No. 95295-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

S. MICHAEL KUNATH, *et al.*,

Respondents,

v.

CITY OF SEATTLE, *et al.*,

Appellants.

LEVINE AND BURKE RESPONDENTS' ANSWER TO CITY OF SEATTLE'S AND EOI'S STATEMENTS OF GROUNDS FOR DIRECT REVIEW

Orrick, Herrington & Sutcliffe LLP
Robert M. McKenna (WSBA 18327)
Daniel J. Dunne, Jr. (WSBA 16999)
Adam N. Tabor (WSBA 50912)
701 Fifth Avenue, Ste 5600
Seattle, WA 98104-7097
Phone: (206) 839-4300

Bean, Gentry, Wheeler & Peternell PLLC
Gerry L. Alexander (WSBA 775)
910 Lakeridge Way SW
Olympia, WA 98502
Phone (360) 357-2852

Talmadge Fitzpatrick Tribe PLLC
Phil Talmadge (WSBA 6973)
2775 Harbor Ave SW, 3rd Flr, Ste C
Seattle, WA 98126
Telephone (206) 574-6661

Attorneys for Levine Respondents

Lane Powell PC
Scott M. Edwards (WSBA 26455)
Ryan P. McBride (WSBA 33280)
1420 Fifth Ave., Ste 4200
Seattle, WA 98101
Phone: (206) 223-7000

The Freedom Foundation
David Dewhirst (WSBA 48299)
c/o The Freedom Foundation
PO Box 552
Olympia, WA 98507
Telephone (360) 956-3482

Attorneys for Burke Plaintiffs

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I. INTRODUCTION

This Court should not accept direct review of the trial court's ruling in this case. This appeal presents straightforward issues of statutory interpretation that are well-settled and well-suited to review in the Court of Appeals. If the judgment is affirmed there on the statutory grounds stated by the trial court, there will be no basis for any review in this Court.

In its November 22, 2017 Order, the trial court granted Plaintiffs' motions for summary judgment, declaring the City's income tax illegal because "the City's tax is not an 'excise tax' and thus is not authorized by RCW 35A.82.020 and RCW 35.22.280(32); the City's tax is not authorized by RCW 35A.11.020; the City's tax is not otherwise authorized by any other statute; and RCW 35.65.030 prohibits the tax." City St. App. 68. The trial court based its reasoning on consistent and settled Washington case law, *id.* at 55-59, as well as sound principles of statutory construction. *Id.* at 60-63.

Even though these core holdings underpin the declaratory judgment, Defendants do not argue that any of *these* conclusions meet the test for direct review under RAP 4.2(a). Instead, Defendants try to create the *appearance* of two inconsistencies in the case law they cite for their position: (i) that Washington cases inconsistently distinguish "express" and "specific" statutory authority (they do not); and (ii) that there is

inconsistency in tax cases where "income" is the "measure" of the tax (there is none). City St. at 5-10. Defendants' semantic quibbles fall far short of demonstrating substantive inconsistencies justifying direct review, as explained in the Argument below.

Defendants also make an argument for direct review involving a line of Supreme Court cases which, over more than 80 years, have consistently found personal income to fall within the Washington Constitution's definition of "property."[1] As to this question, however, because the trial court exercised constitutional avoidance and invalidated the City's income tax on statutory grounds, the trial court declined to reach this issue of constitutional interpretation. *Id*. at 67. Similarly, because the City's income tax is invalid for lack of statutory authority, no court needs to reach the constitutional issue on appeal, either. *See Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000). Indeed, even if a reviewing court were to violate principles of constitutional avoidance and overrule the longstanding, multiple precedents holding that constitutional restrictions on taxing property apply to personal income, it would change nothing. The declaratory judgment would still be affirmed on the statutory

[1] Defendants identify three "Issues Presented For Review." City St. at 4. Of those three, however, only the issue whether the constitutional definition of "property" includes income is argued to justify *direct* review. *See id*.at 5-14. The other two issues arguably supporting *direct* review are not included in the list for appellate review. *Id.* at 4.

bases per Judge Ruhl's order. Furthermore, if the Court of Appeals does affirm on statutory grounds, there will be no basis for further appeal to this Court because the constitutional issue will never be presented. *See* RAP 13.4(b).

RAP 4.2(a) includes no provision for direct review where a party wishes to challenge constitutional *stare decisis*, especially where judgment was entered on statutory grounds and a constitutional ruling would not change the result. The Court of Appeals may apply consistent and settled Washington case law, and the plain meaning of the statutes which apply in this case, to affirm the trial court without reaching any constitutional issue. Direct review is unwarranted and inappropriate.

II. ARGUMENTS AGAINST DIRECT REVIEW

A. There Is No Inconsistency Among Supreme Court Decisions That Cities Must Have "Express Authority" To Tax.

Defendants first argue that direct review is warranted under RAP 4.2(a)(3) to resolve supposed inconsistencies in appellate decisions on municipal taxing authority. City St. 5-7. The illusory difference between "express" and "specific" statutory authority does not require direct review. This Court's opinions are clear and consistent that cities and other municipalities must have *express* statutory authority to levy a tax.[2] The

[2] *See Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 366, 89 P.3d 217

trial court recognized this well-established standard and correctly applied it. City St. App. 55-59. The Court of Appeals will have no difficulty applying this standard on review, either.

The City argues that the trial court erroneously relied on *Algona* to apply a standard—"'specific' as opposed to 'express' statutory authority"—that the City contends applies only when one municipality seeks to tax another. City St. 5-7. Nonsense. The terms "express" and "specific" as used in this context mean the same thing and, like the trial court, this Court and the Court of Appeals use them synonymously in cases deciding local taxing authority that having nothing to do with municipality-on-municipality taxes.[3] The trial court referred to the same term with the same meaning, consistent with these appellate authorities.

Algona did not announce a different or more stringent standard, as the City argues. It simply recognized that when one municipality seeks to tax another, it must find two sources of statutory authority: one expressly authorizing the kind of tax at issue, and one expressly authorizing inter-

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(2014); *King Cnty. v. City of Algona*, 101 Wn.2d 789, 791, 681 P.2d 1281 (1984); *Hillis Homes, Inc. v. Snohomish Cnty.*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982).

[3] *See City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 694 n.8, 743 P.2d 793 (1987) ("we require specific express statutory authority."); *San Telmo Assocs. v. City of Seattle*, 108 Wn.2d 20, 23, 735 P.2d 673 (1987) ("there must be a specific legislative pronouncement allowing for the tax"); *City of Seattle v. T-Mobile West Corp.*, 199 Wn. App. 79, 86, 397 P.3d 931 (2017) ("absence of specific statutory authority").

governmental taxation.[4] Defendants, not the courts, are the ones confused about *Algona*'s holding.

At bottom, the City's semantic exercise masks the only real issue on appeal: whether cities have been granted express authority by the Legislature to tax the personal income of their residents, wherever and however earned. The trial court correctly held that no such authority exists. City St. App. 56-59. The court correctly ruled that the Ordinance cannot be justified as an excise tax or license under RCW 35.22.280(32) or RCW 35.82.020, nor is it authorized under the optional municipal code, which simply gives code cities the same express authority as other cities, not plenary taxing authority. *See* RCW 35A.11.020 ("legislative body of each code city shall have any authority ever given to any class of municipality or to all municipalities of this state").

There is no confusion or inconsistency in the law or in the decisions cited by the City. No other city or county government in Washington has joined Seattle in asserting authority to tax residents' personal income under RCW 35A.11.020 on the theory that the statute

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[4] *Algona*, 101 Wn.2d at 793. "The decision in *Algona* would also have been clearer if the court's discussion of the need for 'express authorization' had made the distinction that, with the benefit of hindsight, we have made here: when governmental immunity is implicated, a two-layered express authorization is needed." *City of Wenatchee v. Chelan Cnty. Pub. Util. Dist. No. 1*, 181 Wn. App. 326, 349, 325 P.3d 419 (2014).

grants plenary taxing authority that is "express" but not "specific."[5] There are no conflicting interpretations of RCW 35A.11.020, so the Court of Appeals can and should review the trial court's dispositive ruling on legislative taxing authority in the first instance.

B. There Is No Inconsistency Among Supreme Court Decisions That an Individual Resident's Receipt Of Personal Income Is Not Subject To An Excise Tax.

Defendants next argue that direct review is necessary to resolve supposed inconsistences among three Supreme Court decisions—*all from the 1930's*—distinguishing between excise taxes on the privilege of engaging in business as *measured* by gross income (i.e., B&O taxes), and graduated taxes levied *directly* on personal income. City St. at 8-11 (discussing *State ex rel. Stiner v. Yelle*, 174 Wash. 402 (1933); *Supply Laundry Co. v. Jenner*, 178 Wash. 72 (1934); and *Jensen v. Henneford*, 185 Wash. 209 (1936)); EOI St. at 7-8. Over 80 years of Washington jurisprudence has followed and applied these fundamental distinctions in taxing authority with no hint of inconsistency. Defendants offer no argument to the contrary. Defendants identify no Supreme Court case holding that a city *may* levy a graduated tax directly on personal income,

[5] Moreover, in the 50 years since it was enacted, the City of Seattle has never before asserted that RCW 35A.11.020 confers the "plenary" taxing power asserted in this action, and it cannot identify a single appellate court that has ever construed it in this way – a novel construction that would effectively render superfluous all other statutes conferring taxing authority on cities.

so they fail to identify any inconsistency requiring direct review.

These three Supreme Court decisions are clear and consistent: it is permissible to license or levy an excise tax on business activities, with the activity *measured* by gross income, but it is impermissible to tax *directly* an individual's earned income divorced from the power to license for the privilege of engaging in a business or occupation. *Supply Laundry Co. v. Jenner*, 178 Wash. 72, 77, 34 P.2d 363 (1934) ("*Stiner* … stresses the distinction between the privilege of carrying on a business … and the privilege merely of being employed as a wage earner"). This Court held unambiguously that the "right to receive … income … is but a necessary element of ownership," and "the mere right to own and hold property cannot be made the subject of an excise tax." *Jensen v. Henneford*, 185 Wash. 209, 218-19, 53 P.2d 607 (1936).[6] There is no conflict among these three 1930's decisions.

For similar reasons, there is no conflict arising from the estate tax. EOI St. at 8. Unlike an income tax, the estate tax is not imposed on one's

[6] While a city may impose an excise on an individual's exercise of privileged business activity, it may not tax the constitutionally protected right to earn wages for one's labor. *Cary v. Bellingham,* 41 Wn.2d 468, 472, 250 P.2d 114 (1952) ("The ordinance is not a license tax in the sense of a regulatory charge imposed under the police power. It is, in effect, a license based upon the *assumed* power of the municipality to control the right to work for wages. The municipality has no such power and hence no right to levy an excise tax upon such right.").

receipt of income. It is "an excise tax upon the happening of an event, namely, death, where the death brings about certain described changes in legal relationships affecting property."[7] The "relevant transfer is the single transfer that occurs to the entire taxable estate upon death." *Id.* at 915. Here, too, Washington law is clear. Excise taxes measured by the value of property, including the estate tax, are predicated upon a taxable event, *i.e.*, the sale, use, or transfer of that property; not its mere ownership.

In the end, Defendants identify no "inconsistency in decisions of the Supreme Court." The City cannot manufacture inconsistency by reference to decisions of out-of-state courts based on the laws of other states.[8] The City's resort to another semantic argument--that it is "irrational" to allow excise taxes that can be "measured" by gross income, but deny property taxes "measured by income on a different type of taxpayer (individuals)," City St. at 9-10—ignores the essential foundations of state and local tax authority distinguishing excise and property taxes in this State. The City's vague public policy plea about who should pay a "fair share" of taxes, *id.*, must be addressed to the Legislature or to the

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[7] *Estate of Ackerley v. Dep't of Revenue*, 187 Wn.2d 906, 914, 389 P.3d 583 (2017) (quoting *In re Estate of Hambleton*, 181 Wn.2d 802, 832-33, 335 P.3d 398 (2014) (quotation marks omitted)).

[8] City St. at 10 & n.3 (citing cases from other jurisdictions). Because the decisions of other courts are irrelevant to the standard for direct review under RAP 4.2(a)(3), we do not address why they are distinguished and irrelevant based on the unique definition of "property" in the Washington Constitution.

People. The City has failed to establish any grounds for direct review under RAP 4.2(a)(3).

C. This Case Presents No "Fundamental and Urgent Issues" of Constitutional Interpretation Requiring Prompt Determination Under RAP 4.2(a)(4)

Finally, the City asks this Court to take direct review of an issue of constitutional interpretation, "what is the nature of a tax on total personal income?" City St. 10. That constitutional issue was never decided in the trial court. "The Ordinance being invalid on statutory grounds, it is unnecessary to consider the art. VII § 1 issue." City. St. App. 67. Similarly, if the Court of Appeals affirms Judge Ruhl's judgment on statutory grounds, "the court will avoid deciding the issue on constitutional grounds."[9] The City cannot establish an "urgent and fundamental need" for direct review of a constitutional question that was not the basis for the underlying judgment and is unlikely to be reached on appeal.

It is important to recognize that it was Plaintiffs who pleaded constitutional infirmity as an *alternative* claim for a declaratory judgment that the City's income tax ordinance is invalid. City St. App. 50-52. Only if the City were to obtain reversal of Judge Ruhl's statutory rulings would any court be required to address Plaintiffs' alternative argument that the

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[9] *Tunstall v. Bergeson,* 141 Wn.2d 210, 210, 5 P.3d 691 (2000).

uniformity provision of art. VII § 1 of the Constitution prohibits Seattle from levying a graduated tax on personal income. Yet, it is the City that purports to seek direct review of *Plaintiffs'* constitutional claim. Because Plaintiffs' unaddressed constitutional claims can support affirmance, but cannot support the *reversal* Defendants seek, as a matter of simple logic, it cannot be a "fundamental and urgent issue" supporting direct review of *Defendants'* appeal.

As the City itself acknowledges, the precise question of state constitutional interpretation was laid to rest by this Court more than 80 years ago,[10] and has been reaffirmed several times since then. In 1933, the Supreme Court ruled that under the broad definition of "property" adopted by state voters in Amendment 14 to the Constitution, income is property, that property is subject to Article VII, Section 1's uniformity provision, and therefore, the Constitution bars graduated taxes on income.[11] Three years later in *Jensen*, the Washington Attorney General urged the Supreme Court to abandon *stare decisis* for many of the same reasons the City urges here.[12]

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[10] "In the 1930's, this Court held that income is a form or property for purposes of Art. VII, § 1 of the Washington Constitution, and therefore an income tax is a property tax." City St. 11 (citations omitted).
[11] *See Culliton*, 174 Wash. at 374.
[12] *Jensen*, 185 Wash. at 215-17.

The City argues that *Culliton* was "erroneous,"[13] but many of the same arguments to overturn *stare decisis* that the City raises here were rejected several decades later in *Huntley*.[14] In *Huntley*, the Court had "no hesitancy" in finding that a tax on "almost any income from almost every source," not based on the amount of "any business in this state," and "geared throughout to the Federal income tax legislation" is "a mere property tax 'masquerading as an excise.'" *Id*. at 196-97. In every critical respect, the Court could have been describing the City of Seattle's income tax here. The rulings in *Culliton*, *Jensen* and *Huntley* have been followed in a consistent line of cases by the Washington Supreme Court numerous times, before and since.[15] The City's problem is not judicial inconsistency,

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[13] Contrary to the City's assertions that *Culliton* did not deeply analyze why income is property, and that *Culliton* incorrectly characterized the holding of *Aberdeen Savings & Loan Ass'n v. Chase*, 157 Wash. 351, 289 P. 536 (1930), City St. 11-14, *Culliton* examined the Washington Constitution's broad constitutional definition of property, distinguished that definition from other states' constitutions, and relied on *Aberdeen* for the proposition that "an income tax is a property tax," citing *Aberdeen*'s dissent as showing that the issue was, necessarily, considered and decided. *See Culliton*, 174 Wash. at 374-77; *id.* at 380-83 (Mitchell, J., concurring); *id*. at 383-84 (Steinert, J., concurring); *see also Aberdeen*, 157 Wash. at 380 (Fullerton, J., dissenting) ("the majority hold and must necessarily hold, that the act is not what upon its face it purports to be. . . [but] is in substance and effect" a *property* tax.).

[14] *Power, Inc. v. Huntley*, 39 Wn.2d 191, 194, 235 P.2d 173 (1951).

[15] *See e.g.*, *Dean v. Lehman*, 143 Wn.2d 12, 25, 18 P.3d 523 (2001) (citing *Jensen* for rule that income is property); *Harbour Vill. Apartments v. City of Mukilteo*, 139 Wash. 2d 604, 608, 989 P.2d 542, 545 (1999) (relying on *Jensen* to hold a tax on rental income is a tax on property that violates constitutional prohibition against nonuniform taxation of real property); *Apartment Operators Ass'n of Seattle, Inc. v. Schumacher*, 56 Wn.2d 46, 47, 351 P.2d 124, 125 (1960) (relying on *Jensen* and holding that question whether tax on rent is property tax "is foreclosed by prior decisions of this court"); *Petroleum Nav. Co. v. Henneford*, 185 Wash. 495, 495, 55 P.2d 1056, 1057 (1936) (following *Aberdeen, Culliton and Jensen* to hold that annual tax measured by net income is a tax on property).

it is that the City doesn't like this Court's consistent answer.

In sum, the City seeks direct review of a constitutional claim the City has not made, that cannot support reversal of the declaratory judgment that its Ordinance is invalid, on an issue of constitutional interpretation that the trial court properly avoided, and that has been upheld in an unwavering line of Supreme Court decisions for more than 80 years. Plainly, this Court's decisions already provide precisely the guidance and "certainty to cities and their taxpayers" that the City requests. *See* City St. 15. By definition, there is no "fundamental and urgent issue" requiring immediate review because the law defining income as property has long been settled. Defendants cite no case where a party's request to overturn *stare decisis*, which is what the City seeks, was found to meet the test for direct review under RAP 4.2(a)(4). And, in any event, Defendants have made no showing of harm, a required element before the Court will overrule *stare decisis*.[16]

The City argues that "[t]his Court regularly accepts direct review of cases involving taxation because of their broad public import," but it identifies just one such case, entirely distinguishable, in the last 25 years.

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[16] *See Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 729–30, 381 P.3d 32 (2016) (requiring, *inter alia*, proof of harm before Court will abandon its precedent).

City St. 15.[17] The City also cannot demonstrate "broad public import" because no other city or county in Washington has levied a graduated tax directly on the personal income of its residents.

The absence of "broad public import" to re-interpreting longstanding constitutional law is further proved by the numerous times voters have rejected efforts to amend the Constitution or approve an income tax. Since 1934, Washington voters have rejected five referendums or initiatives to amend the Constitution to allow graduated taxes on income.[18] Over the same period, Washington voters also rejected five statewide initiatives to authorize an income tax.[19] Most recently in 2010, 64% of Washington voters opposed initiative I-1098 to levy a "progressive" tax on income. From this decades-long string of defeats, former Governor Christine Gregoire observed recently: "Frankly, I think it's not accepted by the people in this state. Statewide, I do not see an appetite by the people of this state to go to an income tax."[20] Her assessment is borne out by a January

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[17] That case, *W.R. Grace & Co. v. State Dept. of Revenue*, 137 Wn.2d 580, 973 P.2d 1011 (1999), provides no support for direct review here. *W.R. Grace* addressed the issue of retroactive application of a U.S. Supreme Court decision invalidating aspects of Washington's B&O tax that affected pending assessments and appeals of hundreds of taxpayers.

[18] H.R.J. Res. 12 (Wash. 1934); S.J. Res. 7 (Wash. 1936); S.J. Res. 5 (Wash. 1938); Constitutional Amendment (Wash. 1942); H.R.J. Res. 42 (Wash. 1970).

[19] Initiative 158 (Wash. 1944); H.R.J. Res. 37 (Wash. 1973); Initiative 314 (Wash. 1975) (corporate excise tax measured by income); Initiative 435 (Wash. 1982) (corporate franchise tax measured by income); Initiative 1098 (Wash. 2010).

[20] KIRO Radio, *Washington state has no 'appetite' for income tax*, (Oct. 6, 2017),

2018 poll in which 57% of a sample of likely Washington voters stated they "definitely oppose" a statewide income tax, while an additional 11% were "somewhat opposed."[21] Direct opposition to Seattle's appeal here has also been registered by major newspaper editorial boards throughout the state.[22] It is inappropriate for the City to seek direct review under RAP 4.2(a) to circumvent the clearly expressed will of the People.

Finally, the City asserts that Washington *State's* tax system is "regressive" and the *City* needs revenue from an income tax. Not only are these public policy assertions not supported by admissible evidence,[23] they must be addressed to the Legislature or the People, not the courts.

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http://mynorthwest.com/775412/no-appetite-for-state-income-tax/.

[21] https://www.washingtonpolicy.org/publications/detail/new-poll-shows-strong-opposition-to-income-tax-in-any-form (last visited Feb. 15, 2018).

[22] The Seattle Times, *Seattle should drop its dead-end income-tax case*, https://www.seattletimes.com/opinion/editorials/seattle-should-drop-its-dead-end-income-tax-case/ (Dec. 8, 2017); The News Tribune, *Sorry, Seattle, this is no time for income tax talk*, http://www.thenewstribune.com/opinion/article187635793.html (Dec. 2, 2017); The Daily News, *Truth on taxes - Part 2*, http://tdn.com/opinion/editorial/truth-on-taxes-part/article_879f1e4a-4324-530f-97dd-b4ab9b8a1eaf.html (Nov. 28, 2017); Yakima Herald, *Judge makes right legal decision on income tax*, http://www.yakimaherald.com/opinion/editorials/judge-makes-right-legal-decision-on-income-tax/article_bc0a0474-d3d6-11e7-b474-df01e255d66e.html?utm_medium=social&utm_source=twitter&utm_campaign=user-share (Nov. 27, 2017); The Columbian, *In Our View: King-Sized Failure on Tax: Seattle violated will of the state's voters, constitution with ill-advised 'wealth tax,'* http://www.columbian.com/news/2017/nov/26/in-our-view-king-sized-failure-on-tax/ (Nov. 26, 2017).

[23] Just in the last four years, the City's total revenues have grown more than 38%, from approximately $3.9 billion in 2011 to $5.4 billion in 2017, an increase of more than $1.3 billion. *Compare* City of Seattle, *2013 Adopted and 2014 Endorsed Budget* (2013) ("2013 Seattle Budget Book"), at 44, http://www.seattle.gov/financedepartment/13adoptedbudget/documents/Full2013Adopted2014EndorsedBudget_000.pdf *with* City of Seattle, *2018 Proposed Budget* ("2018 Seattle

III. CONCLUSION

The City's and EOI's request for direct review fails to satisfy the standards of RAP 4.2(a). Judge Ruhl granted judgment to Plaintiffs entirely on long-established grounds of statutory interpretation, avoiding constitutional interpretation as unnecessary. The Court of Appeals can and should hear this appeal concerning whether a city in Washington is statutorily authorized to tax personal income.

Proposed Budget Book") at 100, http://www.seattle.gov/financedepartment/18proposedbudget/documents/2018ProposedBudgetBook.pdf. This evidence – uncontested in the trial court – rebuts any suggestions that Seattle's fiscal condition supports direct review under RAP 4.2(a)(4).

RESPECTFULLY SUBMITTED this 20th day of February, 2018.

Orrick, Herrington & Sutcliffe LLP
Robert M. McKenna (WSBA 18327)
Daniel J. Dunne, Jr. (WSBA 16999)
Adam N. Tabor (WSBA 50912)
701 Fifth Avenue, Ste 5600
Seattle, WA 98104-7097
Phone: (206) 839-4300

Bean, Gentry, Wheeler & Peternell PLLC
Gerry L. Alexander (WSBA 775)
910 Lakeridge Way SW
Olympia, WA 98502
Phone (360) 357-2852

Talmadge Fitzpatrick Tribe PLLC
Phil Talmadge (WSBA 6973)
2775 Harbor Ave SW, 3rd Flr, Ste C
Seattle, WA 98126
Telephone (206) 574-6661

Attorneys for Levine Respondents

Lane Powell PC
Scott M. Edwards (WSBA 26455)
Ryan P. McBride (WSBA 33280)
1420 Fifth Ave., Ste 4200
Seattle, WA 98101
Phone: (206) 223-7000

The Freedom Foundation
David Dewhirst (WSBA 48299)
c/o The Freedom Foundation
PO Box 552
Olympia, WA 98507
Telephone (360) 956-3482

Attorneys for Burke Plaintiffs

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 20 February 2018.

s/Robert M. McKenna
Robert M. McKenna
Attorney for Respondent-Intervenors

ORRICK, HERRINGTON & SUTCLIFFE LLP

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