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.

BRIEF OF AMICI CURIAE CITIES OF OLYMPIA, PORT TOWSEND, PORT ANGELES AND ASSOCIATION OF WASHINGTON CITIES

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I. IDENTITY AND INTEREST OF AMICI

Olympia is a mid-sized municipality of 52,490 citizens, and is the capital of Washington State. Its citizens rely upon local government for traditional municipal services, including but not limited to fire protection, law enforcement, utilities (water, sewer, solid waste, and storm water), public works (streets, bridges, and other municipal construction), parks and recreation.

Olympia is struggling, as are other Washington municipalities, with societal changes creating funding needs unmet by state and federal authorities. Homelessness, climate change and sea level rise are examples of nontraditional areas that require revenue to address Olympia's local problems and service needs.

Port Townsend is a historic city on the Olympic Peninsula with 9,545 residents. It hosts thousands of visitors and tourists each year who come to admire its Victorian architecture and beautiful setting. Like Olympia, Port Townsend provides its citizens with traditional municipal services including public safety, utilities, public works, and parks. Port Townsend recognizes that its home rule authority will be impaired if the trial court's ruling is affirmed, and so it joins in this motion for leave to file a brief by amici curiae.

Port Angeles, with a population of 19,370, is a mid-sized municipality with many of the same characteristics of Olympia. Port Angeles provides its citizens with a full range of municipal services and is struggling to meet the demands increasingly placed on it to deal with needs unmet by state and federal authorities such as lack of affordable housing, homelessness, drug and mental health issues, living-wage jobs, environmental stress, climate change and sea level rise, to name but a few. The issue of local authority to address local problems – "home rule" – is Port Angeles' primary interest in the case before the Court.

Port Angeles is the only city in Washington State ever to face the prospect of reverting backwards from a code city with home rule authority to a second class city, fully subject to the limitations of Dillon's Rule.[1] In November 2017, in response to a citizen petition, a proposition was placed on the general election ballot asking voters of the city whether Port Angeles' classification should be changed from code city back to second class city. That proposition failed (For: 20.93% / Against: 79.07%); but the prospect of losing home rule authority is an issue of utmost importance to the City of Port Angeles and a significant majority of its residents. Port Angeles has

[1] Named after Judge J.F. Dillon in *Clinton v. Cedar Rapids & M. R. R. Co*., 24 Iowa 455 (1868).

an acute interest in protecting the scope and breadth of local home rule authority.

AWC is a private, non-profit corporation that represents Washington's cities and towns before the State Legislature, the State Executive branch and regulatory agencies. Membership in AWC is voluntary; however, the association includes one-hundred percent participation from Washington's 281 cities and towns. A 25-member board of directors oversees AWC's activities. The association's mission is to serve its members through advocacy, education and other services. Among AWC's core values is support for local authority. While cities or towns have differing policy views on revenues, AWC believes its mission includes protecting local revenue authority for city services, such as infrastructure, housing, and public safety, and this issue is significant to its members. If the trial court's ruling is permitted to stand, it would severely constrain home rule taxation authority granted in RCW 35A.11.020 to the detriment of AWC's member cities and towns.

Amici have a strong interest in ensuring that cities and towns may exercise the home rule taxation authority granted by the Legislature over fifty years ago in the Optional Municipal Code, Title 35A RCW. This case presents the Court with an opportunity to resolve confusion between the doctrine of "Dillon's Rule" which limits city powers, and the "home rule"

approach adopted by the Legislature, which allows cities to exercise all police powers possessed by state government so long as such local ordinances do not conflict with general laws. By adopting the Optional Municipal Code, the Legislature clearly expressed its preference for home rule as the preferred choice of structuring the relationship between state government and cities so that cities are empowered to "administer [their] own affairs to the maximum degree" with "the right to determine the form of government" and to "define the nature and scope of municipal services involving matters of purely local concern." [2]

II. STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in the Opening Brief of Appellant City of Seattle (App. Br. 3-7).

III. ARGUMENT

After more than half a century, and despite a clear expression of legislative intent and public policy by the Legislature, Dillon's Rule continues to be a source of ongoing legal debate among lawyers and before the trial and appellate courts in Washington State. From Amici's perspective, the heart of the parties' dispute is whether Dillon's Rule is still

[2] Hugh Spitzer, *"Home Rule" vs. "Dillon's Rule" for Washington Cities,* 38 Seattle U. L. Rev. 809, 810 (2015); *citing* Ernest H. Campbell, *Municipal Home Rule* (Univ. of Wash. Bureau of Gov't Research & Serv., Research Memorandum No. 53. 1958).

viable in view of the Legislature's undeniable statement of purpose and policy in the Optional Municipal Code, RCW 35A.01.010. The trial court's ruling seemingly applies Dillon's Rule, holding "the Legislature must specifically authorize the tax" Seattle imposed, and that Seattle must identify "specific statutory authorization for its tax;" and that Seattle's tax is not authorized because "the general grant of taxing power recited in RCW 35A.11.020, standing alone, confers no specific authority on [Seattle] to impose any tax, let alone the specific authority to impose an income tax."[3]

A. Over fifty years ago, the Legislature stated its preference for home rule in the Optional Municipal Code.

In 1967, the Legislature enacted the Optional Municipal Code in Title 35A RCW, stating its preference for home rule and granting charter and optional municipal code cities broad unspecified powers. Amici believe the trial court misunderstood the proper analysis to be applied in the context of the Legislature's public policy expressed in RCW 35A.01.010 that the "purpose and policy of [the Optional Municipal Code] is to confer upon two optional classes of cities created hereby the broadest powers of local self-government consistent with the Constitution of this state" and that "[a]ny specific enumeration of municipal powers contained in this title or

[3] *Kunath v. City of Seattle*, Order on Cross Mots. for Summ. J. at 17 (Nov. 22, 2017).

in any other general law *shall not be construed in any way to limit* the general description of power contained in this title, and any such specifically enumerated powers shall be construed as in addition and supplementary to the powers conferred in general terms by this title." [Emphasis added.] So its meaning would not be misunderstood, the Legislature required that "[a]ll grants of municipal power to municipalities electing to be governed under the provisions of this title, whether the grant is in specific terms or in general terms, *shall be liberally construed in favor of the municipality*." [Emphasis added.]

Although Seattle is a first class city, the Legislature specifically grants first class cities all powers conferred on other cities. RCW 35.22.570. Contrary to the Legislature's stated policy supporting home rule, the trial court appears to have applied Dillon's Rule that cities have only those powers "specifically" granted to them by the Legislature. Amici urge this Court to state that the Legislature's intent was clear in 1967, and it is still clear with regard to home rule; that Dillon's Rule is inapplicable to most cities including Seattle with respect to the power of taxation for either the purpose of regulation or the lawful purpose of raising revenue to provide for essential public services. *Watson v. City of Seattle,* 189 Wn.2d 149, 167-168, 401 P.3d 1 (2017).

B. The Legislature's broad grant of authority to cities of "all powers of taxation for local purposes" within a municipality's boundaries properly reflects the legislative intent to implement the home rule principle providing autonomy in local governance.

Amici submit that the specific statutory language in RCW 35A.11.020 confers on the "legislative body of each code city [the] power to organize and regulate [their] internal affairs within the provisions of this title and its charter;" permitting each body to "adopt and enforce ordinances of all kinds relating to and regulating its local or municipal affairs and appropriate to the good government of the city." Further, the legislative body of each code city "shall have all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law.[4]

The final paragraph of RCW 35A.11.020, provides that "[i]n addition and not in limitation, the legislative body of each code city shall have any authority ever given to any class of municipality or to all municipalities of this state before or after the enactment of this title, such authority to be exercised in the manner provided, if any, by the granting statute, when not in conflict with this title." This statute recognizes that "[w]ithin constitutional limitations, legislative bodies of code cities shall

[4] RCW 35.22.570 grants first class cities like Seattle all powers conferred on other cities.

have within their territorial limits all powers of taxation for local purposes except those which are expressly preempted by the state as provided in RCW 66.08.120 [liquor tax], 82.36.440 [repealed in its entirety], 48.14.020 [insurance premium taxes], and 48.14.080 [insurance premium tax].

How did this express legislative delegation of taxation power come to occur? In 1965 the Legislature formed a special Municipal Code Committee to develop legislation providing "a form of statutory home rule" for cities."[5] The committee's report declared that Chapter 35A.11 of the draft legislation "expresses the state legislature's intent to confer the greatest power of local self-government consistent with the State Constitution, upon the cities and directs that the laws be liberally construed in favor of the city *as a clear mandate to abandon the so-called 'Dillon's Rule' of construction.*"[6]

The Municipal Code Committee's recommendations led to enactment of the Optional Municipal Code in 1967.[7] In drafting "the new optional municipal code statute, the Municipal Code Committee engaged a lawyer from the staff of the Association of Washington Cities—the primary

[5] Hugh Spitzer, *"Home Rule" vs. "Dillon's Rule" for Washington Cities,* 38 Seattle U. L. Rev. 809, 840 (2015).
[6] *Id.* at 840.
[7] *Id.* at 840, citing CITIZENS ADVISORY COMM. TO THE JOINT COMM. ON URBAN AREA GOV'T, CITY AND SUBURB—COMMUNITY OR CHAOS? (1962), note 223, at 13.

advocacy group for cities." When enacted, the statute was "drafted in answer to the plea of cities for more authority to run their affairs and impose taxes to meet their financial burdens."[8]

The Legislature's intent was to remove code cities from Dillon's Rule, as provided in RCW 35A.01.010. Amici believe the trial court erred in applying Dillon's Rule in construing that Seattle's income tax is not authorized because the general grant of taxing power in RCW 35A.11.020 confers no specific authority on Seattle to impose any tax.

1. Regardless whether Seattle's tax is considered an excise tax or a sui generis income tax, it is permissible under the broad legislative authority conferred by RCW 35A.11.020.

Properly viewed from the perspective of home rule principles, Seattle's tax authority is conferred by RCW 35A.11.020 to impose a tax on income whether the tax is considered an excise tax or a sui generis income tax. Amici concur with Seattle's argument that the trial court's ruling would render RCW 35A.11.020 meaningless, and it should be reversed. This Court should give effect to the legislative purpose and intent of RCW 35A.11.020.

[8] *Id.* at 840-41.

When viewed from application of home rule authority conferred on Seattle as a first class city, and by extension through the Optional Municipal Code,[9] Seattle should be able to lawfully raise revenue by the actions of its legislative body for any lawful purpose.[10] The only constraints should be where the Legislature has preempted tax authority[11] or where a municipality seeks to tax governmental activities of another municipality and triggers issues of governmental immunity.[12] Neither circumstance is present in this case.

2. Municipalities have been expressly authorized by the Legislature to levy excise taxes whether they be first class cities or cities organized under the Optional Municipal Code in Title 35A RCW.

As a first class city, Seattle is expressly authorized to impose excise taxes under three statutes. The first statutory grant is RCW 35A.82.020, as Seattle possesses the same excise tax authority granted to code cities to "impose excises for regulation or revenue in regard to all places and kinds of business, production, commerce, entertainment, exhibition, and upon all occupations, trades and professions and any other lawful activity . . ."[13]

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[9] RCW 35.22.570
[10] *Watson,* supra, at 167-168.
[11] RCW 35A.11.020 (liquor tax and insurance premium tax)
[12] App. Br. at 48, citing *King County v. City of Algona,* 101 Wn.2d 789, 793, 681 P.2d 1281; *City of Wenatchee v. Chelan Cnty. Pub. Util. Dist. No. 1*, 181 Wn. App. 326, 330, 325 P.3d 419 (2014).
[13] As stated previously, RCW 35.22.570 grants first class cities like Seattle all powers conferred on other cities.

Seattle properly argues that its income tax falls within its broad excise authority.

The second statutory grant is found in RCW 35.22.280(32) which authorizes Seattle to "grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor. . ." This Court has held that the licensing power granted to first class cities is dual, and that cities have the right to impose license fees either for the lawful purpose of regulation or taxes for the lawful purpose of raising revenue.[14]

The third grant comes from RCW 35A.11.020 which confers upon Seattle "all powers of taxation for local purposes" within Seattle's boundaries, subject only to constitutional and statutory constraints. This grant of tax authority reflects the Legislature's intent to implement the home rule principle. This Court should recognize Seattle's autonomy in local governance, to exercise its powers in a way that do not violate constitutional provisions, legislative enactments, or the city's charter.[15] Amici submit that Seattle's personal income tax, whether characterized as an excise tax or a *sui generis* income tax, is within the express grant of "all powers of taxation for local purposes" under RCW 35A.11.020.

[14] *Watson*, supra, 189 Wn.2d at 167-168.
[15] *Watson*, supra, 189 Wn.2d at 166.

V. CONCLUSION

This Court should reverse the trial court's ruling and clarify the authority of first class and code cities to exercise home rule by applying within their territorial limits all powers of taxation for local purposes except those expressly preempted by the state or that implicate governmental immunity.

RESPECTFULLY SUBMITTED this 17th day of October, 2018.

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CERTIFICATE OF SERVICE

On October 17, 2018, I electronically filed the foregoing document via the Washington State Appellate Courts Secure Portal, which will automatically cause such filing to be served on counsel for all other parties in this matter via the Court's e-filing platform. I certify that I am over the age of 18 and competent to make this certification.

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

DATED: October 17, 2018, at Olympia, Washington.

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