

FILED
SUPREME COURT
STATE OF WASHINGTON
1/21/2020 2:16 PM
BY SUSAN L. CARLSON
CLERK

No. 97863-8

SUPREME COURT
OF THE STATE OF WASHINGTON

S. MICHAEL KUNATH et al.,

Respondents,

v.

CITY OF SEATTLE,

Petitioner.

AMICUS MEMORANDUM IN SUPPORT OF PETITIONS FOR
REVIEW ON BEHALF OF WASHINGTON STATE INSURANCE
COMMISSIONER MIKE KREIDLER

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Howard M. Goodfriend
WSBA No. 14355

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Amicus Curiae
Washington State
Insurance Commissioner
Myron "Mike" Kreidler

TABLE OF CONTENTS

A. Identity of Amicus Curiae.....1

B. Interest of Amicus Curiae.....1

C. Amicus Curiae’s Familiarity with the Issues Involved in
Review..... 4

D. Reasons Why Amicus Curiae Believes Review Should
Be Granted. 5

E. Conclusion.7

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Nat'l Fed'n of Indep. Bus. v. Sebelius</i> , 567 U.S. 519 (2012)	3
<i>People of the State of New York ex rel. Cohn v. Graves</i> , 300 U.S. 308, 57 S. Ct. 466, 81 L. Ed. 66 (1937)	7
STATE CASES	
<i>Culliton v. Chase</i> , 174 Wash. 363, 25 P.2d 81 (1933)	5-7
<i>Rose v. Anderson Hay and Grain Co.</i> , 184 Wn.2d 268, 358 P.3d 1139 (2015)	7
STATUTES	
RCW 48.02.190	4
RCW 48.02.230	3
RULES AND REGULATIONS	
RAP 13.4	1, 5-6
CONSTITUTIONAL PROVISIONS	
Wash. Const. Art VII, § 1	5-6
OTHER AUTHORITIES	
Center of Budget and Policy Priorities, Mandatory Grants Outside Major Health Programs at Historically Low Levels, https://www.cbpp.org/research/state-budget- and-tax/federal-aid-to-state-and-local- governments (accessed January 16, 2020)	6

David Gutman, “Dismantling of state’s health care reforms in 1993 may offer lessons for Obamacare repeal”, *Seattle Times* (Jan. 12, 2017).
<https://www.seattletimes.com/seattle-news/politics/dismantling-of-states-health-reforms-in-1993-may-offer-lesson-for-obamacare-repeal/>
(accessed January 16, 2020) 2

Office of the Insurance Commissioner
Annual Report, 2018 Insurance Regulation
Overview (June 1, 2019)
<https://www.insurance.wa.gov/sites/default/files/2019-05/oic-annual-report-2018-final.pdf>
(accessed January 16, 2020) 4

Ryan Blethen, “Washington state health care insurers propose lowest rate increase in Affordable Care Act era”, *Seattle Times* (June 4, 2019).
<https://www.seattletimes.com/seattle-news/health/health-insurers-propose-lowest-rate-increase-in-affordable-care-act-era>
(accessed January 16, 2020) 2

Washington State Office of Financial Management,
Washington State Health Services Research
Project, *Research Brief No. 95* (Dec. 2019).
<https://www.ofm.wa.gov/sites/default/files/public/dataresearch/researchbriefs/brief095.pdf>
(accessed January 16, 2020) 2

A. Identity of Amicus Curiae.

Applicant Washington State Insurance Commissioner Myron “Mike” Kreidler (“the Commissioner”) is head of the Office of the Insurance Commissioner (“OIC”). OIC protects insurance consumers and oversees the insurance industry, representing the interests of the people of the State of Washington as insurance consumers. The Commissioner seeks leave pursuant to RAP 13.4(h) to file the instant Memorandum in support of the petitions for review in this case.

B. Interest of Amicus Curiae.

In fulfilling his statutory duty to regulate the insurance market in Washington State, the Commissioner has a particular interest in using all available means to maintain and enhance the stability of the health insurance market to make available affordable health care coverage for Washington citizens.

In the late 1990s, Washington’s individual health insurance market imploded when the State attempted to impose significant insurance reforms in favor of consumers but failed to provide mechanisms for stabilizing the insurance market and the risks

assumed by carriers.¹ That market has stabilized and improved in the past decade largely due to the federal Patient Protection and Affordable Care Act (“Affordable Care Act” or “ACA”).² The ACA included significant market reforms (many of which had previously been proposed in Washington State), but also included market stabilization provisions that balanced the cost of these new reforms, allowing a robust market for health care insurance. From 2013 to 2017, the percentage of people without health insurance dropped from 14.2% to 5.5%.³

One of the key provisions of the Affordable Care Act is its individual mandate, with a graduated income tax penalty, functioning as both a funding source and a primary stabilizing

¹ David Gutman, “Dismantling of state’s health care reforms in 1993 may offer lessons for Obamacare repeal” *Seattle Times* (Jan. 12, 2017). <https://www.seattletimes.com/seattle-news/politics/dismantling-of-states-health-reforms-in-1993-may-offer-lesson-for-obamacare-repeal/> (accessed January 16, 2020)

² Ryan Blethen, “Washington state health care insurers propose lowest rate increase in Affordable Care Act era,” *Seattle Times* (June 4, 2019). <https://www.seattletimes.com/seattle-news/health/health-insurers-propose-lowest-rate-increase-in-affordable-care-act-era> (accessed January 16, 2020)

³ See Washington State Office of Financial Management, Washington State Health Services Research Project, *Research Brief No. 95* (Dec. 2019). <https://www.ofm.wa.gov/sites/default/files/public/dataresearch/researchbriefs/brief095.pdf> (accessed January 16, 2020) According to the OFM, rates of uninsured increased to 6.2% in 2018.

mechanism. This graduated income tax penalty gave healthy individuals a financial incentive to obtain coverage, expanding the pool of individuals participating in the health insurance market, and improving the overall risk of the health insurance pool. This broader and healthier risk pool gives the Commissioner and other regulators more flexibility to challenge, or even reject, significant premium increases, furthering the goal of maintaining low premiums to ensure that health insurance is affordable for all purchasers.

In 2017, as the ACA came under greater attack at the federal level, the Legislature tasked the Commissioner with looking into various options for creating greater stability in Washington's individual health insurance market. *See* RCW 48.02.230. Achieving market stability while proving accessibility to affordable care requires both reliable funding and a means of ensuring a broad and healthy risk pool.

Although the Commissioner and Legislature explored different options to address the highest, and most unpredictable risks health insurers face, none of those options can effectively expand the health insurance risk pool, or improve the health insurance risk pool. The most effective means of accomplishing these goals is an individual mandate, as it had been imposed by the ACA, in the form of a graduated penalty or income tax. *Cf. Nat'l*

Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 566-67 (2012) (characterizing individual mandate/shared responsibility payment as a tax on income).

The Commissioner is therefore keenly interested in the ability of the state and its instrumentalities to impose a graduated income tax as a mechanism to protect and enhance the gains in health insurance availability and coverage that have resulted from the Affordable Care Act,⁴ and to avoid the devastating spiral of rising costs that our state has already seen when market stabilization is not partnered with market reforms.

C. Amicus Curiae's Familiarity with the Issues Involved in Review.

The Commissioner's counsel has reviewed the merits briefing, the Court of Appeals decision, and the petitions for review filed by

⁴ The Commissioner has direct experience with taxation as well. Each year, OIC collects over \$600 million in premium taxes from insurance companies, sending most of those monies to the state general fund to support education, human services and general government operations, and to the Washington Health Benefit Exchange, which serves as the market place for insurance plans that provide health insurance coverage to individual Washington consumers and Medicaid recipients. See Office of the Insurance Commissioner Annual Report, 2018 Insurance Regulation Overview (June 1, 2019) <https://www.insurance.wa.gov/sites/default/files/2019-05/oic-annual-report-2018-final.pdf> (accessed January 16, 2020). In addition, the OIC collects an assessment from carriers to fund the Commissioner's obligation to regulate the insurance industry. RCW 48.02.190.

the City of Seattle and the Economic Opportunity Institute. The Commissioner's counsel has reviewed the record and briefing and believes it has sufficient familiarity with the scope of argument presented in the petitions related to the constitutionality of a graduated income tax to urge this Court to accept review, and thus is filing this motion and amicus memorandum now in compliance with RAP 13.4(h).⁵

D. Reasons Why Amicus Curiae Believes Review Should Be Granted.

The City's petition sets out the consequences over the State's taxation system during the past 90 years of this Court's characterization, in *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933), of income as property, and its declaration that a graduated income tax was an unconstitutional tax on property under Wash. Const. Art VII, § 1, in conflict with the reasoning of other decisions of this Court. While the City and co-petitioner Economic Opportunity Institute cogently address the urgent fiscal issues facing municipalities, all Washington residents are affected by the Court of

⁵ Respondents may seek cross-review of the Court of Appeals' holding that the City has the statutory authority to levy an income tax, as this Court extended the time for respondents to answer the petition to January 30, 2020. The Commissioner does not address that issue in this Memorandum.

Appeals decision in this case. Either through ballot initiative or through elected legislators, Washington citizens have imposed statutory mandates for public safety, education, health care, the environment and the protection of its most vulnerable citizens, particularly as the federal government's contributions to these efforts (with the exception of Medicaid) wane.⁶

The decision in this case thus has ramifications beyond the City's attempts to address local needs through a graduated income tax. In particular, the restrictions imposed on revenue generation and regulatory authority by the interpretation of *Culliton* by the Court of Appeals in this case affects now, and in the future, the Commissioner's ability to protect the interests of the citizens of the State in having access to a broad and stable insurance risk pool.

The continued characterization of income as a form of "property" for purposes of Wash. Const. Art VII, § 1 is an issue that this Court should definitively resolve under RAP 13.4(b)(3) and (4). As the City cogently argues, the *Culliton* Court's view of income as "property" was analytically deficient when it was decided. (City Pet.

⁶ See, e.g., Center of Budget and Policy Priorities, Mandatory Grants Outside Major Health Programs at Historically Low Levels, <https://www.cbpp.org/research/state-budget-and-tax/federal-aid-to-state-and-local-governments> (accessed January 16, 2020).

10-11, citing *People of the State of New York ex rel. Cohn v. Graves*, 300 U.S. 308, 314, 57 S. Ct. 466, 81 L. Ed. 66 (1937)). Now, almost ninety years later, continued reliance on *Culliton* to bar the State and its political subdivisions from addressing the needs of Washington citizens through a graduated tax on income is not only incorrect but harmful. See *Rose v. Anderson Hay and Grain Co.*, 184 Wn.2d 268, 282, ¶ 25, 358 P.3d 1139 (2015) (“stare decisis does not compel us to follow a past decision when its rationale no longer withstands careful analysis.”).

E. Conclusion.

This Court should definitively address the ability of the State and local government to fund the democratically-determined needs of its citizens through a graduated tax on income. The Commissioner urges this Court to resolve the constitutional issues of grave import to the State and its citizens raised by the petitions for review.

Dated this 21st day of January, 2020.

SMITH GOODFRIEND, P.S.

By: 

Catherine W. Smith

WSBA No. 9542

Howard M. Goodfriend

WSBA No. 1435

Attorneys for Amicus Curiae
Washington State
Insurance Commissioner
Myron "Mike" Kreidler

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 21, 2020, I arranged for service of the foregoing Amicus Memorandum in Support of Petitions for Review on Behalf of Washington State Insurance Commissioner Mike Kreidler, to the court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Kent Meyer Seattle City Attorney's Office 701 Fifth Avenue, Suite 2050 Seattle WA 98104-7095 kent.meyer@seattle.gov Lise.Kim@seattle.gov	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Paul J. Lawrence Gregory Wong Jamie Lisagor Pacifica Law Group LLP 1191 Second Avenue, Suite 2000 Seattle WA 98101 Paul.Lawrence@pacificallawgroup.com greg.wong@pacificallawgroup.com jamie.lisagor@pacificallawgroup.com Dawn.taylor@pacificallawgroup.com cindy.bourne@pacificallawgroup.com thien.tran@pacificallawgroup.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Hugh D. Spitzer 5604 16th Ave NE Seattle WA 98105 spitzerhd@gmail.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

<p>Gerry L. Alexander Bean, Gentry, Wheeler & Peternell, PLLC 910 Lakeridge Way SW Olympia, WA 98502 galexander@bgwp.net</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>
<p>Adam N. Tabor Daniel Dunne Robert McKenna Carolyn Frantz Orrick Herrington & Sutcliffe 701 Fifth Avenue, Suite 5600 Seattle, WA 98104-7045 atabor@orrick.com ddunne@orrick.com rmckenna@orrick.com cfrantz@orrick.com sea_wa_appellatefilings@orrick.com</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>
<p>Philip A. Talmadge Talmadge/Fitzpatrick 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126 phil@tal-fitzlaw.com matt@tal-fitzlaw.com</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>
<p>Scott M. Edwards Ryan P. McBride Lane Powell PC 1420 5th Ave Ste 4100 PO Box 91302 Seattle WA 98101-2375 edwards@lanepowell.com mcbriider@lanepowell.com</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>
<p>Eric R. Stahlfeld 145 Southwest 155th Street, Suite 101 Burien, WA 98166 lawyer@stahlfeld.us ESTahlfeld@freedomfoundation.com</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>

<p>Matthew Davis Davis Leary 3233 56th PL SW Seattle WA 98166-3105 matt@davisleary.com</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>
<p>Eric D. "Knoll" Lowney Claire E. Tonry Smith & Lowney PLLC 2317 East John St Seattle WA 98112-5412 knoll@smithandlowney.com claire@smithandlowney.com</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>
<p>Brian T. Hodges Ethan Blevins Pacific Legal Foundation 10940 NE 33rd Place, Suite 210 Bellevue WA 98004 bhodes@pacificlegal.org ewb@pacificlegal.org</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>
<p>Harriet Strasberg 203 4th Ave E Ste 520 Olympia, WA 98501-1190 hstrasberg@comcast.net</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>
<p>Dmitri L. Iglitzin Kelly Ann Skahan Barnard Iglitzin & Lavitt LLP 18 W Mercer St Ste 400 Seattle, WA 98119-3971 iglitzin@workerlaw.com skahan@workerlaw.com woodward@workerlaw.com</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>

DATED at Seattle, Washington this 21st day of January, 2020.



Sarah N. Eaton

SMITH GOODFRIEND, PS

January 21, 2020 - 2:16 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97863-8
Appellate Court Case Title: City of Seattle, et al. v. S. Michael Kunath, et al.

The following documents have been uploaded:

- 978638_Briefs_20200121141421SC550708_0730.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was 2020 01 21 Amicus Memo ISO Petitions for Review.pdf
- 978638_Motion_20200121141421SC550708_9867.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was 2020 01 21 Motion for Leave to File Amicus Memo ISO Petitions for Review.pdf

A copy of the uploaded files will be sent to:

- Dawn.taylor@pacificlawgroup.com
- EStahlfeld@freedomfoundation.com
- Lise.Kim@seattle.gov
- both@pacificlegal.org
- cfrantz@orrick.com
- cindy.bourne@pacificlawgroup.com
- claire@smithandlowney.com
- ddunne@orrick.com
- edwardss@lanepowell.com
- ewb@pacificlegal.org
- galexander@bgwp.net
- greg.wong@pacificlawgroup.com
- howard@washingtonappeals.com
- hstrasberg@comcast.net
- hstrasberg@me.com
- iglitzin@workerlaw.com
- jamie.lisagor@pacificlawgroup.com
- kent.meyer@seattle.gov
- knoll@smithandlowney.com
- lawyer@stahlfeld.us
- matt@davisleary.com
- matt@tal-fitzlaw.com
- matthew@davisleary.com
- mcbrider@lanepowell.com
- paul.lawrence@pacificlawgroup.com
- phil@tal-fitzlaw.com
- rmckenna@orrick.com
- sea_wa_appellatefilings@orrick.com
- skahan@workerlaw.com
- spitzerhd@gmail.com

- thien.tran@pacificlawgroup.com
- woodward@workerlaw.com

Comments:

Sender Name: Sarah Eaton - Email: sarah@washingtonappeals.com

Filing on Behalf of: Catherine Wright Smith - Email: cate@washingtonappeals.com (Alternate Email: andrienne@washingtonappeals.com)

Address:

1619 8th Avenue N

Seattle, WA, 98109

Phone: (206) 624-0974

Note: The Filing Id is 20200121141421SC550708