IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

S. MICHAEL KUNATH, Plaintiff, v. CITY OF SEATTLE, Defendant.	CONSOLIDATED Case No. 17-2-18848-4 SEA THE HONORABLE JOHN R. RUHL
SUZIE BURKE, *et al.*, Plaintiffs, v. CITY OF SEATTLE, *et al.*, Defendants.	**BURKE/LEVINE PLAINTIFFS' OPPOSITION TO ECONOMIC OPPORTUNITY INSTITUTE'S MOTION FOR SUMMARY JUDGMENT**
DENA LEVINE, *et al.*, Plaintiffs, v. CITY OF SEATTLE, Defendant.	
ECONOMIC OPPORTUNITY INSTITUTE, Intervenor.	

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I. INTRODUCTION

Plaintiffs[1] oppose EOI's motion for summary judgment. In seeking declaratory judgment that RCW 36.65.030 was enacted in 1984 in violation of Article II, Section 19 of the Constitution, EOI raises constitutional arguments that have lain dormant for over 30 years, that no city or county subject to the prohibition on taxing income has made, and that the City of Seattle expressly declined to raise here.[2] And for good reason, because EOI's arguments are completely without merit.

EOI's motion can be decided, and denied, on the basis of a single relevant document—Substitute Senate Bill 4313 ("SSB 4313")—the actual, enacted bill that EOI never submits or discusses. SSB 4313, as signed into law by the Governor, Speaker of the House and President of the Senate, and certified by the Secretary of the Senate, has the following title: "AN ACT Relating to local government". . . ." Under Washington canons of construction, this is a "general title." The prohibition on counties, cities and city-counties from taxing net income in RCW 36.65.030 is indisputably within the general subject matter of "local government," satisfying the "subject-in-title" rule under Washington case law.

There is also "rational unity" between the general title and the income tax prohibition in the Act. The income tax prohibition on cities, counties and city-counties is rationally related to the general title on "local government." It was *essential* that the income tax prohibition include cities and counties because of the constitutional requirement, in Article XI, Section 16, that a prohibition against city-counties from taxing income "apply equally to every other city, county, and city-county." This is exactly what

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[1] "Levine Plaintiffs" are Dena Levine, Christopher Rufo, Martin Tobias, Nicholas Kerr, Chris McKenzie, Alisa Artis, Lien Dang, Kerry Lebel, and Dorothy M. Sale. "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.

[2] City of Seattle's Resp. to EOI's Mot. to Intervene 2 ("EOI's constitutional challenge to the statute can [] be heard in a separate independent lawsuit."). The City argued that the constitutional issue should not be heard in this lawsuit. *Id.*

SSB 4313 does.

Ignoring SSB 4313 itself, EOI constructs tortured arguments based on hearsay in committee and bill reports that have not been authenticated. Regardless whether these documents are admissible, they are irrelevant to identifying the title of SSB 4313, as Washington Supreme Court decisions addressing Article II, Section 19 challenges demonstrate. Applying the presumption that an act is valid and constitutional, as this Court must, EOI has failed to meet its burden to establish a violation of Article II, Section 19 beyond a reasonable doubt.

In addition to its lack of merit, EOI itself lacks standing to bring its claim because it has suffered no injury in fact. EOI also seeks a nonbinding advisory ruling on a nonjusticiable dispute between private citizens. EOI has been spoiling for this fight for several years, as its own complaint and motion explain, but EOI can no more obtain a final and conclusive determination in this suit than if it had sued a Seattle taxpayer at random for declaratory judgment. For all of these reasons, Plaintiffs respectfully request that EOI's unfounded motion for summary judgment be denied.

II. ARGUMENT

A. The Title of SSB 4313 Is Broad, "AN ACT Relating to Local Government . . . ."

EOI's entire challenge to RCW 36.65.030 is based on the false premise that the title of the bill was created by the code reviser after the bill's enactment. EOI Summ. J. Mot. 5. EOI is wrong. The only document that matters for the purpose of identifying the title of a bill under Article II, Section 19, and the only evidence that is admissible, is the bill itself. The Certification of Enrolled Enactment of SSB 4313, signed by the Governor, the President of the Senate and the Speaker of the House, is submitted as Exhibit A[3] to the Declaration of Daniel J. Dunne re EOI's Motion for Summary Judgment ("Dunne EOI

[3] This copy of the Certification of Enrolled Enactment, from the Records of Secretary of State, is certified by Guadalupe E. Lopez, Office of the State Archivist of the State of Washington, in accordance with the provisions of RCW 40.14.

Decl."). The title of that bill is "AN ACT Relating to local government; and adding a new chapter to Title 36 RCW."

EOI does not address Washington law explaining how a court is to identify a bill's proper title. The title of any bill "is the word, phrase, or phrases following 'AN ACT Relating to . . .'." *State v. Thomas*, 103 Wn. App. 800, 808-09, 14 P.3d 854 (2000) (citing *Fray v. Spokane County*, 134 Wn.2d 637, 655, 925 P.2d 601 (1998); *Patrice v. Murphy*, 136 Wn.2d 845, 853, 966 P.2d 1271 (1998)). Frequent constitutional challenges under Article II, Section 19 have resulted in a well-developed body of case law defining a bill's title. Not surprisingly, those cases follow a well-worn path, confirming that the bill title for constitutional analysis is the language immediately following the traditional legislative phrase, "AN ACT Related to . . .". *E.g.*, *Patrice*, 136 Wn.2d at 853 ("The title of the bill begins merely with these words, 'AN ACT Relating to court costs . . . .'"); *Wash. Educ. Ass'n v. State*, 97 Wn.2d 899, 906, 652 P.2d 1347 (1982) ("The title of SHB 782 is 'An Act Relating to Community Colleges'."); *Robison v. Dwyer*, 58 Wn.2d 576, 579, 364 P.2d 521 (1961) ("The title is: 'An Act relating to agriculture and agricultural production . . . .'"; *State v. Cornejo (In re Boot)*, 130 Wn.2d 553, 566, 925 P.2d 964 (1996) ("The title, "AN ACT Relating to violence prevention,' . . . ."); *see also Fray*, 134 Wn.2d at 655 (finding the title "merely states 'AN ACT Relating to making technical corrections'").[4] Applying this precedent here, the title of SSB 4313 is "AN ACT Relating to *local government*; and adding a new chapter to Title 36 RCW." Dunne EOI Decl., Ex. A (emphasis added).

EOI has not submitted the Enrolled Enactment with its motion, and ignores the bill's actual title beginning "AN ACT Relating to…." Instead, EOI argues the "title" for purposes of Article II, Section 19 analysis is the "final title" of the bill as provided by the code reviser's office—"CITY-COUNTY MUNICIPAL CORPORATIONS –

[4] EOI cites *Wash. Citizens Action v. Office of Ins. Comm'r.* 94 Wn. App. 64, 971 P.2d 527 (1999). There is no indication in this Court of Appeals opinion that the parties raised this issue, that the Court of Appeals addressed it, or that use of one source vs. another was material to the court's ultimate decision.

CLARIFICATION"—which is a new and different title applied by the Code Reviser's Office *after* the bill was enacted. EOI Summ. J. Mot. 5 (quoting the "title" from and citing to LAWS of 1984, ch. 91), 9 (using the "title" from LAWS of 1984, ch. 91); EOI Summ. J. Reply 5-6 (citing authorities). EOI's position is not supported by the cases it cites, or logic.

The only Supreme Court case cited by EOI, *Patrice v Murphy*, 136 Wn.2d 845 (1998), does not support EOI's position. Going through the legislative history, the *Patrice* court noted that "At the time the bill was introduced, its title read: 'AN ACT Relating to court costs; and amending RCW 10.01.160.'" *Id.* at 849-50. The legislation was amended before being signed by the Governor and the "final title of the revised bill" was:

> COURT COSTS-COLLECTION AND REMITTANCE
> AN ACT Relating to court costs; amending RCW 10.01.160, 27.24.070, 3.46.120, 3.50.100, 3.62.010, 3.62.040, 10.82.070, 35.20.220, 36.18.025, and 2.42.050; adding new sections to chapter 2.42 RCW; providing an effective date; and declaring an emergency.

Id. at 851 (citing to LAWS of 1985, Ch. 389) (italicization omitted). For its Article II, Section 19 analysis, however, the Supreme Court concluded that "[t]he title of the bill begins merely with these words, 'AN ACT Relating to court costs . . . .'" *Id.* at 853. Thus, the Supreme Court ignored the all caps summary added to the "final title" by the code reviser's office in its Article II, Section 19 analysis. Consistent with Plaintiffs' argument here, the title of a bill, for purposes of the Court's constitutional analysis, is the language that begins "AN ACT Relating to . . . ."

Similarly, *State v. Harris*, 97 Wn. App. 647, 985 P.2d 417 (1999) also disproves EOI's argument. In *Harris*, the court's opinion refers to the "final title" of the legislation at issue from the LAWS of 1985, which includes the code reviser's summary: "COURT COSTS – COLLECTION AND REMISSION. *Id.* at 654. However, when analyzing compliance with Article II, Section 19, the court does *not* refer to that new summary title supplied by the code reviser, but to the familiar legislative phrase, "AN ACT Relating to court costs." *Id.* at 655.

An argument much like EOI's was expressly rejected by the Supreme Court in

Zenner v. Graham, 34 Wash. 81, 74 P. 1058 (1904). The court found no merit in the argument that it was impermissible for a piece of legislation's "headlines" to be limited to "husband" where the provisions of the statute applied to all persons, not just husbands: "[T]his argument is without force, because the compiler's headlines to the chapter are no part of the title of the act." *Id.* at 83.

This rejection of the code reviser's or compiler's headings makes sense. Otherwise Article II, Section 19 analysis would hinge on language *unknown to the legislators at the time the legislation was voted on and passed*, and that was subsequently added by the code reviser's office. Not only is EOI's proposal inconsistent with Supreme Court jurisprudence, it is contrary to logic and reason.[5]

B. EOI Has Not Proved Beyond a Reasonable Doubt That SSB 4313 Violates the Subject-in-Title and Single-Subject Requirements

Courts presume that statutes are constitutional, and a party challenging a statute bears the heavy burden of showing, beyond a reasonable doubt, that a statute is unconstitutional. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000).[6] Article II, Section 19, which "is to be liberally construed in favor of the legislation," *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 654, 278 P.3d 632 (2012), has two separate requirements for legislation: (1) subject-in-title, and (2) single-subject.

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5 EOI also argues that the Legislature could only "narrow RCW 35.22.280 and other laws" granting broad taxing authority "by amending those statutes." EOI Summ. J. Mot. at 14. This specious argument assumes the Legislature granted plenary taxing authority in RCW 35.22.080 and other laws. There is no plenary taxing authority, as Plaintiffs previously established. Certain Plaintiffs' Motion for Summary Judgment and Opposition to City's Motion for Summary Judgment (Oct. 23, 2017) ("Certain Plaintiff's Summ. J. Mot.") at 15-18.

6 Washington courts "will not strike a duly enacted statute unless . . . fully convinced, after a searching legal analysis, that the statute violates the constitution." *Sch. Dists.' All. for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 606, 244 P.3d 1 (2010) (internal quotation marks and citation omitted). Washington courts "assume the Legislature considered the constitutionality of its enactments" and "afford great deference to [the Legislature's policy] judgment." *Tunstall*, 141 Wn.2d at 220.

The title of SSB 4313 easily passes both requirements. Rather than repeat arguments made by another party, Burke/Levine Plaintiffs join in Kunath's Response to EOI's Motion for Summary Judgment and Cross Motion for Summary Judgment ("Kunath's EOI Response"). Kunath demonstrates clearly that SSB 4313 satisfies both the subject-in-title and single-subject requirements of Article II, Section 19. Kunath's EOI Response, 7-11. A few issues bear additional mention.

For purposes of the single-subject analysis, "AN ACT Relating to local government" is construed to be a "general title." *See Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 210, 11 P.3d 762 (2000); *Mount Spokane Skiing Corp. v. Spokane Cty.*, 86 Wn. App. 165, 181-82, 936 P.2d 1148 (1997). "Where a general title is used, all that is required is rational unity between the general subject and the incidental subjects." *Amalgamated*, 142 Wn.2d at 209 (citations omitted). "Rational unity" exists here because the title "local government" is "naturally and reasonably connected to" the taxing authority of cities, counties, and city-counties. In particular, the Constitution provides:

> 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.*

Const. art. XI, § 16. Not only is the income tax prohibition on cities and counties clearly rationally related to the general title on local government, it was essential under the Constitution that the prohibition against city-counties from taxing income "apply equally to every other city, county, and city-county." SSB 4313 effectuates the constitutional requirement to restrict the powers of these "local governments" equally.

"The title of an act complies with art. II, § 19 if it gives notice which would lead to an inquiry into the body of the act or indicates the scope and purpose of the law to an inquiring mind." *Amalgamated*, 142 Wn.2d at 217. In light of this purpose of the subject-in-title requirement, the title does not need to be an index of the contents or provide details of the legislation. *Id.* Here, the authority of counties, cities and city-counties to tax income

is indisputably within the broad general subject matter of "local government." *See, e.g., State v. Korum*, 157 Wn.2d 614, 642, 141 P.3d 13 (2006) (rejecting argument that consecutive sentencing for deadly weapons enhancement was not within the subject of increased punishment for armed crimes); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 640, 71 P.3d 644 (2003) (rejecting argument that title of initiative which dealt with two manners of hunting did not encompass the subject of fur of animals obtained via those methods). Thus, SSB 4313 also satisfies the "subject-in-title" rule under Washington case law.

With the language of the SSB unsupportive of its arguments, EOI argues that SSB 4313 was tainted by "logrolling." The evidence is conclusively to the contrary. SSB 4313 was passed by overwhelming majorities—43 to 5 in the Senate and 94 to 1 in the House—so obviously no horse trading on unrelated items was needed to pass the bill. Dunne EOI Decl., Ex. A. There is no evidence that anti-tax proponents appended the income tax prohibition to must-pass legislation. The suggestion that legislators may been unaware they were voting to prohibit income taxes is contradicted by the fact that SSB 4313's income tax prohibition was consistent with the long-standing constitutional prohibitions against taxes on income under Washington law and was featured prominently on all of the bill reports in an almost verbatim recitation of RCW 36.65.030: "A county, city, or combined city-county is prohibited from enacting an income tax." *See* Decl. of Claire Tonry in Support of EOI's Summ. J. Mot., Ex. 4 at 1, 3, 5.

EOI has failed to overcome the strong presumption of constitutionality afforded legislation and has not met its burden to prove beyond a reasonable doubt that SSB 4313 violates Article II, Section 19.

C. <u>Burke/Levine Plaintiffs Move to Strike EOI's Inadmissible Evidence</u>

While EOI's motion refers to three different declarations, none of it is relevant to the Article II, Section 19 analysis. In fact, EOI does not even cite any of this evidence in its substantive argument. EOI Summary Judgment Motion at 7-13. Which is just as well,

because the select legislative materials for SSB 4313, attached to the Tonry Declaration, are inadmissible, on both authentication and hearsay grounds, and Plaintiffs move to strike them.

Legislative documents may be authenticated through proper certification by an official with authority to do so. RCW 5.44.040; *see* ER 902(d). Accordingly, the Certification of Enrolled Enactment of SSB 4313, "AN ACT Relating to local government; and adding a new chapter to Title 36 RCW" duly certified by the State Archivist is admissible. Dunne EOI Decl., Ex. A. By comparison, none of the legislative materials submitted by EOI are certified, and they cannot be authenticated by a lawyer. Furthermore, EOI relies on the out-of-court statements in these legislative materials for the truth of the matter asserted—the title of the legislation itself. *E.g.*, EOI Summ. J. Mot. at 4 (Exhibits 1-3), 5 (Exhibits 4-7). Accordingly, the documents are also inadmissible hearsay, *see* ER 801, and no recognized exception applies.[7] Finally, the committee and bill reports and related legislative materials are irrelevant to the single factual issue before the Court—the title of SSB 4313. ER 401, 402. As the cases in Section II.A establish, the only evidence relevant to determining the title is the bill, which speaks for itself.

D. EOI Lacks Standing

EOI lacks standing to challenge the constitutionality of RCW 36.65.030 because it is not within the zone of interests defined by the statute, and EOI itself has suffered no harm from the restriction. The Supreme Court has established a two-part test to determine standing under the Uniform Declaratory Judgments Act, chapter 7.24 RCW:

> First, the interest sought to be protected must be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Second, the challenged action must have caused the challenger an injury in fact, economic or otherwise.

[7] As set forth above, the materials do not qualify under the public records exception, RCW 5.44.040. Further, they do not qualify under the business records exception, RCW 5.45.020, because no affiant with knowledge has testified to the essential elements of this exception.

Wash. Ass'n for Substance Abuse & Violence Prevention, 174 Wn.2d at 653 (quoting *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004)) (internal quotation marks omitted). EOI fails both parts of the test.

First, RCW 36.65.030 prohibits cities, counties and city-counties from levying a tax on net income. EOI submits no evidence or argument that it is subject to, regulated by, or within the zone of interests of the statute, which broadly addresses limitations on the power delegated by the Legislature to levy taxes. *See id*. at 653 n.2 (zone of interests inquiry focuses on the law "targeted by the [constitutional] challenge"). *Second*, EOI has not submitted undisputed evidence that it has suffered any cognizable "injury in fact" from the restriction on taxing authority granted to local governments. *See id.* at 653. EOI's purported social objective of promoting more "progressive" taxes is not a "particularized injury" sufficient to constitute "injury in fact." *In re Det. of Reyes*, 176 Wn. App. 821, 844–45, 315 P.3d 532 (2013), aff'd, 184 Wn.2d 340, 358 P.3d 394 (2015) (concluding that sex offender lacked standing to assert state constitutional open courtroom right on behalf of the public because he had shown no injury in fact).[8]

[8] EOI has not alleged in its complaint in intervention, and cannot assert as a matter of law, taxpayer standing based on the claim that it or some of its members are taxpayers challenging the constitutionality of Legislation. *See, e.g.*, *Lee v. State*, 185 Wn.2d 608, 374 P.3d 157 (2016). Unlike Plaintiffs, who have standing as taxpayers to sue the City of Seattle over its passage of the Ordinance, EOI has not named as a defendant or brought its claim for declaratory judgment against the State. For taxpayer standing, the plaintiff taxpayer must bring suit against the governmental entity or agents whose actions are challenged. *See, e.g.*, *id.*; *Huff v. Wyman*, 184 Wn.2d 643, 361 P.3d 727 (2015); *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012); *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 937 P.2d 1082 (1997); *State ex rel. Boyles v. Whatcom Cty. Super. Ct.*, 103 Wn.2d 610 694 P.2d 27 (1985); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 534 P.2d 114 (1975); *Friends of N. Spokane Cty. Parks v. Spokane Cty.*, 184 Wn. App. 105, 336 P.3d 632 (2014); *Washington Pub. Tr. Advocates v. City of Spokane*, 117 Wn. App. 178, 69 P.3d 351 (2003*); Robinson v. City of Seattle*, 102 Wn. App. 795, 10 P.3d 452 (2000).

EOI also has not and cannot assert representational standing. *See Mukilteo Citizens for Simple Gov't v. City of Mukilteo*, 174 Wn.2d 41, 46, 272 P.3d 227 (2012) ("An organization has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."). EOI does not allege that it has members and has not shown the interest that it seeks to protect in this lawsuit to be sufficiently related to EOI's alleged organizational goals of "advancing public policies that

EOI's claim for declaratory judgment must be dismissed for lack of standing.

E. EOI's Claim Is Not Justiciable

Assuming for the sake of argument that EOI had standing, EOI's claim is not justiciable. EOI's declaratory relief claim regarding the constitutionality of RCW 36.65.030 is asserted solely against private parties and, as such, any judicial resolution of the matter would not be *res judicata* as to the State or any governmental actor with an interest in the statute. EOI cites no case where one private citizen sued another private citizen for declaratory judgment over a disagreement about the constitutionality of a statute. EOI's intervention in *Plaintiffs'* lawsuit against the City of Seattle does not alter the underlying reality that EOI's claim against private citizens would not be conclusive.

EOI bears the burden to prove that "a judicial determination of which [its claim will] be final and conclusive." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 417, 27 P.3d 1149 (2001) (citation omitted); *Bercier v. Kiga*, 127 Wn. App. 809, 822, 103 P.3d 232 (2004) (failure to prove justiciability precludes relief under the UDJA).[9] This issue is of particular significance here, because under the Uniform Declaratory Relief Act, the Court should exercise its discretion to decline to award declaratory relief where it "would not terminate the uncertainty or controversy giving rise to the proceeding." RCW 7.24.060. Since issuing a declaration to EOI regarding the constitutionality of RCW 36.65.030 will not be binding on the State that enacted RCW 36.65.030, this Court's determination of that issue will not be final and conclusive and will not terminate any controversy over RCW 36.65.030.

A declaratory judgment is only binding on the parties to the claim. *See* RCW 7.24.110 ("[N]o declaration shall prejudice the rights of persons not parties to the

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promote educational opportunity, good jobs, healthy families and workplaces, and a dignified retirement for all." Compl. In Intervention ¶ 4.

[9] The party seeking a declaratory judgment must demonstrate four elements: "(1) an actual, present and existing dispute, (2) between parties having genuine and opposing interests, (3) that involves interests that are direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination will be final and conclusive." *Id.* (citation omitted).

proceeding."); *see Kendall v. Douglas*, 118 Wn.2d 1, 10-11, 820 P.2d 497 (1991) (explaining failure to join counties in case challenging county commissioner actions prevented declaratory relief claim). Here, the parties to EOI's declaratory judgment claim are EOI, who has "intervened on the side of the City," and the Plaintiffs who have challenged the City's Ordinance imposing an income tax. Compl. in Intervention, ¶ 1. EOI has quite noticeably avoided naming the State as a party. In fact, EOI has not named *any party* as a defendant in its complaint in intervention—it has just thrown its pet constitutional issue into the mix. Thus, assuming that the Court were to rule in EOI's favor, that judgment would not be binding on any other party, including the State itself. There is no utility to such a ruling, as it does not decide the constitutionality of RCW 36.65.030 with finality and is unenforceable as to the State.

EOI's declaratory judgment claim here, asserted against private parties, stands in stark contrast with typical cases challenging the constitutionality of legislation, where the claim is asserted against the State or other governmental agency responsible for enacting or enforcing the statute or regulation. *See, e.g.*, *Manufactured Hous. Cmtys. of Wash. v. State*, 142 Wn.2d 347, 351, 13 P.3d 182 (2000) (asserting challenge to constitutionality of statute regarding rights of mobile home tenants against the State); *Island Cty. v. State*, 135 Wn.2d 141, 145, 955 P.2d 377 (1998) (asserting challenge to constitutionality of Community Council Act against the State); *Seeley v. State*, 132 Wn.2d 776, 785, 940 P.2d 604 (1997) (asserting challenge to constitutionality of statute prohibiting medical marijuana use against the State); *Rafn Co. v. State*, 104 Wn. App. 947, 949, 17 P.3d 711 (2001) (asserting challenge to constitutionality of statutes relating to workers' compensation against the State); *Bennett v. State*, 117 Wn. App. 483, 485-86, 70 P.3d 147 (2003) (asserting challenge to constitutionality of statute relating to child support against the State); *Wash. State Geoduck Harvest Ass'n v. Wash. State Dep't of Nat. Res.*, 124 Wn. App. 441, 445-46, 101 P.3d 891 (2004) (asserting equal protection challenge to statute permitting Department of Natural Resources to regulate geoduck harvest against the Department of Natural

Resources). In those cases, the declaratory judgment was binding on the governmental entity, thus binding and resolving the issue with finality as to the party with responsibility for the challenged act.

Any argument that EOI's service of its complaint on the Attorney General, pursuant to RCW 7.24.110, resolves this issue must be rejected. First, this provision of RCW 7.24.110 does not apply to EOI's claim because it is not a constitutional challenge to a city ordinance. Additionally, while a constitutional challenge to a state statute was allowed to go forward without the State in *Leonard v. City of Seattle*, 81 Wn.2d 479, 483, 503 P.2d 741 (1972), the court acknowledged that the claim was asserted "against a proper party," namely the City of Seattle. *See also Zimmer v. Seattle*, 19 Wn. App. 864, 869-70, 578 P.2d 548 (1978) (citing *Leonard*, 81 Wn.2d 479, and allowing claim to go forward where attorney general declined to participate because "this action will be defended by the corporation counsel for the city of Seattle"). Here, EOI's constitutional challenge is not asserted against a "proper party" because there is no governmental entity with an interest in upholding the constitutionality of the statute.

The lack of collateral estoppel or other binding effect explains the Washington Attorney General's position on participation in such suits:

> As you know, our office defends the constitutionality of statutes when the state or a state agency is sued. That is not the situation here. Intervening requires the state to become a party and incur the expense of litigation. Consequently, where the challenge to a statute arises in a lawsuit to which the state is not a party, the Attorney General's Office rarely intervenes.[10]

EOI offers a conclusory statement that "a judicial determination of the validity of RCW 36.65.030 will be final and conclusive." EOI Summ. J. Mot. 16. EOI cites no case where one private citizen was permitted to obtain a judicial declaration in litigation involving another private citizen. And for good reason. Were the rule otherwise, two private citizens could decide to file a collusive lawsuit to obtain a declaratory judgment on

[10] Dunne EOI Decl., ¶¶ 2-3 and Exs. B and C (State Legislators' letter requesting that the Attorney General intervene and Attorney General's letter in response thereto).

a legal principle of mutual interest that they think would benefit from judicial review, to satisfy some pet personal objective they share. It is no accident that EOI's claim fails for lack of both *standing* and *justiciability*—the two principles go hand-in-hand in eliminating lawsuits over "possible, dormant, hypothetical, speculative, or moot disagreement[s]." *See To-Ro Trade Shows*, 144 Wn.2d at 411. Under the Declaratory Judgments Act, the requirement of standing tends to overlap justiciability requirements. *Amalgamated Transit Union*, 142 Wn.2d at 203. EOI obviously could not pick a Seattle resident potentially subject to the income tax at random—like 98-year-old Dorothy Sale—and sue her for this declaratory judgment, but that is essentially what this intervention does. It is a dispute between citizens who disagree about the constitutionality of a state statute. Especially because private citizens cannot be burdened with defending the constitutionality of duly enacted legislation—that is a duty of the Washington Attorney General[11]—the Court should decline declaratory relief and deny EOI's motion.

III. BURKE/LEVINE PLAINTIFFS' OPPOSITION IS TIMELY UNDER CR 56

EOI noted its motion for the Court's previously scheduled hearing on November 17, 2017. Under CR 56, any opposition is due to be filed and served "not later than 11 calendar days before hearing." Plaintiffs clearly indicated in their motion for summary judgment on the City's claims that they "will demonstrate that EOI's arguments are without merit in their separate response to EOI's motion, filed under the normal schedule set forth in CR 56(c)." Certain Plaintiffs' Summ. J. Mot. 24, n.68. In response, EOI never communicated with Plaintiffs about any different understanding of the briefing schedule, particularly whether the parties would follow the schedule set specifically for City and Plaintiff motions and cross motions.

Nevertheless, in its brief filed November 1, EOI states that "[o]nly plaintiff Kunath timely responded to EOI's motion." EOI Summ. J. Reply 5. If EOI suggests that the

[11] *See, e.g.*, RCW 43.10.030 ("The attorney general shall [appear] for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested.").

parties were required to follow the Stipulation and Order on Summary Judgment Briefing Schedule, EOI was not a party to that stipulation (having chosen not to move to intervene until later), and its motions were not within the contemplation of the parties and are clearly not addressed by that order.[12]

The Court's order granting EOI's motion to intervene does not order the parties to comply with the briefing schedule in its prior Order on Summary Judgment Briefing, or make any order concerning the service and filing of briefs. Order re Intervention at 5. The Court finds that "*EOI* has committed to adhere to the *current briefing schedule*," *id.* ¶ 5, but makes no mention that EOI intends to file its own motion for summary judgment, let alone the schedule for the filing of briefs in response to such a motion.

If EOI had intended that the Court enter an order to limit the time available to Plaintiffs to oppose EOI's motion for summary judgment, it should have *first* conferred with counsel for Plaintiffs about its previously undisclosed intention to file its own motion and propose an order to that effect. Plaintiffs would have opposed that request because they were already pressed for time and resources in responding to the City's motion. EOI undertook no communications on scheduling with Plaintiffs, made no such request to the Court, and in consequence, the Court did not issue an order addressing the filing of briefs in response and reply to any such motion.

Accordingly, in the absence of an order altering the dates for response, CR 56(c) controls the time for response, and Plaintiffs' Opposition is timely.

IV. CONCLUSION

RCW 36.65.030 has stood without controversy as the law of Washington for 33 years. EOI has failed to introduce admissible evidence sufficient to sustain its burden to prove, based on undisputed evidence and beyond a reasonable doubt, that RCW 36.65.030 violates Art. II, Section 19 of the Constitution. EOI also does not have standing, and its

[12] The purpose of the tight scheduling agreed to by parties other than EOI was to accommodate cross motions for summary judgment. There is no issue with cross motions on EOI's motion, and so no reason to proceed on a schedule different than CR 56.

claim for declaratory relief claim is not justiciable. For the reasons stated, Plaintiffs respectfully request that Economic Opportunity Institute's motion for summary judgment be denied.

I certify that this memorandum contains 5,374 words, in compliance with the Local Civil Rules.

By: *s/Robert M. McKenna*

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CERTIFICATE OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years and not a party to this action. On the 23rd day of October 2017, I caused to be served a true copy of the foregoing document via electronic court filing on all registered parties.

I caused the foregoing document to be served upon the parties below via electronic mail:

Hugh D. Spitzer
spitzerhd@gmail.com

I declare under penalty of perjury under the State of Washington that the foregoing is true and correct.

DATED this 6th day of November, 2017.

s/ Robert M. McKenna

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