289 F. 536 (1930)..11, 13

Apartment Operators Ass'n of Seattle, Inc. v. Schumacher,
56 Wn.2d 46, 351 P.2d 124 (1960)...3

Cary v. City of Bellingham,
41 Wn.2d 468, 250 P.2d 114 (1952)...21

Chong and Yim v. City of Seattle,
451 P.3d 675 (Wash. Nov. 14, 2019)..19

City of Spokane v. Horton,
189 Wn.2d 696, 406 P.3d 638 (2017) 20

Culliton v. Chase,
174 Wash. 363, 25 P.2d 81 (1933)... *passim*

Dean v. Lehman,
143 Wn.2d 12, 18 P.3d 523 (2001)..3

Harbour Vill. Apartments v. City of Mukilteo,
139 Wn.2d 604, 989 P.2d 542 (1999)..3

Jensen v. Henneford,
185 Wash. 209, 53 P.2d 607 (1936).. *passim*

King Cty. v. King Cty. Water Dist. Nos. 20 et al.,
452 P.3d 681 (Wash. Dec. 5, 2019) 21

Lehnhausen v. Lake Shore Auto Parts Co.,
410 U.S. 356, 93 S. Ct. 1001, 35 L.Ed.2d 351 (1973)..................18, 19

Petroleum Nav. Co. v. Henneford,
185 Wash. 495, 55 P.2d 1056 (1936)...3

Planned Parenthood of Se. Pa. v. Casey,
505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674
(1992) 14

Power, Inc. v. Huntley,
39 Wn.2d 191, 235 P.2d 173 (1951) 3

Quaker City Cab Co. v. *Pennsylvania*,
277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928) 18

Sheehan v. Cent. Puget Sound Reg'l. Transit Auth.,
155 Wn.2d 790, 123 P.3d 88 (2005) 21

State v. Johnson,
188 Wash. 2d 742, 399 P.3d 507 (2017) 14

State ex rel. Stiner v. Yelle,
174 Wash. 402, 25 P.2d 91 (1933) 10, 13

Supply Laundry Co. v. Jenner,
178 Wash. 72,34 P.2d 36 (1934) 10, 13

W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters,
180 Wn.2d 54, 322 P.3d. 1207 (2014) 9, 15

Statutes

Ordinance No. 125339 ....16, 17

RCW 35.22.280 ....2, 8, 20, 21

RCW 35.22.570 ....2, 21

RCW 35A.11.020 ....2, 21

RCW 35A.82.020 21

RCW 36.65.030 ....2, 8, 22

RCW 84.36.070 ....2, 22

Seattle Municipal Code Chapter 5.65 4

Washington Constitution

Const. art. I, § 19 .... 8, 22

Const. art. II, § 19 2

Const. art. VII, § 1 .... 2, 8, 10, 12

Other Authorities

RAP 13.4(d) 1

Wade J. Newhouse, 2 *Constitutional Uniformity & Equality in State Taxation* § 4.04 (2d ed. 1984) 12

I. IDENTITY OF RESPONDENTS

Respondents constitute two groups of plaintiffs, the "Levine Plaintiffs" and the "Burke Plaintiffs", each of whom filed separate actions, subsequently consolidated, challenging the validity of the Seattle Ordinance levying a tax on residents' personal income.[1]

II. COURT OF APPEALS DECISION

A copy of the Opinion and related Orders were attached to the two petitions seeking review filed with this Court.

III. ISSUES PRESENTED FOR REVIEW

In addition to the two questions presented by the City of Seattle and intervenor Economic Opportunity Institute ("EOI"), and the conditional issue they identified (which taxpayers agree should be subject to review if this Court accepts review of the other issues),[2] taxpayers present the following additional conditional issues:

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[1] . The "Levine Plaintiffs" are Dena Levine, Christopher Rufo, Martin Tobias, Nicholas Kerr, Chris McKenzie, Alisa Artis, Lien Dang, Kerry Lebel, and Dorothy M. Sale. The "Burke Plaintiffs" are Suzie Burke, Gene and Leah Burrus, Paige Davis, Faye Garneau, Kristi Dale Hoofman, Lewis M. Horowitz, Teresa and Nigel Jones, Nick and Jessica Lucio, Linda R. Mitchell, Erika Kristina Nagy, Don Root, Lisa and Brent Sterritt, and Norma Tsuboi. With the exception of Ms. Dang, all were Seattle residents when suit was filed and reasonably expected to be subjected to the City income tax in the future. For example, Dorothy Sale was a low-income resident who expected to face a City income tax on the gain-on-sale of her home of 50 years when sold to fund her move to an assisted care facility.

[2] Seattle and EOI claim that this issue will not be presented if Respondents do not "cross-appeal" Division I's holding relating to the single-subject rule. Petitioner City of Seattle's Petition for Review ("Seattle Pet.") at 3-4; *see also* Petitioner Economic Opportunity Institute's Petition for Review ("EOI Pet."), at 3. Conditional issues may be raised in an answer, and that issue is raised as number 4 below. RAP 13.4(d).

1. Whether RCW 35.22.280(2) grants Seattle the authority to enact an income tax.

2. Whether RCW 35.22.570, in combination with RCW 35A.11.020 or a non-statutory doctrine of "home rule," grants Seattle the authority to enact an income tax.

3. Whether RCW 84.36.070's prohibition of *ad valorem* taxes on intangible property prohibits Seattle's income tax.

4. Whether RCW 36.65.030 violates the "single subject" rule in article II, section 19 of the Washington Constitution.

IV. STATEMENT OF THE CASE

Seattle and EOI petition this Court to turn its back on a century of constitutional law, tax policy and statewide votes, all reaffirming that graduated income taxes are not permitted in Washington. The Court should decline.

A. The Long-Standing, Repeatedly Reaffirmed, Rule in *Culliton*

Graduated income taxes have been unconstitutional in Washington for nearly a century. The Washington constitution was amended in 1930 to prohibit non-uniform taxes on property, defined broadly as "everything, whether tangible or intangible, subject to ownership." Amend. 14 to Const. art. VII, § 1 (1930). Just three years after the amendment, this Court held that the Constitution's expansive definition of property

encompasses personal income and, therefore, any tax on income must be uniform. *Culliton v. Chase*, 174 Wash. 363, 374-78, 25 P.2d 81 (1933).

In the following years, the Court has consistently applied the rule in *Culliton*. See, e.g., *Jensen v. Henneford*, 185 Wash. 209, 215-16, 53 P.2d 607, 609 (1936); *Power, Inc. v. Huntley*, 39 Wn.2d 191, 196-97, 235 P.2d 173 (1951); *see also, e.g., Apartment Operators Ass'n of Seattle, Inc. v. Schumacher*, 56 Wn.2d 46, 47, 351 P.2d 124 (1960); *Petroleum Nav. Co. v. Henneford*, 185 Wash. 495, 496, 55 P.2d 1056 (1936); *Harbour Vill. Apartments v. City of Mukilteo*, 139 Wn.2d 604, 608, 989 P.2d 542 (1999); *Dean v. Lehman,* 143 Wn.2d 12, 25, 18 P.3d 523 (2001).

There have also been numerous democratic challenges to *Culliton* at the voting booth, with Washington voters supporting *Culliton* on every ballot. Voters have rejected proposed graduated income taxes ten times in all. Of significance to the issue of stare decisis here, Washington voters have six times rejected proposed constitutional amendments to allow income taxation not subject to the property tax uniformity restriction. All were voted down resoundingly, with at least 64% opposition to every proposed amendment since 1940; the most recent was rejected by 77% of voters statewide.[3] Washington voters have also definitively rejected four

[3] H.R.J. Res. 37 (Wash. 1973) (rejected 77-23); H.R.J. Res. 42 (Wash. 1970) (rejected 68-32); H.R.J. Res. 4 (Wash. 1942) (rejected 66-34); S.J. Res. 5 (Wash.1938) (rejected 67-33); S.J. Res. 7 (Wash. 1936) (rejected 78-22); H.R.J. Res. 11 (Wash. 1934) (rejected

efforts to enact statewide income taxes by initiative, which supporters evidently hoped would have presented this Court an opportunity to reconsider *Culliton*.[4] The most recent of these statewide votes was the 2010 rejection of Initiative 1098, which was opposed by 64% of voters.[5]

Despite all this, in the summer of 2017, Seattle passed a graduated income tax on "high-income residents." Seattle Municipal Code ("SMC") Chapter 5.65 ("the Ordinance"). The City's tax applies to the net income (as reported on taxpayers' federal income tax returns) of Seattle residents regardless of where the income was earned. The Ordinance imposes a 2.25% tax on residents' incomes above $250,000 ($500,000 for joint filers). Seattle Pet. at 5. Indeed, rather than a truly graduated income tax under which most residents would be expected to pay some tax for the "privilege" of living in the City (as the City argues), "tax the rich" was the rally cry at hearings on the City's income tax legislation.[6]

57-43). For vote totals, see Secretary of State, Elections, https://www.sos.wa.gov/elections/research/income-tax-ballot-measures.aspx.

[4] Initiative 158 (Wash. 1944); Initiative 314 (Wash. 1975) (corporate excise tax measured by income); Initiative 435 (Wash. 1982) (corporate franchise tax measured by income); Initiative 1098 (Wash. 2010).

[5] Secretary of State, Income Tax Ballot Measures, https://www.sos.wa.gov/elections/research/income-tax-ballot-measures.aspx.

[6] CP 1802-04.

B. EOI's "Local" Income Tax Strategy and Creating the Pathway to a Statewide Income Tax Through Seattle

The evidence in the trial court showed that income tax activists at EOI have worked for years to generate a test case they could bring to this Court to overcome Washington's constitutional prohibition on graduated income taxes. CP 711-718. In response to a statewide defeat in 2010, EOI developed a "local" strategy "to pass an income tax somewhere" to generate a lawsuit that could allow this Court to reconsider *Culliton* and, after a 2016 effort in Olympia failed, "that somewhere" became Seattle.[7] EOI's stated goal was to invite a legal challenge in the hope a "sympathetic" Supreme Court would open the door to statewide income taxes.[8] As an EOI action plan entitled "Seattle: Creating the Pathway to a Statewide Income Tax" explained:

> If passed, whether by city council action or by initiative, the ordinance will be immediately challenged by income tax opponents as unconstitutional.
>
> This is what we want, as it provides a *pathway to the state supreme court*, enabling that court to review and reverse their decisions from 1935 and 1933 in which they equated income to property and thereby disallowed a progressive income tax.

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[7] Goldy, *The Road to a State Income Tax Runs Through Seattle*, The Stranger (Nov. 5, 2013), http://www.thestranger.com/slog/archives/2013/11/05/the-road-to-a-state-income-tax-runs-through-seattle; CP 1744.

[8] CP 1742, 1782; *see also id.* at 1781 (EOI counsel opining: "If the Court ultimately determines that the City lacks the authority to enact the tax law in question, it will not necessarily address the income as property case, but it very well may do so, or *at the very least might provide some openings and suggestions for us to follow in devising future progressive tax strategies.*) (emphasis added).

> Let's consider Seattle: We can be forthright in Seattle about the *need for a state income tax* and the pathway which could be pursued by the city to enable that.

CP 1742 (emphasis added).

Seattle dedicated its legislative machinery to EOI's cause.[9] The City resolved to levy an income tax on Seattle's "wealthiest citizens" so that "the City of Seattle can *pioneer a legal pathway* and build political momentum to enable the State of Washington and other local municipalities to put in place progressive tax systems [i.e., income taxes]"). CP 916-922 (City of Seattle Resolution No. 31747, at 2 (May 1, 2017) (emphasis added)).

The focus of Seattle's tax was to influence statewide taxation law rather than advance Seattle's interests. As one Councilmember admitted in a private email, "we may not be making the policy decisions we'd otherwise like to make … simply because a tax on 'net' income is not legal and we have made a commitment to make policy choices based upon the best 'legal' pathway."[10] Seattle did not even identify uses for the revenue for its tax until two weeks before the City Council voted – long after the City had committed itself to pursuing such a tax – and were

[9] *See* CP 1744 (revealing EOI's solicitation of Seattle councilmembers).
[10] *Id.* at 1849.

provided to council members by EOI based on polling to identify causes that would be most popular. CP 1825-26, 1829.

The City Council passed the Ordinance on July 10, 2017,[11] the same week the City entered into a consulting contract to pay EOI $49,500 for their services.[12] Of that amount, $35,500 was paid to Smith & Lowney, EOI's counsel of record in this action.[13] Immediately before the vote, bill sponsor Kshama Sawant convened a rally outside City Hall and asked her supporters, "If we need to pack the courts, will you be there with me?"[14]

The City did not submit the Ordinance to a popular vote by initiative or seek legislative authority to tax residents' income. Mayor Murray signed the Ordinance into law in July 2017.[15]

C. Procedural Background

Following the expected challenge from Seattle residents who would be subject to the new tax, the trial court invalidated the Ordinance. Recognizing that state law requires a city to "have express authority … to levy taxes," CP 1305 (citation omitted), the court found that Seattle lacked that authority. In particular, the court concluded that the Ordinance was

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[11] *Id.*
[12] *Id.* at 1863-69.
[13] *Id.*
[14] Daniel Beekman, *Seattle City Council approves income tax on the rich, but quick legal challenge likely*, Seattle Times (July 10, 2017), https://www.seattletimes.com/seattle-news/politics/seattle-council-to-vote-today-on-income-tax-on-the-wealthy/.
[15] CP 369-99.

not justified either as an excise tax or as a *sui generis* tax. CP 1308-12. In addition, it found that the Ordinance was unlawful because it levied a tax on "net income," which is specifically prohibited under RCW 36.65.030 – at the same time rejecting EOI's argument that RCW 36.65.030 was unconstitutional. CP 1310-12. Because Seattle lacked the authority to enact an income tax at all, the trial court avoided the constitutional issue Seattle had hoped to raise. *Id.*

Division I affirmed the result, but substantially departed from the trial court as to the reasons for its affirmance. It found the City's authority to enact the tax in a provision no party had raised, RCW 35.22.280(2), and, while agreeing with the trial court that RCW 36.65.030 prohibited Seattle's tax, invalidated that statute under the "single subject" rule of article I, section 19 of the Constitution. Because of its statutory rulings, the court had to address the long-standing rule in *Culliton*. It invalidated the non-uniform Ordinance as unconstitutional under article VII, section 1 of the Washington Constitution. Op. at 26-27.

V. ARGUMENT

Both Division I and the trial court invalidated Seattle's graduated income tax – the trial court based on a lack of statutory authority for such a tax, and Division I based on the long-standing constitutional rule in *Culliton*, which has been a bedrock of Washington tax policy for nearly a

century. For both statutory and constitutional reasons, Seattle's tax, which was explicitly designed as vehicle to try to influence statewide taxation policy, should be invalidated. Indeed, the statutory issues themselves would almost surely resolve the issue in favor of affirmance, without the need ever to reach *Culliton*. There is no need for this Court's review.

Seattle and EOI argue that the rule in *Culliton* should be overturned. Washington stare decisis law requires a precedent to be upheld unless it is both erroneous and harmful, or its underpinnings have fundamentally changed or disappeared. *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 322 P.3d. 1207 (2014). Neither is true in this case. Instead, the structure of state taxation law has been built around unchanged constitutional language, correctly interpreted by *Culliton*. Rather than alleviating harm, disrupting the structure upon which citizens and businesses have long relied, and which has repeatedly been preserved by this Court and the state's voters over the last 80 years – all to serve Seattle's and EOI's political agenda – would itself be harmful.

Culliton's rule of constitutional construction has been reaffirmed and ratified six times by the voters (ten times including votes on statewide income taxes). This history of voter ratification belies the City's argument that *Culliton* must be overturned because it was either wrong when decided or is a relic of passing legal history. The voters have rejected the

argument that lack of a graduated income tax is harmful. As a result, any amendment of the rule that income is property should come through the democratic process, not in response to EOI's "income tax pathway" designed to end-run Washington voters. This Court should reject Seattle's cynical attempt to use this Court to implement radical change in longstanding statewide tax policy contrary to the will of the voters.

A. There Is No Significant Constitutional Question Posed by *Culliton*

Culliton and its progeny are central to the structure of Washington tax law, a structure that Washington voters have repeatedly refused to change when asked. Washington taxation law has grown up around the rules established in the 1930s decisions in *Culliton*, *Jensen*, *Stiner*, and *Supply Laundry*. *Culliton*, 174 Wash. 363; *Jensen*, 185 Wash. at 215-16; *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 25 P.2d 91 (1933); *Supply Laundry Co. v. Jenner*, 178 Wash. 72,34 P.2d 36 (1934).

The first two decisions established, and then reaffirmed, that article VII, section 1 of the Constitution forbids a graduated income tax, since a person's income is included in the constitutional definition of property as "everything, whether tangible or intangible, subject to ownership." *Culliton*, 174 Wash. at 375; *Jensen*, 185 Wash. at 215-20 (citing Const. art. VII, § 1). The latter two held that Washington's Business and

Occupations ("B&O") tax, which taxes gross receipts from business activity, is an excise tax on the privilege of conducting a business in Washington, not a tax on property, and not subject to the same constitutional restriction.

Washington has maintained this basic structure ever since, relying on the B&O tax, and sales and other taxes, to support state and local functions. While Seattle tries to paint Washington as an outlier on taxes, it is not unique – nine states including Washington have no state tax on personal income.[16]

1. *Culliton* was not erroneous

Seattle and EOI's arguments in favor of revisiting *Culliton* are based on two primary claims: (1) *Culliton* was bad law when it was decided in 1933 and remains bad law today; and (2) *Culliton* is inconsistent with other cases decided in the 1930s in other states, in the years following its issuance. They are wrong on both counts.

Seattle and EOI's arguments focus on three alleged deficiencies: (1) that *Culliton* was wrong to rely on *Aberdeen Savings & Loan Ass'n v.*

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[16] 9 States with No Income Tax, Nasdaq (Mar. 5, 2018), https://www.nasdaq.com/articles/9-states-no-income-tax-2018-03-05; Tanza Loudenback, There are 9 States with no income tax, but 2 still tax investment earnings, MSN.com (Jan. 9, 2020), https://www.msn.com/en-us/money/personalfinance/there-are-9-states-with-no-income-tax-but-2-still-tax-investment-earnings/ar-AAJjuUL; *see also* Janelle Cammenga, Ranking Individual Income Taxes on the 2020 State Business Tax Climate Index, Tax Foundation (Nov. 20, 2019), https://taxfoundation.org/best-worst-income-tax-codes-in-the-country-2019/.

Chase, 157 Wash. 351, 289 F. 536 (1930), Seattle Pet. at 9; (2) that *Culliton* mischaracterized the law in other states, *id*. at 9-10; and (3) that *Culliton* misinterpreted the "peculiarly forceful constitutional definition of property" in Article VII, § 1, *id.* at 10-11.

The third alleged deficiency shows the irrelevance of the first two. Whatever else *Culliton* may have said, even Seattle acknowledges that the decision rested on that court's interpretation of Washington-specific constitutional language that it deemed "peculiarly forceful." Seattle Pet. at 10-11. Indeed, observing differences in the language and structure of constitutions from other states, the *Culliton* court stated that "[n]one of the decisions from other states have any bearing upon the law before us."[17] Far from erroneously relying on out-of-state authority, as Seattle argues, *Culliton* largely disregarded it in focusing on the unique language of Amendment 14.[18]

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[17] Seattle relies on information from a treatise by Prof. Newhouse to argue that the majority of courts have ruled that income is not property under the constitutions and statutes of other states, arguing that Washington's definition of property is out of step and must be incorrect. Seattle Pet. at 9-10. Consistent with *Culliton's* observation about the "peculiarly forceful" language of Amend. 14, however, the treatise shows that a wide variety of state uniformity provisions exists. Professor Newhouse lists 12 general "types" of state uniformity provisions and then shows, state-by-state, that very few uniformity provisions fall squarely into one type or another. Wade J. Newhouse, 2 *Constitutional Uniformity & Equality in State Taxation* § 4.04, at 1764-1767 (2d ed. 1984).

[18] The allegedly erroneous language quoted in Seattle's petition, "[t]he overwhelming weight of judicial authority is that 'income' is property and a tax upon income is a tax upon property," does not even relate to judicial authority in other states, but rather comments on Washington case authority. *Compare* Seattle Pet. at 9 *with Culliton*, 174

The Court's mention of *Aberdeen,* an equal protection case that pre-dated Washington's adoption of its unique definition of "property" in Amendment 14, did not render its holding "incorrect" as shown by the later decision in *Jensen*. There, the court properly rejected the Attorney General's attempt to convince this Court to overturn *Culliton* based on arguments about *Aberdeen* similar to those Seattle and EOI make today. The *Jensen* decision accurately characterized *Culliton* as having based its holding on the language of the Washington Constitution that that court had "fully analyzed, discussed, and defined." *Jensen*, 185 Wash. at 219.[19]

Jensen also puts to rest the erroneous claim that *Culliton* is inconsistent with the later cases of *Stiner*, 174 Wash. 402 and *Supply Laundry*, 178 Wash. 72. Seattle Pet. at 13-16. This alleged inconsistency is yet another argument the Attorney General raised in "strenuously" urging the *Jensen* court to overturn *Culliton*. The *Jensen* court carefully analyzed the Attorney General's "very able" argument, but nonetheless concluded that the cases were not inconsistent. 185 Wash. at 216-17.[20] In doing so,

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Wash. at 374 (referring to judicial interpretations of the words of "our Fourteenth Amendment.")

[19] *Culliton* was decided after the opinion in *Washington Mut. Sav. Bank v. Chase*, 157 Wash. 351, 392, 290 P. 697 (1930), which clarified the scope of the ruling in *Aberdeen* (including that *Aberdeen* held that the tax in that case "attempt[ed] to establish a property" tax), and had the benefit of that analysis.

[20] The issue Seattle raises was also directly addressed by *Supply Laundry,* decided between *Culliton* and *Jensen*, which stressed the difference "between the privilege of carrying on a business of a commercial nature and the privilege merely of being employed as a wage earner." *Supply Laundry*, 178 Wash. at 77.

Jensen explained why a tax on the right to receive income is a property tax, not an excise tax, under Washington law, and is fully consistent with a B&O tax *measured* in relation to the gross income generated from the privilege of doing business. The right to receive property, the court explained, is one of the core elements of property ownership – without a right to receive property, there is no way to own it. *Id*. at 218-19.

2. The rule in *Culliton* is not harmful

Seattle acknowledges that the structure of Washington law has been shaped by *Culliton*, referring to its "ripple effect" on jurisprudence. Seattle Pet. at 11-12. Changing that rule would cause unknown impacts on state and local taxation, including previously invalidated taxes, all of which are part of a complex state and local structure securing revenue while incentivizing desirable economic and other activity. Stare decisis also jealously protects citizens' reliance interests. *State v. Johnson*, 188 Wash. 2d 742, 756-57, 399 P.3d 507 (2017); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). The evidence below showed that many residents of Seattle and Washington felt that having no income tax was significant to their decisions to move here for work, to start businesses here, and to buy homes and settle permanently. CP 650, 693, 699, 644, 747.

Under current tax policies, Washington's economy is thriving, and individuals and businesses throughout the state have made major decisions in reliance on the long-standing current system. The Washington State Department of Commerce touts the fact that Washington has no income taxes as a significant competitive advantage in its promotional materials to attract businesses and citizens to locate in Washington.[21] The thriving economy over the past ten years has produced huge increases in state and local revenues; over a decade, annual state tax revenues grew 70% to more than $25 billion as of 2019.[22]

Even if, as Seattle and EOI argue, *Culliton* was incorrectly decided from the beginning, after many years of reliance on that structure, and given resounding statewide public support for it after votes on multiple constitutional initiatives, continuing to adhere to that structure is not harmful. Demonstrating actual "harm" from an incorrect precedent is a core requirement of Washington stare decisis law. *W.G. Clark* 180 Wn.2d

[21] http://choosewashingtonstate.com/selectusa/ ("Washington State does not have a personal or corporate income tax."; http://choosewashingtonstate.com/i-need-help-with/foreign-domestic-investment/taxes/ ("Washington State offers business many tax advantages, including no personal or corporate income tax . . . ."); http://choosewashingtonstate.com/why-washington/our-strengths/pro-business/ ("We offer businesses some competitive advantages found in few other states. This includes no personal or corporate income tax.").

[22] 2019 CAFR Statistical Section at 290-91, at https://www.ofm.wa.gov/sites/default/files/public/accounting/report/CAFR/2019/13stats.pdf.

at 66. The harm in this case would come from changing more than 80 years of precedent, not in allowing it to stand.

Much of the interest Seattle asserts is a *statewide* interest in fundamentally changing the manner in which Washingtonians are taxed. Seattle Pet. at 16-17. This interest is not relevant to the complex question of whether an individual city can significantly depart from the overall structure of taxation that has been repeatedly reaffirmed by Washington voters.

Seattle expresses concerns about tax regressivity. Seattle Pet. at 16-17. Whether Washington *state* taxes are regressive is not before this Court, and in any event, is not addressed let alone solved by Seattle's tax on its residents. Seattle failed to present any admissible evidence that *City* taxes are regressive in the trial court. CP 1192-93.

The Ordinance claims that regressive taxes "disproportionately harm communities of color,"[23] but the 2016 census showed that median income in Seattle rose for whites, Asians and multiracial residents, with African Americans showing particularly strong gains.[24] The gender pay

[23] Ordinance No. 125339 § 1.5. CP 24
[24] *See* Gene Balk, *$80,000 median: Income gain in Seattle far outpaces other cities*, Seattle Times (Sept. 15, 2016), https://www.seattletimes.com/seattle-news/data/80000-median-wage-income-gain-in-seattle-far-outpaces-other-cities/.

gap has also decreased.[25] Seattle's unique economy is distributing financial benefits across its diverse population.

The Ordinance also recognizes that "robust economic growth has created significant opportunity and wealth,"[26] funding significant growth in City government. Seattle's revenues grew more than 38%, from approximately $3.9 billion in 2011 to $5.4 billion in 2017.[27] Its General Fund saw a 29% increase.[28] For perspective, the City projected its income tax will increase annual revenues by less than 3%.

The City's assertions about regressive tax burdens also tell only part of the relevant story. Under existing tax policies integral to a thriving economy, Seattle has been creating job opportunities at twice the national average.[29] Over ten years through 2015, a period renowned nationally for the Great Recession and wage stagnation, per capita personal income in the Seattle metropolitan division increased from $52,000 to more than

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[25] *See id.*
[26] *See* Ordinance No. 125339 § 1.2. CP 23
[27] *Compare* City of Seattle, *2013 Adopted and 2014 Endorsed Budget* (2013) ("2013 Seattle Budget Book"), at 44 http://www.seattle.gov/Documents/Departments/FinanceDepartment/13adoptedbudget/Full2013Adopted2014EndorsedBudget_000.pdf *with* City of Seattle, *2018 Proposed Budget* ("2018 Seattle Proposed Budget Book") at 100 http://www.seattle.gov/Documents/Departments/FinanceDepartment/18proposedbudget/2018ProposedBudgetBook.pdf.
[28] *Compare* 2013 Seattle Budget Book, at 57 *with* 2018 Seattle Proposed Budget Book at 110 .
[29] *See* United States Bureau of Labor Statistics, Seattle Area Economic Summary (updated Jan. 15, 2020), https://www.bls.gov/regions/west/summary/blssummary_seattle.pdf .

$65,800—an increase of more than 25%.[30] Workers in a range of fields make more per hour than their national counterparts.[31] Seattle's median household income increased by nearly $10,000 to more than $80,000 just in 2017, the largest increase of the 50 most populous cities in the country.[32]

3. The underpinnings of *Culliton* and its progeny have not changed

Nor have the underpinnings of *Culliton* or *Jensen* changed. The only alleged change in the law that Seattle has identified occurred *forty-seven* years ago, in 1973, when the United States Supreme Court overruled an equal protection case, *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928). *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365, 93 S. Ct. 1001, 35 L.Ed.2d 351 (1973). *Lehnhausen* held that federal equal protection did not prohibit Illinois from taxing the personal property of corporations differently from individuals. In overruling *Quaker City,* the U.S. Supreme Court noted that

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[30] U.S. Bureau of Economic Analysis, *Table CA1 Personal Income Summary: Personal Income, Population, Per Capita Personal Income*, https://www.bea.gov/itable/iTable.cfm?ReqID=70&step=1#reqid=70&step=30&isuri=1&7022=20&7023=7&7033=-1&7024=non-industry&7025=8&7026=42644&7027=2015,2014,2013,2012,2011 2010,2009,2008,2007,2006&7001=720&7028=3&7031=8&7040=-1&7083=levels&7029=20&7090=70 (last visited Oct. 23, 2017).
[31] *See id.*
[32] Gene Balk, *$80,000 median: Income gain in Seattle far outpaces other cities*, Seattle Times (Sept. 15, 2016), https://www.seattletimes.com/seattle-news/data/80000-median-wage-income-gain-in-seattle-far-outpaces-other-cities/ .

equal protection law had relaxed, so that Illinois had wider discretion to make such distinctions. 410 U.S. at 365.

Nothing in *Lehnhausen* even purported to address whether income is properly defined as "property" under Washington *state* law. In fact, *Lehnhausen* itself was not even a case about income taxes, so its holding could not have changed any federal law about the nature of income taxes, if any had ever existed. *Culliton* and its progeny are likewise not based on equal protection principles, but instead on the language of the Washington constitution prohibiting graduated property taxes. *Lehnhausen* therefore has nothing to do with *Culliton*.

This is a far cry from the decision in *Chong and Yim v. City of Seattle*, 451 P.3d 675 (Wash. Nov. 14, 2019), where this Court abandoned stare decisis where Washington regulatory takings law had "always" been based on an "attempt[] to discern and apply the federal definition of regulatory takings," and had to be changed to reflect changes in that definition. *Chong and Yim*, at 9-10 (slip op). Washington taxation law is instead based on *state* constitutional law; Seattle and EOI make no argument that the underpinnings of state law have changed.

Whether *Culliton* should be overturned is therefore not a significant constitutional question requiring this Court's review.

B. If This Court Accepts Review, Issues Relating To Seattle's Statutory Authority To Enact An Income Tax Will Likely Resolve This Case Without Need to Address The Constitutional Question.

Ironically, even if this Court takes review it should never reach *Culliton* because the City is not statutorily authorized to enact a graduated income tax. If it accepts review, this Court will almost certainly affirm Division I, but for the narrower statutory reasons stated by the trial court.

Culliton aside, Seattle lacks authority to enact an income tax at all. As Division I acknowledged, municipalities have no inherent power to tax; the Legislature must delegate them such power. Op. at 11; *City of Spokane v. Horton*, 189 Wn.2d 696, 702, 406 P.3d 638 (2017) (under Washington constitution, cities have no right to levy any particular kind of tax unless authority to do so is specifically delegated by the legislature).

The lower courts considered three possible grants of authority. Since none of them specifically authorizes Seattle to enact an income tax, Division I's invalidation of the Ordinance must be upheld, but on wholly separate grounds. Each of these questions is, therefore, a conditional issue for review, necessary to resolve before the constitutional question in *Culliton* can be reached or reconsidered. These three threshold issues are:

(1) Whether the grant of authority to municipalities to enact "real or personal" property taxes in RCW 35.22.280(2) allows Seattle to impose an

income tax. Neither party made this argument to the trial court or Division I, and Division I cited no Washington authority in support of its erroneous holding that RCW 35.22.280(2) authorized a tax on income as property.

(2) Whether RCW 35A.11.020 and/or the doctrine of "home rule" grants Seattle and all code cities "plenary" authority to enact an income tax. RCW 35A.11.020; RCW 35.22.570. No Washington court has ever found that these provisions, standing alone, grant new taxation authority. Rather, as this Court recently held, this provision is designed only to extend to code cites the defined list of statutorily authorized taxation powers granted to other cities – not to provide "plenary" authority to enact *any* tax. *King County v. King County Water Dist. No. 20 et al*, 453 P.3d 681, 686 (Wash. Dec. 5, 2019).

(3) Whether the Ordinance is an excise tax authorized by RCW 35.22.280(32) or RCW 35A.82.020. Excise taxes are taxes imposed on the voluntary action of a taxpayer and are based on the benefits that the taxpayer obtains from that action. *Sheehan v. Cent. Puget Sound Reg'l. Transit Auth.*, 155 Wn.2d 790, 800, 123 P.3d 88 (2005). The activity that Seattle seeks to tax here, however, is mere residence in the city itself. Unlike starting and operating a business, or producing and selling products, living and earning income in the City is not the proper subject of an excise tax, which would likewise violate fundamental rights. *See Cary*

v. City of Bellingham, 41 Wn.2d 468, 471, 250 P.2d 114 (1952) ("The right to earn a living by working for wages is not a substantive privilege granted or permitted by the state."). Neither Division I nor the trial court found this to be a basis of authority for Seattle's Ordinance.

In addition to the need for statutory authorization for Seattle's graduated income tax, which is lacking, two other statutory provisions affirmatively prohibit the Ordinance. If this Court grants review on the *Culliton* question, it must also review these additional conditional issues:

(4) RCW 36.65.030 provides that a city "shall not levy a tax on net income." After analyzing tax law and the underlying facts, Division I correctly concluded that the Ordinance levies a tax on "net income" and would therefore prohibit Seattle's tax. Division I's invalidation of this statute under the "single subject" rule of Article I, section 19 of the Washington Constitution was incorrect, and this Court should also consider that issue if review is granted.

(5) RCW 84.36.070(2) exempts "intangible personal property" from *ad valorem* taxation. Division I decided that the legislature did not intend this provision to apply to income taxes, despite longstanding Washington law holding income to be personal property. If the petition is granted, then conditional review of this issue should also be granted.

There are therefore multiple paths supporting affirmance without ever reaching the rule in *Culliton*.

VI. CONCLUSION

The substantial public interest is best served by declining to accept review of a case premised upon a single city's state-wide political agenda. Recognizing that the citizens of Washington have affirmed the holding in *Culliton* time and again, tax activists have worked for years to pioneer a "local" pathway that would open a "side door" into this courthouse as an alternative route to amend the constitution. Now that the Constitution has been construed, and with full respect for the fact that the Court's construction was repeatedly confirmed by the voters, if there is to be a constitutional change it too should occur by a vote of the people of Washington, in full consideration of the state-wide impacts of such a change.

RESPECTFULLY SUBMITTED this 30th day of January, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Answer to Statement of Grounds for Direct Review to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated January 30, 2020.

s/Robert M. McKenna
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